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COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES

PART I OF II

2005 EDITION

JUNE 2005

Prepared for the use of Members of the Committee on Ways and Means by members of its staff. This document has not been officially approved by the Committee and may not reflect the views of its Members.

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COMMITTEE ON WAYS AND MEANS
U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

WILLIAM M. THOMAS, CALIFORNIA, *Chairman*

ALLISON H. GILES, *Chief of Staff*

This document was prepared by the trade staff of the Committee on Ways and Means and is issued under the authority of Chairman William M. Thomas. This document has not been reviewed or officially approved by the Members of the Committee.

LETTER OF TRANSMITTAL

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
Washington, DC, June 2005

Hon. William M. Thomas, Chairman
Committee on Ways and Means
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

In 1987, the Committee first published a resource document entitled "Overview and Compilation of U.S. Trade Statutes" for use by Committee Members and interested parties in the international trade community. This document was unique in that it contained not only an overview of U.S. trade statutes but also an up-to-date statutory text of such laws, integrating numerous separate acts of Congress into a single statutory compilation.

This document was so well received by Members of Congress, congressional staff, government officials, the international trade community, and the general public that staff has updated the book after nearly every Congress. This addition incorporates all statutory provisions enacted through the 108th Congress.

As was the case with the earlier versions, the statutory authorities selected are the major provisions of Federal law directly related to the conduct of U.S. international trade. The compilation is not meant to be a comprehensive treatise of every trade-related law or program, nor does it cover provisions to regulate domestic commerce. The laws and programs within the jurisdiction of the Committee on Ways and Means are the main focus and are discussed in the greatest detail. In addition, some of the laws and programs described may be within the jurisdiction of other committees of the U.S. House of Representatives and are included to provide a complete survey of the principal trade authorities.

The document has been prepared by the Committee's trade staff with assistance from the Office of the Legislative Counsel, the Congressional Research Service and various government agencies, to which the staff extends its most sincere thanks.

Sincerely,
ANGELA PAOLINI ELLARD
Staff Director and Counsel, Subcommittee on Trade

PREFACE

The role of Congress in formulating international economic policy and regulating international trade is based on a specific constitutional grant of power. Article I of the U.S. Constitution sets forth the various powers and responsibilities of the legislature. Article I, section 8 lists certain specific express powers of the Congress. Among these express powers are the powers:

> "to lay and collect taxes, duties, imposts and excises . . . [and] to regulate commerce with foreign nations, and among the several states. . . ."

The Congress therefore is the fundamental authority responsible for Federal Government regulation of international transactions. Within the U.S. House of Representatives, jurisdiction over trade legislation lies in the Committee on Ways and Means, based on its jurisdiction over taxes, tariffs, and trade agreements. Throughout the history of U.S. trade law and policy, the Committee on Ways and Means has been at the forefront. The Committee's jurisdiction ranges from regulation of tariff affairs to regulation of non-tariff trade barriers such as quotas and standards, regulation of unfair trade practices such as dumping or subsidization, provisions of temporary relief from import competition and adjustment assistance, bilateral and multilateral trade agreements with foreign trading partners, and authorization and oversight of the departments and agencies charged with implementation of the trade laws and programs.

The difficulties of retaining and exercising full control over international trade matters within the legislative branch were recognized by Congress shortly after enactment of the Smoot-Hawley Tariff Act of 1930. In 1934, Congress enacted the Reciprocal Trade Agreements Act, which delegated to the President authority to negotiate international trade agreements for the reduction of tariffs. This Act, which marked the beginning of the trade agreements program for the United States, represented the first significant delegation of authority from Congress to the President with respect to international trade policy.

Since 1934, the delegation of authority from Congress to the President has varied in scope and degree, reflecting congressional concern over maintaining careful control of international trade policy. When the trade agreement negotiating authority granted to the President expired in 1967, for example, it was not renewed again until 1974. In the Trade Act of 1974, presidential negotiating authority was substantially revised, extended to non-tariff as well as tariff negotiations, and made subject to specific consultation and notification requirements both prior to and during the course of negotiation. The Omnibus Trade and Competitiveness Act of 1988, in addition to providing negotiating authority and explicit negotiating objectives for the Uruguay Round, expanded the consultation requirements between

USTR and Congress and required the formulation of an annual trade policy agenda. Both the Uruguay Round Agreements Act and the North American Free Trade Agreement Implementation Act provide for the involvement of Congress in a number of key trade policy areas.

After a lapse of 8 years, the Trade Act of 2002, which includes the Bipartisan Trade Promotion Authorities Act of 2002, grants Trade Promotion Authority (formally called fast track) to the President through July 1, 2007. The Act also establishes a new Congressional Oversight Group to provide an opportunity for consultation with the Administration by all committees of jurisdiction over laws that might be affected by a trade agreement. The Trade Act of 2002 both restores American leadership in the international trading system and incorporates other key initiatives including the Trade and Adjustment Assistance Reform Act of 2002, the Andean Trade Promotion and Drug Eradication Act, and the Customs Border Security Act of 2002.

Due to the central role of Congress in formulating international economic policy, an understanding of U.S. international trade law and policy must begin with the statutory authorities and programs that provide the foundation for our trade policy. This document provides two essential tools for those interested in obtaining a better understanding of U.S. trade law and policy. Part I contains a general overview of current provisions of U.S. trade laws. This overview was prepared by the staff of the Subcommittee on Trade and provides a thorough yet understandable explanation of how these laws operate. Part II contains a compilation of the actual text of these laws, as amended. This updated statutory compilation incorporates all major provisions of U.S. trade law and includes all amendments to these laws as of the end of the 108th Congress. While this text should not be treated as a substitute for official public laws or the United States Code, we hope that the integration of numerous separate Acts of Congress into one text, as well as the explanatory volume, will prove useful to official policymakers as well as the interested public.

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PART I: OVERVIEW

Chapter 1: TARIFF AND CUSTOMS LAWS

Harmonized Tariff Schedule of the United States

Historical background

The Harmonized Tariff Schedule of the United States (HTS) was enacted by subtitle B of title I of the Omnibus Trade and Competitiveness Act of 1988[1] and became effective on January 1, 1989.[2] The HTS replaced the Tariff Schedules of the United States (TSUS), enacted as title I of the Tariff Act of 1930 (19 U.S.C. 1202) by the Tariff Classification Act of 1962;[3] the TSUS had been in effect since August 31, 1963.

The HTS is based upon the internationally adopted Harmonized Commodity Description and Coding System (known as the Harmonized System or HS) of the Customs Cooperation Council. Incorporated into a multilateral convention effective as of January 1, 1988, the HS was derived from the earlier Customs Cooperation Council Nomenclature, which in turn was a new version of the older Brussels Tariff Nomenclature. The HS is an up-to-date, detailed nomenclature structure intended to be utilized by contracting parties as the basis for their tariff, statistical and transport documentation programs.

The United States did not adopt either of the two previous nomenclatures but, because it was a party to the convention creating the Council and because of the potential benefits from using a modern, widely adopted nomenclature, became involved in the technical work to develop the HS. Section 608(c) of the Trade Act of 1974[4] directed the U.S. International Trade Commission (ITC) to investigate the principles and concepts which should underlie such an international nomenclature and to participate fully in the Council's technical work on the HS. The ITC, Customs and Border Protection (which represents the United States at the Council), and other agencies were involved in this work through the mid and late 1970s; in 1981, the President requested that the ITC prepare a draft conversion of the U.S. tariff into the nomenclature format of the HS, even as the international efforts to complete the nomenclature continued. The Commission's report and converted tariff were issued in June 1983. After considerable review and the receipt of comments from interested parties, legislation to repeal the TSUS and replace it with the HTS was introduced. Following the August 23, 1988 enactment of the Omnibus Trade

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[1] Public Law 100-418, approved August 23, 1988.
[2] Presidential Proclamation No. 5911, November 19, 1988.
[3] Public Law 87-456, approved May 24, 1962.
[4] Public Law 93-618, approved January 3, 1975.

and Competitiveness Act, the United States became a party to the HS Convention, joining over 75 other major trading partners.

Structure of the HTS

Under the HS Convention, the contracting parties are obliged to base their import and export schedules on the HS nomenclature, but the rates of duty are set by each contracting party. The HS is organized into 21 sections and 96 chapters, with accompanying general interpretive rules and legal notes. Goods in trade are assigned in the system, in general, to categories beginning with crude and natural products and continue in further degrees of complexity through advanced manufactured goods. These product headings are designated, at the broadest coverage level, with 4-digit numerical codes and are further subdivided into narrower categories assigned 2 additional digits. The contracting parties must employ all 4- and 6-digit provisions and all international rules and notes without deviation; they may also adopt still narrower subcategories and additional notes for national purposes, and they determine all rates of duty. Thus, a common product description and numbering system to the 6-digit level of detail exists for all contracting parties, facilitating international trade in goods. Two final chapters, 98 and 99, are reserved for national use (chapter 77 is reserved for future international use).

The HTS therefore sets forth all the international nomenclature through the 6-digit level and, where needed, contains added subdivisions assigned 2 more digits, for a total of 8 at the tariff-rate line (legal) level. Two final (non-legal) digits are assigned as statistical reporting numbers where further statistical detail is needed (for a total of 10 digits to be listed on entries). Chapter 98 comprises special classification provisions (former TSUS schedule 8), and chapter 99 (former appendix to the TSUS) contains temporary modifications pursuant to legislation or to presidential action.

Each section's chapters contain numerous 4-digit headings (which may, when followed by 4 zeroes, serve as U.S duty rate lines) and 6- and 8-digit subheadings. Additional U.S. notes may appear after HS notes in a chapter or section. Most of the general headnotes of the former TSUS appear as general notes to the HTS set forth before chapter 1, along with notes covering more recent trade programs (and the non-legal statistical notes). These notes contain definitions or rules on the scope of the pertinent provisions, or set additional requirements for classification purposes. In addition, the HTS contains a table of contents, an index, footnotes, and other administrative material, which are provided for ease of reference and, along with the statistical reporting provisions, have no legal significance or effect.

The HTS is not published as a part of the statutes and regulations of the United States but is instead subsumed in a document produced and updated regularly by the ITC entitled "Harmonized Tariff Schedule of the United States: Annotated for Statistical Reporting Purposes." Changes in the TSUS became so frequent and voluminous that its inclusion in title 19 of the U.S. Code effectively ceased with the 1979 supplement to the 1976 edition. The Commission is charged by section 1207 of the 1988 Omnibus Trade and Competitiveness Act (19 U.S.C. 3007) with the responsibility of compiling and publishing, "at appropriate intervals," and keeping up to date the HTS and any related materials. The initial document appeared as USITC Publication 2030. That document, and subsequent issuances, have included both the current legal text of the HTS and all statistical provisions adopted under section 484(f) of the Tariff Act of 1930 (19 U.S.C. 1484(f)). It is presented as a looseleaf publication so that pages being issued in supplements to modify the schedule's basic edition for any year edition may be inserted as replacements. Two or more supplements may appear between the publication of each basic edition.

Unlike the TSUS, which applied exclusively to imported goods, the HTS can, for almost all goods, be used to document both imports and exports, with a small number of exceptions enumerated before chapter 1, which require particular exports to be reported under schedule B provisions. That schedule, which prior to 1989 served as the means of reporting all exports, has been converted to the HS nomenclature structure. For certain goods that are significant U.S. exports, variations in the desired product description and detail compel the use of schedule B reporting provisions that cannot be accommodated in the HTS under the international nomenclature structure.

The HTS, like its predecessor the TSUS, is presented in a tabular format containing 7 columns, each with a particular type of information. A sample page of the HTS is set forth on the next page.

Harmonized Tariff Schedule of the United States (2005)

Annotated for Statistical Reporting Purposes

Heading/ Subheading	Stat. Suf-fix	Article Description	Unit Of Quantity			
		I. PRIMARY MATERIALS; PRODUCTS IN GRANULAR OR POWDER FORM				
7201		Pig iron and spiegeleisen in pigs, blocks or other primary forms:				
7201.10.00	00	Nonalloy pig iron containing by weight 0.5 percent or less Of phosphorus	t	Free		$1.11/t
7201.20.00	00	Nonalloy pig iron containing by weight more than 0.5 percent Of phosphorus	t	Free		$1.11/t
7201.50		Alloy pig iron; spiegeleisen				
7201.50.30	00	Alloy pig iron	t	Free		$1.11/t
7201.50.60	00	Spiegeleisen	T	Free		0.5%
7202		Ferroalloys:				
		Ferromanganese:				
7202.11		Containing by weight more than 2 percent of carbon:				
7202.11.10	00	Containing by weight more than 2 percent but not more than 4 percent of carbon	Kg	1.4%	Free (A, AU, CA, CL, E, IL, J, JO, MX, SG)	6.5%

The first column, entitled "Heading/subheading," sets forth the 4-, 6-, or 8-digit number assigned to the class of goods described to its right. It should be recalled that 8-digit-level provisions bear the only numerical codes at the legal level which are determined solely by the United States, because the 4- and 6-digit designators are part of the international convention.

The second column is labeled "Stat. suffix," meaning statistical suffix. Wherever a tariff rate line is annotated to permit collection of trade data on narrower classes of merchandise, the provisions adopted administratively by an interagency committee under section 484(f) of the 1930 Act (19 U.S.C. 1484(f)) are given 2 more digits which must be included on the entry filed with customs officials. Where no annotations exist, 2 additional zeroes are added to the 8-digit legal code applicable to the goods in question. The goods falling in all 10-digit statistical reporting numbers of a particular 8-digit legal provision receive the same duty treatment.

The third column, "Article description," contains the detailed description of the goods falling within each tariff provision and statistical reporting number.

In the fourth column, "Units of quantity," the unit of measure in which the goods in question are to be reported for statistical purposes is set forth. These units are administratively determined under section 484(f) of the Tariff Act of 1930. In many instances, the unit of quantity is also the basis for the assessment of the duty. For many categories of products, two or three different figures in different units must be reported (e.g., for some textiles, weight and square meters; for some apparel, the number of garments, value, and weight), with the second unit of quantity frequently being the basis for administering a measure regulating imports, such as a quota. If an "X" appears in this column, only the value of the shipment must be reported.

The remaining columns appear under the common heading "Rates of duty" and are designated as column 1 (subdivided into "General" and "Special" subcolumns) and column 2. These columns contain the various rates of duty that apply to the goods of the pertinent legal provision, depending on the source of the goods and other criteria. Their application to goods originating in particular countries is discussed below under the heading "Applicable duty treatment."

A rate of duty generally has one of three forms: ad valorem, specific or compound. An ad valorem rate of duty is expressed in terms of a percentage to be assessed upon the customs value of the goods in question. A specific rate is expressed in terms of a stated amount payable on some quantity of the imported goods, such as 17 cents per kilogram. Compound duty rates combine both ad valorem and specific components (such as 5 percent ad valorem plus 17 cents per kilogram).

Chapter 98 contains special classification provisions permitting, in specified circumstances, duty-free entry or partial duty-free entry of goods which would otherwise be subject to duty. The article descriptions in the provisions of this chapter enunciate the circumstances in which goods are eligible for this duty treatment. Some of the goods eligible for such duty treatment include: articles reimported after having been exported from the United States; goods subject to personal exemptions (such as those for returning U.S. residents); government importations; goods for religious, educational, scientific, or other qualifying institutions; samples; and, articles admitted under bond.

Chapter 99 contains temporary modifications of the duty treatment of specified articles in the other chapters. Additional duties and suspensions or reductions of duties enacted by Congress are included, as are temporary modifications (increases or decreases in duty rates) and import restrictions (quotas, import fees, and so forth) proclaimed by the President under trade agreements or pursuant to legislation. Separate subchapters contain temporary special duty treatment for certain goods of countries having a free trade agreement with the United States. However, antidumping and countervailing duties imposed under the authority of the Tariff Act of 1930, as amended, are not included and are instead announced in the *Federal Register*.

Applicable duty treatment

Column 1-General.—The rates of duty appearing in the "General" subcolumn of column 1 of the HTS are imposed on products of countries that have been extended normal trade relations (NTR), which was previously called most-favored-nation (MFN) or non-discriminatory trade treatment, by the United States, unless such imports are claimed to be eligible for treatment under one of the preferential tariff schemes discussed below. The general duty rates are concessional and have been set through reductions of full statutory rates in negotiations with other countries, generally under the GATT and the WTO.

Column 1-Special.—General Note 3 to the HTS sets forth the special tariff treatment afforded to covered products of designated countries or under specified measures. These programs and the corresponding symbols by which they are indicated in the "Special" subcolumn along with the appropriate rates of duty are as follows:

Generalized System of Preferences ..... A, A* or A+
United States-Australia Free Trade Agreement ..... AU
Automotive Products Trade Act ..... B
Agreement on Trade in Civil Aircraft..... C
North American Free Trade Agreement:
  Goods of Canada, under the terms of general note 12 to this schedule ..... CA
  Goods of Mexico, under the terms of general note 12 to this schedule ..... MX
African Growth and Opportunity Act ..... D

United States-Chile Free Trade Agreement CL
Caribbean Basin Economic Recovery Act..... E or E*
United States-Israel Free Trade Area IL
Andean Trade Preference Act or
Andean Trade Promotion and Drug Eradication Act . J, J* or J+
United States-Jordan Free Trade Area Implementation Act..... JO
Agreement on Trade in Pharmaceutical Products..... K
Uruguay Round Concessions on Intermediate
Chemicals for Dyes L
United States-Caribbean Basin Trade Partnership Act ..... R
United States-Singapore Free Trade Agreement ..... . SG

The presence of one or more of these symbols indicates the eligibility of the described articles under the respective program. In the case of the GSP (when in effect), a symbol followed by an asterisk indicates that, although the described articles are generally eligible for duty-free entry, such tariff treatment does not apply to products of the designated beneficiary countries specified in General Note 4(d). In the case of CBERA and the ATPA, the asterisk indicates that some of the described articles are ineligible for duty-free entry. These programs are discussed in greater detail elsewhere in this volume.

Column 2.—The column 2 rates of duty apply to products of countries that have been denied NTR status by the United States (see General Note 3(b)); these rates are the full statutory rates, generally as originally enacted through the Tariff Act of 1930. (See separate description of NTR treatment and HTS General Note 3(b) for a list of countries subject to column 2 rates of duty.)

Special duty exemptions and preferences

Certain notable provisions in chapter 98 of the HTS grant duty-free entry to various categories of American goods returned from abroad and allow U.S. tourists to import foreign articles free of duty. Other provisions in the general notes of the HTS provide duty-free entry to imports from the U.S. insular possessions, to imports of Canadian auto products under the Automotive Products Trade Act, and to articles imported for use in civil aircraft under the Agreement on Trade in Civil Aircraft.

American goods returned (HTS subheading 9801.00.10).—American goods not advanced or improved abroad may be returned to the U.S. free of duty under HTS subheading 9801.00.10. The courts have interpreted this provision to allow duty-free entry of American goods which had been exported for sorting, separating (e.g., by grade, color, size, etc.), culling out, and discarding defective items and repackaging in certain containers, so long as the goods themselves were not advanced in value or improved in condition while abroad.

American goods repaired or altered abroad (HTS subheading 9802.00.40).—HTS subheading 9802.00.40 provides that goods exported from the United States for repairs or alterations abroad are subject to duty upon their reimportation into the

United States (at the duty rate applicable to the imported article) only upon the value of such repairs or alterations. The provision applies to processing such as restoration, renovation, adjustment, cleaning, correction of manufacturing defects, or similar treatment that changes the condition of the exported article but does not change its essential character. The value of the repairs or processing for purposes of assessing duties is generally determined, in accordance with U.S. note 3 to subchapter II of chapter 98, by—

(1) the cost of the repairs or alterations to the importer; or

(2) if no charge is made, the value of the repairs or alterations, as set out in the customs entry.

However, if the customs officer finds that the amount shown in the entry document is not reasonable, the value of the repairs or alterations will be determined in accordance with the valuation standards set out in section 402 of the Tariff Act of 1930, as amended.[5]

American metal articles processed abroad (HTS subheading 9802.00.60).—HTS subheading 9802.00.60 provides that an article of metal (except precious metal) which is exported from the United States for processing abroad may be subject to duty on the value of the processing only upon its return to the United States. To qualify for this duty treatment, the exported article (1) must have been manufactured or subjected to a process of manufacture in the United States; and (2) must be returned "for further processing" in the United States.

The term "processing" refers to such operations as melting, molding, casting, machining, grinding, drilling, tapping, threading, cutting, punching, rolling, forming, plating, and galvanizing.

As in the case of articles imported under subheading 9802.00.40 (repairs or alterations), discussed above, the duty on metal articles processed abroad is assessed against the value of such processing, determined in accordance with U.S. note 3 to subchapter II of chapter 98.

American components assembled abroad (HTS subheading 9802.00.80).—Articles assembled abroad from American-made components may be exempt from duty on the value of such components when the assembled article is imported into the United States under HTS subheading 9802.00.80. This provision enables American manufacturers of relatively labor-intensive products to take advantage of low-cost labor and fiscal incentives in other countries by exporting American parts for assembly in such countries and returning the assembled products to the United States, with partial exemption from U.S. duties.

Subheading 9802.00.80 applies to articles assembled abroad in whole or in part of fabricated components, the product of the United States, which—

(1) were exported in condition ready for assembly without further fabrication;

(2) have not lost their physical identity in such articles by change in form,

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[5] 19 U.S.C. 1401a.

shape, or otherwise; and

(3) have not been advanced in value or improved in condition abroad except by being assembled and by operations incidental to the assembly process such as cleaning, lubricating, and painting.

The exported articles used in the imported goods must be fabricated U.S. components, i.e., U.S.-manufactured articles ready for assembly in their exported condition, except for operations incidental to the assembly process. Integrated circuits, compressors, zippers, and precut sections of a garment are examples of fabricated components, but uncut bolts of cloth, lumber, sheet metal, leather, and other materials exported in basic shapes and forms are not considered to be fabricated components for this purpose.

To be considered U.S. components, the exported articles do not necessarily need to be fabricated from articles or materials wholly produced in the United States. If a foreign article or material undergoes a manufacturing process in the United States resulting in its "substantial transformation" into a new and different article, then the component that emerges may qualify as an exported product of the United States for purposes of subheading 9802.00.80.

The assembly operations performed abroad can involve any method used to join solid components together, such as welding, soldering, gluing, sewing, or fastening with nuts and bolts. Mixing, blending, or otherwise combining liquids, gases, chemicals, food ingredients, and amorphous solids with each other or with solid components is not regarded as "assembling" for purposes of subheading 9802.00.80. Special rules apply to certain goods receiving preferential benefits under the African Growth and Opportunity Act, the Caribbean Basin Trade Partnership Act, and the Andean Trade Promotion and Drug Eradication Act, as discussed elsewhere in this volume.

The rate of duty that applies to the dutiable portion of an assembled article is the same rate that would apply to the imported article. The assembled article is also treated as being entirely of foreign origin for purposes of any import quota or similar restriction applicable to that class of merchandise, and for purposes of country-of-origin marking requirements. All requirements regarding labeling, radiation standards, flame retarding properties, etc., that apply to imported products apply equally to subheading 9802.00.80 merchandise.

An article imported under subheading 9802.00.80 is treated as a foreign article for appraisement purposes. That is, the full appraised value of the article must first be determined under the usual appraisement provisions. The dutiable value, however, is determined by deducting the cost or value of the American-made fabricated components from the appraised value of the assembled merchandise entered under subheading 9802.00.80.

Personal (tourist) exemption.—Subchapter IV of chapter 98 of the HTS sets forth various personal exemptions for residents and non-residents that arrive in the United States from abroad. The relevant customs regulations are set forth at 19 CFR 148 et seq. In particular, HTS subheading 9804.00.65 provides that U.S. residents

returning from a journey abroad may import up to $800 of articles free of duty, an increase from $400 recently made in the Trade Act of 2002 (Public Law 107-210). The articles must be for personal or household use and may include not more than 1 liter of alcoholic beverages, not more than 200 cigarettes, and not more than 100 cigars.

Special rules, most recently amended in the Miscellaneous Trade and Technical Corrections Act of 2004 (Public Law 108-429) provide increased duty-free allowances for U.S. residents returning from U.S. insular possessions or from beneficiary countries under the Caribbean Basin Economic Recovery Act (CBERA) and under the Andean Trade Preference Act (ATPA). An increased duty-free allowance of $1600 is provided under HTS subheading 9804.00.70 for U.S. residents returning from the U.S. insular possessions, and an increased duty-free allowance of $800 is provided under HTS subheading 9804.00.72 for U.S. residents returning from beneficiary countries under the CBERA and the ATPA. U.S. note 3 to chapter 98 provides that, in addition to being exempt from customs duty, all such articles are exempt from any internal revenue taxes as well.

In addition, the Miscellaneous Trade and Technical Corrections Act of 1996 (Public Law 104-295) amended the personal allowance exemption for merchandise purchased in duty-free sales enterprises. Previously, under section 555(b)(6) of the Tariff Act of 1930 (19 U.S.C. 1555(b)(6)), merchandise purchased in duty-free sales enterprises which was brought back to U.S. customs territory was not eligible for a duty-free exemption under the personal allowance exemption for returning U.S. residents. The Miscellaneous Trade and Technical Corrections Act of 1996 amended section 555(b)(6) to make merchandise purchased by returning U.S. residents in duty-free enterprises eligible for a duty-free exemption under HTS subheadings 9804.00.65, 9804.00.70, and 9804.00.72, if the person meets the eligibility requirements of the exemption. This provision does not apply in the case of travel involving transit to, from, or through an insular possession of the United States.

Duty-free treatment for personal effects of participants in international sporting events.—The Miscellaneous Trade and Technical Corrections Act of 1999 (Public Law 106-36) extended until December 2002 duty-free treatment for the personal effects of participants in, officials of, and accredited members of delegations to certain international athletic events held in the United States provided that these items are not intended for sale or distribution in the United States. The provision also exempted the articles covered under this provision from taxes and fees and gave the Secretary of the Treasury discretion to determine which athletic events, articles, and persons are covered under this provision. The Tariff Suspension and Trade Act of 2000 (Public Law 106-476) made this exemption permanent under new HTS subheading 9817.60.00.

Products of U.S. insular possessions (General Note 3(a)(iv)).—Imports from the Virgin Islands, Guam, American Samoa, Wake Island, Kingman Reef, Johnson Island, and Midway Islands are entitled to duty-free entry under certain conditions,

designed to promote the economic development of these U.S. insular possessions. This provision does not apply to Puerto Rico, which is part of the "customs territory of the United States."

As provided in General Note 3(a)(iv) of the HTS, an article imported directly from a possession is exempt from duty if—

(1) it was grown or mined in the possession;

(2) it was produced or manufactured in the possession, and the value of foreign materials contained in that article does not exceed 70 percent of its total value. Materials of U.S. origin are not considered foreign for this purpose. Likewise, materials that could be imported into the U.S. duty free (except from Cuba or the Philippines) are not counted as foreign materials for purposes of the 70 percent foreign-content limitation; or

(3) in the case of any article excluded from duty-free entry under section 213(b) of the Caribbean Basin Economic Recovery Act, it was produced or manufactured in the possession, and the value of foreign materials does not exceed 50 percent of its total value.

In addition, an article previously imported into the United States with duty or tax paid thereon, shipped to a possession without benefit of remission, refund, or drawback of such duty or tax, may be returned to the U.S. duty free. General Note 3(a)(iv) also provides that articles from insular possessions are entitled to no less favorable duty treatment than that accorded to eligible articles under the Generalized System of Preferences and the Caribbean Basin Initiative described below.

In applying the 70 percent foreign-materials test, Customs determines the value of the foreign materials by their actual purchase price, plus the transportation cost to the possession, excluding any duties or taxes assessed by the possession and excluding any post-landing charges. The value thus determined is then compared with the appraised value of the products imported into the United States, determined in accordance with the usual appraisement methods. If the differential is 30 percent or more, the foreign materials limitation is satisfied. This procedure is set out in 19 CFR 7.8(d).

As previously noted, the product imported from a possession must have been produced or manufactured there (unless grown or mined there). It is not sufficient for foreign goods to be shipped to a possession for nominal handling or manipulation, followed by a price mark-up to meet the 70 percent test.

Extension of United States Insular Possession Program.—The Miscellaneous Trade and Technical Corrections Act of 1999 (Public Law 106-36) (the Act) amended the U.S. notes to Chapter 71 by adding an additional U.S. Note 3. This amendment extends to certain fine jewelry the same trade benefits enjoyed by watch makers in U.S. insular possessions under the Production Incentive Certificate (PIC) program. U.S. Note 5 allows producers of watches located in U.S. insular possessions to benefit from the PIC system, which permits watch producers to import specified quantities of watches, watch movements, and watch parts. The

benefits provided under Note 5 are based on the amount of wages paid to produce such watches in insular possessions. New Note 3(a) permits the inclusion of wages paid for jewelry production in the insular possessions as an offset to duties paid on watches, watch movements, and watch parts imported into the United States. Note 3(b) provides that the extension of Note 5 benefits to jewelry may not result in any increase in the authorized amount to benefits established by Note 5, and Note 3 (c) prohibits diminishing of benefits that had been available to watch producers under paragraph (h)(iv) of Note 5 to Chapter 91. The Miscellaneous Trade and Technical Corrections Act of 2004 (Public Law 108-429) extended the PIC program until 2015, added a separate 10 million unit cap for jewelry to account for the fact that jewelry is generally produced at higher volumes than watches, and enhanced the benefits to importers by allowing use of PIC program certificates for refund of duties on any articles imported into the United States.

Canadian motor vehicles and original equipment entry pursuant to the Automotive Products Trade Act of 1965 (APTA) (General Note 5).—Throughout the HTS there are a number of specific provisions which provide for duty-free entry of imported motor vehicles and specified original equipment parts that qualify as "Canadian articles" under General Note 5. These provisions were added to the HTS pursuant to the Automotive Products Trade Act of 1965,[6] which was enacted to implement the U.S.-Canadian Automotive Agreement. The purpose of the Agreement was to create a North American common market for motor vehicles and original equipment parts (replacement parts are not covered).

The term "Canadian article" refers to an article produced in Canada but does not include any article produced with non-Canadian or non-U.S. materials unless the article satisfies the criteria set forth in the NAFTA (General Note 12).

Most of the product categories established by the APTA are applicable to "original motor-vehicle equipment," which is defined in General Note 5(a)(ii) as a Canadian fabricated component intended for use as original equipment in the manufacture of a motor vehicle in the United States and which was obtained from a Canadian supplier pursuant to "a written order, contract, or letter of intent of a bona fide motor-vehicle manufacturer in the United States." The phrase "bona fide motor-vehicle manufacturer" is defined as a person determined by the Secretary of Commerce to have produced at least 15 motor vehicles in the previous 12 months and to have the capacity to produce at least 10 motor vehicles per week.

Civil aircraft products (ATCA) (General Note 6).—Title VI of the Trade Agreements Act of 1979 gave the President the authority to proclaim new headnote 3 to part 6C of schedule 6; to make specific headnotes to designated TSUS items in order to implement the Tokyo Round Agreement on Trade in Civil Aircraft; and to provide duty-free treatment, in accordance with the annex to the Agreement for the civil aircraft articles described therein. These changes were implemented by Presidential Proclamation 4707 of December 11, 1979. This duty treatment is

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[6] Public Law 89-283, 19 U.S.C. 2001, et seq.

continued in the "Special" rates subcolumn of the HTS.

The provisions work much like those implementing the APTA in that a number of specific product breakouts are spread throughout the HTS providing duty-free entry to specifically described articles which are "certified for use in civil aircraft" in accordance with General Note 6.

Section 234 of the Trade and Tariff Act of 1984 enacted on October 30, 1984, gave the President the authority to make additional tariff breakouts in designated TSUS items in order to provide duty-free coverage comparable to the expanded coverage provided by all other signatories to the Aircraft Agreement pursuant to the extension of the annex to the Agreement agreed to in Geneva on October 6, 1983. This duty treatment has been continued in the "Special" rates subcolumn of the HTS for the relevant articles.

The Miscellaneous Trade and Technical Corrections Act of 1996 (Public Law 104-295) significantly amended General Note 6. The note now requires importers of duty-free civil aircraft parts to maintain such supporting documentation as the Secretary of the Treasury may require. Importers must also certify that the imported article is a civil aircraft, or has been imported for use in a civil aircraft and will be so used. The importer may amend the entry or file a written statement to claim duty-free treatment under General Note 6 at any time before the liquidation of the entry becomes final, except that any refund resulting from any such claim shall be without interest.

The amendment to General Note 6 also changed the definition of "civil aircraft" to mean any aircraft, aircraft engine, or ground flight simulator (including parts, components, and subassemblies thereof):

> (A) that is used as original or replacement equipment in the design, development, testing, evaluation, manufacture, repair, maintenance, rebuilding, modification, or conversion of aircraft; and
>
> (B)(1) that is manufactured or operated pursuant to a certificate issued by the Federal Aviation Administration (FAA), or pursuant to the approval of the airworthiness authority in the country of exportation, if such approval is recognized by the FAA as an acceptable substitute for an FAA certificate;
>
> (2) for which an application for such certificate has been submitted to, and accepted by, the FAA by an existing type and production certificate holder; or
>
> (3) for which an application for such approval or certificate will be submitted in the future by an existing type and production certificate holder, pending the completion of design or other technical requirements stipulated by the FAA. This section applies only to quantities of parts, components, and subassemblies as are required to meet the design and technical requirements stipulated by the FAA. The Commissioner of Customs may also require the importer to estimate the quantities of parts, components, and subassemblies covered under this section.

The term "civil aircraft" does not include any aircraft, aircraft engine, or ground flight simulator purchased for use by the Department of Defense or the U.S. Coast

Guard, unless such aircraft, aircraft engine, or ground flight simulator satisfies the requirements outlined above.

Generalized System of Preferences (GSP)

TITLE V OF THE TRADE ACT OF 1974, AS AMENDED

The concept of a Generalized System of Preferences (GSP) was first introduced in the United Nations Conference on Trade and Development (UNCTAD) in 1964. Developing countries (DCs) asserted that one of the major impediments to accelerated economic growth and development was their inability to compete with developed countries in the international trading system. Through tariff preferences in developed country markets, the DCs claimed they could increase exports and foreign exchange earnings needed to diversify their economies and reduce dependence on foreign aid.

After several international meetings and long internal debate, in 1968 the United States joined other industrialized countries in supporting the concept of GSP. As initially conceived, GSP systems were to be (1) temporary, unilateral grants of preferences by developed to developing countries; (2) designed to extend benefits to sectors of developing country economies which were not competitive internationally; and (3) designed to include safeguard mechanisms to protect domestic industries sensitive to import competition from articles receiving preferential tariff treatment. In the early 1970's, 19 other members of the Organization for Economic Cooperation and Development (OECD) also instituted and have since renewed GSP schemes.

In order to implement their GSP systems, the developed countries obtained a waiver from the most-favored-nation (MFN) obligation of article I of the General Agreement on Tariffs and Trade (GATT), which provides that trade must be conducted among countries on a non-discriminatory basis. A 10-year MFN waiver was granted in June 1971 and was made permanent in 1979 through the "enabling clause" of the Texts Concerning a Framework for the Conduct of World Trade concluded in the Tokyo Round of GATT multilateral trade negotiations. The enabling clause, which has no expiration date, provides the legal basis for "special and differential treatment" for developing countries. The enabling clause also requires that developing countries accept the principle of graduation, under which such countries agree to assume "increased GATT responsibilities as their economies progress."

U.S. GSP basic authority

Statutory authority for the U.S. Generalized System of Preferences program is set

forth in title V of the Trade Act of 1974, as amended.[7] Authority to grant GSP duty-free treatment on eligible articles from beneficiary developing countries (BDCs) became effective under that Act on January 3, 1975, for a 10-year period expiring on January 3, 1985. The program was implemented on January 1, 1976 under Executive Order 11888.

GSP has been renewed and enhanced several times in subsequent years. The most recent renewal was included in Section 4101 of the Trade Act of 2002 (P.L. 107-210). Section 4101 extended duty-free treatment under GSP until December 31, 2006.

The U.S. Trade Representative (USTR) administers the GSP program and makes recommendations to the President through an interagency committee that conducts annual reviews under regulatory procedures of petitions by interested parties and self-initiated actions to add or remove GSP eligibility for individual products or countries.

Section 501 of the Trade Act of 1974, as amended, authorizes the President to provide GSP duty-free treatment on any eligible article from designated BDCs, subject to certain conditions and limits, having due regard for (1) the effect of such action on furthering the economic development of DCs through the expansion of their exports; (2) the extent other major developed countries are undertaking a comparable effort to assist DCs by granting generalized preferences on their products (i.e., burden-sharing); (3) the anticipated impact on U.S. producers of like or directly competitive products; and (4) the extent of the BDC's competitiveness with respect to eligible articles. In 2003, the program provided duty-free treatment on imports valued at about $21 billion from more than 140 beneficiary developing economies.

Designation of beneficiary developing countries

Section 502 of the Trade Act of 1974 authorizes the President to designate a country or territory as a BDC. It also authorizes the President to designate any BDC as a least-developed beneficiary developing country (LDBDC). However, the President is expressly prohibited from designating the following developed countries as BDCs:

Australia	Japan
Canada	Monaco
European Union	New Zealand
Member States	Norway
Iceland	Switzerland

The President is also prohibited from designating any country for GSP benefits which:

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[7] Public Law 93-618, approved January 3, 1975.

(1) is a communist country unless (a) its products receive non-discriminatory (NTR) treatment; (b) it is a WTO member and a member of the International Monetary Fund (IMF); and (c) it is not dominated or controlled by international communism;

(2) is party to an arrangement and participates in any action which withholds supplies of vital commodity resources or raises their price to unreasonable levels, causing serious disruption of the world economy;

(3) affords "reverse preferences" to other developed countries which have or are likely to have a significant adverse effect on U.S. commerce;

(4) has nationalized or expropriated U.S. property, including patents, trademarks, or copyrights, or taken actions with similar effect, unless the President determines and reports to Congress there is adequate and effective compensation, negotiations underway to provide compensation, or a dispute over compensation is in arbitration;

(5) fails to recognize as binding or to enforce arbitral awards in U.S. favor;

(6) aids or abets by granting sanctuary from prosecution to, any individual or group which has committed international terrorism, or is the subject of a determination by the Secretary of State under section 6(j)(1)(A) of the Export Administration Act of 1979 (50 U.S.C. app. 2405) regarding repeated support for terrorism or such country has not taken steps to support the efforts of the United States to combat terrorism;

(7) has not taken or is not taking steps to afford internationally recognized workers rights to its workers;[8] or

(8) has not implemented its commitments to eliminate the worst forms of child labor.

The President may waive conditions (4), (5), (6), (7), and (8) if he determines and reports with reasons to the Congress that designation of the particular country is in the national economic interest.

In addition, the President must take certain other factors into account under section 502(c) in designating BDCs: (1) an expressed desire of the country to be designated; (2) the country's level of economic development; (3) whether other major developed countries extend GSP to the country; (4) the extent the country has assured the United States it will provide "equitable and reasonable access" to its markets and basic commodity resources and refrain from engaging in unreasonable export practices; (5) the extent the country is providing adequate and effective protection of intellectual property rights; (6) the extent the country has taken action to reduce trade distorting investment practices and policies and reduce or eliminate barriers to trade in services; and (7) whether the country has taken or is taking steps

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[8] Defined by amendment under section 503 of the 1984 Act for purposes of GSP to include: "(A) the right to association; (B) the right to organize and bargain collectively; (C) a prohibition on the use of any form of forced or compulsory labor; (D) a minimum age for the employment of children; and (E) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health."

to afford its workers internationally-recognized worker rights.

If the President determines that a BDC has become a "high income" country as defined by the World Bank, the President is required to remove the country from eligibility under the program. The statute provides for a transition period of up to 2 years for country graduation from the GSP program. In 2003 the World Bank designated countries with a per capita gross national income of $9,386 as "high income" countries.

Before designating any country as a BDC, the President must notify the Congress of his intention and the considerations entering into the decision. Before terminating designation of any beneficiary country, the President must provide the Congress and the country concerned at least 60 days advance notice of his intention, together with the reasons. The President must withdraw or suspend the designation if he determines the country no longer meets the conditions for designation.

The countries currently designated as BDCs of GSP are listed under General Note 4(a) of the Harmonized Tariff Schedule of the United States (HTS). As of January 1, 2005, designated GSP beneficiaries are:

Independent Countries

Afghanistan
Albania
Algeria
Angola
Antigua and Barbuda
Argentina
Armenia
Bahrain
Bangladesh
Barbados
Belize
Benin
Bhutan
Bosnia and Herzegovina
Botswana
Brazil
Bulgaria
Burkina Faso
Burundi
Cambodia
Cameroon
Cape Verde
Central African Republic
Chad
Columbia
Comoros
Congo (Brazzaville)
Congo (Kinshasa)
Ethiopia
Fiji
Gabon
Gambia, The
Georgia
Ghana
Grenada
Guatemala
Guinea
Guinea-Bissau
Guyana
Haiti
Honduras
India
Indonesia
Iraq
Jamaica
Jordan
Kazakhstan
Kenya
Kiribati
Kyrgyzstan
Lebanon
Lesotho
Macedonia, Former Yugoslav Republic of
Madagascar
Malawi
Mali
Mauritania
Panama
Papua New Guinea
Paraguay
Peru
Philippines
Romania
Russia
Rwanda
St. Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
Samoa
Sao Tomé and Principe
Senegal
Seychelles
Sierra Leone
Solomon Islands
Somalia
South Africa
Sri Lanka
Suriname
Swaziland
Tanzania
Thailand
Togo
Tonga
Trinidad and Tobago
Tunisia

Costa Rica	Mauritius	Turkey
Côte d'Ivoire	Moldova	Tuvalu
Croatia	Mongolia	Uganda
Djibouti	Morocco	Uruguay
Dominica	Mozambique	Uzbekistan
Dominican Republic	Namibia	Vanuatu
Ecuador	Nepal	Venezuela
Egypt	Niger	Republic of Yemen
El Salvador	Oman	Zambia
Equatorial Guinea	Pakistan	Zimbabwe
Eritrea		

Non-Independent Countries and Territories

Anguilla	Gibraltar	Turks and Caicos Islands
British Indian Ocean Territory	Heard Island and McDonald Islands	Virgin Islands, British
Christmas Island (Australia)	Montserrat	Wallis and Futuna
Cocos (Keeling) Islands	Niue	West Bank and Gaza Strip
Cook Islands	Norfolk Island	Western Sahara
Falkland Islands (Islas Malvinas)	Pitcairn Islands	
	Saint Helena	
	Tokelau	

Associations of Countries (treated as one country)

Member Countries of the Cartagena Agreement (Andean Group) Consisting of:

Bolivia	Ecuador	Venezuela
Columbia	Peru	

Member Countries of the Association of South East Asian Nations (ASEAN) Currently qualifying:

Cambodia	Philippines
Indonesia	Thailand

Member Countries of the Caribbean Common Market (CARICOM), except The Bahamas Consisting of:

Antigua and Barbuda	Grenada	Saint Lucia
Barbados	Guyana	Saint Vincent and the Grenadines
Belize	Jamaica	Trinidad and Tobago
Dominica	Montserrat	
	St. Kitts and Nevis	

Member Countries of the West African Economic and Monetary Union (WAEMU) Consisting of:

Benin	Guinea-Bissau	Senegal
Burkina Faso	Mali	Togo
Côte d'Ivoire	Niger	

Member Countries of the Southern Africa Development Community (SADC) Currently qualifying:

Botswana	Mauritius	Tanzania

Countries designated as LDBDCs are listed under General Note 4(b) of the HTS. As of January 1, 2005, designated GSP LDBDCs are:

Afghanistan	Equatorial Guinea	Niger
Angola	Ethiopia	Rwanda
Bangladesh	Gambia, The	Samoa
Benin	Guinea	Sao Tomé and Principe
Bhutan	Guinea-Bissau	Sierra Leone
Burkina Faso	Haiti	Somalia
Burundi	Kiribati	Tanzania
Cambodia	Lesotho	Togo
Cape Verde	Madagascar	Tuvalu
Central African Republic	Malawi	Uganda
Chad	Mali	Vanuatu
Comoros	Mauritania	Republic of Yemen
Congo (Kinshasa)	Mozambique	Zambia
Djibouti	Nepal	

Eligible articles

The President designates articles under section 503 eligible for GSP duty-free treatment after considering advice required through public hearings, from the U.S. International Trade Commission (ITC) on the probable domestic economic impact, and from executive branch agencies.

In general, GSP duty-free treatment is prohibited by statute on textile and apparel articles which were not eligible articles on January 1, 1994; watches, except those watches entered after June 30, 1989, that the President specifically determines, after public notice and comment, will not cause material injury to watch or watch band, strap, or bracelet manufacturing and assembly operations in the United States or U.S. insular possessions; import-sensitive electronic articles; import-sensitive steel articles; footwear, handbags, luggage, flat goods (e.g., wallets, change purses, eyeglass cases), work gloves, and leather wearing apparel which were ineligible for GSP as of January 1, 1995; and import-sensitive semi-manufactured and manufactured glass products. The President must also exclude any other articles he

determines to be import sensitive in the context of GSP. Articles are ineligible for GSP during any period they are subject to import relief under sections 201-204 of the Trade Act of 1974 or to national security actions under section 232 of the Trade Expansion Act of 1962. Also, no quantity of an agricultural product subject to a tariff-rate quota that exceeds the in-quota quantity may be eligible for duty-free treatment under GSP. Section 1555 of the Miscellaneous Trade and Technical Corrections Act of 2004 (P.L. 108-429) modified GSP to allow the President to designate certain hand-made rugs as eligible for duty-free treatment.

The President may designate any article that is the growth, product or manufacture of an LDBDC as an eligible article with respect to LDBDCs after receiving advice from the ITC, if he determines such an article is not import-sensitive in the context of imports from LDBDCs. However, he may not designate the statutorily exempt articles—textiles and apparel, footwear and related articles, and watches. The President must notify Congress at least 60 days in advance of LDBDC designations.

The USTR has established by regulation an interagency procedure for annual review of petitions from any interested party to have articles added to, or removed from, the GSP eligible list. The interagency committee also considers modifications on its own motion. However, section 503 prohibits consideration of an article for designation of eligibility for 3 years following formal consideration and denial of that article.

GSP duty-free treatment applies only to an eligible article which is the growth, product, or manufacture of a BDC (i.e., has undergone "substantial transformation" in an exporting BDC) and which meets the following rule-of-origin requirements:

(1) the article must be imported directly from a BDC into the U.S. customs territory; and

(2) the sum of (a) the cost or value of materials produced in a beneficiary country, plus (b) the direct cost of processing performed in such country is not less than 35 percent of the appraised value of the article when it enters into the U.S. customs territory.

Materials and processing costs in two or more beneficiary countries which are members of the same association of countries which is a customs union or free trade area may be treated as one BDC and cumulated to meet the 35 percent minimum local content. Materials imported into a BDC may be counted toward the 35 percent minimum valued-added requirement only if they are substantially transformed into new and different articles in the BDC, before they are incorporated into the GSP eligible article.

Treatment of sugar imports under GSP

Under the tariff-rate quota system for sugar,[9] the Secretary of Agriculture

[9] Presidential Proclamation No. 6763, December 23, 1994, 60 Fed. Reg. 1007.

establishes the quota quantity that can be entered at the lower tier import duty rate, and the U.S. Trade Representative (USTR) allocates the quantity among sugar exporting quantities. The quantities allocated to beneficiary countries under the Generalized System of Preferences receive duty-free treatment. Imports above the in-quota amount from beneficiary countries are tariffed at the higher, over-quota rate. Certificates of quota eligibility (CQE) are issued to the exporting countries and must be returned with the shipment of sugar in order to receive quota treatment.

Limitations on preferential treatment

The President has general authority under section 503(c) to withdraw, suspend, or limit application of GSP and restore column 1 normal trade relations (NTR) duties with respect to any article or any country after considering the factors in sections 501 and 502(c), but he cannot establish any intermediate rates of duty. Since 1981, this authority has been used in the context of the annual interagency review process for "discretionary graduation" from GSP of particular products from particular countries which have demonstrated their competitiveness and to promote a shifting of benefits to less advanced developing countries.

In addition to the annual review of petitions on article or country eligibility, section 503(c) establishes statutory "competitive need" limitations on GSP duty-free treatment, subject to waiver under certain conditions. The basic purposes of the competitive need limitations are to (1) establish a benchmark for determining when products from particular countries are competitive in the U.S. market and therefore no longer warrant preferential tariff treatment; and (2) to reallocate GSP benefits to less competitive producing countries. The limits have also provided some measure of import protection to domestic producers of like or directly competitive products.

Under the competitive need limits, if imports of a particular article from a particular BDC exceed either (1) a value level adjusted annually (in calendar year 2004, $115 million, and in each subsequent year, the amount for the preceding year plus $5 million); or (2) 50 percent of total U.S. imports of the article in a particular calendar year, GSP treatment on that article from that country must be removed and the normal rate of duty imposed on all imports of the article from that country by July 1 of the following year. GSP treatment may be reinstated in a subsequent calendar year if imports of the product from the excluded country have fallen below the competitive need ceilings then in effect during the preceding calendar year.

There are four statutory circumstances in which competitive need limits may not apply:

(1) If the President determines that an article like or directly competitive with a particular GSP article was not produced in the United States on January 1, 1995, then that article is exempt from the 50-percent, but not the dollar value, competitive need limit.

(2) The President may waive the 50-percent, but not the dollar, competitive need limit on articles for which total U.S. imports are de minimis, i.e., not more

than $17 million in calendar year 2004, and in each subsequent year, the amount for the preceding year plus $500,000.

(3) Neither of the competitive need limits applies to any BDC the President determines to be a LDBDC.

(4) The President may waive the competitive need limits for a particular country based on a determination that (a) there has been an historical preferential trade relationship between the United States and such country; (b) there is a treaty or trade agreement in force covering economic relations between such country and the United States; and (c) such country does not discriminate against or impose unjustifiable or unreasonable barriers to U.S. commerce. This waiver authority, which was designed for possible exemption of the Philippines, has never been utilized.

The President may waive competitive need limits on any article if he (1) receives ITC advice on whether any U.S. industry is likely to be adversely affected; (2) determines a waiver is in the national economic interest based upon the country designation factors under sections 501 and 502(c) as amended; and (3) publishes his determination. In making the national interest determination the President must give great weight to (1) assurances of equitable and reasonable market access in the BDC; and (2) the extent the country provides adequate and effective intellectual property rights protection. Total waivers for all countries above existing competitive need limits cannot exceed 30 percent of total GSP duty-free imports in any year, of which not more than one-half (i.e., 15 percent of total GSP duty-free imports) may apply to waivers on articles from countries which account for at least a 10-percent share of total GSP duty-free imports or have a per capita GNP of $5,000 or more in that year.

Other provisions

Section 504 requires the President to submit an annual report to the Congress on the status of internationally-recognized worker rights within each BDC, including the findings of the Secretary of Labor with respect to each BDC's implementation of its international commitments to eliminate the worst forms of child labor.

Section 506 requires appropriate U.S. agencies to assist BDCs to develop and implement measures designed to assure that the agricultural sectors of their economies are not directed to export markets to the detriment of foodstuff production for their own citizens.

Caribbean Basin Initiative (CBI)

The Caribbean Basin Economic Recovery Act (CBERA),[10] commonly referred to as the Caribbean Basin Initiative or CBI, was enacted on August 5, 1983, authorizing the grant of certain U.S. unilateral preferential trade and tax benefits for Caribbean Basin countries and territories.

The centerpiece of the CBI is authority granted to the President to provide unilateral duty-free treatment on U.S. imports of eligible articles from designated Caribbean Basin countries and territories. Duty-free treatment became effective as of January 1, 1984, and currently applies to imports from 24 designated beneficiary countries or territories.

The United States developed the CBI program to respond to the economic crisis in the Caribbean in close consultation with governments and private sectors of potential recipients and with other donor countries in the region. On February 24, 1982, President Reagan outlined the CBI before the Organization of American States, and on March 17, 1982, he first submitted this plan to the Congress. An amended version of CBI was agreed to by the House and Senate on July 28, 1983 and became law on August 5, 1983 (P.L. 98-67).

Following extensive congressional consideration and consultations with representatives of the countries involved and U.S. private sector interests on measures to improve the program, the Caribbean Basin Economic Recovery Expansion Act of 1990 (P.L. 101-382), so-called CBI II, was enacted as title II of the Customs and Trade Act of 1990. CBI II amended CBERA to make the trade benefits permanent by repealing the 12-year (September 30, 1995), termination date and to make certain improvements in the trade and tax benefits. The Act also included measures to promote tourism and created a scholarship assistance program for the region.

CBERA Beneficiary countries or territories

Section 212 of CBERA lists the 27 countries and territories as potentially eligible for designation by the President as CBI beneficiary countries. Current CBERA beneficiary countries are listed in General Note 7(a) of the HTS. As of January 1, 2005, designated CBERA beneficiary countries are:[11]

Antigua and Barbuda	Grenada	Panama
Aruba	Guatemala	St. Kitts and Nevis
Bahamas	Guyana	Saint Lucia
Barbados	Haiti	Saint Vincent and the Grenadines
	Honduras	

[10] Public Law 98-67, title II, approved August 5, 1983, 19 U.S.C. 2701 et seq.

[11] Anguilla, Cayman Islands, Suriname, and the Turks and Caicos Islands are not currently designated; Aruba, originally part of the Netherlands Antilles, is designated separately.

Belize	Jamaica	Trinidad and
Costa Rica	Montserrat	Tobago
Dominica	Netherlands Antilles	Virgin Islands,
Dominican Republic	Nicaragua	British
El Salvador		

General CBERA Designation Criteria

Section 212(b) of CBERA, as amended, prohibits the President from designating a country or territory as a beneficiary of CBI trade or tax benefits if it:

(1) is a Communist country;

(2) has nationalized or expropriated U.S. property, including any patent, trademark, or other intellectual property, or taken actions with similar effect, without compensation or submission to arbitration;

(3) fails to recognize or enforce awards arbitrated in favor of U.S. citizens;

(4) affords preferential tariff treatment to products of other developed countries that has or is likely to have a significant adverse effect on U.S. commerce;

(5) broadcasts U.S. copyrighted material without the owners' consent;

(6) has not signed an extradition agreement with the United States; and

(7) has not or is not taking steps to afford internationally-recognized worker rights (as defined for the Generalized System of Preferences program) to workers in the country (including any designated zone in that country).

The President may waive conditions (1), (2), (3), (5), and (7) if he determines that designation of the particular country would be in the national economic or security interest of the United States and so reports to the Congress.

In addition, the President must take into account certain other factors under section 212(c) of CBERA in determining whether to designate a country a CBI beneficiary: (1) the country's expressed desire to be designated; (2) economic conditions and living standards in the country; (3) the extent the country has assured the United States it will provide equitable and reasonable access to its markets and basic commodity resources; (4) the degree the country follows accepted rules of international trade under the World Trade Organization and applicable trade agreements; (5) the degree the country uses export subsidies or imposes export performance or local content requirements; (6) the degree the country's trade policies contribute to regional revitalization; (7) the degree the country is undertaking self-help measures; (8) whether or not the country has taken or is taking steps to afford its workers (including in any designated zone of the country) internationally-recognized worker rights; (9) the extent the country provides adequate and effective means under its law for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property; (10) the extent the country prohibits its nationals from broadcasting U.S. copyrighted materials without permission; and (11) the extent to which the country is prepared to cooperate in the administration of the CBI. The President must notify the Congress of his intention

to designate countries, together with the considerations entering the decision.

The President may later withdraw or suspend the designation of any country as a beneficiary country or withdraw, suspend, or limit the application of duty-free treatment for any eligible article of any country if he determines that, based on changed circumstances, such country would be barred from designation under the criteria set forth in section 212(b). The President is required to publish at least 30 days advance notice of such proposed action in the Federal Register. During the 30-day notice period, USTR is required to hold a public hearing and accept public comments on the proposed action.

CBERA Eligible Articles

CBERA duty-free treatment under section 213(a) of CBERA applies only to articles which meet three rule-of-origin requirements:

(1) The article must be imported directly from a beneficiary country into the U.S. customs territory;

(2) The article must contain a minimum 35 percent local content of one or more beneficiary countries (up to 15 percent of the total value of the article from U.S.-made materials may count toward the 35 percent requirement); and

(3) The article must be wholly the growth, product, or manufacture of a beneficiary country or, if it contains foreign materials, be substantially transformed into a new or different article in a beneficiary country.

Other provisions and regulations preclude minor pass-through operations or transshipments from qualification.

Section 213(b) of CBERA exempts the following articles from duty-free treatment: textiles and apparel subject to textile agreements; certain footwear; canned tuna; petroleum and petroleum products; and watches and watch parts containing components from non-most-favored-nation (column 2) sources.

Section 213(h) of CBERA authorizes the President to proclaim a tariff reduction of 20 percent, but not more than 2.5 percent ad valorem on any article, in the duties applicable to handbags, luggage, flat goods, work gloves, and leather wearing apparel not designated as eligible articles under the GSP program on August 5, 1983 from CBERA beneficiary countries, phased in in five equal annual stages beginning on January 1, 1992.

Section 222 of CBI II modified U.S. Note 2(b) of subchapter II of chapter 98 of the HTS to extend duty-free treatment to articles, other than textiles and apparel and petroleum and petroleum products, that are processed or assembled wholly from U.S. fabricated components or materials or processed wholly from U.S. ingredients (except water) in a CBI beneficiary country and neither the components, materials, and ingredients after export from the United States nor the article itself before importation into the United States enters the commerce of any third country.

CBERA Special Provisions for Dehydrated Ethanol

Special criteria have been established for the duty-free entry of ethanol under the CBERA program. The Tax Reform Act of 1986[12] amended CBERA to require increasing amounts of CBI feedstock in order for ethanol to qualify for duty-free treatment—30 percent in 1987; 60 percent in 1988; and 75 percent in 1989 and thereafter.

The Steel Trade Liberalization Program Implementation Act of 1989[13] provided that for calendar years 1990 and 1991, ethanol (and any mixture thereof) that is only dehydrated within a CBI beneficiary country or an insular possession receives duty-free treatment only if it meets the applicable local feedstock requirement: (1) no feedstock requirement is imposed on imports up to a level of 60 million gallons or 7 percent of the domestic ethanol market (as determined by the ITC, based on the 12-month period ending on the preceding September 30), whichever is greater;[14] (2) a local feedstock requirement of 30 percent by volume applies to the next 35 million gallons of imports above the 60 million gallon or 7 percent level described above; and (3) a local feedstock requirement of 50 percent by volume applies to any additional imports. Ethyl alcohol (or a mixture thereof) that is produced by a process of full fermentation in an insular possession or beneficiary country continues to be eligible for duty-free treatment in unlimited quantities without regard to feedstock requirements.

These provisions have been continuously renewed, most recently in section 9003(a)(4) of the Transportation Equity Act for the 21st Century (P.L. 105-178), which extended them through September 1, 2007.

Treatment of Sugar Imports under CBERA

Under the tariff-rate quota system for sugar,[15] the Secretary of Agriculture establishes the quota quantity that can be entered at the lower tier import duty rate, and the U.S. Trade Representative (USTR) allocates the quantity among sugar exporting countries. Sugar within the quantities allocated to beneficiary countries under the Caribbean Basin Initiative receives duty-free treatment. Imports above the in-quota amount from beneficiary countries are tariffed at the higher, over-quota rate. Certificates of quota eligibility (CQE) are issued to the exporting countries and must be returned with the shipment of sugar in order to receive quota treatment.

Section 213(c) requires the President to suspend duty-free treatment on imports of sugar and beef products from any beneficiary country that does not submit a

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[12] Public Law 99-514, section 423, approved October 22, 1986.

[13] Public Law 101-221, section 7, approved December 12, 1989.

[14] For the 12-month period ending on September 30, 2004, the ITC determined the domestic ethanol market to be 3.43 billion gallons. Accordingly, the ITC determined the base quantity for 2005 should be 240.4 million gallons.

[15] Presidential Proclamation No. 6763, December 23, 1994, 60 Fed. Reg. 1007.

satisfactory stable food production plan within 90 days after its designation, or while the country is not making a good faith effort to implement the plan or the plan is not achieving its purpose. The President must withhold suspension if the country agrees to consultations within a reasonable period of time and undertakes to formulate and implement remedial action.

Suspensions of Duty-Free Treatment

The import relief procedures and authorities under sections 201-204 of the Trade Act of 1974, as amended, and national security measures under section 232 of the Trade Expansion Act of 1962 apply to imports from CBI beneficiary countries. Section 213(e) of CBERA authorizes the President to suspend duty-free treatment under CBERA or the U.S. – Caribbean Basin Trade Partnership Act (CBTPA, discussed later in this section) and proclaim a rate of duty or other relief measures on CBI imports as on imports of the article from non-CBI countries. Alternatively, the President may maintain duty-free treatment or establish a margin of preference on imports from CBI countries. In its report to the President on import relief investigations covering CBI eligible articles, the ITC must state whether its findings with respect to serious injury to the domestic industry and its recommended remedy apply to imports from CBI beneficiary countries.

Under a special procedure under section 213(f) of CBERA, petitioners for import relief on agricultural perishable products may also file a request with the Secretary of Agriculture for emergency relief. Within 14 days, the Secretary must determine whether there is reason to believe a CBI perishable product is being imported in such increased quantities as to be a substantial cause of serious injury to the domestic industry, and recommend to the President emergency relief, if warranted. The President must determine within 7 days after receiving the Secretary's recommendation whether to take emergency action restoring the normal rate of duty pending final action on the import relief petition.

Trade Remedy Benefits for CBERA countries

Under the antidumping and countervailing duty laws, imports from two or more countries subject to investigation must generally be aggregated for the purpose of determining whether the unfair trade practice causes material injury to a U.S. industry, absent certain exceptions. Section 224 of CBI II created an exception to the general cumulation rule for imports from CBI beneficiary countries. If imports from a CBI country are under investigation in an antidumping or countervailing duty case, imports from that country may not be aggregated with imports from non-CBI countries under investigation for purposes of determining whether the imports from the CBI country are causing, or threatening to cause, material injury to a U.S. industry. They may be aggregated with imports from other CBI countries under investigation. Imports from CBI countries continue to be cumulated with

imports from non-CBI countries for purposes of determining material injury in investigations of imports from non-CBI countries.

Tourist Duty-Free Allowance for CBERA countries

Section 2004(d)(8)(B) of P.L. 108-429 increased the duty-free tourist allowance for U.S. residents returning directly or indirectly from a CBERA beneficiary country from $600 to $800 to be equal to the tourist duty-free allowance for most other countries in the world. Tourists returning from a CBERA beneficiary country are also allowed to enter 1 additional liter of alcoholic beverages (for a total of two liters) duty-free if produced in a CBI beneficiary country.

Measures for Puerto Rico and U.S. Insular Possessions

CBERA contains a number of provisions to maintain and improve the competitive position of Puerto Rico and the U.S. insular possessions (including the U.S. Virgin Islands, American Samoa, Guam):

(1) Imports from Puerto Rico and the U.S. Virgin Islands may be counted toward the 35 percent minimum local content rule of origin requirement for CBI duty-free treatment. Section 213(a)(4) of CBERA permits articles from CBERA beneficiary countries to enter under bond for processing or manufacture in Puerto Rico without payment of duty upon withdrawal if they meet CBERA rule of origin requirements. Section 213(a)(5) of CBERA provides that any article which is the growth, product, or manufacture of Puerto Rico qualifies for duty-free treatment under CBERA if (a) the article is imported directly from a CBERA beneficiary country into the United States; (b) the article was advanced in value in a CBERA beneficiary country; and (c) if any materials are added to the article in a CBERA beneficiary country, such materials are a product of a CBERA beneficiary country or the United States.

(2) For goods that are the growth or product of a U.S. insular possession and are imported directly from any such possession to be eligible for duty free treatment, the permissible foreign content is 70 percent of their total value (or 50 percent of their total value for CBTPA goods described in section 213(b) of CBERA). See General Note 3(a)(iv) of the U.S. Harmonized Tariff Schedule (HTS) for more information.

(3) Duty-free entry of alcoholic beverages by returning U.S. residents arriving directly from insular possessions are limited to 5 liters, provided at least 1 liter is the product of an insular possession. Section 2004(d)(8)(A) of P.L. 108-429 increased the duty-free tourist allowance for U.S. residents returning directly or indirectly from a U.S. insular possession from $1200 to $1600.

(4) Section 221 of CBERA amended section 7652 of the Internal Revenue Code to require that all excise taxes collected on foreign rum imported into the

United States be paid to the treasuries of Puerto Rico and the Virgin Islands. Section 214(c) of CBERA requires the President to consider compensatory measures for the governments of Puerto Rico and the U.S. Virgin Islands if there is a reduction in the amount of rum excise tax rebates.

(5) Section 214(f) of CBERA states that the term "industry" under the import relief provisions of section 201 of the Trade Act of 1974 enables producers in the insular possessions to petition for import relief.

(6) Section 214(g) of CBERA exempts non-toxic rum stillage discharges in the U.S. Virgin Islands from certain provisions of the Federal Water Pollution Control Act if the discharges are 1,500 feet from the shore and are determined by the Governor of the U.S. Virgin Islands not to constitute a health or environmental hazard.

Tax Measures

Section 222 of CBERA amended section 274(h) of the Internal Revenue Code to allow deductions for business expenses incurred while attending conventions and meetings in a designated Caribbean Basin beneficiary country (or Bermuda) if the country enters into an executive agreement with the United States to provide, on a reciprocal basis, for information relating to U.S. tax matters to be made available to U.S. tax officials, including agreement to exchange bearer share and bank account information for criminal tax purposes. No deduction is available for attending a convention in a country found by the Secretary of the Treasury to discriminate in its tax laws against conventions held in the United States.

Reporting Requirements

Section 212(f) of CBERA requires the United States Trade Representative to submit to the Congress every two years a complete report regarding the operation of the CBERA and CBTPA programs, including the results of a general review of beneficiary countries based on criteria in sections 212(b) and (c), and section 213(b)(5)(B) of CBERA.

Section 215 of CBERA requires the ITC to report annually to the Congress on the actual economic impact and its assessment of the probable future effects of the Act on the U.S. economy generally and on specific domestic industries.

Additional Temporary Benefits under the U.S. – Caribbean Basin Trade Partnership Act

Based on the success of the CBI program and in response to the devastation caused to the region by Hurricanes Georges and Mitch in September and October of 1998, H.R. 984, the Caribbean and Central American Relief and Economic

Stabilization Act, a bill to grant NAFTA parity to nations in the Caribbean Basin, was introduced on March 9, 1999. It was approved by the Ways and Means Committee on March 31, 2000. No further action on H.R. 984 was taken in the House.

On June 22, 1999, the Senate Committee on Finance considered draft legislation reported titled "The United States – Caribbean Basin Trade Enhancement Act." The provisions in this version marked up by the Committee on Finance differed from the trade provisions in H.R. 984, as approved by the Committee on Ways and Means, by requiring that imports of apparel products from the Caribbean Basin region qualifying for duty-free and quota free entry be made of fabric of U.S. origin.

During Senate consideration of H.R. 434, the African Growth and Opportunity Act, additional trade preferences for the CBI region were added as an amendment. Subtitle A of the conference report for H.R. 434 included the United States – Caribbean Basin Trade Partnership Act (CBTPA). H.R. 434 was signed into law on May 18, 2000 (P.L.106-200).

CBTPA temporarily reduces or eliminates tariffs and eliminates most quantitative restrictions on certain products that previously were not eligible for preferential treatment under CBERA. In addition, CBTPA was intended to foster increased opportunities for U.S. companies in the textile and apparel sector to expand co-production arrangements with countries in the CBI region, thereby sustaining and preserving manufacturing operations in the United States that would otherwise be relocated to the Far East.

CBTPA benefits are in effect during a "transition period" that began on October 1, 2000 and ends on the earlier of September 30, 2008, or whenever the Free Trade Area of the Americas or other free trade agreement as described in the legislation enters into force between the United States and the CBTPA beneficiary country.

Designation Criteria and Eligibility for CBTPA Benefits

In designating a country as eligible for CBTPA benefits, section 213(b)(5)(B) of CBERA requires that the President take into account the existing eligibility criteria established under CBERA, as well other appropriate criteria, including whether a country has demonstrated a commitment to undertake its WTO obligations and participate in negotiations toward the completion of the FTAA or comparable trade agreement, the extent to which the country provides intellectual property protection consistent with or greater than that afforded under the Agreement on Trade-Related Aspects of Intellectual Property Rights, the extent to which the country provides internationally recognized worker rights, whether the country has implemented its commitments to eliminate the worst form of child labor, the extent to which a country has taken steps to become a party to and implement the Inter-American Convention Against Corruption, and the extent to which the country applies transparent, nondiscriminatory and competitive procedures in government procurement equivalent to those included in the WTO Agreement on Government

Procurement and otherwise contributes to efforts in international fora to develop and implement international rules in transparency in government procurement. On October 2, 2000, the President designated all 24 current beneficiaries under CBERA as "CBTPA beneficiary countries."[16]

In accordance with section 213(b)(4)(A)(ii) of CBERA, the enhanced trade benefits provided by CBTPA are available to imports of eligible products from countries that (1) are designated as "CBTPA beneficiary countries," and (2) have implemented and follow, or are making substantial progress toward implementing and following, certain customs procedures and documentation requirements drawn from Chapter 5 of the North American Free Trade Agreement (NAFTA), that allow U.S. Customs to verify the origin of products. Requirements regarding Certificates of Origin for imports receiving preferential tariffs are detailed in Article 502.1 of NAFTA. The CBTPA requires the Secretary of the Treasury to prescribe regulations that require, as a condition of entry, that any importer of record claiming preferential tariff treatment for textile and apparel products under the bill must comply with requirements similar in all material respects to the requirements regarding Certificates of Origin contained in Article 502.1 of NAFTA, for a similar importation from Mexico. Proclamation 7351 delegated to the United States Trade Representative (USTR) the authority to determine whether the designated CBTPA beneficiary countries have implemented and follow, or are making substantial progress toward implementing and following, the customs procedures required by CBTPA. The President directed USTR to announce any such determinations in the Federal Register and to implement any such determinations in the HTS.

CBTPA Beneficiary Countries

General note 17(a) to the HTS lists the countries that are currently eligible for enhanced benefits under CBTPA. As of January 1, 2005, CBTPA beneficiary countries eligible for enhanced CBTPA benefits are:

Barbados	Guatemala	Nicaragua
Belize	Guyana	Panama
Costa Rica	Haiti	Saint Lucia
Dominican Republic	Honduras	Trinidad and Tobago
El Salvador	Jamaica	

CBTPA Temporary Benefit of Parity With NAFTA for Certain Products

Under NAFTA, imported products from Mexico receive NAFTA declining tariff or duty-free and quota-free treatment. Chapter Four of NAFTA establishes rules of origin for identifying goods that are treated as "originating in the territories of

[16] 65 FR 60236.

NAFTA parties" and are therefore eligible for preferential treatment accorded to originating goods under NAFTA, including reduced duties and duty-free and quota-free treatment. The CBTPA provides that NAFTA tariff treatment applies to certain articles excluded from CBERA that meet NAFTA rules of origin (treating the United States and CBTPA beneficiary countries as "parties" under the agreement for this purpose). In addition, as discussed above, Customs procedures applicable to exporters under NAFTA also must be met for CBTPA countries to quality for parity treatment.

CBTPA specifically lists the products for which NAFTA parity treatment applies. Specifically, for imports of canned tuna, petroleum and petroleum products, footwear, handbags, luggage, flat goods work gloves, and leather-wearing apparel, CBTPA provides an immediate reduction in tariffs equal to the preference Mexican products enjoy under NAFTA. The applicable duty paid by importers on such CBTPA goods is equal to the duty applicable to the same goods if entered from Mexico.

Section 1558 of P.L. 108-429 modified the NAFTA parity benefits for certain footwear under CBTPA by reducing the rule of origin requirement for eligible footwear to the standard CBERA 35% value-added rule of origin. This change does not apply to 17 categories of footwear under the HTS that are considered import sensitive.

CBTPA Temporary Trade Benefits for Apparel Imports

The CBTPA provides duty-free treatment to the following apparel products:

(1) apparel articles assembled in one or more CBTPA beneficiary countries from U.S. fabrics wholly formed from U.S. yarns and cut in the United States that would enter the United States under Harmonized Tariff Schedule (HTS) item number 9802.00.80 (a provision that allows an importer to pay duty solely on the value-added abroad when U.S. components are shipped abroad for assembly and re-imported into the United States);

(2) apparel articles assembled in one or more CBTPA countries from fabrics wholly formed and cut in the United States, from yarns wholly formed in the United States that are entered under chapter 61 or 62 of the HTS, if, after such assembly, the articles would have qualified for entry under subheading 9802.00.80 but for the fact that the articles were embroidered or subjected to stone-washing, enzyme-washing, acid washing, perma-pressing, oven-baking, bleaching, garment-dyeing, screen printing, or other similar processes;

(3) apparel articles cut and assembled in one or more CBTPA beneficiary countries from fabric wholly formed in the United States from yarns wholly formed in the United States, if such articles are assembled in such country with thread formed in the United States;

(4) certain apparel articles knit-to-shape (other than socks provided for in heading 6115 of the HTS) in a CBTPA beneficiary country from yarns wholly formed in the United States, and knit apparel articles (other than certain t-shirts, as described below) cut and wholly assembled in one or more CBTPA beneficiary countries from fabric formed in one or more CBTPA beneficiary countries or the United States from yarns wholly formed in the United States, in an amount not to exceed 250 million square meter equivalents (SMEs) during the one-year period beginning on October 1, 2000. That amount increased by 16 percent, compounded annually, in each succeeding one-year period. Section 3107(a)(3) of the Trade Act of 2002 (P.L. 107-210) increased the cap for knit and knit-to-shape apparel assembled in CBTPA countries from regional fabric beginning in October 1, 2002 (500 million SMEs in the first year; 850 million SMEs in the year starting October 1, 2003). Beginning October 1, 2004 through September 30, 2008, P.L. 107-210 set the cap for qualifying knit and knit-to-shape apparel at 970 million SMEs per year.

For T-shirts, other than underwear T-shirts, CBTPA set a cap for duty-free treatment of 4.2 million dozen during the one-year period beginning on October 1, 2000. That amount increased by 16 percent, compounded annually, in each succeeding one-year period. Section 3107(a)(4) of the Trade Act of 2002 (P.L. 107-210) increased the cap for t-shirts beginning in October 1, 2001 (4.872 million dozen in the first year; 9 million dozen in the year starting October 1, 2002; 10 million dozen in the year beginning October 1, 2003). Beginning October 1, 2004 through September 30, 2008, P.L. 107-210 set the cap for t-shirts at 12 million dozen per year.

(5) certain brassieres cut and sewn or otherwise assembled in the United States or one or more CBTPA beneficiary countries, subject to the requirements set forth in the Act;

(6) certain articles assembled from fibers, yarns or fabric not widely available in commercial quantities, with reference to the relevant provisions of the NAFTA; the conference agreement also authorizes the President to extend duty-free and quota-free treatment to certain other fibers, fabrics and yarns. Any interested party may submit to the President a request for extension of benefits to fibers, fabrics and yarns not available. The requesting party bears the burden of demonstrating that a change is warranted by providing sufficient evidence. The President must make a determination within 60 calendar days of receiving a request from an interested party;

(7) certain handloomed, handmade and folklore articles; and

(8) certain textile luggage, as described in the legislation.

The CBTPA establishes certain special rules relating to apparel products:

(1) Finding and trimmings.–Articles otherwise eligible for preferential treatment shall not be ineligible for such treatment because the article contains findings or trimmings of foreign origin, if such findings and trimmings do not

exceed 25 percent of the cost of the components of the assembled product. However, sewing thread shall not be treated as a finding or trimming for purposes of apparel articles cut in a CBTPA beneficiary country from fabric wholly formed in the United States from yarns wholly formed in the United States, where preferential treatment in contingent upon assembly with thread formed in the United States.

(2) Interlinings.–Articles otherwise eligible for preferential treatment shall not be ineligible for such treatment because the articles contain certain interlinings, as described in the legislation, of foreign origin, if the value of such interlinings (and any findings and trimmings) does not exceed 25 percent of the cost of the components of the assembled articles. This rule will not apply if the President determines that U.S. manufacturers are producing such interlinings in the United States in commercial quantities;

(3) De Minimis.—An article otherwise ineligible for preferential treatment because the article contains fibers or yarns not wholly formed in the United States or in one or more beneficiary countries shall not be ineligible for such treatment if the total weight of all such fibers or yarns is not more then seven percent of the total weight of the good. However, in order for an apparel article containing elastomeric yarns to be eligible for preferential treatment, such yarns must be wholly formed in the United States.

(4) Special Origin Rule.—An article otherwise eligible for preferential treatment shall not be ineligible for such treatment because the article contains nylon filament yarn (other then eleastomeric yarn), if entered under certain tariff headings from a country that is a party to an agreement with the United States establishing a free trade area which entered into force before January 1, 1995.

The Trade Act of 2002 (P.L. 107-210) contained several clarifications regarding CBTPA apparel benefits as described below:

(1) Section 3107 clarified that CBTPA preferential treatment is provided to knit-to-shape apparel articles assembled in beneficiary countries from U.S. inputs. Section 2004(g) of P.L. 108-429 provided retroactive duty-free treatment for such apparel (except for socks) as of October 1, 2000.

(2) Section 3107 clarified that CBTPA preferential treatment is provided to apparel articles that are cut both in the United States and in beneficiary countries (i.e., so-called hybrid cutting).

(3) P.L. 107-210 requires that, for imports entered on or after September 1, 2002, apparel made of U.S. knit or woven fabric and assembled in a CBTPA beneficiary country may qualify for CBTPA duty-free treatment only if the U.S. knit or woven fabric is dyed, printed, and finished in the United States. Section 3001 of the conference report for the Supplemental Appropriations Bill for the fiscal year ending September 30, 2002 (P.L. 107-206) contained identical language.

CBTPA Transshipment Provisions

In accordance with section 213(b)(2)(D) of CBERA, if an exporter is determined under the laws of the United States to have engaged in illegal transshipment of textile or apparel products from a CBTPA country, then the President shall deny all benefits under the bill to such exporter, and to any successors of such exporter, for a period of two years.

In cases where the President has requested a CBTPA country to take action to prevent transshipment and the country has failed to do so, the President shall reduce the quantities of textile and apparel articles that may be imported into the United States from that country by three times the quantity of articles transshipped, to the extent that such action is consistent with WTO rules.

Meetings of Caribbean Trade Ministers and USTR

Section 213 of P.L. 106-200 directs the President to convene a meeting with the trade ministers of CBTPA countries in order to establish a schedule of regular meetings, to commence as soon as practicable, of the trade ministers and USTR. The purpose of the meetings is to advance consultations between the United States and CBTPA countries concerning the likely timing and procedures for initiating negotiations for CBTPA countries to: (1) accede to NAFTA; or (2) enter into comprehensive, mutually advantageous trade agreements with the United States that contain comparable provisions to NAFTA, and would make substantial progress in achieving the negotiation objectives listed in Section 108(b)(5) of Public Law 103-182.

Free Trade Agreement Negotiations

A free trade agreement (FTA) between the United States and Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua (the CAFTA countries) was signed on May 28, 2004. On August 5, 2004, an FTA was signed between the United States, the CAFTA countries, and the Dominican Republic, and that agreement is awaiting Congressional approval. On November 18, 2003, the President notified the Administration's intent to negotiate an FTA with Panama, and those negotiations continue as of this writing.

Andean Trade Preference Act, as amended

On July 23, 1990, President George H. W. Bush announced that he would seek congressional approval of a preferential trade program for four Andean countries—Bolivia, Ecuador, Colombia, and Peru—to fulfill a commitment made at the February 1990 Cartagena Drug Summit to expand economic incentives to

encourage these countries to move out of the production, processing, and shipment of illegal drugs into legitimate products. Increased access to the U.S. market through tariff preferences was part of a package of measures that included expanded agricultural development assistance, additional product coverage under the Generalized System of Preferences program, and negotiation of long-term trade and investment liberalization building on the "Enterprise for the Americas Initiative" announced by the President on June 27, 1990.

On October 5, 1990, President Bush transmitted to Congress proposed implementing legislation. H.R. 661, the "Andean Trade Preference Act of 1991," was introduced on January 28, 1991 reflecting the Administration's proposal. After some modifications, the Andean Trade Preference Act (ATPA), commonly referred to as the Andean Initiative, was enacted on December 4, 1991, as title II of Public Law 102-182, to authorize preferential trade benefits for the Andean nations similar to benefits provided to Caribbean beneficiary countries under the Caribbean Basin Initiative program.

ATPA went into effect on December 4, 1991. The designations of Columbia and Bolivia as ATPA beneficiary countries became effective July 22, 1992.[17] Designations of Ecuador[18] and Peru[19] became effective, respectively, on April 30, 1993 and August 31, 1993. Each of these designations has been reviewed annually and renewed.

Duty-free treatment is granted under the ATPA to any otherwise eligible article which is the growth, product, or manufacture of a designated beneficiary country if (1) that article is imported directly from a beneficiary country into the U.S. customs territory; and (2) the sum of the cost or value of materials produced in one or more Andean beneficiary countries or one or more CBI beneficiary countries, plus the direct costs of processing operations performed in one or more Andean or CBI beneficiary countries is not less than 35 percent of the appraised value of the article. Puerto Rico and the Virgin Islands are also considered beneficiary countries for purposes of calculating value-added. Up to 15 percent of the value attributable to the cost or value of materials produced in the United States may be applied toward the 35 percent minimum local content requirement. The ATPA includes rules and requirements to preclude transshipment or pass-through operations which are identical to CBI provisions, except that content from CBI beneficiary countries may also be counted toward the minimum 35 percent local content requirement for determining the product of an Andean country.

ATPA Beneficiary Countries

Section 203(b)(1) of ATPA, as amended, lists Bolivia, Colombia, Ecuador, and Peru as potentially eligible for designation by the President as ATPA beneficiary

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[17] Presidential Proclamation 6455 and 6456; 57 Fed. Reg. 30069 and 30097.
[18] Presidential Proclamation 6544; 58 Fed. Reg. 195547.
[19] Presidential Proclamation 6585; 58 Fed. Reg. 43239.

countries. Designated beneficiary countries are listed in General Note 11(a) of the Harmonized Tariff Schedule of the United States. As of January 1, 2005, designated ATPA beneficiary countries are:

Bolivia
Colombia
Ecuador
Peru

ATPA Designation Criteria

Section 203 of ATPA, as amended, lists seven mandatory and twelve discretionary criteria that the President must take into account when determining whether to designate a country as an ATPA beneficiary country. In accordance with section 203(c), the mandatory criteria require that the President shall not designate any country a ATPA beneficiary country if:

(1) the country is a Communist country;

(2) the country has nationalized, expropriated, imposed taxes or other exactions or otherwise seized ownership or control of U.S. property (including intellectual property), unless he determines that prompt, adequate, and effective compensation has been or is being made, or good faith negotiations to provide such compensation are in progress, or the country is otherwise taking steps to discharge its international obligations, or a dispute over compensation has been submitted to arbitration;

(3) the country fails to act in good faith in recognizing as binding or in enforcing arbitral awards in favor of U.S. citizens;

(4) the country affords preferential tariff treatment to products of other developed countries that has or is likely to have a significant adverse effect on U.S. commerce;

(5) a government-owned entity in the country engages in the broadcast of copyrighted material belonging to U.S. copyright owners without their express consent or the country fails to work toward the provision of adequate and effective intellectual property rights;

(6) the country is not a signatory to an agreement regarding the extradition of U.S. citizens;

(7) if the country has not or is not taking steps to afford internationally recognized worker rights to workers in the country.

Under ATPA, the President is prohibited from designating a country a beneficiary country if any of criteria (1)-(7) apply to that country. However, criteria (1), (2), (3), (5), and (7) do not prevent a country's designation if the President determines that such designation is in the U.S. national economic or security interest.

Section 203(d) includes the discretionary criteria that the President is to take into account when determining whether to designate a country as eligible for ATPA

benefits:

(1) an expression by the country of its desire to be designated;

(2) the economic conditions in the country, its living standards, and any other appropriate economic factors;

(3) the extent to which the country has assured the United States it will provide equitable and reasonable access to its markets and basic commodity resources;

(4) the degree to which the country follows accepted rules of international trade under the World Trade Organization;

(5) the degree to which the country uses export subsidies or imposes export performance or local content requirements which distort international trade;

(6) the degree to which the trade policies of the country are contributing to the revitalization of the region;

(7) the degree to which the country is undertaking self-help measures to protect its own economic development;

(8) whether or not the country has taken or is taking steps to afford to workers in that country (including any designated zone in that country) internationally recognized workers rights;

(9) the extent to which the country provides under its law adequate and effective means for foreign nationals to secure, exercise, and enforce exclusive intellectual property rights;

(10) the extent to which the country prohibits its nationals from engaging in the broadcast of copyrighted material belonging to U.S. copyright owners without their express consent;

(11) whether such country has met the narcotics cooperation certification criteria of the Foreign Assistance Act of 1961 for eligibility for U.S. assistance; and

(12) the extent to which the country is prepared to cooperate with the United States in the administration of the Act.

The President may withdraw or suspend beneficiary country status or duty-free treatment on any article if he determines the country should be barred from designation if, as a result of changed circumstances, a country's performance under eligibility criteria is no longer satisfactory.

Andean Trade Promotion and Drug Eradication Act

The original ATPA, scheduled to expire on December 4, 2001, contained a list of products that were ineligible for duty-free treatment. More specifically, ATPA duty-free treatment did not apply to textile and apparel articles that are subject to textile agreements; petroleum and petroleum products; footwear not eligible for duty-free treatment under the Generalized System of Preferences; certain watches and watch parts; certain leather products; and sugar, syrups and molasses subject to over-quota rates of duty.

The Andean Trade Promotion and Drug Eradication Act (ATPDEA) amended ATPA and extended and enhanced trade benefits as a way to create additional alternatives to illicit drug production, thereby enhancing political security in the Andean region and the hemisphere. In general, the ATPDEA expanded trade benefits to include additional products such as apparel made of U.S. fabric, Andean apparel made of regional fabric subject to a cap, and certain tuna (P.L. 107-210).

ATPDEA Designation Criteria

Under section 204(b)(6)(B) of ATPA, as amended by ATPDEA, when designating a country as eligible for the enhanced ATPDEA benefits, the President is to take into account the existing eligibility criteria established under ATPA described above, as well as other criteria, including: whether a country has demonstrated a commitment to undertake its WTO obligations and participate in negotiations toward the completion of the FTAA or comparable trade agreement; the extent to which the country provides intellectual property rights protection consistent with or greater than that afforded under the World Trade Organization (WTO) Agreement on Trade-Related Aspects of Intellectual Property Rights; the extent to which the country provides internationally recognized worker rights; whether the country has implemented its commitments to eliminate the worst forms of child labor; the extent to which the country has met the counternarcotics certification criteria in section 490 of the Foreign Assistance Act of 1961; the extent to which a country has taken steps to become a party to and implement the Inter-American Convention Against Corruption; the extent to which the country applies transparent, nondiscriminatory, and competitive procedures in government procurement equivalent to those included in the WTO Agreement on Government Procurement and otherwise contributes to efforts in international fora to develop and implement international rules in transparency in government procurement; and the extent to which the country has taken steps to support U.S. efforts to combat terrorism.

Articles (Other than Apparel) Eligible for Preferential Treatment

ATPDEA authorizes the President to proclaim duty-free treatment for any of the following articles which were previously excluded from duty-free treatment under ATPA, if the President determines that the article is not import-sensitive in the context of imports from beneficiary countries:

(1) Footwear not designated at the time of the effective date of this Act as eligible for the purposes of the Generalized System of Preferences under title V of the Trade Act of 1974;

(2) Petroleum, or any product derived from petroleum, provided for in headings 2709 and 2710 of the HTS;

(3) Watches and watch parts (including cases, bracelets and straps), of

whatever type including, but not limited to, mechanical, quartz digital or quartz analog, if such watches or watch parts contain any material which is the product of any country with respect to which HTS column 2 rates of duty apply;

(4) Handbags, luggage, flat goods, work gloves, and leather wearing apparel that—(i) are the product of any beneficiary country; and (ii) were not designated on August 5, 1983, as eligible articles for purposes of the Generalized System of Preferences under title V of the Trade Act of 1974.

The ATPDEA also authorizes the President to proclaim duty-free treatment for imports of Andean tuna if it is packed in flexible (e.g. foil), airtight containers weighing with their content not more than 6.8 kg each if it is harvested by United States or ATPDEA vessels. The ATPDEA also updated the calculation of the NTR tariff-rate quota (TRQ) on other tuna so that it is calculated at 4.8 percent of apparent domestic consumption of tuna in airtight containers. (It had previously been calculated based on domestic production.)

Under ATPDEA, 1) certain textiles; 2) sugar, syrups and molasses subject to over-quota tariffs; 3) rum and tafia classified in subheading 2208.40.00 of the HTS; and 4) products on the above list that are import sensitive in the context of Andean imports continue to be ineligible for duty-free treatment, as are apparel products other than those specifically described below.

Eligible Apparel Articles

Under sections 202 and 204(b)(3) of ATPA, as amended by ATPDEA, the President may proclaim duty-free and quota-free (except category 4, which is capped) treatment for apparel articles sewn or otherwise assembled in one or more beneficiary countries exclusively from any one or any combination of the following:

(1) Fabrics or fabric components formed, or components knit-to-shape, in the United States (including fabrics not formed from yarns, if such fabrics are classifiable under heading 5602 or 5603 of the HTS and are formed in the United States).

(2) Fabrics or fabric components formed, or components knit-to-shape, in one or more beneficiary countries, from yarns formed in one or more beneficiary countries, if such fabrics (including fabrics not formed from yarns, if such fabrics are classifiable under heading 5602 or 5603 of the HTS and are formed in one or more beneficiary countries) are in chief value of llama, alpaca, and vicuna.

(3) Fabrics or yarn not produced in the United States or in the region, to the extent that apparel articles of such fabrics or yarn would be eligible for preferential treatment, without regard to the source of the fabrics or yarn, under Annex 401 of the NAFTA (short supply provisions). Any interested party may request the President to consider such treatment for additional fabrics and yarns on the basis that they cannot be supplied by the domestic industry in

commercial quantities in a timely manner, and the President must make a determination within 60 calendar days of receiving the request from the interested party.

(4) Apparel articles sewn or otherwise assembled in one or more beneficiary countries from fabrics or fabric components formed or components knit-to-shape, in one or more beneficiary countries, from yarns formed in the United States or in one or more beneficiary countries (including fabrics not formed from yarns, if such fabrics are classifiable under heading 5602 or 5603 of the HTS and are formed in one or more beneficiary countries), whether or not the apparel articles are also made from any of the fabrics, fabric components formed, or components knit-to-shape in the United States described in paragraph 1. Imports of apparel made from regional fabric and regional yarn was capped at 2% of U.S. imports in the 1-year period beginning October 1, 2002, and grows in equal increments over the following four years to 5% of U.S. imports beginning October 1, 2006.

(5) Textile luggage assembled in an ATPEA beneficiary country from fabric and yarns formed in the United States.

Special Origin Rule for Nylon Filament Yarn

Under section 204(b)(3)(B)(vi)(IV) of ATPA, as amended, articles otherwise eligible for duty-free treatment are not ineligible because they contain certain nylon filament yarn (other than elastomeric yarn) from a country that had an FTA in force with the United States prior to January 1, 1995.

Dyeing, Finishing, and Printing Requirement

ATPDEA requires that apparel assembled in one or more beneficiary countries from U.S. knit or woven fabric qualifies for benefits only if the U.S. knit or woven fabric is dyed and finished in the United States.

Penalties for Transshipment

Section 204(b)(5) of ATPA, as amended, requires that importers comply with requirements similar in all material respects to the requirements regarding Certificates of Origin contained in Article 502.1 of the North American Free Trade Agreement (NAFTA) for a similar importation from Mexico.

In addition, if an exporter is determined under the laws of the United States to have engaged in illegal transshipment of apparel products from an Andean country, then the President shall deny all benefits under the bill to such exporter, and to any successors of such exporter, for a period of two years.

In cases where the President has requested a beneficiary country to take action to prevent transshipment and the country has failed to do so, the President is to reduce

the quantities of textile and apparel articles that may be imported into the United States from that country by three times the quantity of articles transshipped, to the extent that such action is consistent with World Trade Organization (WTO) rules.

Import Safeguard Provisions

The import relief procedures and authorities under sections 201-204 of the Trade Act of 1974 apply to imports from beneficiary countries, as they do to imports from other countries. If ATPA imports cause serious injury, or threat of such injury, to the domestic industry producing a like or directly competitive article, section 204(c) of ATPA, as amended, authorizes the President to suspend duty-free treatment and proclaim a rate of duty or other relief measures if the ITC determines that the serious injury or threat thereof is a result of duty-free treatment provided under the Act. A NAFTA equivalent safeguard applies to imports of apparel products from ATPA beneficiary countries.

Import Safeguard Provisions for Perishable Products

Authorities under ATPA to grant import relief measures and to take emergency action on imports of perishable products are identical to provisions under the CBI program. The President may suspend duty-free treatment and proclaim a duty rate on any eligible article under the import relief provisions of the Trade Act of 1974 or the national security provisions of the Trade Expansion Act of 1962. The U.S. International Trade Commission must state in its report to the President on any import relief investigation involving an eligible article under the ATPA whether and to what extent its injury findings and remedy recommendations apply to imports of the article from beneficiary countries.

Section 204(d) of ATPA includes an emergency relief procedure for perishable products. Petitions may be filed with the Secretary of Agriculture at the same time as a petition for import relief is filed with the ITC. Within 14 days, the Secretary advises the President whether he has reason to believe that a perishable product from a beneficiary country is being imported in such increased quantities as to be a substantial cause of serious injury or threat thereof to the domestic industry and that emergency action is warranted, or publishes notice and advises the petitioner of a determination not to recommend emergency action. Within 7 days after receiving a recommendation, the President must proclaim the withdrawal of duty-free treatment or publish notice of his determination not to take emergency action.

Section 204(e) states that no proclamation under ATPA is to affect fees imposed pursuant to section 22 of the Agricultural Adjustment Act of 1933.

Reporting Requirements

Section 203(f)(1) of ATPA, as amended, requires USTR to submit to the

Congress a biannual report on the operation of ATPA, including a general review of beneficiary countries of the criteria listed in sections 203(c) and 203(d) and the performance of beneficiary countries under criteria in section 204(b)(6)(B).

Section 206 requires the International Trade Commission to submit to the Congress an annual report (in each year that the report required by section 215 of the Caribbean Basin Economic Recovery Act is not submitted) on the economic impact of ATPA and its effectiveness in promoting drug-related crop eradication and crop substitution efforts of beneficiary countries.

Section 207 requires an annual report by the Secretary of Labor on the impact of ATPA with respect to U.S. labor.

Section 204(b)(5)(c) required a one-time report by the Customs Service due by October 1, 2003, on compliance and anti-circumvention on the part of beneficiary countries in the area of textile and apparel trade.

Petitions for Review

Section 3103(d)(2) of ATPDEA (19 U.S.C. 3202 note) directed the President to promulgate regulations within 180 days of enactment regarding the review of eligibility of articles and countries under the ATPA and ATPDEA. Section 3103(d) directed that such regulations are to be similar to regulations governing the Generalized System of Preferences petition process.

Expiration of Trade Benefits

Duty-free treatment under the original ATPA expired on December 4, 2001, but ATPDEA was signed into law on August 6, 2002, creating a lapse in benefits. ATPDEA restored all of the benefits of the original ATPA program, providing for retroactive reimbursement of duties paid during the period after the program's lapse. Section 2003 of P.L. 108-429 corrected a technical error in ATPDEA to provide continuous duty-free treatment for eligible articles entered between the date of enactment of ATPDEA and the date on which the President proclaimed such duty-free treatment. Duty-free treatment under the expanded ATPA, as modified by ATPDEA, terminates on December 31, 2006.

Tourist Duty-Free Allowance for ATPA countries

Section 2004(d)(8)(B) of P.L. 108-429 increased the duty-free tourist allowance for U.S. residents returning directly or indirectly from an ATPA beneficiary country from $600 to $800 to be equal to the tourist duty-free allowance for most other countries in the world. Tourists returning from an ATPA beneficiary country are also allowed to enter one additional liter of alcoholic beverages (for a total of two liters) duty-free if produced in an ATPA beneficiary country.

African Growth and Opportunity Act

The African Growth and Opportunity Act (AGOA) was enacted as title I of the Trade and Development Act of 2000,[20] to authorize the grant of certain U.S. unilateral preferential trade benefits to sub-Saharan African countries pursuing political and economic reform. The Trade Act of 2002 (P.L. 107-210) contains several enhancements to AGOA, including a doubling of the annual quantitative limit on apparel produced in the region from regional fabric. The AGOA Acceleration Act of 2004 made further significant enhancements and extended the program (P.L. 108-274).

Background

Section 134 of the Uruguay Round Agreements Act (URAA)[21] required the President to produce a comprehensive trade and development policy for African countries. The President's first report was submitted to Congress on February 5, 1996. Among other things, the President's report proposed the creation of the Africa Trade and Development Coordinating Group, an interagency group to be co-chaired by the National Security Council and the National Economic Council.

Subsequent reports indicated the Administration's strong support for the passage of legislation and described the five major components of the Administration's Partnership for Economic Growth and Opportunity in Africa: (1) enhanced trade benefits; (2) technical assistance; (3) enhanced dialogue with African countries; (4) financing and debt relief; and (5) continued U.S. leadership in multilateral fora to support private sector development, trade development, and institutional capacity building in African countries.

After failing to pass Africa trade legislation in the 105th Congress, on February 2, 1999, legislation was reintroduced in the 106th Congress as H.R. 434, the African Growth and Opportunity Act. H.R. 434 was passed by the House of Representatives on July 16, 1999. On July 16, 1999, S. 1387, also entitled the African Growth and Opportunity Act, was introduced in the Senate. The text of S. 1387 differed from H.R. 1432, among other things, by imposing a requirement that imports of textile and apparel products from sub-Saharan Africa qualifying for duty-free and quota-free entry be made from fabric of U.S. origin.

On January 21, 2000, the President submitted his fifth and final report required by section 134 of the URAA. The President's report stated the Administration's support for enactment of H.R. 434. In addition, it described the ways the U.S. Government agencies work to support economic reform in sub-Saharan Africa, enhance U.S.-sub-Saharan African economic engagement, increase African integration into

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[20] Public Law 106-200, approved May 18, 2000.

[21] Public Law 103-465, approved December 8, 1994, 19 U.S.C. 3554.

the multilateral trading system, and promote sustainable economic development.

On May 4, 2000, the conference report on H.R. 434, the Trade and Development Act of 2000, was filed (H. Rept. 106-606) and passed by the House of Representatives. The African Growth and Opportunity Act was contained in title I of the conference report. The Senate passed the conference report on May 11, 2000. The bill was signed into law by the President on May 18, 2000 (P.L. 106-200). The trade provisions in the African Growth and Opportunity Act had an effective date of October 1, 2000 through September 30, 2008.

Soon after implementation, it became apparent that African beneficiary countries and U.S. importers were not receiving the full benefits envisioned by Congress. For example, U.S. Customs officials interpreted AGOA to deny benefits to importers of apparel products that are cut both in the United States and an African beneficiary country (the so-called "hybrid cutting" problem), and apparel products that were knit-to-shape. Congress quickly reacted in the Trade Act of 2002 by clarifying its original intent to cover such products.

After closely reviewing the successful trade and development results of AGOA within only a few years, the House introduced H.R. 4103, the AGOA Acceleration Act of 2004, on April 1, 2004. As described below, H.R. 4103 extended the AGOA program until 2015 and significantly enhanced its benefits. The House swiftly passed H.R. 4103 on June 14, 2004, and the Senate followed by passing the bill without amendment on June 24, 2004. The President signed the bill into law on July 13, 2004 (P.L. 108-274).

Beneficiary Countries

Section 107 of the African Growth and Opportunity Act (AGOA) lists the following 48 countries, or their successor political entities, as potentially eligible for designation by the President as beneficiary countries:

Angola	Eritrea	Nigeria
Benin	Ethiopia	Republic of Congo
Bostswana	Gabon	Rwanda
Burkina Faso	Gambia	Sao Tomé and
Burundi	Ghana	Principe
Cameroon	Guinea-Bissau	Senegal
Cape Verde	Kenya	Seychelles
Central African	Lesotho	Sierra Leone
Republic	Liberia	Somalia

Chad	Madagascar	South Africa
Comoros	Malawi	Sudan
Democratic	Mali	Swaziland
Republic of	Mauritania	Tanzania
Congo	Mauritius	Togo
Cote d'Ivoire	Mozambique	Uganda
Djibouti	Namibia	Zambia
Equatoria Guinea	Niger	Zimbabwe

Section 111(a) of AGOA amends title V of the Trade Act of 1974 by inserting a new section 506A on the designation of sub-Saharan African countries for the benefits of the Act. The new section 506A authorizes the President to designate a country listed in section 107 of AGOA as a beneficiary sub-Saharan African country if: (1) the President determines that the country meets the eligibility requirements set forth in section 104 of AGOA in effect on the date of enactment; and (2) the country otherwise meets the GSP eligibility criteria.[22]

Section 104(a) of AGOA authorizes the President to designate a sub-Saharan African country as an eligible sub-Saharan African country if the President determines that the country has established, or is making continual progress toward establishing:

> (1) a market-based economy that protects private property rights, incorporates an open rules-based trading system, and minimizes government interference in the economy through measures such as price controls, subsidies, and government ownership of economic assets;
>
> (2) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law;
>
> (3) the elimination of barriers to U.S. trade and investment, including by:
>
> (A) the provision of national treatment and measures to create and environment conducive to domestic and foreign investment;
>
> (B) the protection of intellectual property; and
>
> (C) the resolution of bilateral trade and investment disputes;

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[22]As of January 1, 2005, 37 African countries are eligible under AGOA as a result of various Presidential proclamations: Angola; Benin; Botswana; Cameroon; Cape Verde; Chad; Republic of the Congo; Democratic Republic of the Congo; Djibouti; Ethiopia; Gabon; The Gambia; Ghana; Guinea; Guinea-Bissau; Kenya; Lesotho; Madagascar; Malawi; Mali; Mauritania; Mauritius; Mozambique; Namibia; Niger; Nigeria; Rwanda; So Tome and Principe; Senegal; Seychelles; Sierra Leone; South Africa; Swaziland; Tanzania; Uganda; and Zambia. Burkina Faso was designated as eligible for economic and trade benefits under AGOA on December 10, 2004. The President removed Cote d'Ivoire from the list of eligible countries using his proclamation authority on December 21, 2004.

(4) economic policies to reduce poverty, increase the availability of health care and educational opportunities, expand physical infrastructure, promote the development of private enterprise, and encourage the formation of capital markets through micro-credit or other programs;

(5) a system to combat corruption and bribery, such as signing and implementing the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions; and

(6) protection of internationally recognized worker rights, including the right of association, the right to organize and bargain collectively, a prohibition on the use of any form of forced or compulsory labor, a minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

In designating a country as an eligible sub-Saharan African country, the President must also find under section 104(a) that it: (1) does not engage in activities that undermine U.S. national security or foreign policy interests; and (2) does not engage in gross violations of internationally recognized human rights or provide support for acts of international terrorism and cooperates in international efforts to eliminate human rights violations and terrorist activities.

If the President determines that a beneficiary sub-Saharan African country is not making continual progress in meeting the eligibility requirements, then under section 506A(a)(3) of the Trade Act of 1974 the President must terminate the designation of that country as a beneficiary sub-Saharan African country effective on January 1 of the year following the year in which the determination is made.

The President is required under section 106 of AGOA to submit a comprehensive report to Congress, annually through 2008, on the trade and investment policy of the United States for sub-Saharan Africa and on the implementation of AGOA and the amendments made by it. Section 506A(c) of the Trade Act of 1974 requires the President to include his country eligibility determinations, along with explanations of his determinations and specific analysis of the eligibility requirements, in the annual report.

Section 7 of the AGOA Acceleration Act provides that AGOA eligible countries may continue to use inputs from former AGOA countries that are no longer AGOA beneficiaries because they have entered into a free trade agreement with the United States. The provision anticipates conclusion of a U.S. free trade agreements with the five members of the Southern African Customs Union, some of which produce inputs that may be used by other AGOA countries.

Eligible articles

Section 111(A) of AGOA amends the GSP provisions in title V of the Trade Act of 1974 by inserting a new section 506A. Section 506A(b)(1) of the Trade Act of 1974 authorizes the President to provide duty-free treatment for imports from beneficiary sub-Saharan African countries of any article, other than textiles or

apparel products or textile luggage, that is designated as import sensitive under the GSP statute, provided that, after receiving advice from the U.S. International Trade Commission (ITC), the President determines that the article is not import sensitive in the context of imports from beneficiary sub-Saharan African countries.[23] The general rules of origin governing duty-free entry under GSP apply, except that, in determining whether products are eligible for the enhanced benefits of AGOA, up to 15 percent of the appraised value of a product at the time of importation may be derived from material produced in the United States. In addition, under section 506A(b)(2) of the Trade Act of 1974, the cost or value of materials produced in any beneficiary sub-Saharan African country may be applied in determining whether a product meets the applicable rules of origin for the enhanced GSP benefits of AGOA. Section 111(b) of AGOA amends GSP to waive permanently the competitive need limits that would otherwise apply to beneficiary sub-Saharan African countries. Section 114 of AGOA inserts a new section 506B in the Trade Act of 1974 providing that the enhanced GSP benefits for sub-Saharan African countries are in effect through September 30, 2008.

Section 112 of AGOA provides preferential treatment to certain textile and apparel articles imported directly into the customs territory of the United States from beneficiary sub-Saharan African countries meeting the transshipment requirements set forth in section 113 of AGOA (see description below). Under section 112(b), the following textile and apparel articles may enter the U.S. free of duty and quantitative restrictions:

(1) apparel articles assembled in one or more beneficiary sub-Saharan African countries from fabrics wholly formed and cut in the United States, from yarns wholly formed in the United States;

(2) apparel articles cut and assembled in one or more beneficiary sub-Saharan African countries from fabrics wholly formed in the United States from yarns wholly formed in the United States, and assembled with thread formed in the United States;

(3) sweaters knit-to-shape in one or more beneficiary sub-Saharan African countries made from cashmere and fine merino wool;

(4) apparel articles both cut (or knit-to-shape) and sewn, or otherwise assembled, in one or more beneficiary sub-Saharan African countries from fabric or yarn not formed in the United States or a beneficiary sub-Saharan African country, to the extent that apparel articles of such fabrics or yarns would be eligible for preferential treatment, without regard to the source of the fabric or yarn, under Annex 401 of the North American Free Trade Agreement (NAFTA); and

(5) certified handloomed, handmade, folklore articles, and ethnic printed

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[23] Presidential Proclamation 7388 of December 18, 2000 (65 Fed. Reg. 80723, December 21, 2000) lists the articles determined by the President to be non-import sensitive in the context of imports from beneficiary sub-Saharan African countries and therefore eligible for duty-free treatment under the enhanced GSP benefits in AGOA.

fabrics.[24]

With regard to findings and trimmings, section 112(d)(1)(A) provides that an article eligible for preferential treatment shall not be ineligible for such treatment because it contains findings or trimmings of foreign origin, if the value of such findings and trimmings does not exceed 25 percent of the costs of the components of the assemble article. Examples of findings and trimmings are sewing thread, hooks and eyes, snaps, buttons, "bow buds," decorative lace trim, elastic strips, and zippers, including zipper tapes and labels. Elastic strips are considered findings or trimmings only if they are each less then one inch in width and used in the production of brassieres. For apparel articles free of duty and quantitative restrictions under AGOA by virtue of being cut and assembled in one or more beneficiary sub-Saharan African countries from fabrics wholly formed in the United States from yarn formed in the United States and assembled with U.S. thread, sewing thread is not included in the findings and trimmings exception.

On certain interlinings of foreign origin, section 112(d)(1)(B) provides that an apparel article otherwise eligible for preferential treatment shall not be ineligible because it contains such interlinings, if their value (and any findings and trimmings) does not exceed 25 percent of the cost of the components of the assembled article. Interlinings eligible for such treatment are defined as a chest type plate, a "hymo" piece, or "sleeve header," of woven or weft-inserted warp knit construction and of coarse animal hair or man-made filaments. This treatment must be terminated if the President makes a determination that U.S. manufacturers are producing such interlinings in the United States in commercial quantities.[25]

The AGOA Acceleration Act allows beneficiary countries to use additional minor apparel components without losing AGOA benefits. Under new section 112(d)(3), an article of apparel may contain any of the following without regard to the components' country of origin: any collars or cuffs (cut or knit-to-shape), drawstrings, shoulder pads or other padding, waistbands, belts attached to the article, straps containing elastic, or elbow patches.

A de minimis rule is also established in section 112(d)(2) to provide that an article otherwise eligible for preferential treatment shall not be ineligible for such treatment because the article contains fibers or yarns not wholly formed in the United States or one or more beneficiary sub-Saharan African countries if the total

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[24] Executive Order 13191 of January 17, 2001 (66 Fed. Reg. 7271, January 22, 2001) delegated authority to the Committee for the Implementation of Textile Agreements (CITA), after consultation with the Commissioner of the U.S. Customs Service, to consult with beneficiary sub-Saharan African countries and to determine which, if any, particular textile and apparel goods shall be treated as being handloomed, handmade, or folklore articles for the purposes of section 112(b)(6) of AGOA.

[25] Executive Order 13191 of January 17, 2001 (66 Fed. Reg. 7271, January 22, 2001) delegated authority to the CITA to determine whether U.S. manufacturers are producing interlinings in the United States in commercial quantities for the purposes of section 112(d)(1)(B)(iii) of AGOA. The Executive Order further directs CITA to establish procedures to ensure appropriate public participation in such determination and requires that CITA's determinations under the provision be published in the Federal Register.

weight of all such fibers and yarns is not more than ten percent of the total weight of the article.

Caps on eligible articles

Section 112b(b)(3) of the original AGOA legislation, as amended by the AGOA Acceleration Act, provided that certain apparel articles may enter the customs territory of the United States from beneficiary sub-Saharan African countries free of duty and quantitative restrictions. The following apparel articles are eligible for preferential treatment subject to a cap:

(1) through September 30, 2007, apparel articles wholly assembled in one or more lesser developed beneficiary sub-Saharan African countries (defined as beneficiary sub-Saharan African countries with a per capita gross national product of less than $1,500 in 1998, as measured by the World Bank), without regard to the origin of the fabric (so-called "third country fabric" goods); [26] and

(2) apparel articles wholly assembled in one or more beneficiary sub-Saharan African countries from fabric wholly formed in one or more beneficiary countries from yarn originating either in the United States or in one or more beneficiary countries.

Section 112(b)(3)(A) establishes a quantitative limit or "cap" on the amount of apparel that may be imported under section 112(b)(3) or section 112(b)(3)(B). The original cap was 1.5 percent of the aggregate square meter equivalents of all apparel articles imported into the United States for the year that began October 1, 2000, and increases in equal increments to 3.5 percent for the year beginning October 1, 2007. Section 3018 of the Trade Act of 2002 increased the cap by changing the applicable percentages from 1.5 percent to 3 percent in the year that began October 1, 2000, and from 3.5 percent to 7 percent in the year beginning October 1, 2007, but this cap is limited to apparel products made with regional or U.S. fabric and yarn (meaning no increase in amounts of apparel made of third country fabric beyond current law). Section 7 of the AGOA Acceleration Act provides a 7% cap for each year beyond 2007 until September 30, 2005.

Section 112(b)(3)(B) establishes a special rule for lesser developed beneficiary sub-Saharan African countries which provides preferential treatment for apparel wholly assembled in one or more such countries regardless of the origin of the fabric used to make the articles. The original AGOA legislation extended this benefit through September 30, 2004, and placed no special restriction or "sub-cap"

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[26] As of January 1, 2005, 23 African "lesser developed countries" are eligible for the purposes of section 112(b)(3)(B) of AGOA as a result of various Presidential proclamations: Benin, Botswana, Cape Verde, Cameroon, , Ethiopia, Ghana, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Swaziland, Tanzania, Uganda, and Zambia. See discussion below describing eligibility for Botswana, Namibia, and Mauritius.

on these articles, but the abovementioned Trade Act of 2002 effectively created a sub-cap for third-country fabric articles by limiting such imports to the original 3.5% cap and subject to the original starting point of 1.5 percent in 2000 and ending in 2004. The AGOA Acceleration Act extends the cap for lesser developed beneficiaries for three years, thereby allowing more time for the incremental increases to occur but phasing this benefit out by September 2007. Specifically, the Act provides for a 2.3571% cap in 2004, 2.6428% in 2005, 2.9285% in 2006, and 1.6071% in 2007. In doing so, Congress reinforced its intent to provide beneficiary countries with an opportunity to attract investment in simple cut-and-sew operations in the early years through 2007 while encouraging African manufacturers to invest in fabric and component manufacturing.

Botswana, Namibia, and Mauritius: Botswana and Namibia exceed the income eligibility for the lesser developed countries, set at $1500 in AGOA, and therefore these countries were not eligible to use third country fabric for the transition period under the AGOA regional fabric country cap. Section 3108 of the Trade Act of 2002 allows Namibia and Botswana to use third country fabric for the transition period under the AGOA regional fabric country cap. Mauritius also exceeds the income threshold to qualify for lesser developed beneficiary treatment; however, Section 2004 of the Miscellaneous Trade and Technical Corrections Act of 2004 provided Mauritius with one year of eligibility provided imports using third country fabric do not exceed 5 percent of the entire third country cap.

Recent clarifications to enhance benefits

The Trade Act of 2002 (P.L. 107-210) and the AGOA Acceleration Act of 2004 (P.L. 108-274) contain several enhancements and clarifications to apparel trade benefits in AGOA:

(1) Knit-to-shape amendment: Draft regulations issued by the U.S. Customs Service to implement P.L. 106-200 stipulate that knit-to-shape garments, because technically they do not go through the fabric stage, are not eligible for trade benefits under the Act. Section 3108 amends P.L. 106-200 to clarify that preferential treatment is provided to knit-to-shape apparel articles assembled in beneficiary countries.

(2) Hybrid cutting and component amendments: Draft regulations issued by the U.S. Customs Service to implement P.L. 106-200 deny preferential access to garments that are cut both in the United States and beneficiary countries or contain components from both the United States and beneficiary countries, on the rationale that the legislation does not specifically list this variation in processing. The Trade Act of 2002 adds new rules to AGOA to provide preferential treatment for apparel articles that are cut both in the United States and beneficiary countries. The AGOA Acceleration Act of 2004 similarly adds new rules to AGOA in order to permit use of components from both the United States and beneficiary countries.

(3) Merino wool amendment: Congress intended to provide duty-free, quota-free treatment to sweaters knit in African beneficiary countries from fine merino wool yarn, regardless of where the yarn was formed. However, due to a technical problem, the diameter listed was incorrect, making it impossible to use the provision. Section 3108 corrected the yarn diameter in the AGOA legislation so that sweaters knit to shape from merino wool of a specific diameter are eligible.

(4) Eligibility: Section 112(b)(3) of the AGOA provides preferential treatment for apparel made in beneficiary sub-Saharan African countries from "regional" fabric (i.e., fabric formed in one or more beneficiary countries) from yarn originating either in the United States or one or more such countries. Section 3108 of the Trade Act of 2002 (P.L. 107-210) clarifies that apparel wholly assembled in one or more beneficiary sub-Saharan African countries from components knit-to-shape in one or more such countries from U.S. or regional yarn is eligible for preferential treatment under section 112(b)(3) of AGOA. Similarly, section 3018 clarifies that apparel knit-to-shape and wholly assembled in one or more lesser developed beneficiary sub-Saharan African countries is eligible for preferential treatment, regardless of the origin of the yarn used to make such articles.

(5) Interpretation of AGOA: Given the many misinterpretations of the apparel and textile provisions by U.S. Government agencies resulting in the denial of benefits intended by Congress, the AGOA Acceleration Act included a Sense of the Congress statement directing the executive branch to interpret, implement, and enforce the provisions of section 112 broadly in order to expand trade by maximizing opportunities for imports of such articles from eligible sub-Saharan African countries.

Executive Branch determinations affecting imports

Section 112(b)(3)(C) of AGOA provides import relief within the cap in the form of a tariff snapback if the Secretary of Commerce determines that an article qualifying for duty-free treatment under the cap from a single beneficiary sub-Saharan African country is being imported in such increased quantities and under such conditions as to cause "serious damage, or threat thereof" to the domestic industry producing the like or directly competitive article. In determining whether a domestic industry has been seriously damaged, or is threatened with serious damage, the Secretary is required to examine the effect of the imports on relevant economic indicators such as domestic production, sales, market share, capacity utilization, inventories, employment, profits, exports, prices, and investment.

The Secretary of Commerce is required to make a determination on whether import relief is warranted if there has been a surge in imports under the cap from a single beneficiary sub-Saharan African country based on import data. The Secretary

is also required to initiate such an inquiry within 10 days of receiving a written request and supporting information from an interested party. Notice of the initiation of an inquiry, and the Secretary's subsequent determination, are to be published in the Federal Register. The Secretary of Commerce is required to establish procedures to ensure participation in the inquiry by interested parties. If relevant information is not available on the record or any party withholds information that has been requested by the Secretary, the Secretary can make the determination on the basis of the facts available. When the Secretary relies on information submitted in the inquiry as facts available, the Secretary must, to the extent practicable, corroborate the information from independent sources that are reasonably available.

Section 112(b)(3)(C) defines the term "interested party" for the purposes of the subparagraph as: (1) any producer of a like or directly competitive article; (2) a certified union or recognized union or group or workers which is representative of an industry engaged in the manufacture, production or sale in the United States of a like or directly competitive article; (3) a trade or business association representing producers or sellers of like or directly competitive articles; (4) producers engaged in the production of essential inputs for like or directly competitive articles; (5) a certified union or group of workers which is representative of an industry engaged in the manufacture, production or sale of essential inputs for like or directly competitive articles; (5) a certified union or group of workers which is representative of an industry engaged in the manufacture, production or sale of essential inputs for like or directly competitive articles; or (6) a trade or business association representing companies engaged in the manufacture, production or sale of such essential inputs.

Section 112(b)(5)(B) of AGOA authorizes the President, at the request of any interested party and subject to certain requirements, to proclaim duty-free and quota-free treatment for apparel articles both cut (or knit-to-shape) and sewn or otherwise assembled in one or more beneficiary sub-Saharan African countries, from fabric or yarn not formed in the United States or a beneficiary sub-Saharan African country (in addition to those fabrics and yarns already listed in Annex 401 of the NAFTA) if:

(1) the President determines that such yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner;[27]

(2) The President has obtained advice regarding the proposed action from the appropriate advisory committee established under section 135 of the Trade Act of 1974[28] and the ITC;

(3) within 60 calendar days after the request, the President has submitted a report to the Committee on Ways and Means in the House of Representatives and the Committee on Finance in the Senate that sets forth:

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[27] Executive Order 13191 of January 17, 2001 (66 Fed. Reg. 7271, January 22, 2001) delegated authority to CITA to determine whether yarns or fabrics cannot be supplied by the domestic industry in commercial quantities in a timely manner for the purposes of section 112(b)(5)(B)(i) of AGOA.

[28] 19 U.S.C. 2155.

(A) the action proposed to be proclaimed and the reasons for such action; and

(B) the advice obtained from the advisory committee and the ITC;

(4) a period of 60 calendar days, beginning with the first day on which the President has met the reporting requirements has expires; and

(5) the President has consulted with such committees regarding the proposed action during the 60 day period.

Section 112(c) of AGOA eliminates quotas on textile and apparel exports to the United States from Kenya and Mauritius within 30 days after the countries adopt efficient visa systems to guard against unlawful transshipment of textile and apparel goods and the use of counterfeit documents related to the importation of such articles into the United States.[29] U.S. Customs and Border Protection is required to provide technical assistance to Kenya and Mauritius in the development and implementation of the visa systems.

Protections against transshipment

Section 113(a) of AGOA provides that the preferential treatment provided to textile and apparel articles in section 112(a) shall not be extended to imports from a beneficiary sub-Saharan African country unless that country:[30]

(1) has adopted an efficient visa system, domestic laws, and enforcement procedures applicable to covered articles to prevent unlawful transshipment and the use of counterfeit documents related to the entry of the articles into the United States;[31]

(2) has enacted legislation or promulgated regulations to permit U.S. Customs Service verification teams to have the access necessary to investigate thoroughly allegations of transshipment;

(3) agrees to report, on a timely basis, export and import information requested by the U.S. Customs Service;

(4) will cooperate fully with the U.S. Customs Service to prevent circumvention and transshipment as provided in Article 5 of the WTO Agreement on Textiles and Clothing;[32]

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[29] Presidential Proclamation 7350 of October 2, 2000 (65 Fed. Reg. 59321, October 4, 2000) delegated authority to perform the functions specified in section 112(c) of AGOA to USTR.

[30] Presidential Proclamation 7350 of October 2, 2000 (65 Fed. Reg. 59321, October 4, 2000) delegated authority to make the findings identified in section 113(a) of AGOA to USTR.

[31] Executive Order 13191 of January 17, 2001 (66 Fed. Reg. 7271, January 22, 2001) delegated authority to USTR to direct the Commissioner of the U.S. Customs Service to take such actions as may be necessary to ensure that textile and apparel articles described in section 112(b) of AGOA that are entered, or withdrawn from warehouse, for consumption are accompanied by an appropriate export visa if the preferential treatment described in section 112(a) of AGOA is claimed with respect to such articles.

[32] Article 5 of the WTO Agreement on Textiles and Clothing provides that cooperation to prevent circumvention transshipment includes: investigation of circumvention practices; exchange of documents, correspondence, reports, and other relevant information to the extent available; and

(5) agrees to require all producers and exporters of covered articles in that country to maintain complete records of the production and the export of covered articles, including materials used in the production, for at least two years after the production or export; and

(6) agrees to report on a timely basis, at the request of the U.S. Customs Service, documentation establishing the country of origin of covered articles as used by that country in implementing an effective visa system.

Section 113(A) defines country of origin documentation to include documentation such as production records, information relating to the place of production, the number and identification of the types of machinery used to production, the number of workers employed in production, and certification from both the manufacturer and the exporter.

Section 113(b)(1) requires importers to comply with U.S. Customs Service requirements similar in all material respects to the requirements regarding Certificates of Origin contained in Article 502.1 of the NAFTA for a similar importation from a NAFTA partner.[33] Furthermore, in order to qualify for preferential treatment and for a Certificate of Origin to be valid with respect to any article for which preferential treatment is claimed, the President is required to determine that each country has implemented and follows, or is making substantial progress toward implementing and following, procedures similar in all material respects to the relevant procedures and requirements under chapter 5 of the NAFTA on Customs Procedures.[34] Section 113(b)(2) states that the Certificate of Origin is not required if such Certificate of Origin would not be required under Article 503 of the NAFTA (as implemented into U.S. Law) if the article were imported from Mexico.[35] Under section 113(b)(3), if the President determines, based on sufficient evidence, that an exporter has engaged in transshipment, then the President is

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facilitation of plant visits and contacts.

[33] Article 502.1 of the NAFTA requires an importer that claims preferential tariff treatment for a good imported into its territory from the territory of another Party to: (1) make a written declaration, based on a valid Certificate of Origin, that the good qualifies as an Originating good; (2) have the Certificate in its possession at the time the declaration is made; (3) provide, on the request of that Party's customs administration, a copy of the Certificate; and (4) promptly make a corrected declaration and pay any duties owed where the importer has reason to believe that a Certificate on which a declaration was based contains information that is not correct.

[34] Presidential Proclamation 7350 of October 2, 2000 (65 Fed. Reg. 59321) delegated authority to perform the functions specified in section 113(b)(1)(B) of AGOA to USTR.

[35] Article 503 of the NAFTA provides an exemption from the Certificate of Origin requirements for: (1) a commercial importation of a good whose value does not exceed $1,000, or such higher amount that a Party may establish, except that it may require that the invoice accompanying the importation include a statement certifying that the good qualifies as an originating good; (2) a non-commercial importation of a good whose value does not exceed $1,000, or such higher amount that a Party may establish; or (3) an importation of a good for which the NAFTA partner into whose territory the good is imported has waived the requirement for a Certificate of Origin. These exceptions are permitted provided that the importation does not form part of a series of importations that may reasonably be considered to have been undertaken or arranged for the purpose of avoiding the Certificate of Origin requirements.

required to deny for a period of five years all benefits under section 112 of AGOA to such exporter, any successor, and any other entity owned or operated by the principal of the exporter.[36]

Transshipment is defined to have occurred in section 113(b)(4) when preferential treatment for a textile or apparel article has been claimed under AGOA on the basis of material false information concerning the country of origin, manufacture, processing, or assembly of the article or any of its components. False information is material if disclosure of the true information would mean or would have meant that the article is or was ineligible for preferential treatment.

Section 113(b)(5) requires the U.S. Customs service to monitor and the Commissioner of Customs to report to Congress on an annual basis beginning no later than March 31, 2001 on the effectiveness of the visa systems, the implementation of legislation and regulations described by sub-Saharan African countries, and the measures taken to deter circumvention as described in Article 5 of the WTO Agreement on Textiles and Clothing.

Section 113(c) requires the U.S. Customs Service to provide technical assistance to beneficiary sub-Saharan African countries in the development and implementation of effective visa systems and domestic laws. In addition, the U.S. Customs Service is required to provide assistance in training sub-Saharan African officials in anti-transshipment enforcement and to the extent feasible, in developing and adopting electronic visa systems. The U.S. Customs Service is also required in section 113(c) to send production verification teams to at least four beneficiary sub-Saharan African countries each year. Section 113(d) authorizes additional resources to the U.S. Customs Service to provide technical assistance to sub-Saharan African countries and to increase transshipment enforcement.

United States-Sub-Saharan Africa Trade and Economic Cooperation Forum

In order to foster close economic ties between the United States and sub-Saharan Africa, section 105 of AGOA requires the President to convene annual high-level meetings between appropriate officials of the U.S. Government and officials of the governments of sub-Saharan African countries. Not later than 12 months after the date of enactment,[37] the President, after consulting with Congress and the governments concerned, is required to establish a United States-Sub-Saharan Africa Trade and Economic Cooperation Forum.

In creating the Forum, section 105(c)(1) requires the President to direct the

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[36] Executive Order 13191 of January 17, 2001 (66 Fed. Reg. 7271, January 22, 2001) delegated authority to CITA to determine, after consultation with the Commissioner of the U.S. Customs Service, based on sufficient evidence, whether an exporter has engaged in transshipment and to deny for a period of five years all benefits under section 112 of AGOA to any such exporter, any successor of such exporter, and any other entity owned or operated by the principal of such exporter. The Executive Order further requires CITA to publish its determinations under this section in the Federal Register.

[37] Public Law 106-200, approved May 18, 2000.

Secretary of Commerce, the Secretary of the Treasury, the Secretary of State, and the USTR to host the first annual meeting with their counterparts from the governments of sub-Saharan African countries meeting the eligibility criteria in section 104. The purpose of the meeting is to discuss expanding trade and investment relations between the United States and sub-Saharan Africa and the implementation of AGOA, including encouraging joint ventures between small and large businesses. The President is also required to direct the Secretaries and the USTR to invite to the meeting representatives from appropriate sub-Saharan African regional organizations and government officials from the other appropriate countries in sub-Saharan Africa.

Section 105(c)(2) requires the President, in consultation with Congress, to encourage U.S. nongovernmental organization (NGOs) to host annual meetings with NGOs from sub-Saharan Africa in conjunction with the annual Forum meetings. Section 105(c)(3) requires the President, in consultation with Congress, to encourage similar meetings between representatives of the U.S. and sub-Saharan African private sector.

Under section 105(c)(3), the President is required to meet, to the extent practicable, with the heads of governments of sub-Saharan African countries eligible under section 104, and those sub-Saharan African countries that the President determines are taking substantial positive steps toward meeting those eligibility requirements, not less than once every two years for the purpose of discussing expanding trade and investment relations between the United States and sub-Saharan African and the implementation of AGOA, including encouraging joint ventures between small and large businesses. The United States held the first Trade and Economic Cooperation Forum in Washington, D.C. on October 29-30, 2001. The second was held in Mauritius on January 15-17, 2003, and the third was held in Washington, D.C. on December 8-10, 2003

Trade cooperation and capacity building

The AGOA Acceleration Act provides multiple directions to the President regarding enhancing trade cooperation and capacity building with AGOA countries. The Act directs the President to submit a report to Congress, no later than a year after the enactment of this Act, which identifies the sectors of each eligible sub-Saharan African country's economy that show the greatest potential for growth, identifies any barriers that may exist, and makes recommendations on how the United States Government and private sector can provide technical assistance to remove these barriers to maximize AGOA's benefits for U.S. and African investors, businesses, and farmers. The Act further directs the President to develop infrastructure projects that increase trade capacity particularly with regard to the ecotourism industry. The Act also directs the President to foster improved coordination between customs services at ports and airports in the United States and sub-Saharan countries to reduce time in transit and increase efficiency and safety

procedures.

In order to assist AGOA countries in further developing their economic potential in the agricultural sector, the Act directs the President to assign at least 20 full-time personnel for the purpose of providing agricultural technical assistance to select AGOA countries based on their potential to increase marketable agricultural products and their need for technical assistance. While serving in this capacity, they are to advise AGOA countries on improvements in their sanitary and phytosanitary standards to help them meet U.S. requirements.

Lastly, the Act directs the Administration to convene the trade advisory committee on Africa in order to maintain ongoing discussions with African trade and agriculture ministries and private sector organizations to facilitate the goals of AGOA and this Act. Presidential Executive Order 11846 of March 27, 1975, under section 135(c) of the Trade Act of 1974, had authorized the creation of such a trade advisory committee on Africa but the committee was never fully activated.

Free trade agreements with sub-Saharan African countries

Congress declares in Section 116 of AGOA that free trade agreements should be negotiated, where feasible, with interested countries in sub-Saharan Africa, in order to serve as the catalyst for increasing trade between the United States and sub-Saharan Africa and increasing private sector investment in sub-Saharan Africa.

Section 116(b)(1) requires the President, taking into account the provisions of the treaty establishing the African Economic Community and the willingness of the governments of sub-Saharan African countries to engaged in negotiations to enter into free trade agreements, to prepare and transmit to Congress not later than 12 months after the date of enactment[38] a plan for the purpose of negotiating and entering into one or more trade agreements with interested beneficiary sub-Saharan African countries.

Responding to Congressional direction, in November 2002 U.S. Trade Representative Zoellick notified Congress of the President's intent to initiate a free trade agreement with the five member countries of the Southern African Customs Union (SACU): Botswana, Lesotho, Namibia, South Africa, and Swaziland. Negotiations are ongoing.

Customs Valuation

Historical background

To assess applicable duty rates under the Harmonized Tariff Schedule of the

[38] Public Law 106-200, approved May 18, 2000.

United States (HTS) and to collect appropriate import statistics, the dutiable value of all imported merchandise must be determined. The process by which Customs determines the dutiable value of imported merchandise is referred to as "appraisement" or "valuation."

Merchandise exported to the United States on or after July 1, 1980, is subject to appraisement under a uniform system of valuation established by title II of the Trade Agreements Act of 1979. Title II, which implements the Customs Valuation Agreement (entitled the Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade) negotiated as one of the Tokyo Round of multilateral trade negotiations (MTN) agreements, was put into effect by Presidential Proclamation 4768 of June 28, 1980.[39]

Title II revised section 402 of the Tariff Act of 1930[40] and repealed the American Selling Price (ASP) method of valuation. However, under section 204(c) of the Trade Agreements Act of 1979, the ASP method of valuation continues to apply to certain rubber footwear exported to the United States before July 1, 1981. Title II also repealed the alternative valuation system under section 402a of the Tariff Act of 1930.[41]

Prior to the Trade Agreements Act of 1979, separate valuation standards—commonly referred to as the "old law" and the "new law"—existed side by side. Section 402a of the Tariff Act of 1930 was called the "old law" because it was enacted as part of the Tariff Act of 1930. It provided for the following order of progression in appraising merchandise: (1) foreign value or export value, whichever is higher; (2) U.S. value; (3) cost of production. It also provided for the application of the ASP basis of appraisement for designated articles such as benzenoid chemicals and certain footwear. The ASP method was based on the value of a domestic product rather than an imported product in order to protect the U.S. industry from foreign competition.

During the early 1950's the Department of the Treasury proposed eliminating the foreign value basis of appraisement, which as its name implies is based on the value of merchandise sold in foreign markets. The Department of the Treasury argued that data for determining export value were more readily available and the elimination of foreign value would streamline the appraisement process by obviating the need to make simultaneous appraisements under export value and foreign value.

In response to these proposals, the Customs Simplification Act of 1956 created a new group of valuation standards. These standards were contained in section 402 of the Tariff Act of 1930[42] and referred to as the "new law." The "new law" eliminated the foreign value standard and made export value the primary basis for appraisement. With certain modifications, both U.S. value and cost of production (renamed the constructed value) were retained as the first and second alternative

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[39] 45 Fed. Reg. 45135 (1980).
[40] 19 U.S.C. 1401a.
[41] 19 U.S.C. 1402.
[42] 19 U.S.C. 1401a.

standards. The meaning of each standard was modified, however, by changes in the statutory language and by the inclusion in the law of definitions for certain of the terms.

However, Congress was unwilling to make these changes applicable to all imported articles. Because the new provisions were expected to have a duty-reducing effect for many articles, the Secretary of the Treasury was instructed to prepare a list of commodities which, if appraised under the new valuation standards, would have been appraised at 95 percent or less of the value at which they were actually appraised in the 12 months ending June 30, 1954 (i.e., dutiable value reduced by 5 percent or more). The articles so identified were published in Treasury Decision 54521 (January 20, 1958), which is referred to as "the Final List" and such articles continued to be appraised under the "old law" standards of section 402a of the Tariff Act. Thus, after the enactment of the Customs Simplification Act of 1956,[43] there were nine separate bases of appraisement (five under the old law and four under the new) applicable to imported products.

It was largely this complexity of U.S. valuation laws as well as foreign objections to the American Selling Price basis of appraisement which prompted our trading partners to enter into negotiations at the Tokyo Round of MTN on the development of a new system of customs valuation.

THE GATT/WTO CUSTOMS VALUATION AGREEMENT

The Customs Valuation Agreement was signed by most major U.S. trading partners at the conclusion of the Tokyo Round. The WTO Agreement on Customs Valuation, which is essentially the same document, is included in the Uruguay Round Agreements applicable to all WTO members. Internationally-agreed rules governing customs valuation will apply to the overwhelming majority of trading countries. Newly joining developing countries may delay implementation for up to 5 years.

The Agreement consists of four major parts in addition to a preamble and three annexes. Part I sets out the substantive rule of customs valuation, the substance of which was codified in U.S. law by the Trade Agreements Act of 1979 as an amendment to section 402 of the Tariff Act of 1930. Part II provides for the international administration of the Agreement and for dispute resolution among signatories. Part III provides for special and differential treatment for developing countries, and part IV contains so-called final provisions dealing with matters such as acceptance and accession of the Agreement, reservations, and servicing of the Agreement.

Administration and dispute resolution.—The Agreement establishes two committees—a "Committee on Customs Valuation" (referred to as "the Committee") and a "Technical Committee on Customs Valuation" (referred to as

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[43] Act of August 2, 1956, ch. 887.

the "Technical Committee")—to administer the Agreement and creates a mechanism for resolving disputes between parties to the Agreement. The rules under the WTO Dispute Settlement Understanding apply to disputes over the interpretation or application of the Agreement.

The Committee, which is composed of representatives from each of the parties, meets annually in Geneva "to consult on matters relating to the administration of the customs valuation system by any Member as it might affect the operation of this Agreement or the furtherance of its objectives and carrying out such other responsibilities as may be assigned to it by the Members." The WTO secretariat acts as the secretariat to the Committee, and the Office of the U.S. Trade Representative is the U.S. representative to this Committee.

The Technical Committee was created under the auspices of the Customs Cooperation Council (CCC) to carry out the responsibilities assigned to it by the parties and set forth in annex II to the Agreement with a view towards achieving uniformity in interpretation and application of the Agreement at the technical level. Among the responsibilities assigned to the Technical Committee are—

(1) to examine specific technical problems arising in the administration of the customs valuation systems and to give advisory opinions offering solutions to such problems;

(2) to study, as requested, and prepare reports on valuation laws, procedures and practices as they relate to the Agreement; and

(3) to furnish such information and advice on customs valuation matters as may be requested by parties to the Agreement.

The Technical Committee meets periodically in Brussels, and the U.S. Customs Service serves as the U.S. representative to this technical committee.

Dispute resolution.—Several steps are provided for a party to follow if it considers that any benefit accruing to it under the Agreement is being nullified or impaired, or if any objectives of the Agreement are being impeded by the actions of another party.

First, the aggrieved party should request consultations with the party in question with a view to reaching a mutually satisfactory solution. If no mutually satisfactory solution is reached between the parties within a reasonably short period of time, the Committee shall meet at the request of either party (within 30 days of receiving such request) and attempt to facilitate a mutually satisfactory solution. If the dispute is of a technical nature, the Technical Committee will be asked to examine the matter and report to the Committee within 3 months.

In the absence of a mutually agreeable solution from the Committee up to this point, the Committee shall, upon the request of either party, establish a panel (within 3 months from the date of the parties' request for the Committee to investigate where the matter is not referred to the Technical Committee, otherwise within 1 month from the date of the Technical Committee's report) to examine the matter and make such finding as will assist the Committee in making recommendations or giving a ruling on the matter.

After the investigation is complete, the Committee shall take appropriate action (in the form of recommendations or rulings). If the Committee considers the circumstances to be serious enough, it may authorize one or more parties to suspend the application to any other party of obligations under the valuation agreement.

Special and different treatment.—Part III of the Agreement allows developing countries which are party to the Agreement—

(1) to delay application of its provisions for a period of 5 years from the date the Agreement enters into force;

(2) to delay application of articles 1, 2(b)(iii) and 6 (both of which provide for a determination of the computed value of imported goods) for a period of 3 years; and

(3) to receive technical assistance (such as training of personnel, assistance in preparing implementation measures and advice on the application of the Agreement's provisions) upon request, from developed countries party to the Agreement.

CURRENT LAW[44]

Section 402 of the Tariff Act of 1930,[45] as amended by the Trade Agreements Act of 1979, establishes "Transaction Value" as the primary basis for determining the value of imported merchandise. Generally, transaction value is the price actually paid or payable for the goods, with additions for certain items not included in that price.

If the first valuation basis cannot be used, the secondary bases are considered. These secondary bases, in the order of precedence for use, are: transaction value of identical or similar merchandise; deductive value; and computed value. The order of precedence of the last two bases can be reversed if the importer so requests. Each of these bases is discussed in detail below:

Transaction value of imported merchandise.–Several concepts relating to the transaction value of imported merchandise are also applicable to the transaction value of identical or similar merchandise, as discussed in the next section. These concepts, concerning the nature of transaction value itself, are discussed in terms of the transaction value of imported merchandise.

DEFINITIONS

The transaction value of imported merchandise (i.e., the merchandise undergoing appraisement) is defined as the price actually paid or payable for the merchandise when sold for exportation to the United States, plus amounts equal to:

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[44] Most of the description of current law can be found in "Customs Valuation Encyclopedia," Department of the Treasury, U.S. Customs & Border Protection, Office of Regulations and Rulings,June 2004.

[45] 19 U.S.C. 1401a.

(1) the packing costs incurred by the buyer;

(2) any selling commission incurred by the buyers;

(3) the value of any assist;[46]

(4) any royalty or license fee that the buyer is required to pay as a condition of the sale; and

(5) the proceeds, accruing to the seller, of any subsequent resale, disposal, or use of the imported merchandise.

These amounts (1 through 5) are added only to the extent that each is not included in the price and is based on information establishing the accuracy of the amount. If sufficient information is not available and thus the transaction value cannot be determined, then the next basis of value, in order of precedence, must be considered for appraisement.

The price actually paid (or payable) for the imported merchandise is the total payment, excluding international freight, insurance, and other C.I.F. charges, that the buyer makes to the seller.

Amounts to be disregarded in determining transaction value are:

(1) The cost, charges, or expenses incurred for transportation, insurance, and related services incident to the international shipment of the goods from the country of exportation to the place of importation in the United States.

(2) Any decrease in the price actually paid or payable that is made or effected between the buyer and seller after the *date of importation* of the goods into the United States.

As well as, *if identified separately*:

(3) Any reasonable cost or charge incurred for constructing, erecting, assembling, maintaining, or providing technical assistance with respect to the goods importation into the United States; or transporting the goods after importation.

(4) The customs duties and other Federal taxes, including any Federal excise tax for which sellers in the United States are ordinarily liable.

LIMITATIONS ON THE APPLICABILITY OF TRANSACTION VALUE

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[46] An "assist" is any of the following items that the buyer of imported merchandise provides directly or indirectly, and free of charge or at reduced cost, for use in the production of or the sale for export to the United States of the imported merchandise:

Materials, components, parts, and similar items incorporated in the imported merchandise;

Tools, dies, molds, and similar items used in producing the imported merchandise;

Merchandise consumed in producing the imported merchandise;

Engineering, development, artwork, design work, and plans and sketches that are undertaken outside the United States.

The last item listed above ("Engineering, development . . .") will not be treated as an assist if the service or work is (1) performed by a person domiciled within the United States, (2) performed while that person is acting as an employee or agent of the buyer of the imported merchandise, and (3) incident to other engineering, development, artwork, design work, or plans or sketches undertaken within the United States.

The transaction value of imported merchandise is the appraised value of that merchandise, provided certain limitations do not exist. If any of these limitations are present, then transaction value cannot be used as the appraised value, and the next basis of value will be considered. The limitations can be divided into four groups:

(1) *Restrictions on the disposition or use of merchandise.*—The first category of limitations which preclude the use of transaction value is the imposition of restrictions by a seller on a buyer's disposition or use of the imported merchandise. Exceptions are made to this rule. Thus, certain restrictions are acceptable, and their presence will still allow the use of transaction value. The acceptable restrictions are: (a) those imposed or required by law, (b) those limiting the geographical area in which the goods may be resold, and (c) those not substantially affecting the value of the goods. An example of the last restriction occurs when a seller stipulates that a buyer of new-model cars cannot sell or exhibit the cars until the start of the new sales year.

(2) *Conditions for which a value cannot be determined.*—If the sale of, or the price actually paid or payable for, the imported merchandise is subject to any condition or consideration for which a value cannot be determined, then transaction value cannot be used. Some examples of this group include when the price of the imported merchandise depends on (a) the buyer's also buying from the seller other merchandise in specified quantities, (b) the price at which the buyer sells other goods to the seller, or (c) a form of payment extraneous to the imported merchandise, such as, the seller's receiving a specified quantity of the finished product that results after the buyer further processes the imported goods.

(3) *Proceeds accruing to the seller.*—If part of the proceeds of any subsequent resale, disposal, or use of the imported merchandise by the buyer accrues directly or indirectly to the seller, then transaction value cannot be used. There is an exception. If an appropriate adjustment can be made for the partial proceeds the seller receives, then transaction value can still be considered. Whether an adjustment is made depends on whether the price actually paid or payable includes such proceeds and, if it does not, the availability of sufficient information to determine the amount of such proceeds.

(4) *Related-party transactions where the transaction value is unacceptable.*—Finally, the relationship between the buyer and seller may preclude the application of transaction value. The fact that the buyer and seller are related[47] does not automatically negate using their transaction value;

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[47] For appraisement purposes, any of the following persons are considered related—

Members of the same family, including brothers and sisters (whether by whole or half blood), spouse, ancestors, and lineal descendants;

Any officer or director of an organization and such organization;

An officer or director of an organization and an officer or director of another organization, if each such individual is also an officer or director in the other organization;

however, the transaction value must be acceptable under prescribed procedures. To be acceptable for transaction value, relationship between the buyer and seller must not have influenced the price actually paid or payable. Alternatively, the transaction value may be acceptable if the imported merchandise closely approximates any one of the following test values, provided these values relate to merchandise exported to the United States at or about the same time as the imported merchandise:

(A) The transaction value of identical merchandise, or of similar merchandise, in sales to unrelated buyers in the United States,

(B) The deductive value or computed value for identical merchandise or similar merchandise, or

(C) The transaction value of imported merchandise in sales to unrelated buyers of merchandise, for exportation to the United States, that is identical to the imported merchandise under appraisement, except for having been produced in a different country. No two sales to unrelated buyers can be used for comparison unless the sellers are unrelated.

The test values are used for comparison only. They do not form a substitute basis of valuation.

In determining whether the transaction value is close to one of the foregoing test values (A, B, or C), an adjustment is made if the sales involved differ in commercial levels, quantity levels; the costs, commissions, values, fees, and proceeds described in (1) through (5) of the "definition" of value; and the costs incurred by the seller in sales in which he and the buyer are not related that are not incurred by the seller in sales in which he and the buyer are related.

As stated, the test values are alternatives to the relationship criterion. If one of the test values is met, it is not necessary to examine the question of whether the relationship influenced the price.

Transaction value of identical merchandise or similar merchandise.—If the transaction value of imported merchandise cannot be determined, then the customs value of the imported goods being appraised is the transaction value of identical merchandise. If merchandise identical to the imported goods cannot be found or an acceptable transaction value for such merchandise does not exist, then the customs value is the transaction value of similar merchandise.

The same additions, exclusions, and limitations, previously discussed in determining the transaction value of imported merchandise, also apply in determining the transaction value of identical or similar merchandise.

Besides the data common to all three transaction values, certain factors

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Partners;

Employer and employee;

Any person directly or indirectly owning, controlling, or holding with power to vote, 5 percent or more of the outstanding voting stock or shares of any organization and such organization;

Two or more persons directly or indirectly controlling, controlled by, or under common control with, any person.

specifically apply to the transaction value of identical merchandise or similar merchandise. These factors concern the exportation date, the level and quantity of sales, the meaning, and the order of precedence of identical merchandise and of similar merchandise.

(a) *Exportation date.*—The identical merchandise, or similar merchandise, for which a transaction value is being determined must have been sold for export to the United States and exported at or about the same time as the merchandise being appraised.

(b) *Sales level/quantity.*—The transaction value of identical merchandise (or similar merchandise) must be based on sales of identical merchandise (or similar merchandise) at the same commercial level and, in substantially the same quantity, as the sales of the merchandise being appraised. If no such sale exists, then sales at either a different commercial level or in different quantities, or both, can be used, but must be adjusted to take account of any such difference. Any adjustment must be based on sufficient information, that is, information establishing the reasonableness and accuracy of the adjustment.

(c) *Definition.*—(1) The term "*identical merchandise*" means merchandise that is: identical in all respects to the merchandise being appraised; produced in the same country as the merchandise being appraised; and produced by the same person as the merchandise being appraised.

If merchandise meeting all three criteria cannot be found, then identical merchandise is merchandise satisfying the first two criteria but produced by a different person than the merchandise being appraised. Merchandise can be identical to the merchandise being appraised and still show minor differences in appearance. However, identical merchandise does not include merchandise that incorporates or reflects engineering, development, artwork, design work, and plans and sketches provided free or at reduced cost by the buyer and undertaken in the United States.

(2) The term "*similar merchandise*" means merchandise that is produced in the same country and by the same person as the merchandise being appraised; like the merchandise being appraised in characteristics and component materials; and commercially interchangeable with the merchandise being appraised.

If merchandise meeting the foregoing criteria cannot be found, then similar merchandise is merchandise having the same country of production, like characteristics and component materials, and commercial interchangeability but produced by a different person.

In determining whether goods are similar, some of the factors to be considered are the quality of the goods, their reputation, and the existence of a trademark. It is noted, however, that similar merchandise does not include merchandise that incorporates or reflects engineering, development, artwork, design work, and plans and sketches provided free or at reduced cost by the buyer and undertaken in the United States.

(d) *Order of precedence.*—Sometimes more than one transaction value will be

present, that is, for identical merchandise produced by the same person, for identical merchandise produced by another person, for similar merchandise produced by the same person, and for similar merchandise produced by another person. If this occurs, one value must take precedence.

As stated previously, accepted sales at the same level and quantity take precedence over sales at different levels and/or quantities. The order of precedence can be summarized as:

(1) Identical merchandise produced by the same person;
(2) Identical merchandise produced by another person;
(3) Similar merchandise produced by the same person; and
(4) Similar merchandise produced by another person.

It is possible that two or more transaction values for identical merchandise (or similar merchandise) will be determined. In such a case, the lowest value will be used as the appraised value of the imported merchandise.

Deductive value.—If the transaction value of imported merchandise, of identical merchandise, or of similar merchandise cannot be determined, then deductive value is calculated for the merchandise being appraised. Deductive value is the next basis of appraisement to be used, unless the importer designated, at entry summary, computed value as the preferred method of appraisement. If computed value was chosen and subsequently determined not to exist for customs valuation purposes, then the basis of appraisement reverts back to deductive value.

If an assist is involved in a sale, that sale cannot be used in determining deductive value. So any sale to a person who supplies an assist for use in connection with the production or sale for export of the merchandise concerned is disregarded for deductive value.

Basically deductive value is the resale price in the United States after importation of the goods, with deductions for certain items in order to arrive at an import price. Generally, the deductive value is calculated by starting with a unit price and making certain additions to and deductions from that price.

One of three prices constitutes the unit price in deductive value. The price used depends on when and in what condition the merchandise concerned is sold in the United States. If the merchandise is sold in the condition as imported at or about the date of importation of the merchandise being appraised, the price used is the unit price at which the greatest aggregate quantity of the merchandise concerned is sold at or about such date.

If the merchandise concerned is sold in the condition as imported but not sold at or about the date of importation of the merchandise being appraised, the price used is the unit price at which the greatest aggregate quantity of the merchandise concerned is sold after the date of importation of the merchandise being appraised but before the close of the 90th day after the date of such importation.

Finally, if the merchandise concerned is not sold in the condition as imported and not sold before the close of the 90th day after the date of importation of the merchandise being appraised. The price used is the unit price at which the greatest

aggregate quantity of the merchandise being appraised, after further processing, is sold before the 180th day after the date of such importation.

After determining the appropriate price, packing costs for the merchandise concerned must be added to the price used for deductive value, provided such costs have not otherwise been included. These costs are added, regardless of whether the importer or the buyer incurs the cost. Packing costs include the cost of all containers and coverings of whatever nature; and of packing, whether for labor or materials, used in placing the merchandise in condition, packed ready for shipment to the United States.

Certain other items are not a part of deductive value and must be deducted from the unit price. The items are:

(1) *Commissions or profit and general expenses.*—Any commission usually paid or agreed to be paid, or the addition usually made for profit and general expenses, applicable to sales in the United States of imported merchandise that is of the same class or kind as the merchandise concerned; and regardless of the country of exportation.

(2) *Transportation/insurance costs.*—The usual and associated costs of transporting and insuring the merchandise concerned from the country of exportation to the place of importation in the United States; and from the place of importation to the place of delivery in the United States, provided these costs are not included as a general expense under the preceding paragraph.

(3) *Customs duties/Federal taxes.*—The customs duties and other Federal taxes payable on the merchandise concerned because of its importation, plus any Federal excise tax on, or measured by the value of, such merchandise for which sellers in the United States are ordinarily liable; and

(4) *Value of further processing.*—The value added by the processing of the merchandise after importation, provided sufficient information exists concerning the cost of processing. The price determined for deductive value is reduced by the value of further processing, only if the third unit price is used as deductive value (i.e., the merchandise concerned is not sold in the condition as imported and not sold before the close of the 90th day after the date of importation, but is sold before the 180th day after the date of importation).

Computed value.—The last basis of appraisement is computed value. If customs valuation cannot be based on any of the values previously discussed, then computed value is considered. This value is also the one the importer can select at entry summary to precede deductive value as a basis of appraisement.

Computed value consists of the sum of the following items:

(1) materials, fabrication, and other processing used in producing the imported merchandise;

(2) profit and general expenses;

(3) any assist, if not included in (a) and (b); and

(4) packing costs.

The cost or value of the materials, fabrication, and other processing of any kind

used in producing the imported merchandise is based on information provided by or on behalf of the producer and on the commercial accounts of the producer, if the accounts are consistent with generally accepted accounting principles applied in the country of production of the goods.

The producer's profit and general expenses are used, provided they are consistent with the usual profit and general expenses reflected by producers in the country of exportation in sales of merchandise of the same class or kind as the imported merchandise.

If the value of an assist used in producing the merchandise is not included as part of the producer's materials, fabrication, other processing or general expenses, then the prorated value of the assist will be included in computed value. The value of any engineering, development, artwork, design work, and plans and sketches undertaken in the United States is included in computed value only to the extent that such value has been charged to the producer.

Finally, the cost of all containers and coverings of whatever nature and of packing, whether for labor or material, used in placing merchandise in condition, packed ready for shipment to the United States is included in computed value.

As can be seen, computed value relies to a certain extent on information that has to be obtained outside the United States, that is, from the producer of the merchandise. If a foreign producer refuses to or is legally constrained from providing the computed value information, or if the importer cannot provide such information within a reasonable period of time, then computed value cannot be determined.

Other.–If none of the previous five values can be used to appraise the imported merchandise, then the customs value must be based on a value derived from one of the five previous methods, reasonably adjusted as necessary. The value so determined should be based, to the greatest extent possible, on previously determined values. Only data available in the United States will be used.

Customs User Fees

History of Customs user fees

Prior to the 99th Congress, the U.S. Customs Service did not have the legal authority to collect fees for processing commercial merchandise, conveyances, and passengers entering the United States. Only limited authority existed to charge fees for services which were of special benefit to a particular individual such as preclearance of passengers and private aircraft. Special fees were also authorized on operators of bonded warehouses, foreign trade zones, and the entry of vessels into ports. Also, Customs was authorized to receive reimbursement from carriers for overtime for services provided during non-business hours and from local authorities for services provided to certain small airports.

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985

(COBRA)[48] established a schedule of flat-rate fees for processing conveyances and passengers entering the United States. The Act imposed fees for Customs' costs on a per arrival basis on commercial vessels, trucks, railroad cars, private aircraft and boats, and passengers arriving on commercial vessels or aircraft from countries other than Mexico, Canada, U.S. insular possessions, and other adjacent islands. The statute also imposed fees on the processing of dutiable mail entries prepared by a customs officer, and the issuance of customs broker permits.

Modifications to these fees, in the Tax Reform Act of 1986,[49] included the placement of an annual cap on the arrival of commercial vessels, the establishment of a lower vessel fee for certain barges and bulk carriers, and an increase in the fee for rail cars carrying passengers or freight from $5 to $7.50, coupled with the elimination of the fee on empty railroad cars.

The Omnibus Budget Reconciliation Act of 1986 (OBRA)[50] expanded customs user fee authority to cover Customs' costs of processing commercial merchandise entries—the so-called Merchandise Processing Fee (MPF). The Act imposed an ad valorem fee based on the customs value of all formal entries of merchandise imported for consumption, including warehouse withdrawals for consumption.

As amended by the Omnibus Budget Reconciliation Act of 1987[51] and the Technical and Miscellaneous Revenue Act of 1988,[52] the U.S. portion of the value of articles classifiable under items 9802.00.60 and 9802.00.80 of the Harmonized Tariff Schedule of the United States (HTS) or to products of the least developed developing countries (LDDC's), products of eligible countries under the Caribbean Basin Initiative (CBI), and products of U.S. insular possessions were exempted from the MPF. Further, pursuant to section 203 of the United States-Canada Free-Trade Agreement Implementation Act of 1988,[53] the merchandise user fees were set to be phased out with respect to articles of Canadian origin in accordance with article 403 of the bilateral agreement.

Receipts from user fees are deposited in a dedicated "Customs User Fee Account" within the general fund of the Treasury, with one subaccount of the receipts from the merchandise processing fee and a second subaccount of the receipts from the conveyance and passenger fees. Subject to authorization and appropriations, all funds in the Account are available to pay costs incurred by the Customs Service in conducting commercial operations and are treated as receipts offsetting expenditures of salaries and expenses for these purposes, except for that portion of the fees required for the direct reimbursement of appropriations for costs incurred by the Customs Service in providing inspectional overtime and preclearance services. Inspectional overtime and preclearance services are reimbursed subject to

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[48] Public Law 99-272, approved April 7, 1986.
[49] Public Law 99-514, approved October 22, 1986.
[50] Public Law 99-509, approved October 21, 1986.
[51] Public Law 100-203, section 9501, December 22, 1987.
[52] Public Law 100-647, section 9001, November 10, 1988.
[53] Public Law 100-449, approved September 28, 1988.

a permanent indefinite appropriation, and are not subject to OMB apportionment.

In February 1988 the General Agreement on Tariffs and Trade (GATT) Council adopted a panel finding that the ad valorem structure of the merchandise processing fee is inconsistent with U.S. GATT obligations to the extent the fee exceeds the approximate cost of customs processing for the individual entry, and includes costs for Customs Service activities that are not services to the particular importer (e.g., costs of processing imports exempt from the fee).

Revised fee structure

The Customs and Trade Act of 1990,[54] as amended by the Omnibus Budget Reconciliation Act of 1990,[55] completely revised and reauthorized customs user fees through fiscal year 1995. The new fee structure was intended to bring the United States into conformity with U.S. obligations under the GATT. The conference report (H. Rept. 101-650) sets forth the underlying rationale and congressional intent behind the user fee revision:

The new fee schedule is structured to respond to this ruling and to bring the United States into conformity with its GATT obligations. As required by the relevant provisions of articles II and VIII of the GATT, the new fee schedule limits the fees charged to the approximate cost of the services rendered. It also limits the fee to customs operations related to merchandise processing and to the processing of imports covered by the fee. Fee revenues also are established so as to approximate the cost of the commercial customs services. As a result, the new fee schedule represents the type of fee permitted under GATT article VIII. It does not represent an indirect protection to domestic products nor does it represent a taxation of imports for domestic purposes.

The MPF for the first time differentiated between entries or releases of merchandise that are entered formally and those that are entered informally. Section 111 of the Customs and Trade Act of 1990 authorized a capped ad valorem fee for each formal entry and a three-tiered flat rate fee for each entry of merchandise entered informally. The amount of the user fee would depend upon whether the fee is filed manually or electronically. A special reimbursement rule for air courier facilities and other reimbursable facilities was also established.

In lieu of paying under regular schedule of fees, air courier facilities and other reimbursable facilities were originally subject to a reimbursement for Customs' processing costs to be collected at a rate of twice the assessment currently applied at courier hubs. Also, the industry's current 80 percent offset was eliminated. In 2002, the Customs Border Security Act reset the reimbursement amount for air couriers from a variable assessment to a flat $0.66 per airway bill fee subject to limited change by Customs and gave the Customs Service authority to adjust the fee within

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[54] Public Law 101-382, title I, subtitle C, approved August 20, 1990.

[55] Public Law 101-508, section 10001, approved November 5, 1990.

a range of $.35 to $1.00 per individual airway bill.

The Commissioner of Customs was authorized to use any surplus from the schedule of flat-rate fees (the "COBRA fees") to hire full- and part-time personnel, buy equipment, or satisfy other direct expenses necessary to provide services directly to the payers of the fee, subject to OMB apportionment authority. A $30 million reserve of the surplus was required to maintain staffing levels equal to those existing in the prior year in the event customs collections were reduced. Other provisions included new user fee enforcement authority, treatment of railroad cars, and agriculture products processed and packed in foreign trade zones.

The 1990 Budget Reconciliation Act also permitted small user fee airports processing fewer than 25,000 informal entries annually to collect the entry-by-entry fee, rather than paying the new double reimbursement fee.

Section 13813 of the 1993 Omnibus Budget Reconciliation Act changed provisions of the COBRA fee statute as part of a major reform of the customs inspector pay system (the Customs Overtime Pay Reform Act) to authorize the use of COBRA funds for a portion of customs officer premium pay and for customs retirement-fund contributions related to customs officer overtime pay. In addition, the COBRA account was made subject to OMB budget apportionment authority.

The North American Free Trade Agreement Implementation Act implemented U.S. obligations under the NAFTA to eliminate the Merchandise Processing Fee immediately for Canadian goods (consistent with U.S. obligations under the U.S.-Canada FTA), and by June 30, 1999 for imports of Mexican goods. The fee may not be increased with respect to Mexican goods after December 31, 1993.

The NAFTA Implementation Act provided for a temporary increase in the $5 COBRA passenger fee to $6.50 through September 30, 1997, when it would revert to $5. It also lifted the current fee exemptions for passengers arriving from Mexico, Canada, and the Caribbean for the same time period. These additional fee receipts were dedicated, subject to appropriation, to cover Customs' inspectional costs not covered by existing customs user fees. The Act also extended all customs user fees through September 30, 2003.

The Uruguay Round Agreements Act provided for an increase in the Merchandise Processing Fee rate for formal entries to 0.21 percent ad valorem, and increased the maximum and minimum fee amounts for formal entries from $400 to $485 and from $21 to $25, respectively. It also increased the rates from $5 to $6 for informal electronic entries and $8 to $9 for informal paper entries. The revised fee was designed to cover a revenue shortfall below Customs' commercial costs, as well as increases in Customs' operating expenses. The Uruguay Round Agreements Act also corrected a technical error in the Customs Overtime Pay Reform Act (COPRA) to provide for reimbursement of customs inspector premium pay to the extent it was greater than Federal Employee Pay Act (FEPA) premium pay authorized to be paid to customs inspectors prior to enactment of COPRA.

Miscellaneous refinements to the user fee laws

The Miscellaneous Trade and Technical Corrections Act of 1996 (Public Law 104-295) made three amendments with regard to customs user fees and merchandise processing fees. First, the Act amended section 13031(b) of the COBRA to clarify that the ad valorem MPF in foreign trade zones is to be assessed only on the foreign value of merchandise entered from a foreign trade zone. In addition, the amendment clarified that the application of the MPF to processed agricultural products will apply to all entries from foreign trade zones after November 30, 1986, for which liquidation has not been finalized. The provision was necessary to clarify that the MPF applicable solely to foreign merchandise entered from a foreign trade zone, exempting domestic value, for agricultural products, also would apply to non-agricultural products.

Second, the Act amended section 13031(b) of the COBRA with regard to limitations on the collection of customs passenger processing fees. As indicated above, the NAFTA Implementation Act increased the COBRA passenger processing fee from $5 to $6.50 and temporarily lifted the exemption on passengers arriving from Canada, Mexico, and the Caribbean during the period from January 1, 1994 through September 30, 1997. The statute was also modified to apply the fee to so-called "cruises to nowhere," that is, cruises which leave U.S. customs territory and return, without calling on any port outside the United States. The amendment clarified that Customs should collect fees only one time in the course of a single continuous voyage for a passenger aboard a commercial vessel that calls on more than one U.S. port.

Third, the Act amended section 13031(b) of the COBRA to clarify that Customs may provide reimbursable services to air couriers operating in express consignment carrier facilities and in centralized hub facilities during daytime hours. The amendment also clarified that Customs may be reimbursed for all services related to the determination to release cargo, and not just "inspectional" services. These services are now reimbursable whether they are performed on site or not.

Customs' authority to collect user fees under the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c) for passengers arriving into the United States aboard a commercial vessel or aircraft from Canada, Mexico, a U.S. territory or possession or the Caribbean expired on September 30, 1997. As a result, Customs considered that its authority to use the COBRA user fee account for preclearance services for such passengers had also expired. Customs continued to fund those positions out of its regular budget in order to keep those services. However, due to budgetary constraints, Customs was unable to fund all of the positions, resulting in decreased preclearance services.

To address this issue, the Miscellaneous Trade and Technical Corrections Act of 1999 (Public Law 106-36) (the Act) made two amendments to Customs user fees under 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c). First, the Act amended section 58c(f)(3)(A)(iii) to permit Customs access to the COBRA user fee account to pay for the salaries for up to 50 full-time

equivalent inspectional positions to provide preclearance services. These services would be provided only to the extent that funds remain available after reimbursements for salaries for full-time and part-time inspectional personnel and equipment that enhance Customs' services for those persons or entities required to pay fees under this section.

Second, the Act amended section 58c(a) by establishing (i) a $5 fee for passengers arriving in the United States aboard a commercial vessel or aircraft other than from Canada, Mexico, U.S. territory or possession, or the Caribbean, and (ii) a $1.75 fee for passengers arriving aboard a commercial vessel from Canada, Mexico, U.S. territory or possession, or the Caribbean.

The Act also amended section 58c(f) to authorize Customs access to $50 million of the merchandise processing fees for the Customs Automated Commercial System for FY 1999. In addition, the Act mandated the Commissioner of Customs to establish an advisory committee consisting of representatives from the airline, cruise ships, and other transportation industries subject to these fees. Under this provision, the representatives would meet periodically and advise the Commissioner on issues relating to these services and fees.

Finally, the Act authorized the Secretary of the Treasury to implement a National Customs Reconciliation Test program relating to an alternative mid-point interest accounting methodology that may be used by an importer. Section 1451 of the Tariff Suspension and Trade Act of 2000 (Public Law 106-476) made this authorization permanent.

The Tariff Suspension and Trade Act of 2000 also amended section 13031(b)(1)(A)(iii) of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c(b)(1)(A)(iii)) to allow Customs to collect user fees from passengers arriving aboard a ferry operating south of 27 degrees latitude and east of 89 degrees longitude, whose operations began on or after August 1, 1999. Prior to enactment of this legislation, because of the limitations on user fees under the COBRA, Customs was prevented from collecting user fees from such ferries, and as a result, did not issue landing rights to such ferries.

Passage of several free trade agreements in the 108th Congress and entry into force of those agreements resulted in the elimination of the merchandise processing fee for Chile, Singapore, and Australia- respectively the U.S.-Chile Free Trade Agreement Implementation Act (Public Law 108-77), the U.S.-Singapore Free Trade Agreement Implementation Act (Public Law 108-78), and the U.S.-Australia Free Trade Agreement Implementation Act (Public Law 108-286).

Customs fees and the Homeland Security Department

The above history and explanation shows a focused interest by Congress to insure that customs functions are adequately funded but at levels that are commensurate with the cost of the service provided. That interest became more acute after the creation of the Department of Homeland Security and the concern that inadequate

accounting could lead to cross-subsidization of non-customs function costs in the new Department.

Accordingly, in the Jobs Creation Act of 2004, Congress required that monies in the Customs User Fee Account shall be available for those customs revenue functions (as defined in the Homeland Security Act Section 415) "and for no other purpose." The Act also provided that $350,000,000 should be directed toward development, establishment, and implementation of a new computer system for the processing of merchandise – the Automated Commercial Environment. Lastly, the Act authorized the Secretary of the Treasury to undertake a study of all fees collected by the Department of Homeland Security for the purpose of identifying fees that should be eliminated or changed. Subsequent to the study, the Secretary of the Treasury is required to evaluate the cost of providing customs services to the COBRA fee activities and adjust the fee accordingly to recover the approximate cost of providing the service. The Secretary is authorized to adjust the fee without further Congressional action by not more than 10 percent above the current level in section 13031(a)(1) through section 13031(a)(8) of COBRA.

Other Customs Laws

COUNTRY-OF-ORIGIN MARKING

Section 304 of the Tariff Act of 1930, as amended,[56] provides that, with certain exceptions, every imported article of foreign origin (or its container in specified circumstances) "shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." The purpose of this provision is to provide information so that the "ultimate purchaser" in the United States can choose between domestic and foreign-made products, or between the products of different foreign countries.

When imported articles ordinarily reach their ultimate purchasers in packaged form, the containers or holders must, as a general rule, be marked with the country of origin of their contents, whether or not the article themselves are required to be marked.

Exceptions.—The statute gives the Secretary of the Treasury the authority to allow exceptions to the marking requirement under prescribed circumstances. For example, certain classes of merchandise are excepted from the country-of-origin marking requirements because they are not physically susceptible to marking or can only be marked at the cost of injury to the article.

Marking requirements may also be waived as to articles which arrive at the U.S. border unmarked, provided: the expense of marking under Customs supervision

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[56] 19 U.S.C. 1304.

would be economically prohibitive; and the Customs Service is satisfied that the importer or shipper did not fail to mark the merchandise before shipment to the United States for the purpose of invoking this exception and thereby avoiding the marking requirements.

Another exception to the marking requirement may be granted for articles for which the ultimate purchaser necessarily knows the country of origin. An exception is also provided for articles to be processed by the importer for resale if the processing would necessarily obliterate or conceal any marking. If the processing undertaken by the importer is sufficient to convert the imported article into a new and different article of trade, any subsequent purchaser is not an "ultimate purchaser" of the imported article.

Other classes of excepted merchandise include products of American fisheries, products of U.S. possessions, products of U.S. origin which have been exported and returned, and articles entered for immediate transshipment and exportation from the United States. In addition, articles qualifying for duty-free treatment as being $1 or less in value, or as bona fide gifts less than $10 in value each, are relieved of the marking requirements, as are articles produced more than 20 years prior to importation.

Finally, under section 304(a)(3)(J), classes of articles originally named in certain notices published by the Secretary of the Treasury in the late 1930's are not subject to the marking requirements. The articles named in such notices were those which had been imported in substantial quantities during the 5-year period ending December 31, 1936, and which had not been required to bear country-of-origin markings during that period. Such excepted articles are now found in the so-called "J-List."[57]

The Miscellaneous Trade and Technical Corrections Act of 1996 (Public Law 104-295) amended section 304 to exempt from the country-of-origin marking requirements certain imported coffees, teas, and spices. These items are specifically identified by their respective Harmonized Tariff Schedule numbers.

Section 334 of the Uruguay Round Agreements Act (URAA) (Public Law 103-165) established the country of origin for certain fabrics, silk handkerchiefs and scarves as the country where the fabrics are made, even if they undergo dyeing, printing, cutting, sewing, and other finishing operations in another country ("the Breaux-Cardin rule"). Prior to Breaux-Cardin, the rules of origin permitted the processes of dyeing and printing to confer origin when accompanied by two or more finishing operations for certain products. As a result of Breaux-Cardin, silk scarves dyed, finished, or printed in Italy (or other countries) from imported silk fabric that could formerly be marked "Made in Italy" were now required to be marked with the country of the silk fabric as the country of origin.

The European Union brought a World Trade Organization dispute against the United States relating to the Breaux-Cardin rule. As part of the U.S. settlement of

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[57] 19 CFR 134.33.

this dispute, Congress added a new subsection (h) to section 304 of the Tariff Act of 1930 in the Miscellaneous Trade and Technical Corrections Act of 1999 (Public Law 106-36). This provision exempted silk fabric and scarves from the country of origin marking requirement so that these articles were no longer required to be marked as having the origin of the country where the fabric was produced. This provision did not change the rules for determining the country of origin. Thus, under the Act, a silk scarf dyed and printed in Italy from silk fabric imported from China could not be marked "Made in Italy" thus indicating origin, but could be marked "Designed in Italy," "Dyed and Printed in Italy," "Crafted in Italy," or other similar marking.

In August 1999, the United States and the EU settled the dispute, and the United States agreed to amend the rule of origin requirements under section 334 of the URAA. As a result, Congress included in the Trade and Development Act of 2000 (Public Law 106-200) legislation which reinstated the rules of origin that existed prior to the URAA for certain products. Specifically, the legislation allows dyeing, printing, and two or more finishing operations to confer origin on certain fabrics and goods. In particular, the dyeing and printing rule applies to fabrics classified under the Harmonized Tariff Schedule (HTS) as silk, cotton, man-made, and vegetable fibers. The rule also applies to the various products classified in 18 specific subheading of the HTS listed in the bill, except for goods made from cotton, wool, or fiber blends containing 16 percent or more of cotton.

Marking of certain pipe and fittings.—An amendment to section 304 of the Tariff Act of 1930 contained in section 207 of the Trade and Tariff Act of 1984 provided that no exceptions may be made to the country-of-origin marking requirement for imported pipe, pipe fittings, compressed gas cylinders, manhole rings or frames, covers and assemblies thereof, and specifies the type of marking which is acceptable for those products.

Penalty for failure to mark.—Imported goods that are not properly marked are liable for a 10 percent ad valorem duty in addition to any other duty that might be applicable. The payment of the 10 percent marking duty does not discharge the importer's obligation to comply.[58]

Imported articles or their containers that are found to be improperly marked are generally retained in Customs custody until such time as the importer, after notification, arranges for their exportation, destruction, or proper marking under Customs supervision, or until they are deemed abandoned to the government. If such unmarked articles are part of a shipment the balance of which has previously been released from Customs custody, the importer will be notified and ordered to redeliver the released articles to Customs for marking, exportation, or destruction under Customs supervision.

Section 304(h) of the Tariff Act (19 U.S.C. 1304) provided for a maximum fine of $5,000, or imprisonment of not more than 1 year upon conviction for any person

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[58] *Globemaster, Inc. v. United States*, 68 Cust. Ct. C.D. 4340, 340 F. Supp. 974 (1972).

who "with intent to conceal" alters or removes the country-of-origin marking. Section 1907(a) of the OTCA increased the maximum fine for intentional alteration or removal of country-of-origin markings to $100,000 on the first offense and $250,000 for subsequent offenses.

Automobile labeling.—The American Automobile Labeling Act, enacted as section 210 of the Motor Vehicle Information and Cost Savings Act,[59] requires manufacturers to affix, and dealers to maintain, labels on cars and light-duty trucks regarding the country of origin of component parts and the location of assembly. For each line of cars, the label will include the percentage (by value) of component parts which originated in the United States or Canada, and the countries and percentages from other manufacturers who contribute 15 percent or more to the component value of the vehicle. The combined U.S./Canadian percentage, which is based on the longstanding special bilateral relationship in automotive trade, must be clearly identified, listing clearly both countries. No other countries are to be combined with the U.S. and Canadian combined percentage. For each individual vehicle, the label will also include the city, state (where appropriate), and country where the vehicle was assembled; the country of origin of the engine; and the country of origin of the transmission. For the purpose of identifying the country of assembly and the country of origin of the engine and transmission, the United States will be identified separately. All vehicles manufactured on or after October 1, 1994, for sale in the United States must be labeled.

North American Free Trade Agreement.—Sections 207 and 208 of the North American Free Trade Agreement Implementation Act implemented U.S. obligations under NAFTA articles 311, annex 311, and article 510 regarding country-of-origin marking for NAFTA-origin goods, and the review and appeal of customs marking decisions. Section 207 amends section 304 of the Tariff Act of 1930, as amended, to provide certain limited exemptions for the country-of-origin marking requirements for goods of NAFTA origin. It exempted goods where the importer "reasonably knows" that they are NAFTA-origin goods, and specifically exempted original works of art, ceramic bricks, semiconductor devices, and integrated circuits. Sections 207(a) and 208 amended sections 304 and 514 of the Tariff Act to provide NAFTA exporters and producers with rights to challenge and protest adverse NAFTA marking decisions by the Customs Service.

NAFTA RULES OF ORIGIN

Originating goods.—Section 202 of the North American Free Trade Agreement Implementation Act enacts articles 401 through 415 of the NAFTA regarding rules of origin. The NAFTA rules ensure that NAFTA preferential tariff treatment is granted only to the products of the United States, Mexico, and Canada. Goods are considered to originate in a NAFTA party if: (1) they are wholly obtained or

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[59] As added by Public Law 102-388, section 355 approved October 6, 1992.

produced in the territory of one or more NAFTA parties; (2) each of the non-originating materials used in the good undergoes a change in tariff classification as a result of production that occurs entirely within one or more of the parties; (3) the good is produced entirely in one or more of the parties exclusively from NAFTA-origin materials; or (4) with certain exceptions, the good is produced entirely in one or more of the NAFTA parties but one or more of the non-originating parts does not undergo a change in tariff classification; and the regional value content of the goods meets certain thresholds (at least 60 percent of the value of the goods or 50 percent of their net cost.). The President may proclaim modifications to the NAFTA rules of origin as are necessary to implement an agreement with one or more NAFTA countries on such a modification, and CITA occasionally publishes such proposed modifications in the Federal Register.60

Regional value-content.—Section 202(b) of the North American Free Trade Agreement Implementation Act sets forth methodologies for calculating regional value-content on the basis of either "transaction value" or "net cost of the good." Regional value using the transaction value method is computed by taking the difference between the transaction value of the good and the value of non-originating materials used in the production of the good, divided by the transaction value of the good. Regional value using the net-cost method is computed by dividing the difference between the net cost of the good and the value of non-originating materials used in the production of the good by the net cost of the good. A producer of a good may use one of three ways to allocate applicable costs when using the net-cost method. Under certain circumstances delineated in section 202(b), the net-cost method is required to be used.

Automotive goods.—Section 202(c) of the North American Free Trade Agreement Implementation Act sets forth the regional value-content requirement for motor vehicles. For passenger motor vehicles, light trucks, and their engines and transmissions, the regional value-content is increased in stages from 50 percent for the first 4 years of NAFTA to 56 percent for the second 4 years and to 62.5 percent thereafter. Other motor vehicles and other automotive parts are subject to a 50 percent regional content requirement for the first 4 years, 55 percent for the second 4 years, and 60 percent thereafter. A special rule applies to investors who newly construct or refit a plant to produce a new vehicle. Section 202(c) provides that, for passenger vehicles and light trucks and their automotive parts, the value of non-originating materials must be "traced" back through the production process for purposes of calculating the regional value-content. An auto producer may average its calculation of regional value-content using a number of different methodologies.

Certificate of Origin.—Section 205 of the North American Free Trade Agreement Implementation Act amends section 508 of the Tariff Act to require a NAFTA Certificate of Origin for goods for which preferential tariff treatment is claimed, and

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60 E.g., See 69 Fed. Reg. 30633 (May 28, 2004). CITA requested public comment concerning a request for modification of the NAFTA rule of origin for sanitary articles made from tri-lobal rayon staple filter based upon an earlier showing of short supply.

imposes recordkeeping requirements to substantiate the Certificates subject to recordkeeping penalties.

DRAWBACK

Under section 313(a) of the Tariff Act of 1930 (19 U.S.C. 1313(a)), "drawback" is payable upon the exportation of an article manufactured or produced in the United States with the use of duty-paid imported merchandise. To receive the benefit of drawback, the completed article must have been exported within 5 years from the date of importation of the pertinent duty-paid merchandise. The amount of refund is equal to 99 percent of the duties attributable to the foreign, duty-paid content of the exported article. The procedural and other requirements governing drawbacks are set forth in 19 CFR part 22.

The purpose of section 313(a) is to permit American-made products to compete more effectively in world markets. It enables domestic manufacturers and producers to select the most advantageous sources for their raw materials and component requirements without regard to duties, thereby permitting savings in their production costs. It also encourages domestic production and, as a result, the utilization of American labor and capital.

An important feature of section 313(a) and a number of other drawback provisions is the allowance of drawback on a substitution basis. Pursuant to section 313(b), an exported article incorporating components entirely of domestic origin can nevertheless qualify for drawback, to the extent that duty has been paid on the importation of components of the same kind and quality as those used in the manufacture or production of the exported article.

Section 202 of the Trade and Tariff Act of 1984 expanded the application of current drawback provisions in three important respects. First, it allows drawback if the same person requesting drawback, subsequent to importation and within 3 years of importation of the merchandise, exports from the United States or destroys under Customs supervision fungible merchandise (whether imported or domestic) which is commercially identical to the merchandise imported.

Second, it allows drawback for all packaging materials imported for packaging or repackaging imported merchandise.

Finally, the Act provides that any domestic merchandise acquired in exchange for imported merchandise of the same kind and quality shall be treated as the use of such imported merchandise for drawback purposes if no certificate of delivery is issued for such imported merchandise.

In addition to section 313(a), there are a variety of other specific drawback provisions allowing for the refund of duties and/or internal revenue taxes under specified circumstances for the exportation of products such as flavoring extracts, toiletries, distilled spirits, salts, and cured meats. Further, under section 313(c), drawback is allowable when merchandise is rejected by the importer because it fails to conform to the sample upon which the purchase order was made, or because it

fails to conform to the importer's specifications, or because the merchandise was shipped without the consignee's consent. When such rejected merchandise is exported under Customs supervision, 99 percent of the duties paid will be refunded upon compliance with the pertinent regulations.

Because of the law's complexity, the drawback statutes are subject to frequent changes by Congress. The Customs Modernization Act (section 632 of the North American Free Trade Agreement Implementation Act) made a series of changes to address questions which have arisen in the implementation and administration of the drawback law. Section 632 made changes including: allowing manufacturing drawback for unused articles that are destroyed rather than exported, extending the period for drawback claims on rejected merchandise to 3 years; with respect to same condition drawback, changing the standard for allowing substitution of merchandise for the imported merchandise from "fungible" to "commercially interchangeable"; authorizing the electronic filing of drawback claims and setting a period of 3 years from the date of exportation or destruction in which to file a claim; and simplifying accounting requirements for petroleum. Section 622 established penalty provisions for the submission of false drawback claims and created a "Drawback Compliance Program."

The Miscellaneous Trade and Technical Corrections Act of 1999 (Public Law 106-36) amended section 313(p) of the Tariff Act of 1930 (19 U.S.C. 1313(p)) to expand the scope of petroleum products eligible for substitution drawback. The Act also amended 313(q) of the Tariff Act of 1930 (19 U.S.C. 1313(q)) to permit drawback of imported materials used by a manufacturer or any other person to manufacture packaging materials where the packaging in "used" in exportation or is destroyed. The Tariff Suspension and Trade Act of 2000 (Public Law 106-476) further amended section 313(p) to broaden the scope of petroleum products eligible for substitution drawback. This Act also amended section 313 of the Tariff Act of 1930 (19 U.S.C. 1313) by adding new subsection (x) to permit drawback of recycled materials.

The Miscellaneous Trade and Corrections Bill of 2004 (Public Law 108-429) made several changes to the duty drawback program. Section 1556 of the Act applies the duty drawback statute to United States insular possessions. *Section 1563(a)* simplifies the process of filing for duty drawback for commercially interchangeable products in three ways: 1) drawback is allowed on products that do not conform to the appropriate sample or specifications as requested by the importer, or that are ultimately sold in the U.S. at retail and are returned to the foreign exporter/supplier for any reason; 2) exportation or destruction must be under the supervision of U.S. Customs but imported goods must be exported within one year of importation; and 3) drawback certificates are not required if the drawback claimant and the importer are the same party, or if the drawback claimant is a successor to the importer. *Section 1563(b)* expands the products that are eligible for drawback to include those that are destroyed under U.S. Customs supervision. *Section 1563(c)* clarifies 313(k) when drawback can be obtained

through 'tradeoff' on drawback products using the same kind and quality imported merchandise in the manufacturing process. *Section 1563(d)* allows U.S. exporters to claim drawback for imported packaging materials that are filled with or used to contain (i.e., package). *Section 1563 (e)* establishes a statutory time frame of one year for the liquidation of drawback claims. *Section 1563(f)* establishes a 'statute of limitations' on how long a negligent violation would 'remain on the books.' Section 1557 amends Section 313(j) of the Tariff Act of 1930 (19 U.S.C. 1313(j)) to clarify that the Harbor Maintenance Tax (HMT) is a fee eligible for drawback under the statute.

NAFTA drawback.—Section 203 of the North American Free Trade Agreement Implementation Act implemented limitations on duty drawback included under NAFTA article 303. "NAFTA drawback" refers to the formula used to compute the amount of drawback that will be allowed for dutiable goods traded between the NAFTA parties. The formula limits drawback to the lesser of: (1) the total amount of customs duties paid or owed on the non-NAFTA components initially imported; and (2) the total amount of customs duties paid to another party on the goods subsequently exported. It generally applies to all goods imported into the United States, with certain exceptions. It has the practical effect of essentially eliminating drawback for NAFTA-origin goods as NAFTA tariff reductions become effective. While no limitations were imposed on same condition drawback, same condition substitution drawback was eliminated upon the entry into force of the Agreement, with certain exceptions. In no case may drawback be paid with respect to countervailing or antidumping duties on goods entering the United States. Furthermore, section 210 of the Act generally prohibits drawback for color television picture tubes.

Chile FTA drawback.—Section 203 of the United States-Chile Free Trade Agreement Implementation Act (Public Law 108-77) begins a 3-year, phased elimination of duty drawback and duty deferral programs between the United States and Chile eight years after the entry into force of the Agreement. Specifically, eight years after the Agreement enters into force, the United States will reduce the refund, waiver, or remission of duties subject to duty drawback or duty deferral programs by the following formula: 75 percent during the first year period; 50 percent in the following year; and 25 percent during the final year. The formula will be applied to drawback claims for duties paid on imported goods that are subsequently exported, as well as duties for which the payment has been deferred because of their introduction into a foreign-trade zone or other duty deferral program. *Drawback in other FTAs.*—There are no provisions affecting the drawback or duty deferral program in the implementation acts for the U.S.-Australia FTA, U.S.-Singapore FTA, or U.S.-Morocco FTA.

PROTESTS AND ADMINISTRATIVE REVIEW

Generally, liquidation of an entry represents a final determination by Customs

regarding an importer's duty liability unless a protest is timely filed, in proper form, after the date of liquidation. A protest allows the importer to secure further administrative review and preserve the right to judicial review. Under current law, a protest must be filed in the port where the underlying decision was made.

Sections 514, 515 and 516 of the Tariff Act of 1930,[61] as amended, provide for administrative review of decisions of the Customs Service, requirements for filing protests, amendment of protests, review and accelerated disposition, and further administrative review. These provisions provide a statutory means whereby the "correctness" of decisions by Customs may be administratively reviewed.

Under section 514, an importer is entitled to protest the legality of decisions by Customs relating to:

(1) the appraised value of merchandise;

(2) the classification and rate and amount of duties chargeable;

(3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;

(4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination appealable under section 337;

(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;

(6) the refusal to pay a claim for drawback; or

(7) the refusal to reliquidate an entry under subsection (c) or (d) of section 520 (19 U.S.C. 1520).

In addition, section 514 provides the requirements for the form, number and amendments of protest, and limitations on protest or reliquidation. The Miscellaneous Trade and Technical Corrections Act of 2004 (Public Law 108-429) recently increased the time for filing a protest from 90 days to 180 days from the time of liquidation or decision creating the basis for the protest.

Section 515 provides Customs a 2-year period to respond to a protest unless there is a request for accelerated disposition. In a case of a request for accelerated disposition, Customs is required to respond within 30 days. This section also provides that the protest may be subject to further review of the protest by another Customs officer (usually Customs Headquarters), upon a timely request. The Miscellaneous Trade and Technical Corrections Act of 1999 (Public Law 106-36) amended this section to require the appropriate Customs officer to issue a decision on an application for further review within 30 days of the application, and if allowed, to forward the protest to the Customs Officer who will be conducting the review.

If a protesting party believes that the application for further review was erroneously or improperly denied, such a party may file a request to the Commissioner of Customs, within 60 days after the notice of denial, that the denial

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[61] 19 U.S.C. 1514, 1515, and 1516.

be set aside. If the Commissioner fails to act within the 60 days, the request is deemed denied.

Section 516 is a unique Customs provision that entitles American manufactures, producers, wholesalers, labor unions, groups of workers, or trade or business associations the statutory right to challenge Customs treatment of an imported product of the same class or kind as the product they produce or sell. Under this section, an interested domestic party may file a petition with the Commissioner of Customs alleging that appraised value, classification, or rate of duty is not correct. Other interested party may submit comments.

If Customs agrees with the petition, in whole or in part, it will publish a notice of its decision and will appraise, classify, or assess duty on merchandise entered after a thirty-day period in accordance with that decision. If Customs reaches a negative decision on the petitioner's claims, it will notify the petitioner. The petitioner may file a notice with Customs within thirty days that he will contest the negative decision in court.

Once the appropriate administrative procedures in Sections 514, 515, and 516 have been completed, the importer or domestic party may have redress to the Court of International Trade based on other statutory provisions.

COPYRIGHTS AND TRADEMARK ENFORCEMENT

Copyrights.—Section 602(a) of the Copyright Revision Act of 1976[62] provides that the importation into the United States of copies of a work acquired outside the United States without authorization of the copyright owner is an infringement of the copyright and are subject to seizure and forfeiture. Forfeited articles are generally destroyed; however, the articles may be returned to the country of export whenever Customs is satisfied that there was no intentional violation. Copyright owners seeking import protection from the U.S. Customs Service must register their claim to copyright with the U.S. Copyright Office and record their registration with Customs in accordance with applicable regulations.[63]

Trademarks and trade names.—Articles bearing counterfeit trademarks, or marks which copy or simulate a registered trademark registration of a U.S. or foreign corporation are prohibited importation, provided a copy of the U.S. trademark registration is filed with the Commissioner of Customs and recorded in the manner provided by regulations.[64] The U.S. Customs Service also affords similar protection against unauthorized shipments bearing trade names which are recorded with Customs pursuant to regulations.[65] It is also unlawful to import articles bearing genuine trademarks owned by a U.S. citizen or corporation without permission of the U.S. trademark owner, if the foreign and domestic trademark owners are not

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[62] Public Law 94-553, section 101, approved October 19, 1976, 17 U.S.C. 602(a).
[63] 19 CFR 133, subpart D.
[64] 19 CFR 133.1-133.7.
[65] 19 CFR part 133, subpart B.

parent and subsidiary companies or otherwise under common ownership and control, provided the trademark has been recorded with Customs and the U.S. trademark owner has not authorized the distribution of trademarked articles abroad.

The Anticounterfeiting Consumer Protection Act of 1996 (Public Law 104-153) strengthened the protection afforded trademark owners against the importation of articles bearing a counterfeit trademark. A "counterfeit trademark" is defined as a spurious trademark which is identical to, or substantially indistinguishable from, a registered trademark. First, the Act redefined counterfeiting as a form of racketeering. Second, it extended both the copyright and trademark laws, and the seizure and forfeiture laws, to computer programs, computer documentation, and packaging. Third, the Act amended the law such that, upon seizure of counterfeit merchandise, the Customs Service must notify the owner of the trademark, and, after forfeiture, destroy the merchandise. Alternatively, if the merchandise is not unsafe or a hazard to health, and the Customs Service has the consent of the trademark owner, the forfeited goods may be: (1) given to any Federal, state, or local government agency which has established a need for the article; (2) given to a charitable institution; or (3) sold at public auction, if more than 90 days have passed since the date of forfeiture, and no eligible organization has established a need for the article.

The Anticounterfeiting Consumer Protection Act of 1996 also amended section 431 of the Tariff Act of 1930 to require public disclosure of aircraft manifests in addition to vessel manifests. Last, the Act amended section 484 of the Tariff Act of 1930 to require the Customs Service to prescribe new regulations governing the content of entry documentation so as to aid in the determination of whether imported merchandise bears a counterfeit trademark.

The Digital Millennium Copyright Act of 1998 (DMCA) (Public Law 105-304) is a complex piece of legislation which makes major changes in U.S. copyright law to address the digitally networked environment. U.S. trade officials now routinely include similar provisions from the DMCA in trade agreements for the purpose of bringing U.S. trading partners up to a higher standard of intellectual property protection. Title I of the DMCA amends U.S. copyright law to comply with the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty, adopted at the WIPO Diplomatic Conference in December 1996.

Two major provisions in the WIPO treaties require contracting parties to provide legal remedies against circumventing technological protection measures and tampering with copyright management information. To comply with these provisions, the DMCA adds a new chapter, Chapter 12, to Title 17 of the United States Code. The DMCA prohibits gaining unauthorized access to a work by circumventing a technological protection measure put in place by the copyright owner where such protection measure otherwise effectively controls access to a copyrighted work.

To facilitate enforcement of the copyright owner's right to control access to his

copyrighted work, the DMCA also prohibits manufacturing or making available technologies, products, or services used to defeat technological measures controlling access. Similarly, the DMCA prohibits the manufacture and distribution of the means of circumventing technological measures protecting the rights of a copyright owner, e.g., measures which prevent reproduction. But to ensure that legitimate multipurpose devices can continue to be made and sold, the prohibition applies only to those devices that:

(1) are primarily designed or produced for the purpose of circumventing;

(2) have only a limited commercially significant purpose or use other than to circumvent; or

(3) are marketed for use in circumventing.

The DMCA does not affect rights, remedies, limitations, or defenses to copyright infringement, including fair use, nor does it alter the existing doctrines of vicarious and contributory liability. The prohibitions that were set up in the DMCA were extended to those products which were imported into the United States with authority being given to the Secretary of the Treasury to enforce these provisions.

PENALTIES

Section 592 of the Tariff Act of 1930, as amended,[66] is the basic and most widely used customs penalty provision. It prescribes monetary penalties against any person who imports, attempts to import, or aids or procures the importation of merchandise by means of false or fraudulent documents, statements, omissions or practices, concerning any material fact. The statute may be applied even though there is no loss of revenue involved.

Section 592 infractions are divided into three categories of culpability, each giving rise to a different maximum penalty, as follows:

(1) *Fraud.*—This category involves an act of commission or omission intentionally done for the purpose of defrauding the United States of revenue, or otherwise violating section 592. The maximum civil penalty for a fraudulent violation is the domestic value of the merchandise in the entry or entries concerned.

(2) *Gross negligence.*—This category involves an act of commission or omission with actual knowledge of, or wanton disregard for, the relevant facts and a disregard of section 592 obligations, whereby the United States is or may be deprived of revenue, or where section 592 is otherwise violated. The maximum civil penalty for gross negligence is the lesser of the domestic value of the merchandise or four times the loss of revenue (actual or potential). If the infraction does not affect the revenue, the maximum penalty is 40 percent of the dutiable value of the goods.

(3) *Negligence.*—This category involves a failure to exercise due care in

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[66] 19 U.S.C. 1592.

ascertaining the material facts or in ascertaining the obligations under section 592. The maximum civil penalty for negligence is the lesser of the domestic value of the merchandise or twice the loss of revenue (actual or potential). However, where there is no loss-of-revenue issue, the penalty cannot exceed 20 percent of the dutiable value.

In addition to the civil penalties described above, a criminal fraud statute provides for sanctions to those presenting false information to customs officers. Title 18, U.S. Code, section 542, provides a maximum of 2 years imprisonment, or a $5,000 fine, or both, for each violation involving an importation or attempted importation.

The Secretary of the Treasury is authorized to seize merchandise if there is resasonable cause to believe that a person has violated these provisions and the alleged violator is insolvent; outside the jurisdiction of the United States; is otherwise essential to protect the revenue; or to prevent the importation of prohibited merchandise into the United States.

For proceedings commenced by the United States in the Court of International Trade for monetary penalties, all issues shall be tried *de novo*. The statute specifies the standard of proof required to establish a violation. In fraud cases, the United States has the burden to prove the violation by clear and convincing evidence; in gross negligence cases, the government has the burden to establish all the elements of the alleged violation; and for negligence cases, the government has the burden to establish the act or omission and the defendant has the burden of proof that the act or omission did not occur as a result of negligence.

The Customs Modernization Act (section 621 of the North American Free Trade Agreement Implementation Act) amended section 592 to apply existing penalties for false information to information transmitted electronically; allow Customs to recover unpaid taxes and fees resulting from 592 violations; clarify that the mere non-intentional repetition of a clerical error does not constitute a pattern of negligent conduct; and define the commencement of a formal investigation for the purposes of prior disclosure of alleged violations. It also introduced the requirement that importers use "reasonable care" in making entry and providing the initial classification and appraisement; establishing a "shared responsibility" between Customs and importers; and allowing Customs to rely on the accuracy of the information submitted and streamline entry procedures (section 637 of the North American Free Trade Agreement Implementation Act). To the extent that an importer fails to use reasonable care, Customs may impose a penalty under section 592.

Section 205 of the North American Free Trade Agreement Implementation Act amended section 592 to apply identical penalty provisions to importers making false declarations and certificates of NAFTA origin. As in NAFTA, there are provisions in the U.S. FTAs with Singapore, Australia, and Chile which provide a means for importers to avoid penalties for filing incorrect information if there is voluntary disclosure and prompt correction. Section 592 of the Tariff Act of 1930 therefore

provides importers this opportunity.

The Anticounterfeiting Consumer Protection Act of 1996 (Public Law 104-153) made several amendments to the Tariff Act of 1930, as amended. First, the Act extended the application of customs civil penalties to include merchandise bearing a counterfeit trademark. Second, the Act amended section 526 of the Tariff Act of 1930 to require the consent of the trademark owner prior to any action by the Secretary of the Treasury regarding the disposition of seized merchandise. Third, the Act linked the relevant civil penalties to the value that the merchandise would have had if it were genuine, according to the manufacturer's suggested retail price, in addition to any other civil or criminal penalties. Last, the Act amended section 431(c)(1) of the Tariff Act of 1930 to require the advanced public disclosure of aircraft manifests to assist Customs in electronically screening passengers for inspection upon arrival.

Recordkeeping.—The Customs Modernization Act (section 615 of the North American Free Trade Agreement Implementation Act) provided new penalties for the failure to comply with a lawful demand for records required for the entry of merchandise, and established a "Recordkeeping Compliance Program." For willful failure to comply, the penalty is the lesser of up to $100,000, or 75 percent of the value of the merchandise, and for negligence, the lesser of up to $10,000 or 40 percent of the value. The new penalties were authorized with the understanding that Customs would routinely waive the production of records at entry, while retaining the ability to audit those records at a later time.

Import prohibitions/restrictions relating to dog and cat fur products.—The Tariff Suspension and Trade Act of 2000 (Public Law 106-476) amended title III of the Tariff Act of 1930 by adding Section 308 (19 U.S.C. 1308) to prohibit all commercial activities relating to trading with day or cat fur products. Specifically, this legislation prohibits the importation or exportation of products made with dog or cat fur, as well as domestic activities including the introduction into interstate commerce, manufacture for introduction into interstate commerce, sale or offer for sale, trade, advertisement, transportation or distribution in interstate commerce of products made with dog or cat fur. In addition to criminal and civil penalties under existing law, a person violating this section may be liable for additional civil penalties, forfeiture, and debarment from importing, exporting, transporting, distributing, manufacturing, or selling any fur products in the United States. A person accused of violating this section is entitled to an affirmative defense if he shows by a preponderance of the evidence that he has exercised reasonable care.

Section 308 authorizes the Secretary of the Treasury to enforce the import and export prohibitions while the President has enforcement authority relating to domestic activities. The designated enforcement authorities are required to publish a list of violators at least once a year, to submit an enforcement plan to Congress within three months of the date of enactment, a report within one year of that same date, and, annually thereafter, a report on enforcement efforts and adequacy of resources to execute this provision. Finally, the legislation amends the Fur Products

Labeling Act (15 U.S.C. 69(d)) to require the labeling of products containing even a *de minimus* amount of dog or cat fur.

Requirements applicable to cigarette imports.—Title V of the Tariff Suspension and Trade Act of 2000 (Public Law 106-476) made several changes to laws governing the importation of cigarettes. In particular, section 4004 of this legislation amended the Tariff Act of 1930 to create a new title VIII imposing certain requirements on imports of cigarettes. Section 4004 requires the following:

(1) the original manufacturer of cigarettes being imported into the United States must certify that it has timely submitted, or will timely submit, to the Secretary of Health and Human Services the lists of ingredients described in section 7 of the Federal Cigarette Labeling and Advertising Act (FCLAA);

(2) the precise warning statements in the precise format specified in section 4 of the FCLAA must be permanently imprinted on the cigarette packaging. Prior to the legislation, the Federal Trade Commission allowed importers, under certain circumstances, to comply with the requirements of FCLAA by affixing adhesive labels with compliant warning statements;

(3) the importer must certify that it is in compliance with a rotation plan approved by the Federal Trade Commission pursuant to section 4(c) of the FCLAA, unless the FTC grants a waiver; and

(4) if the cigarettes bear a U.S. registered trademark, the owner of such trademark, or such owner's authorized representative, must consent to the importation of such cigarettes into the United States.

The legislation also requires Customs certification at the time of entry that the importer, under the penalty of perjury, has complied with the above requirements. Cigarettes imported in personal use quantities, as well as those imported for analysis, noncommercial use, reexport or repackaging, are exempt from the above requirements. In addition to any other applicable penalties under law, violators are subject to civil penalties as well as forfeiture.

Examination of Outbound Mail.—Section 344 of the Trade Act of 2002 (Public Law 107-210) authorized the Customs Service subject to certain restrictions to stop and search at the border, without a search warrant, mail of domestic origin transmitted for export by the United States Postal Service and foreign mail transiting the United States that is being imported or exported by the United States Postal Service, as long as it weighs over 16 ounces.

COMMERCIAL OPERATIONS

Advisory Committee.—Section 9503(c) of the Omnibus Budget Reconciliation Act of 1987 (Public Law 100-203) established in the Department of Treasury the "Advisory Committee on Commercial Operations of the U.S. Customs Service." The Assistant Secretary of Treasury for Enforcement is the Committee Chairman, which is composed of 20 members.

In making appointments, the Secretary is to select individuals or firms "affected

by the commercial operations" of the Customs Service. A majority of the members may not belong to the same political party. The Advisory Committee is required to provide advice to the Secretary on all Customs commercial operation matters and to report annually to the House Ways and Means and Senate Finance Committees.

Management improvements.–The Customs and Trade Act of 1990 made numerous changes to improve Customs commercial operations. Section 103 contained a biennial authorization of appropriations for the U.S. Customs Service, including a statutory funding floor for commercial operations and a ceiling on non-commercial (enforcement) operations.

Section 121 made major amendments to the Customs Forfeiture Fund statute (section 613A of the Tariff Act of 1930) and in the administrative forfeiture proceedings authority (section 607 of the Tariff Act of 1930).

The Act also included several provisions recommended by the House Ways and Means Subcommittee on Oversight.[67] Section 123 required an annual national trade and customs law violation estimate and enforcement strategy report. Section 124 required an Administration report on possible expansion of Customs' foreign preclearance operations and legislative proposals for recovery for imported merchandise damaged during customs examination. Finally, the Act required changes to Customs' cost accounting systems and new labor distribution surveys.

In 1992, the annual Treasury appropriations legislation for fiscal year 1993 (Public Law 102-393) created a unified Treasury Asset Forfeiture Fund to be administered by the Treasury Secretary. It succeeded the Customs Forfeiture Fund (section 613A of the Tariff Act). The Committee on Ways and Means maintains legislative jurisdiction over the Customs portion of the Treasury Fund.

A major reform to the customs inspector pay system was included in the Omnibus Budget Reconciliation Act of 1993. Section 5 of the Act of February 13, 1911 (the "1911" Act) was amended to address the existing inspector overtime pay system (WMCP:102-17). It also authorized foreign language bonuses and additional retirement benefits linked to a portion of overtime hours worked.

Notification requirements.—Section 9501(c) of the Omnibus Budget Reconciliation Act prohibited the establishment of any new Centralized Examination Station (CES) unless Customs provides written notice to both the House Ways and Means and Senate Finance Committees not less than 90 days prior to the proposed establishment.

The Omnibus Budget Reconciliation Act of 1987 required the Commissioner of Customs to notify the House Ways and Means and Senate Finance Committees at least 180 days prior to taking any action which would: (a) result in any significant reduction in force of employees by means of attrition; (b) result in any reduction in hours of operation or services rendered at any customs office; (c) eliminate or relocate any customs office; (d) eliminate any port, or significantly reduce the

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[67] "Report on Abuses and Mismanagement in the U.S. Customs Service Commercial Operations"; February 8, 1990; WMCP: 101-22.

number of employees assigned to any customs office or any port of entry.

Customs modernization.—The Customs Modernization Act (title VI of the North American Free Trade Agreement Implementation Act) represented the most extensive set of changes to the customs laws since the Customs Procedural Reform Act of 1978. The major provisions of the Act removed archaic statutory provisions requiring paper documentation, and provided authority for full electronic processing of all customs-related transactions under the National Customs Automation Program (NCAP) (section 631). In return for waiving paperwork requirements, importers were required to maintain and produce information after the fact. Section 631 further sets forth the NCAP goals of ensuring uniform importer treatment, facilitating business activity, while improving compliance with the customs laws. It authorized new automation initiatives for remote-entry filing and periodic entry and duty payment, and required adequate planning, testing, and evaluation of all new automated systems before implementation.

The Act provided for accreditation of independent laboratories and public access to all Customs rulings and decisions. It also provided additional projections for importers by reforming Customs' seizure authority under section 596(c) of the Tariff Act of 1930 (19 U.S.C. 1595a(c)); established a new statute of limitations on duty violations, provided procedural safeguards for regulatory audits; allowed judicial review of detentions; clarified the conditions under which duty drawback claims may be made; and authorized payment for damaged merchandise for non-commercial shipments.

In the on-going effort to fully implement the Mod Act, the Miscellaneous Trade and Technical Corrections Act of 1999 (Public Law 106-36) (the Act) amended section 411 of the Tariff Act of 1930 (19 U.S.C. 1411) to require Customs, pursuant to the NCAP, to establish a program for the automation of electronic filing of commercial importation data from foreign-trade zones no later than January 1, 2000. The program was originally voluntary on the part of importers, but the Trade Act of 2002 (Public Law 107-210) gave discretion to Customs to require the filing of electronic submission of information.

Periodic Payment.—Section 383 of the Trade Act of 2002 (Public Law 107-210) amends Section 505(a) of the Tariff Act of 1930 (19 U.S.C. 1505(a)) to authorize the Customs Service to collect duty and fees at either the time of entry or no later than 10 working days after entry. Upon completion of the Automated Commercial Environment periodic payment module, a participating importer or the importer's filer may make payment no later than the 15th day of the month following the month in which the merchandise was entered or released, which ever comes first. Ongoing development and implementation of the Customs computer system, ACE – Automated Commercial Environment, is proceeding in step with these efforts to streamline the entry process.

Foreign Trade Zones

The Foreign Trade Zones Act of 1934,[68] as amended, authorizes the establishment of foreign trade zones. A foreign trade zone (FTZ) is a special enclosed area within or adjacent to ports of entry, usually located at industrial parks or in terminal warehouse facilities. Although operated under the supervision and enforcement of the Customs Service, they are considered outside the customs territory of the United States. With certain exceptions, any foreign or domestic merchandise may be brought into a foreign trade zone for storage, sale, exhibition, break-of-bulk, repacking, distribution, mixing with foreign or domestic merchandise, assembly, manufacturing, or other processing. Foreign merchandise imported into an FTZ is not subject to duty, formal entry procedures or quotas unless and until it is subsequently imported into U.S. customs territory.

The framework that governs the establishment and operation of FTZs has three principal components. First, the Foreign Trade Zones Act of 1934 (the Act) authorizes the establishment of FTZs and, as amended in 1950, allows manufacturing in FTZs.[69] Second, regulations, promulgated by both the Customs Service[70] and the Department of Commerce,[71] expand on the Act. A 1952 amendment to the regulations provided for the establishment of "subzones" in addition to general purpose zones. Third, the decision in *Armco Steel Corp. v. Stans* in 1970 validated the use of zone manufacturing to avoid customs duties and interpreted several key provisions of the Act.[72]

The original purpose of the Foreign Trade Zones Act of 1934 was to expedite and encourage foreign commerce. Initially, FTZs were little more than transshipment or consignment centers for the storage, repackaging, or light processing of foreign goods pending re-exportation. The 1934 Act prohibited the manufacture and exhibition of goods in FTZs. In 1950, however, Congress removed this prohibition and added manufacturing to the list of activities permitted, and authorized exhibition in zones.

The amendment to the FTZ regulations in 1952 that provided for the establishment of subzones is important to manufacturing and assembly operations in zones. The essential distinction between the two types of zones is that individual subzones are generally used by only one firm, whereas there is no limitation on the number of firms that can operate in a general-purpose zone. Subzones were established to assist companies which were unable to relocate to or take advantage of an existing general-purpose zone.[73] Under the regulations, only a grantee of a previously approved general zone may apply to establish a subzone.

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[68] Act of June 18, 1934, ch. 590, 48 Stat. 998, 19 U.S.C. 81a-81u.
[69] Boggs amendment of 1959, ch. 296, 64 Stat. 246, 19 U.S.C. 81c.
[70] 19 CFR 146.0-48 (1980).
[71] 15 CFR 400.100-1406 (1980).
[72] 431 F.2d 779 (2d Cir. 1970), aff'g 303 F. Supp. 262 (S.D.N.Y. 1969).
[73] 15 CFR 400.304 (1983).

Authority for establishing these facilities is granted to qualified corporations, or political subdivisions, who must submit applications to the Department of Commerce's Foreign Trade Zones Board, comprised of the Secretary of Commerce (Chair), and the Secretary of the Treasury.[74] Public Law 104-201, authorizing appropriations for fiscal year 1997 for the military activities of the Department of Defense, amended the Foreign Trade Zones Act to remove the Secretary of Army from membership on the Board. The Board's regulations set forth the basic requirements for applying and qualifying for an FTZ. The statute provides that every officially designated port of entry is entitled to at least one FTZ. Public hearings are often held by the Board staff in the locale involved. While most applications are non-controversial, occasionally domestic industries or labor that are sensitive to imports will oppose a subzone application. The sharp growth of manufacturing in subzones, particularly by the automobile industry, has led to increased criticism of the practice by U.S. parts producers, who are concerned that the practice may reduce their effective tariff protection.

Section 3, which contains the basic substantive provisions of the Act, allows merchandise to be imported into FTZs without being subject to U.S. customs laws. The section regulates the tariff treatment of FTZ merchandise according to its status as foreign or domestic, and as privileged or non-privileged.

One may apply for privileged status for foreign merchandise in an FTZ, provided the merchandise has not yet been manipulated or manufactured so as to effect a change in its tariff classification. Foreign merchandise that is not privileged, recovered waste, and merchandise that was originally domestic but can no longer be identified as such, are deemed to be non-privileged foreign merchandise. Domestic merchandise that would otherwise have been eligible for privileged status but for which no application was made is considered non-privileged merchandise.

The status of merchandise becomes relevant when it enters U.S. customs territory. Customs appraises and classifies privileged foreign merchandise to determine the taxes and duties owed according to the condition of the merchandise when it *enters* an FTZ. The importer pays the previously determined taxes and duties when bringing the merchandise into U.S. customs territory regardless of any manufacturing or manipulation of the goods with other foreign or domestic privileged merchandise.

In contrast, merchandise that is composed entirely of, or derived entirely from, non-privileged merchandise, either foreign or domestic, or of a combination of privileged and non-privileged merchandise, is appraised and classified according to its condition when constructively *transferred out* of an FTZ and into U.S. customs territory. Thus, the duty and taxes payable on non-privileged or combined merchandise are those applicable to its classification and value when it enters U.S. customs territory and not when it enters the zone. This distinction is an important

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[74] 19 U.S.C. 81a(b) (1976). The jurisdiction and authority of the Board are set forth in 15 CFR 400.200-203 (1980).

potential advantage of zone-based operations.

Final revised regulations.—The first changes to those regulations since 1980—were issued by the FTZ Board on October 8, 1991 (15 CFR Part 400) clarifying criteria for the establishment and review of FTZ (including subzone) operations. Among other provisions, the revised regulations authorize the review of zone and subzone operations to determine whether those operations provide a net economic benefit to the United States.

Use of weekly entry filing.—Section 484 of the Tariff Act of 1930 (19 U.S.C. 1484) sets forth the procedures for the entry of merchandise imported into the United States. Under section 484, the Customs Service has permitted limited weekly entry filing for foreign trade zones (FTZ) since May 12, 1986, for merchandise which is manufactured or changed into its final form just prior to its transfer from the zone manufacturing operations). Customs regulations governing entry into and removal from an FTZ are contained in Part 146 of the Customs Regulations (19 CFR Part 146). The regulations permit zone users to make a weekly entry filing for all entries removed for an entire weekly period, allowing them to pay a single merchandise processing fee (MPF) for the entire weekly entry filing instead of an MPF for each entry removed from the zone.

Section 410 of the Trade and Development Act of 2000 (Public Law 106-200) amended section 484 of the Tariff Act of 1930 to establish a new section 19 U.S.C. 1484(a)(3). This legislation allows merchandise withdrawn from a foreign-trade zone during a week (i.e., any 7 calendar day period) to be the subject of a single entry filing, at the option of the zone operator or user. This statutory change allows zone users the option of making weekly entry filing for both manufacturing and non-manufacturing operations, and the merchandise processing fee would be collected as if all entries during one week were made as a single entry.

Deferral of duty on certain production equipment.—The Miscellaneous Trade and Technical Corrections Act of 1996 (Public Law 104-295) amended section 3 of the Foreign Trade Zones Act to permit the deferral of payment of duty on certain production equipment admitted into FTZs. The provision allows for duty on imported production equipment and components installed in a U.S. FTZ to be deferred until the equipment is ready to be placed into use for production. By allowing a manufacturer to assemble, install, and test the equipment before duties would be levied, this change is meant to encourage production in FTZs.

Effect on FTZ by free trade agreements.—The United States-Canada Free-Trade Agreement Implementation Act[75] amended section 3(a) of the Foreign Zones Act to provide that, with the exception of "drawback eligible goods," goods withdrawn from a foreign trade zone will be treated as if they are withdrawn for consumption in the United States, thus subject to applicable customs duties. The North American Free Trade Agreement Implementation Act[76] further amended section 3(a) to

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[75] Public Law 100-449, approved September 28, 1988.

[76] Public Law 100-182, approved December 8, 1993.

provide that "goods subject to NAFTA drawback" and withdrawn from a foreign trade zone will be treated as if they are withdrawn for consumption in the United States, and are thus subject to the applicable customs duties. The customs duties may be reduced or waived in an amount that is the lesser of the customs duties paid to the other NAFTA country upon import of the manufactured goods. The amendment also provides for the same treatment should Canada cease to be a NAFTA country and the suspension of the United States-Canada Free-Trade Agreement is terminated.

There are no provisions affecting duty deferral programs in the implementation acts for the U.S.-Australia FTA, U.S.-Singapore FTA, or U.S.-Morocco FTA. See the discussion above on the impact of Section 203 of the United States-Chile Free Trade Agreement Implementation Act (Public Law 108-77) on duty deferral programs. Essentially, after a transition period, the Chile FTA eliminated duty deferral programs for Chilean goods except for products that are merely warehoused and reexported without change in condition.

Chapter 2: TRADE REMEDY LAWS

The Antidumping and Countervailing Duty Laws

Two important trade remedy laws are the antidumping (AD) and countervailing duty (CVD) laws. Although these laws are aimed at different forms of unfair trade, they have many procedural and substantive similarities.

CVD LAW: SUBSIDY DETERMINATION

The purpose of the CVD law is to offset any unfair competitive advantage that foreign manufacturers or exporters might enjoy over U.S. producers as a result of foreign countervailable subsidies. Countervailing duties equal to the net amount of the countervailable subsidies are imposed upon importation of the subsidized goods into the United States.

Subtitle A of title VII of the Tariff Act of 1930, as amended,[1] provides that a countervailing duty shall be imposed, in addition to any other duty, equal to the amount of net countervailable subsidy, if two conditions are met. First, the Department of Commerce (DOC) must determine that a countervailable subsidy is being provided, directly or indirectly, "with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) into the United States" and must determine the amount of the net countervailable subsidy. Second, the U.S. International Trade Commission (ITC) must determine that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation." The law applies to imports from (1) World Trade Organization (WTO) member countries, (2) countries which have assumed obligations equivalent to those of the Agreement on Subsidies and Countervailing Measures, commonly referred to as the Subsidies Agreement, or (3) countries with whom the United States has a treaty requiring unconditional most-favored-nation treatment with respect to articles imported into the United States. Imports from countries which do not fall into one of these three categories are generally not afforded an injury test by the ITC in CVD cases.

Historical Background: Prior to the General Agreement on Tariffs and Trade (GATT) rules

The first U.S. statute dealing with foreign unfair trade practices was a CVD law passed in 1897. The provisions of the 1897 statute remained substantially the same until 1979, when the U.S. CVD law was changed to conform with the agreement

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[1] 19 U.S.C. 1671.

reached in the Tokyo Round of multilateral trade negotiations.

The law prior to 1979 required the Secretary of the Treasury to assess countervailing duties on imported dutiable merchandise benefiting from the payment or bestowal of a "bounty or grant." The 1897 law authorized countervailing duties against any bounty or grant on the export of foreign articles. In 1922, Congress amended the provision to cover bounties or grants on the manufacture or production of merchandise as well as on its export. The amount of the countervailing duty was to equal the net amount of the "bounty or grant." Prior to the amendments made by the Trade Act of 1974, the CVD law applied only to dutiable merchandise and afforded no injury test.

The Trade Act of 1974 made two important changes to the CVD law, although the substantive requirements of the CVD law remained virtually the same. First, it extended the application of the CVD law for the first time to duty-free imports, subject to a finding of injury as required by the international obligations of the United States (i.e., duty-free imports from GATT members).

Second, the Trade Act of 1974 made extensive changes in many procedural aspects of the law, which had the effect of limiting executive branch discretion in administering the CVD statute. The responsibilities for CVD investigations were also split, with the Department of Treasury being responsible for subsidy determinations and the ITC being responsible for injury determinations. In 1979, under President Carter's Reorganization Plan No. 3, the responsibility for administering the subsidy portions of the CVD statute was transferred from the Department of the Treasury to the DOC.[2]

Tokyo Round Subsidies Code

During the Tokyo Round of trade negotiations in the 1970's, a multilateral agreement governing the use of subsidies and countervailing measures was concluded and signed by the United States and 23 other countries ("Subsidies Code"). In order to enforce obligations with regard to the use of subsidies, the Subsidies Code provided for improved international procedures for notification, consultation and dispute settlement and, where a breach of an obligation concerning the use of subsidies is found to exist or a right to relief exists, countermeasures are contemplated. In addition to the availability of either remedial measures or countermeasures through the dispute settlement process, countries could also take traditional countervailing duty action to offset subsidies upon a showing of material injury to a domestic industry by reason of subsidized imports. The Subsidies Code set out criteria for material injury determinations.

The key provisions of the Subsidies Code were as follows: (1) prohibition of export subsidies on non-primary products as well as primary mineral products; (2) description of export subsidies which superseded the requirement that an export

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[2] Exec. Order No. 12188, January 4, 1980, 44 Fed. Reg. 69273.

subsidy must result in export prices lower than prices for domestic sales, and inclusion of an updated illustrative list of subsidy practices; (3) recognition of the harmful trade effects of domestic subsidies and therefore, the permissibility of relief (including countermeasures) where such subsidies injure domestic producers and nullify or impair benefits of concessions under the GATT (including tariff bindings), or cause serious prejudice to the other signatories; (4) commitment by signatories to "take into account" conditions of world trade and production (e.g., prices, capacity, etc.) in fashioning their subsidy practices; (5) improved discipline on the use of export subsidies for agriculture; (6) provisions governing the use and phase-out of export subsidies by developing countries; (7) tight dispute settlement process; (8) greater transparency regarding subsidy practices including provisions for GATT notification of practices of other countries; (9) an injury and causation test designed to afford relief where subsidized imports (whether an export or domestic subsidy is involved) impact U.S. producers either through volume or through effect on prices; and (10) greater transparency in the administration of CVD laws and regulations.

Congress approved the Subsidies Code under section 2(a) of the Trade Agreements Act of 1979. Section 101 of the 1979 Act added a new title VII to the Tariff Act of 1930, containing the new provisions of the CVD law to conform to U.S. obligations under the Subsidies Code. One of the most fundamental changes made by the 1979 Act was the requirement of an injury test in all CVD cases involving imports from "countries under the Agreement"—countries which either are signatories to the Subsidies Code or have assumed substantially equivalent obligations to those under the Code. For countries that were not "countries under the Agreement," a special section of the CVD statute applied. Specifically, section 303 of the Tariff Act of 1930, as amended, permitted countervailing duties to be imposed without an injury test for such countries. In addition, section 303 applied a different definition of subsidy. Other changes made by the 1979 Act included the grant of provisional relief for the first time, reduction of the time periods for investigation, and greater opportunities for participation by interested parties.

Uruguay Round Subsidies Agreement

The Uruguay Round Agreement on Subsidies and Countervailing Measures ("Subsidies Agreement") went beyond the Tokyo Round Subsidies Code by: (1) providing definitions of key terms such as "subsidy" and "serious prejudice" for the first time in any GATT agreement; (2) prohibiting export subsidies and subsidies based on the use of domestic instead of imported goods; (3) creating a special presumption of serious prejudice for egregious subsidies; (4) defining and significantly strengthening the procedures for showing when serious prejudice exists in foreign markets; (5) creating a "green light" category (which lapsed January 1, 2000) of government assistance that is non-actionable and non-countervailable; (6) requiring most developing countries to phase out export subsidies and import

substitution subsidies; and (7) applying the WTO dispute settlement mechanism, which ended the ability of the subsidizing government to block adoption of unfavorable panel reports. Unlike the Subsidies Code (in which only 24 countries joined), all countries that become WTO members are bound by the Subsidies Agreement.

In 1994, Congress implemented the Agreement on Subsidies and Countervailing Measures of the Uruguay Round Multilateral Trade Negotiations (Subsidies Agreement) under title II of the Uruguay Round Trade Agreements Act (URAA).[3] The URAA provides for the application of an injury test to all members of the WTO. The definition of a subsidy applicable to non-WTO members was incorporated in section 701 of the Tariff Act of 1930. Accordingly, section 303 was repealed because it was no longer necessary.

Highlights of the Uruguay Round Subsidies Agreement and CVD Statute

Definition of a subsidy.—Section 251 of the URAA provides that a subsidy is determined to exist if there is a financial contribution by a government or any public body, or any form of income or price support, which confers a benefit. Examples of financial contribution include a direct transfer of funds (e.g., grants, loans, equity infusions), a potential direct transfer (e.g., loan guarantees), the foregoing of revenue otherwise due (e.g., tax credits), the provision of goods or services for less than adequate remuneration (other than general infrastructure), or the purchase of goods. This may also include cases where a government entrusts or directs a private body to carry out these functions. The URAA also provides guidelines for determining when there is a "benefit to the recipient" in the case of an equity infusion, a loan, a loan guarantee, or provision of goods or services.

Specificity.— In order for a subsidy to be countervailable, the Subsidies Agreement requires that it be "specific." The URAA provides that a subsidy will be deemed to be specific if it is provided in law or in fact to a specific enterprise or industry, or group of enterprises or industries. Export subsidies (i.e., those contingent upon export performance), import substitution subsidies (i.e., those contingent on the use of domestic over imported goods), and certain domestic subsidies, if provided to a specific enterprise or industry or group of enterprises or industries, are included. A subsidy limited to certain enterprises within a designated geographical region may also be considered specific.

Prohibited "red light" subsidies.—The Subsidies Agreement identifies two types of subsidies that are prohibited under all circumstances: (1) subsidies based on export performance and (2) subsidies based on the use of domestic rather than imported goods. Article III includes those covered in the illustrative list of export subsidies provided in annex I to the Agreement such as more favorable transport and freight terms for exports, special tax deductions based on export, and export

[3] Public Law 103-465, 19 U.S.C. 3572.

credit guarantees or insurance programs providing rates that are inadequate to cover long-term operating costs. The URAA establishes procedures for investigating prohibited subsidies; if Commerce has reason to believe that foreign goods are benefiting from a prohibited subsidy, the United States Trade Representative (USTR) will then determine whether to initiate a section 301 investigation.

Non-actionable "green light" subsidies.—Article 8 of the Subsidies Agreement identifies three types of non-countervailable or "green light" subsidies: (1) certain research subsidies (excluding those provided to the aircraft industry); (2) subsidies to disadvantaged regions; and (3) subsidies for adaptation of existing facilities to new environmental requirements. The URAA provides expressly that the "green light" provisions on research and pre-competitive development activity do not apply to civil aircraft products.

The Subsidies Agreement stipulates that the provisions on non-actionable subsidies apply for 5 years, unless extended or modified. Because the Subsidies Committee of the WTO was unable to reach a consensus on extending the application of these provisions in their existing or modified form, the "green light" provisions automatically lapsed as of January 1, 2000. Accordingly, with the exception of non-specific subsidies, which remain non-actionable and non-countervailable, subsidies formerly qualifying as non-actionable "green light" subsidies now fall within the actionable category.

Enforcement of U.S. rights.—Sections 281 and 282 of the URAA set forth a mechanism for enforcing U.S. rights under the Subsidies Agreement, reviewing the operation of provisions in the Agreement relating to green light subsidies, and ensuring prompt and effective implementation of successful WTO dispute settlement proceedings.

Section 282 of the URAA provides for an ongoing review of the Subsidies Agreement and establishes objectives for that review. Footnote 25 of the Subsidies Agreement required the Subsidies Committee to review the operation of the green light category of research subsidies within 18 months from the date of entry into force: January 1, 1995. Under section 282, the Administration was required to include all green light subsidies in its review.

Section 282(c) provides that subparagraphs B, C, D, and E of section 771 of the Tariff Act of 1930, which established the non-countervailable status of "green light" subsides under U.S. law, expire 66 months after the date of entry into force of the WTO unless extended by Congress. Because the Subsidies Committee of the WTO was unable to reach a consensus on extending the "green light" subsidies provisions by December 31, 1999, subparagraphs B, C, D, and E of section 771 of the Tariff act of 1930 expired on July 1, 2000.

Rules for developing countries.—The URAA provides different treatment for developing country subsidies. The Subsidies Agreement provided an 8 to 10 year window for developing countries with annual GNP per capita at or above $1,000 to phase out all export subsidies (or 2 years for competitive products). An exception to this transition period, which has ended, was granted by the WTO Members in

2002 for certain types of export subsidies provided by countries whose share of global trade was very small. For least developed countries and countries with GNP per capita below $1,000, the phase out period for export subsidies for competitive products is 8 years. Otherwise, these countries may continue to provide export subsidies. Developing countries were allowed a 5-year phase out period, and the least developed countries an 8-year period, to eliminate prohibited import substitution subsidies. The transition period for import substitution subsidies has ended.

Subsidy Determinations

As noted above, section 701 of the Tariff Act of 1930, as amended,[4] provides for the imposition of additional duties whenever a countervailable subsidy is bestowed by a foreign country upon the manufacture or production for export of any article which is subsequently imported into the United States. Reference to the sale of merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise. The countervailing duty will apply whether the merchandise is imported directly or from third countries, and whether or not in the same condition as when exported.

Again, as noted above, section 701(c) applies to a country which is not a "Subsidies Agreement country." Under section 701(c), a country which is not a "Subsidies Agreement country" is not entitled to an injury test. In addition, certain provisions pertaining to suspension agreements, special rules for regional industries, critical circumstances, and the 5-year review of countervailing duty orders do not apply to such a country.

Countervailing duties are imposed in the amount of the net countervailable subsidy as determined by the DOC. To determine the amount of net countervailable subsidy on which the CVD will be based, the DOC may subtract from gross countervailable subsidy the amount of:

(1) any application fee, deposit, or similar payment paid to qualify for or receive the subsidy;

(2) any loss in the countervailable subsidy value resulting from deferred receipt mandated by government order; and

(3) export taxes, duties, or other charges levied on the exports to the United States specifically intended to offset the countervailable subsidy.

Upstream Subsidies

The Trade and Tariff Act of 1984 modified the application of the CVD law to "upstream subsidies"—subsidies bestowed on inputs which are then incorporated into the manufacture of a final product which is exported to the United States.

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[4] 19 U.S.C. 1671.

Section 268 of URAA further modified the law by establishing criteria for determining the existence of an upstream subsidy.

Section 771(A) of the Tariff Act of 1930, as amended, provides the criteria for identifying upstream subsidies. The potential for an upstream subsidy exists only when a sector-specific benefit meeting all the other criteria of being a countervailable subsidy is provided to the input producer. A determination that the subsidy is also bestowing a "competitive benefit" on the merchandise is also required. The provision is also limited to countervailable subsidies paid or bestowed by the country in which the final product is manufactured.

With regard to the "competitive benefit" criterion, the DOC must decide that a competitive benefit has been bestowed when the price for the input used in manufacture or production of the merchandise subject to investigation is lower than the price the manufacturer or producer would otherwise pay for the input from another seller in an arm's length transaction. Whenever the DOC has reasonable grounds to believe or suspect an upstream subsidy is being paid or bestowed, the DOC must investigate whether it is in fact and, if so, include the amount of any competitive benefit, not to exceed the amount of upstream subsidy, in the amount of any CVD imposed on the merchandise under investigation.

Agricultural Subsidies

Section 771(5B) of the Tariff Act of 1930, as amended, implements Article 13(a) of the WTO Agreement on Agriculture and provides a separate, special rule for the calculation of countervailable subsidies on certain processed agricultural products.

AD LAW: LESS-THAN-FAIR-VALUE (LTFV) DETERMINATION

Dumping generally refers to a form of international price discrimination, whereby goods are sold in one export market (such as the United States) at prices lower than the prices at which comparable goods are sold in the home market of the exporter, or in its other export markets.

Two provisions of U.S. law address different types of dumping practices. Title VII of the Tariff Act of 1930, as amended, provides for the assessment and collection of AD duties by the U.S. government after an administrative determination that foreign merchandise is being sold in the U.S. market at less than fair value and that such imports are materially injuring the U.S. industry. Section 1317 of the Omnibus Trade and Competitiveness Act of 1988 establishes procedures for the USTR to request a foreign government to take action against third-country dumping that is injuring a U.S. industry, and section 232 of the URAA permits a third country to request that an order be issued against dumped imports from another country that are materially injuring an industry in a third country.

Historical Background

In 1916, the Congress enacted the Antidumping Act of 1916, providing a civil cause of action in Federal court for private damages as well as for criminal penalties against parties who dump foreign merchandise in the United States.[5] After a successful WTO challenge by the European Union and Japan of the Antidumping Act of 1916, Congress repealed the law in P.L. 108-429, effective December 3, 2004. Litigation commencing prior to the effective date of repeal was not affected. In 1921, the Antidumping Act of 1921 was passed, which provided the statutory basis until 1979 for an administrative investigation by the Department of the Treasury of alleged dumping practices and for imposition of AD duties.[6] In 1954, the administration of the AD law was split, and the function of determining injury was transferred from the Treasury Department to the U.S. Tariff Commission (now the ITC). The function of determining sales at less than fair value was left with the Treasury Department until 1979.

During the post-World War II negotiations to establish an International Trade Organization, the United States proposed a draft article on dumping, based on the Antidumping Act of 1921. This draft became the basis for article VI of the GATT, which is the international framework governing national AD laws.

During the 1960s, AD actions and their potential for abuse, rather than the dumping practice itself, became a source of great concern to many nations. As a result, during the Kennedy Round of multilateral trade negotiations, the GATT Antidumping Code of 1967 was established. The 1967 Code had three main functions: (1) to clarify and elaborate on the broad concepts of article VI of the GATT; (2) to supplement article VI by establishing appropriate procedural requirements for AD investigations; and (3) to bring all GATT signatory countries into conformity with article VI. The GATT Antidumping Code entered into force on July 1, 1968, and provided for the establishment of a GATT Committee on Antidumping Practices whose function was to review annually the operation of national antidumping laws.

During the Tokyo Round of multilateral trade negotiations in the 1970s, the GATT Antidumping Code was amended to conform to the newly negotiated Agreement Relating to Subsidies and Countervailing Measures, also negotiated at that time and involving changes in article VI of the GATT. The GATT Agreement on Implementation of article VI of the GATT, Relating to Antidumping Measures, came into force on January 1, 1980.[7]

The Congress approved the revised GATT Antidumping Code under section 2(a) of the Trade Agreements Act of 1979.[8] Title I of the 1979 Act repealed the

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[5] Act of September 8, 1916, ch. 463, sec. 801, 39 Stat. 798, 15 U.S.C. 72.
[6] Act of May 27, 1921, ch. 14, 42 Stat. 11, 19 U.S.C. 160 (now repealed).
[7] Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade, MTN/NTM/W/232, reprinted in House Doc. No. 96-153, pt. I at 311.
[8] Public Law 96-39, approved July 26, 1979.

Antidumping Act of 1921 and added a new title VII to the Tariff Act of 1930 implementing the provisions of the Agreement in a new U.S. antidumping law. In addition to the substantive and procedural changes made by the 1979 Act, the responsibility for making dumping determinations was transferred from the Department of the Treasury to the DOC in 1979.[9]

Finally, during the Uruguay Round negotiations, provisions related to antidumping were further amended through the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement"). Article VI of the original GATT remained unchanged in the Antidumping Agreement.

Effective January 1, 1995, the Congress implemented the Antidumping Agreement under title II of the URAA. The Act made considerable substantive and procedural changes to the U.S. AD statute.

Basic Provisions

Section 731 of the Tariff Act of 1930, as amended, provides that an AD duty shall be imposed, in addition to any other duty, if two conditions are met. First, the DOC must determine that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." The determination of whether LTFV sales exist, and what is the margin of dumping, is based on a comparison of "normal value" with the "export price" of each import sale made during the relevant time period under investigation. Second, the ITC must determine that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise." If the DOC determines that LTFV sales exist and the ITC determines that material injury exists, an AD order is issued imposing AD duties equal to the amount by which normal value (i.e., the price in the foreign market) exceeds the export price (i.e., U.S. price) for the merchandise (the dumping margin).

Section 732 of the Tariff Act of 1930, as amended, includes a procedure in AD investigations by which the DOC may monitor imports from additional supplier countries for up to 1 year in order to determine whether persistent dumping exists with respect to that product and self-initiation of additional dumping cases is warranted.

Basis of Comparison: Normal Value

Normal value is determined by one of three methods, in order of preference: home market sales, third-country sales, or constructed value. If a foreign like

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[9] Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (Dec. 3, 1979); and Exec. Order No. 12188, January 2, 1980, 45 Fed. Reg. 989.

product is sold in the market of the exporting country for home consumption, then normal value is to be based on such sales. If home market sales do not exist, or are so few as to form an inadequate basis for comparison, then the price at which the foreign like product is sold for exportation to countries other than the United States becomes the basis for normal value. If neither home market sales nor third-country sales form an adequate basis for comparison, then normal value is the constructed value of the imported merchandise. Constructed value is determined by a formula set forth in the statute, which is the sum of costs of production, plus the actual amount of profit and selling, general and administrative expenses. If actual data is not available, then a surrogate for profit and such expenses may be used, as specified in the statute.

Normal value based on home market or third-country sales is a single price, in U.S. dollars, which represents the weighted average of prices in the home market or third-country market during the period under investigation. Sales made at less than the cost of production may be disregarded in the determination of normal value under certain circumstances. Adjustments are made for differences in merchandise, quantities sold, circumstances of sale, and differences in level of trade to provide for comparability of normal value with export price. Section 223(a)(7) of the URAA and the accompanying Statement of Administrative Action (SAA) changed the requirements for making level of trade adjustments to provide that the DOC is to make a level of trade adjustment (i.e., deduct the price difference between the two levels of trade) if sales are made at different levels of trade and the appropriate adjustment can be established. The level of trade adjustment was intended to provide the normal value counterpart to the related party profit deduction in constructed export price sales (described below) so that the effect is to compare a U.S. sale to a sale in the home market at the same point in the commercial transaction. Finally, averaging or sampling techniques may be used in the determination of normal value whenever a significant volume of sales is involved or a significant number of price adjustments is required.

If the exporting country is a non-market economy, the normal value is constructed by valuing the non-market economy producer's "factors of production" in a market economy country which is a significant producer of comparable merchandise and which is at a level of economic development comparable to the non-market economy, and adding amounts for general expenses, profit, and packing. The "factors of production" include labor, raw materials, energy and other utilities, and representative capital costs.

In determining whether a country is a non-market economy, the DOC considers: the convertibility of the country's currency, whether wages are determined through free bargaining between labor and management, whether foreign investment is permitted, the extent of government ownership, and the extent of government control over the allocation of resources and the pricing and output decisions of enterprises. The DOC's determination of whether a country is a non-market economy is not subject to judicial review.

Export Price

The margin of dumping, and the amount of antidumping duty to be imposed, is determined by comparing the normal value with the export price of each entry into the United States of foreign merchandise subject to the investigation. Export price in general refers to either "export price" or the "constructed export price" of the merchandise, whichever is appropriate. "Export price" is the price at which merchandise is purchased or agreed to be purchased prior to date of importation to the United States. It is typically used where the purchaser is unrelated to the foreign manufacturer and is based on the price agreed to before importation into the United States. However, it may be used if the purchaser and foreign manufacturer are related but the purchaser is merely the processor of sales-related documentation and does not set the price to the first unrelated customer. "Constructed export price" is the price at which merchandise is sold or agreed to be sold in the United States before or after importation, by or for the account of the producer or exporter to the first unrelated purchaser. Typically, it is used if the purchaser and exporter are related.

Export price is adjusted to derive an ex-factory price, including the subtraction of certain delivery expenses and U.S. import duties. Additional subtractions are made from constructed export price, including selling commissions, indirect selling expenses, and expenses and profit for further manufacturing in the United States. In addition, the URAA provides for the deduction of an amount for related party profit, if any, earned in a sale through a related distributor to an end-user in the United States.

Third Country Dumping

Section 1318 of the Omnibus Trade and Competitiveness Act of 1988 was enacted in response to concern over the injurious effects of foreign dumping in third country markets. Section 1318 establishes procedures for domestic industries to petition the USTR to pursue U.S. rights under article 12 of the GATT Antidumping Code. A domestic industry that produces a product like or directly competitive with merchandise produced by a foreign country may submit a petition to USTR if it has reason to believe that such merchandise is being dumped in a third country market and such dumping is injuring the U.S. industry.

If USTR determines there is a reasonable basis for the allegations in the petition, USTR shall submit to the appropriate authority of the foreign government an application requesting that antidumping action be taken on behalf of the United States. Article 12 of the GATT Antidumping Code requires that such an application "be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned" (paragraph 2, article 12). Accordingly, at the request

of the USTR, the appropriate officers of the DOC and the ITC are to assist USTR in preparing any such application.

After submitting an application to the foreign government, USTR must seek consultations with its representatives regarding the requested action. If the foreign government refuses to take any AD action, USTR must consult with the domestic industry on whether action under any other U.S. law is appropriate.

The Uruguay Round Antidumping Agreement added a provision providing authority to issue an order upon the request of a third country, under certain circumstances. The URAA provides that the government of a WTO member may file with USTR a petition requesting that an investigation be conducted to determine if imports from another country are being dumped in the United States, causing material injury to an industry in the petitioning country. USTR, after consultation with the DOC and the ITC, and after obtaining the approval of the WTO Council for Trade in Goods, is to determine whether to initiate an investigation. If the DOC determines that imports are dumped and the ITC determines that an industry in the petitioning country is materially injured by such imports, the DOC is to issue an AD order.

AD AND CVD LAWS: MATERIAL INJURY DETERMINATION

Prior to issuance of an AD or CVD order, the ITC must determine that the domestic industry is being materially injured, or threatened with material injury, or the establishment of a domestic industry is materially retarded, by reason of dumped or subsidized imports. The standard of injury under the AD and CVD laws is "material injury," defined by section 771(7) of the Tariff Act of 1930 as harm which is not inconsequential, immaterial, or unimportant.

The ITC determination of injury involves a two-prong inquiry: first, with respect to the fact of material injury, and second, with respect to the causation of such material injury (i.e., that dumping caused the injury, and not other factors). The ITC is required to analyze the volume of imports, the effect of imports on U.S. prices of like merchandise, and the effects that imports have on U.S. producers of like products, taking into account many factors, including lost sales, market share, profits, productivity, return on investment, and utilization of production capacity. Also relevant are the effects on employment, inventories, wages, the ability to raise capital, and negative effects on the development and production activities of the U.S. industry. Finally, in AD investigations, the ITC is to consider the magnitude of the dumping margin.

Section 222(b)(2) of the URAA (19 U.S.C. 1677(7)(C)(iv)) states that, in determining market share and the factors affecting financial performance, the ITC is to focus primarily on the merchant market for the domestic like product if domestic producers internally transfer significant production of the domestic like product for the production of a downstream article (i.e., captive production not for sale on the merchant market). The SAA accompanying the implementing legislation makes

clear that captively produced imports are not to be included in the import penetration ratio for the merchant market if they do not compete with merchant market production.[10]

Section 771(7) of the Tariff Act of 1930, as amended, requires the ITC to cumulatively assess the volume and effect of like imports from two or more countries subject to investigation if the imports compete with each other and with like products of the domestic industry in the U.S. market, as long as the relevant petitions were filed on the same day or investigations were initiated on the same day (for cases which were self-initiated). However, the ITC is to immediately terminate an investigation with respect to a country (and, hence, may not cumulate imports from that country) if imports from that country are "negligible." Section 222(d) of the URAA amended the negligibility standard so that imports from a country are to be considered negligible if they account for less than 3 percent of the volume of all imports of such merchandise and if imports from all countries accounting for less than 3 percent do not exceed 7 percent of imports.

There are two exceptions to the general rule of cumulation. First, the ITC may not cumulate imports from Israel with imports from other countries for purposes of determining material injury, unless the ITC separately determines that Israeli imports are causing material injury alone. Second, section 224 of the Caribbean Basin Economic Recovery Expansion Act of 1990 (P.L. 101-382) created an exception to the general cumulation rule for imports from Caribbean Basin (CBI) beneficiary countries. If imports from a CBI country are under investigation in an AD or countervailing duty case, imports from that country may not be aggregated with imports from non-CBI countries under investigation for purposes of determining whether the imports from the CBI country are causing, or threatening to cause, material injury to a U.S. industry. They may be aggregated with imports from other CBI countries under investigation. Imports from CBI countries continue to be cumulated with imports from non-CBI countries for purposes of determining material injury in investigations of imports from non-CBI countries.

ISSUES COMMON TO AD AND CVD INVESTIGATIONS

Initiation of Investigation

AD and CVD investigations may be self-initiated by the DOC or may be initiated as a result of a petition filed by an interested party. Petitions may be filed by any of the following, on behalf of the affected industry: (1) a manufacturer, producer, or wholesaler in the United States of a like product; (2) a certified or recognized union or group of workers which is representative of the affected industry; (3) a trade or business association with a majority of members producing a like product; (4) a coalition of firms, unions, or trade associations that have individual standing; or (5)

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[10] The URAA Statement of Administrative Action at 853.

a coalition or trade association representative of processors, or processor and growers, in cases involving processed agricultural products. The DOC provides technical assistance to small businesses to enable them to prepare and file petitions.

Petitions are to be filed simultaneously with both the DOC and ITC. Within 20 days after the filing of a petition, the DOC must decide whether or not the petition is legally sufficient to commence an investigation. If so, an investigation is initiated with respect to imports of a particular product from a particular country.

Because of new standing provisions in the Uruguay Round Agreements, section 212 of the URAA requires DOC to determine, as part of its initiation determination, whether the petition has been filed by or on behalf of the industry. A petitioner has standing if: (1) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the like product; and (2) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition. The SAA accompanying the Act specifies that if the management of a firm expresses a position in direct opposition to the views of the workers in that firm, DOC will treat the production of that firm as representing neither support for nor opposition to the petition.[11] The DOC is to poll the industry if the petition does not meet the second test set forth above. In such circumstances, the DOC is permitted 40 days in which to determine whether it will initiate an investigation. Standing of the industry may not be challenged to the agency after an investigation is initiated but may be challenged later in court.

Preliminary ITC Injury Determination

The ITC must determine whether there is a "reasonable indication" of material injury, based on the information available to it at the time. The petitioner bears the burden of proof with respect to this issue. If the ITC preliminary determination is negative, the investigation is terminated. If it is positive, the investigation continues. The ITC is to make this determination within 45 days of the date of filing of the petition or self-initiation, or within 25 days after the date on which the ITC receives notice of initiation if the DOC has extended the period for initiation in order to poll the industry to determine standing.

Preliminary DOC Determination

If the ITC makes an affirmative preliminary injury determination, then the DOC must determine whether dumping or subsidization is occurring.

In AD cases, the DOC must determine whether there is a "reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less

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[11] URAA Statement of Administrative Action at 862.

than fair value," within 140 days after initiation. The preliminary determination is based on the information available to the DOC at the time. If affirmative, the preliminary determination must include an estimated average amount by which the normal value exceeds the export price. An expedited preliminary determination within 90 days of initiation of the investigation may be made based on information received during the first 60 days if such information is sufficient and the parties provide a written waiver of verification and an agreement to have an expedited preliminary determination. A preliminary determination may also be expedited for cases involving short life cycle merchandise, if the foreign producer has been subject to prior affirmative dumping determinations on similar products. On the other hand, the preliminary determination may be postponed until 190 days after initiation by the DOC, at the petitioner's request or in cases which the DOC determines are extraordinarily complicated.

In subsidy cases, the DOC must determine whether there is a "reasonable basis to believe or suspect that a countervailable subsidy is being provided," within 65 days after initiation of the investigation. In cases involving upstream subsidies, the time period may be extended to 250 days. If affirmative, the preliminary determination must include an estimated amount of the net countervailable subsidy. An expedited preliminary determination may be made based on information received during the first 50 days if such information is sufficient and the parties provide a written waiver of verification and agree to an expedited preliminary determination. On the other hand, the preliminary determination may be postponed until 130 days after initiation at the petitioner's request or in cases which the DOC determines are extraordinarily complicated.

The effect of an affirmative DOC preliminary determination is that the DOC orders the suspension of liquidation of all entries of foreign merchandise subject to the determination from the date of publication of the preliminary determination. The DOC must also order the posting of a cash deposit, bond, or other appropriate security for each subsequent entry of the merchandise equal to the estimated margin of dumping or the amount of the net countervailable subsidy. If the DOC preliminary determination is negative, no suspension of liquidation occurs, and the ITC and DOC investigations simply continue into the final stage. If the DOC final determination is negative, then the entire investigation is terminated (including the ITC final injury investigation).

In AD investigations in which the petitioner alleges critical circumstances, the DOC must determine, on the basis of information available at the time, whether (1) there is a history of dumping and material injury in the United States or elsewhere of the subject merchandise, or the importer knew or should have known that the merchandise was being sold at less than fair value and that there was likely to be material injury by reason of such sales; and (2) there have been massive imports of the merchandise over a relatively short period.

In CVD investigations involving "countries under the Agreement" in which the petitioner alleges critical circumstances, the DOC must determine, on the basis of

information available at the time, whether (1) the alleged countervailable subsidy is inconsistent with the GATT Subsidies Agreement; and (2) there have been massive imports of the merchandise over a relatively short period.

In both AD and CVD investigations, this critical circumstances determination may be made prior to a preliminary determination. If the DOC determines critical circumstances exist, then any suspension of liquidation ordered retroactively applies to unliquidated entries of merchandise entered up to 90 days prior to the date suspension of liquidation was ordered.

Final DOC Determination

In AD investigations, the DOC must issue its final LTFV determination within 75 days after the date of its preliminary determination, unless a timely request for extension is granted, in which case the final determination must be made within 135 days. In CVD investigations, the DOC must issue a final subsidy determination within 75 days after the date of its preliminary determination, unless the investigation involves upstream subsidies, in which case special extended time limits apply. If there are simultaneous investigations under the AD and CVD laws involving imports of the same merchandise, the final CVD determination may be postponed until the date of the final determination in the AD investigation at the request of a petitioner.

In both LTFV and subsidy investigations, the investigation is terminated if the final determination is negative, including any suspension of liquidation which may be in effect, and all estimated duties are refunded and all appropriate bonds or other security are released. If the final determination is affirmative, the DOC orders the suspension of liquidation and posting of a cash deposit, bond, or other security (if such actions have not already been taken as a result of the preliminary determination), and awaits notice of the ITC final injury determination.

Final ITC Injury Determination

Within 120 days of a DOC affirmative preliminary determination or 45 days of a DOC affirmative final determination, whichever is longer, the ITC must make a final determination of material injury. If the DOC preliminary determination is negative, and the DOC final determination is affirmative, the ITC has until 75 days after the final affirmative determination to make its injury determination.

Termination or Suspension of Investigation

Either the DOC or ITC may terminate an AD or CVD investigation upon withdrawal of the petition by petitioner, or by the DOC if the investigation was self-initiated. The DOC may also suspend an investigation on the basis of a suspension agreement limiting U.S. imports of the merchandise subject to

investigation if the DOC is satisfied that termination on the basis of such agreement is in the public interest, and effective monitoring of the agreement is practicable.

The DOC may suspend a CVD investigation on the basis of one of three types of agreements entered into with the foreign government or with exporters who account for substantially all of the imports under investigation. The three types of agreements are: (1) an agreement to eliminate the subsidy completely or to offset completely the amount of the net countervailable subsidy within 6 months after suspension of the investigation; (2) an agreement to cease exports of the subsidized merchandise to the United States within 6 months of suspension of the investigation; and (3) an agreement to eliminate completely the injurious effect of subsidized exports to the United States (which, unlike under the AD law, may be based on quantitative restrictions).

The DOC may suspend an AD investigation on the basis of one of three types of agreements entered into with exporters who account for substantially all of the imports under investigation: (1) an agreement to cease exports of the merchandise to the United States within 6 months of suspension of the investigation; (2) an agreement to revise prices to eliminate completely any sales at less than fair value; and (3) an agreement to revise prices to eliminate completely the injurious effect of exports of such merchandise to the United States. Unlike CVD cases, AD investigations cannot generally be suspended on the basis of quantitative restriction agreements. The one exception is where the AD investigation involves imports from a non-market economy country.

Prior to actual suspension of an investigation, the DOC must provide notice of its intent to suspend and an opportunity for comment by interested parties. When the DOC decides to suspend the investigation, it must publish notice of the suspension, and issue an affirmative preliminary LTFV or subsidy determination (unless previously issued). The ITC also suspends its investigation. Any suspension of liquidation ordered as a result of the affirmative preliminary LTFV determination, however, is to be terminated, and all deposits of estimated duties or bonds posted are to be refunded or released.

If, within 20 days after notice of suspension is published, the DOC receives a request for continuation of the investigation from a domestic interested party or from exporters accounting for a significant proportion of exports of the merchandise, then both the DOC and ITC must continue their investigations.

If the DOC determines not to accept a suspension agreement, it is to provide to the exporters who would have been subject to the agreement both the reasons for not accepting the agreement and an opportunity to submit comments, where practicable.

The DOC has responsibility for overseeing compliance with any suspension agreement. Intentional violations of suspension agreements are subject to civil penalties.

AD or CVD Order

An AD or CVD order may be issued only if both the DOC and ITC issue affirmative final determinations, in both title VII AD and CVD investigations and in section 303 CVD investigations requiring an injury test.

A DOC final LTFV determination must include its determinations of normal value and export price. Within 7 days of notice of an affirmative final ITC determination, the DOC must issue an AD duty order which (1) directs the Customs Service to assess AD duties equal to the amount by which normal value exceeds the export price, i.e., the dumping margin; (2) describes the merchandise to which the AD duty applies; and (3) requires the deposit of estimated AD duties pending liquidation of entries, at the same time as estimated normal customs duties are deposited. The DOC must publish notice of its final determination, which shall be the basis for assessment of AD duties on the entries subject to investigation and for deposit of estimated AD duties on future entries.

For CVD investigations, the DOC must issue a CVD order within 7 days of notice of an affirmative final ITC determination, which (1) directs the Customs Service to assess countervailing duties equal to the amount of the net countervailable subsidy; (2) describes the merchandise to which the countervailing duty applies; and (3) requires the deposit of estimated countervailing duties pending liquidation of entries, at the same time as estimated normal customs duties are deposited. The DOC must publish notice of its determination of net countervailable subsidy which shall be the basis for assessment of countervailing duties on the entries subject to investigation and for deposit of estimated countervailing duties on future entries.

Differences Between Estimated and Final Duties

If a cash deposit or bond collected as security for estimated AD or countervailing duties pursuant to an affirmative preliminary or final LTFV or CVD determination is greater than the amount of duty assessed pursuant to an AD or CVD order, then the difference between the deposit and the amount of final duty will be refunded for entries *prior* to notice of the final injury determination. Sections 707 and 737 of the Tariff Act of 1930, as amended, provide that if the cash deposit or bond is lower than the final duty under the order, then the difference is disregarded. No interest accrues in either case.

If estimated AD or countervailing duties deposited for entries *after* notice of the final injury determination are greater than the amount of final AD or countervailing duties determined under an AD or CVD order, then the difference will be refunded, together with interest on the amount of overpayment. If estimated duties are less than the amount of final duties, then the difference will be collected together with interest on the amount of such underpayment.

Administrative Review

The DOC is required, upon request, to conduct an annual review of outstanding AD and CVD orders and suspension agreements. For all entries of merchandise subject to an AD review, the DOC must determine the normal value, export price, and the amount of dumping margin. For all entries of merchandise subject to a CVD review, the DOC must review and determine the amount of any net countervailable subsidies. These determinations provide the basis for assessment of AD and countervailing duties on all entries subject to the review, and for deposits of estimated duties on entries subsequent to the period of review.

The results of its annual review must be published together with a notice of any AD or countervailing duty to be assessed, estimated duty to be deposited, or investigation to be resumed. Under the URAA, time limits were added to the administrative review process so that final determinations are due in 1 year (with extensions up to an additional 6 months available).

Changed Circumstances Review

Under section 751(b) of the Tariff Act of 1930, as amended, a review of a final determination or of a suspension agreement is to be conducted by the DOC or ITC whenever it receives information or a request showing changed circumstances sufficient to warrant such review. Without good cause shown, however, no final determination or suspension agreement can be reviewed within 24 months of its notice. The party seeking revocation of an order has the burden of persuasion as to whether there are changed circumstances sufficient to warrant revocation.

Sunset Review

The Uruguay Round Agreements provide for the termination, or sunset, of AD and CVD orders and suspension agreements after 5 years unless the authorities determine that such expiry would be likely to lead to the continuation or recurrence of dumping, subsidization and material injury. Accordingly, section 751(d) of the Tariff Act of 1930, as amended, provides that orders may be revoked and suspension agreements terminated after 5 years if the terms are met. The DOC publishes a notice of initiation of a sunset review not later than 30 days before the fifth anniversary of the order. A party interested in maintaining the order must respond to the notice by providing information to the DOC and ITC concerning the likely effects of revocation. The DOC is to conclude its investigation within 240 days of initiation, and the ITC within 360 days of initiation. These deadlines may be extended if the investigation is extraordinarily complicated.

In AD cases, the DOC determines whether revocation of an order or termination of a suspension agreement would be likely to lead to continuation or recurrence of dumping. In making this determination, the DOC considers the weighted average

dumping margins determined in the investigation and subsequent reviews and the volume of imports of the subject merchandise for the period before and the period after the issuance of the order or acceptance of the suspension agreement. The DOC may consider other enumerated factors, upon good cause shown. In addition, the DOC provides to the ITC the magnitude of the margin of dumping that is likely to prevail if the order is revoked or the suspended investigation terminated.

In CVD cases, the DOC determines whether revocation of an order or termination of a suspension agreement would be likely to lead to continuation or recurrence of a countervailable subsidy. In making this determination, the DOC considers the net countervailable subsidy determined in the investigation and subsequent reviews and whether any change in the program which gave rise to the net countervailable subsidy has occurred that is likely to be of effect. The DOC may consider other enumerated factors, upon good cause shown. In addition, the DOC provides to the ITC the amount of the net countervailable subsidy that is likely to prevail if the order is revoked or the suspended investigation terminated.

In both AD and CVD cases, the ITC determines whether revocation would be likely to lead to the likelihood of continuation or recurrence of material injury within a reasonably foreseeable period of time. In making this determination, the ITC considers the likely volume, price effect, and impact of subject imports on the industry if the order is revoked or the suspension agreement terminated. The ITC takes into account its prior injury determinations, whether any improvement in the state of the industry is related to the order or the suspension agreement, and whether the industry is vulnerable to material injury if the order is revoked or the suspension agreement terminated.

In AD sunset reviews, the ITC may also consider the magnitude of the dumping margin. In CVD sunset reviews, the ITC may also consider the magnitude of the net countervailable subsidy. The nature of the countervailable subsidy as well as whether the subsidy is covered by Article 3 (export subsidies or subsidies contingent on the use of domestic over imported goods) or Article 6.1 (subsidies causing serious prejudice) of the WTO Subsidies Agreement must be considered.

The ITC may cumulatively assess the volume and effect of imports of the subject merchandise from all countries subject to sunset reviews if such imports are likely to compete with each other and with domestic like products in the U.S. market. However, the ITC is not to cumulate imports from a country if those imports are not likely to have a discernible adverse impact on the domestic industry.

Section 751(a)(4), as amended, specifies that 2 years or 4 years after the issuance of an order in which the subject merchandise is sold in the United States by an importer related to the exporter, and where the DOC determines that there is a reasonable basis to believe or suspect that duty absorption is occurring, the DOC is to examine in AD reviews whether duties have been absorbed by a foreign producer or exporter subject to the order. The ITC is to take such findings into account in its sunset injury review. The URAA SAA provides, however, that the provision is not to apply as a duty as cost provision, in which AD duties are deducted from export

price if the related importer is being reimbursed for duties by the manufacturer, effectively doubling AD duties.[12]

Expedited Reviews with Security in Lieu of Deposits

In AD cases only, the DOC may permit, for not more than 90 days after publication of an order, the posting of a bond or other security in lieu of the deposit of estimated AD duties if certain conditions exist. The DOC must be satisfied that it will be able to determine, within such 90-day period, the normal value and the export price for all merchandise entered on or after an affirmative LTFV determination (either preliminary or final, whichever is the first affirmative determination) and before publication of an affirmative final injury determination. Also, in order for the DOC to undertake this expedited review, the preliminary determination in the investigation must not have been extended because the case was "extraordinarily complicated," the final determination must not have been extended, the DOC must receive information indicating that the revised margin would be significantly less than the dumping margin specified in the AD order, and there must be adequate sales to the United States since the preliminary (or final) determination to form a basis for comparison. The determination of such new dumping margin will then provide the basis for assessment of AD duties on the entries for which the posting of bond or other security has been permitted, and will also provide the basis for deposits of estimated AD duties on future entries.

Anticircumvention Authority

Under section 781 of the Tariff Act of 1930, as amended, the DOC is authorized to take action to prevent or address attempts to circumvent an outstanding AD or CVD order. The authority addresses four particular types of circumvention: assembly of merchandise in the United States, assembly of merchandise in a third country, minor alterations of merchandise, and later-developed merchandise. Under certain circumstances and after considering certain specified factors, the DOC may extend the scope of the AD or CVD order to include parts and components (in cases involving U.S. assembly), third country merchandise (in cases involving third country assembly), altered merchandise, or later-developed merchandise.

As part of the Uruguay Round negotiations on AD, the United States sought the inclusion of an anticircumvention provision in the Antidumping Agreement. The negotiators, however, were unable to agree on a text concerning anticircumvention and referred the matter to the Committee on Antidumping Practices for resolution. Accordingly, the Agreement is silent concerning anticircumvention authority.

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[12] URAA Statement of Administrative Action at 885.

Facts Available/Best Information Available

In order to promote transparency, the Uruguay Round signatories agreed to detailed guidelines concerning the use of "best information available." In seeking to implement those guidelines, section 776 of the Tariff Act of 1930, as amended, allows the DOC and ITC to use "facts otherwise available" to reach their determinations. Section 776(b) allows the agencies to rely on adverse inferences upon a finding that the party has failed to cooperate by not acting to the best of its ability to comply with a request for information. At the same time, however, section 782 of the Tariff Act of 1930, as amended, contains limitations on the use of facts available, many of which are designed to assist small companies in providing information. For example, the agency is to consider the ability of an interested party to submit the information in the requested form and manner, and may modify the requirements upon a reasoned and timely explanation by that party. In addition, if the agency determines that a response does not comply with the request, the agency must, to the extent practicable, provide an opportunity to remedy the deficiency.

The WTO Antidumping Agreement provides that the authorities are not justified in disregarding less than ideal information if the party acted to the best of its ability. Section 782(e) of the Tariff Act of 1930, as amended, provides that the agencies are not to decline to consider information that is timely submitted, verifiable, and not so incomplete that it cannot serve as a reliable basis for the determination, if the submitting party acted to the best of its ability to meet the requirements, and if the information can be used without undue difficulties.

Section 776(c) of the Tariff Act of 1930, as amended, further provides that if an agency relies on secondary information rather than on information submitted by a respondent, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal.

Judicial Review

An interested party dissatisfied with a final AD or CVD determination or review may file an action in the U.S. Court of International Trade (CIT) for judicial review. To obtain judicial review of the administrative action, a summons and complaint must be filed concurrently within 30 days of publication of the final determination. As set forth in section 516A of the Tariff Act of 1930, as amended, the standard of review used by the Court is whether the determination is supported by "substantial evidence on the record" or "otherwise not in accordance with law." Appeal of negative preliminary determinations is based on whether the determination is "arbitrary, capricious, an abuse of discretion, or [is] otherwise not in accordance with law." Decisions of the CIT are subject to appeal to the U.S. Court of Appeals for the Federal Circuit.

As a result of provisions in the North American Free Trade Agreement (NAFTA) and its implementing legislation, final determinations in AD or CVD proceedings

involving products of Canada and Mexico are reviewed by a NAFTA panel instead of by the CIT, if so requested. The panel will apply U.S. law and U.S. standards of judicial review to decide whether U.S. law was applied correctly by the DOC and the ITC.

WTO Panel Review

As part of the Uruguay Round Agreements, the parties agreed to a strengthened dispute resolution process under the WTO, in which parties are permitted to bring their disputes to a review body for resolution. The URAA contains provisions relating to the adoption of panel reports in AD and CVD cases.

Section 129(a) of the URAA provides that if a dispute settlement panel or appellate body finds that an action by the ITC is not in conformity with U.S. obligations, USTR may request that the ITC issue an advisory report on whether the statute permits it to take steps that would render its determination not inconsistent with those findings. If the ITC issues an affirmative report, USTR may request that it issue a determination not inconsistent with the findings of the panel or appellate body. If, by virtue of that determination, an AD or CVD order is no longer supported by an affirmative determination, USTR, after consultation with Congress, may direct the ITC to revoke the order. However, the President may, again after consultation with Congress, reduce, modify, or terminate the agency action.

If a dispute settlement panel or appellate body finds that an action by the DOC is not in conformity with U.S. obligations, under section 129(b), USTR may request that the DOC issue a determination that would render its determination not inconsistent with those findings, after consultation with Congress. USTR may further request that the DOC implement that determination.

Any ITC and DOC action implemented as a result of dispute settlement is to apply to liquidated entries of the subject merchandise entered on or after the date on which USTR directs the ITC to revoke an order or the DOC to implement a determination.

Continued Dumping and Subsidy Offset Act

Title X of the Agriculture and Related Agencies Appropriations Act for Fiscal Year 2001 contained the Continued Dumping and Subsidy Offset Act of 2000,[13] commonly referred to as the Byrd Amendment, which provides for the annual distribution of AD and countervailing duties assessed pursuant to a CVD order, an AD order, or a finding under the Antidumping Act of 1921 to the affected domestic producers for qualifying expenditures. The provision amends title VII of the Tariff Act of 1930 by inserting a new section 754. The amendments made by the new section apply to all AD and CVD assessments made on or after October 1, 2000

[13] Public Law 106-387, approved October 28, 2000, 19 U.S.C. 754.

with respect to orders in effect from January 1, 1999.

Under section 754, the term "affected domestic producer" is defined as a manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that: (1) was a petitioner or interested party in support of the petition with respect to which an AD order, a finding under the Antidumping Act of 1921, or a CVD order has been entered; and (2) remains in operation. Companies, businesses, or persons that have ceased the production of the product covered by the order or finding, or who have been acquired by a company or business that is related to a company that opposed the investigation, shall not be considered an "affected domestic producer."

Section 754(d)(1) requires the ITC to forward a list to the Commissioner of Customs of petitioners and persons with respect to each order or finding, and a list of persons who indicated support of a petition by letter or through questionnaire response. The ITC is required to submit such lists within 60 days after the date an AD or CVD order or finding is issued. In those cases where an injury determination was not required or the ITC's records do not permit identification of petition supporters, the ITC is to consult with the DOC to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews.

Customs published the final rule on procedures to distribute Byrd Amendment funds on September 21, 2001 (66 FR 48546). Distribution is to be made not later than 60 days after the first day of a fiscal year from duties assessed during the preceding fiscal year. At least 30 days prior to a distribution, the Commissioner is required to publish in the Federal Register a notice of intention to distribute and the list of affected domestic producers potentially eligible for the distribution based on the list obtained from the ITC. The Commissioner is to request certifications from each potentially eligible affected domestic producer indicating: (1) that the producer desires to receive a distribution; (2) that the producer is eligible to receive the distribution as an affected domestic producer; and (3) the qualifying expenditures incurred by the producer since the issuance of the order or finding for which distribution has not previously been made.

The Commissioner distributes all funds (including all interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic industries based on the certifications received. The distributions are made on a pro rata basis based on new and remaining qualifying expenditures. A "qualifying expenditure" is defined as an expenditure incurred after the issuance of the AD finding or order or CVD order in any of the following categories: (1) manufacturing facilities; (2) equipment; (3) research and development; (4) personnel training; (5) acquisition of technology; (6) health care benefits to employees paid for by the employer; (7) pension benefits to employees paid by the employer; (8) environmental equipment, training, or technology; (9) acquisition of raw materials and other inputs; and (10) working capital or other funds needed to maintain production.

The Commissioner of Customs is required to establish a special account in the U.S. Treasury with respect to each order or finding within 14 days after the date of that an AD order or finding or CVD order takes effect. The Commissioner is responsible for depositing all AD or countervailing duties (including interest earned on such duties) that are assessed into the special account appropriate for each AD order or finding or CVD order.

The Commissioner is to prescribe the time and manner in which distribution of the funds in a special account shall be made.

A special account is to terminate after: (1) the order or finding with respect to which the account was established has terminated; (2) all entries relating to the order or finding are liquidated and duties assessed collected; (3) the Commissioner has provided notice and a final opportunity to obtain distribution; and (4) 90 days has elapsed from the date of notice and final opportunity to obtain distribution.

In December 2000, Australia, Brazil, Chile, the European Union, India, Indonesia, Japan, Korea, and Thailand requested consultations with the United States in the World Trade Organization (WTO) regarding the Continued Dumping and Subsidy Offset Act of 2000. In May 2001, Canada and Mexico also requested consultations on the same matter. All complaints were subsequently consolidated into one panel and in September 2002, the panel ruled that the Byrd Amendment is inconsistent with WTO obligations and recommended that it be repealed. The United States appealed the panel's ruling, and the WTO Appellate Body largely upheld the panel's decision.

In late 2004, the WTO authorized eight complainants (Brazil, Canada, Chile, the European Union, India, Japan, Korea and Mexico) to retaliate against the United States for its failure to comply with the WTO rulings. Under the retaliation formula established by the WTO, complainants may retaliate in an amount equal to 72% of annual Byrd Amendment disbursements related to that country's products. The total retaliation level for 2004 disbursements is estimated to be $134 million. The United States reached separate agreements with Australia, Indonesia, and Thailand to postpone their requests for authorization to retaliate.

Enforcement of U.S. Rights Under Trade Agreements and Response to Certain Foreign Practices: Sections 301-310 of the Trade Act of 1974, as amended

INTERNATIONAL CONSULTATIONS AND DISPUTE SETTLEMENT

Article XII and XIII of the General Agreement on Tariffs and Trade (GATT), as elaborated upon by the Texts Concerning a Framework for the Conduct of World Trade concluded in the Tokyo Round of multilateral trade negotiations (Tokyo Round),[14] provided the general consultation and dispute settlement procedures

[14] MTN/FR/W/20/Rev. 2, reprinted in House Doc. No. 96-153, pt. I at 619.

applicable to GATT rights and obligations. In addition, the GATT agreements concluded in the Tokyo Round on specific non-tariff barriers each contained procedures for consultation and resolution of disputes among signatories concerning practices covered by each agreement.

As part of the Uruguay Round, the parties agreed to the Understanding on Rules and Procedures Governing the Settlement of Disputes which establishes a single, integrated Dispute Settlement Body dealing with disputes arising under any of the WTO agreements. One of the most marked changes in this new dispute resolution mechanism is that all of the key decisions in the dispute settlement process, including the establishment of panels, adoption of panel and Appellate Body reports, and the authorization to retaliate will be automatic unless there is a unanimous vote against the action. Accordingly, parties may no longer block panel reports adverse to them. In addition, timetables are established for each phase of the dispute resolution process. Moreover, an Appellate Body is established to examine issues of law covered in a panel report and legal interpretations developed by the panel. Retaliation, in the form of suspended concessions or obligations, is to be limited to the sector that is at issue in the proceeding, unless it is not practicable or effective. Issues related to the level of retaliation may be submitted to binding arbitration.

In 1998, the European Union (EU) initiated a dispute settlement case against the United States challenging the WTO consistency of section 301. Specifically, the EU claimed that section 301 violated the Dispute Settlement Understanding (DSU) because certain statutory deadlines could require the USTR to take action before WTO panel proceedings were finished. The EU complaint was not based on U.S. actions in a particular section 301 case.

On December 22, 1999, a WTO panel rejected the EU's complaint. The panel found that section 301 provides the USTR with adequate discretion to comply with the DSU rules in all cases, and that the USTR had in fact exercised that discretion in accordance with U.S. WTO obligations in every section 301 determination involving an alleged violation of U.S. WTO rights. The EU did not appeal the panel decision. The decision was adopted by the WTO Dispute Settlement Body on January 27, 2000.

Carousel Retaliation

Section 407 of the Trade and Development Act of 2000 (P.L. 106-200) addresses effective operation of the WTO dispute settlement mechanism and lack of compliance with WTO panel decisions, particularly in cases brought by the United States in disputes with the EU involving bananas and beef. Section 407 amended sections 301-310 of the Trade Act of 1974 to require the USTR to make periodic revisions of retaliation lists 120 days from the date the retaliation list is made and every 180 days thereafter. The purpose of this provision is to facilitate efforts by the USTR to enforce rights of the United States if another WTO member fails to

comply with the results of a dispute settlement proceeding.

ENFORCEMENT AUTHORITY AND PROCEDURES (SECTION 301)

Chapter 1 of title III (sections 301-310) of the Trade Act of 1974, as amended,[15] (commonly referred to as "Section 301") provides the authority and procedures to enforce U.S. rights under international trade agreements and to respond to certain unfair foreign practices. Section 301 is the principal statutory authority under which the United States may impose trade sanctions on foreign countries that either violate trade agreements or otherwise maintain laws or practices that are unjustifiable and restrict U.S. commerce. When a section 301 investigation involves an alleged violation of a trade agreement (such as the WTO Agreement or the North American Free Trade Agreement (NAFTA)), USTR must follow the consultation and dispute settlement procedures set out in that agreement.

The Omnibus Trade and Competitiveness Act of 1988 modified the Trade Act of 1974 to create additional authorities commonly known as "Super 301"[16] to deal with priority practices and priority countries and "Special 301" to deal with priority intellectual property rights (IPR) practices.

Sections 301-309 of the Trade Act of 1974, as amended, provide the domestic counterpart to the WTO consultation and dispute settlement procedures. They contain the authority under U.S. domestic law to take retaliatory action, including import restrictions if necessary, to enforce U.S. rights against violations of trade agreements by foreign countries, or unjustifiable, unreasonable, or discriminatory foreign trade practices which burden or restrict U.S. commerce. Section 301 authority applies to practices and policies of countries whether or not the measures are covered by, or the countries are members of the WTO or other trade agreements. The USTR administers the statutory procedures through an interagency committee.

Basis and Form of Authority

Under section 301, if the USTR determines that a foreign act, policy, or practice *violates or is inconsistent with a trade agreement, or is unjustifiable and burdens or restricts U.S. commerce*, then action by the USTR to enforce the trade agreement rights or to obtain the elimination of the act, policy, or practice is *mandatory*, subject to the specific direction, if any, of the President. The USTR is not required to act, however, if (1) a WTO panel has reported, or a dispute settlement ruling

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[15] 19 U.S.C. 2411--2420.

[16] The Statutory authority for Super 301 expired in 1990. Since then, the President has chosen to renew Super 301 authorities three times by Executive Order. The last time was on March 31, 1999, when the President issued Executive Order 13116 (64 Fed. Reg. 16333), which renewed Super 301 authorities through 2001. The authority has not been renewed since.

under a trade agreement finds, that U.S. trade agreement rights have not been denied or violated; (2) the USTR finds that the foreign country is taking satisfactory measures to grant U.S. trade agreement rights, or has agreed to (a) eliminate or phase out the practice, (b) an imminent solution to the burden or restriction on U.S. commerce, or (c) provide satisfactory compensatory trade benefits; or (3) the USTR finds, in extraordinary cases, that action would have an adverse impact on the U.S. economy substantially out of proportion to the benefits of action, or finds that action would cause serious harm to the U.S. national security. Any action taken must affect goods or services of the foreign country in an amount equivalent in value to the burden or restriction being imposed by that country on U.S. commerce.

If the USTR determines that the act, policy, or practice is *unreasonable or discriminatory and burdens or restricts U.S. commerce* and action by the United States is appropriate, then the USTR has *discretionary* authority to take all appropriate and feasible action, subject to the specific direction, if any, of the President, to obtain the elimination of the act, policy, or practice.

With respect to the form of action, the USTR is authorized to (1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to carry out a trade agreement with the foreign country involved; (2) impose duties or other import restrictions on the goods of, and notwithstanding any other provision of law, fees or restrictions on the services of, the foreign country for such time as the USTR deems appropriate; (3) withdraw or suspend preferential duty treatment under the Generalized System of Preferences (GSP), the Caribbean Basin Initiative, or the Andean Trade Preferences Act; or (4) enter into binding agreements that commit the foreign country to (a) eliminate or phase out the act, policy, or practice, (b) eliminate any burden or restriction on U.S. commerce resulting from the act, policy, or practice, or (c) provide the United States with compensatory trade benefits that are satisfactory to the USTR. The USTR may also take all other appropriate and feasible action within the power of the President that the President may direct the USTR to take.

With respect to services, the USTR may also restrict the terms and conditions or deny the issuance of any access authorization (e.g., license, permit, order) to the U.S. market issued under Federal law, notwithstanding any other law governing the authorization. Such action can apply only prospectively to authorizations granted or applications pending on or after the date a section 301 petition is filed or the USTR initiates an investigation. Before imposing fees or other restrictions on services subject to Federal or state regulation, the USTR must consult as appropriate with the Federal or state agency concerned.

Under section 301, action may be taken on a non-discriminatory basis or solely against the products or services of the country involved and with respect to any goods or sector regardless of whether they were involved in the particular act, policy, or practice. The statute does not require that action taken under section 301 be consistent with U.S. obligations under international agreements, but the dispute-settlement provisions of such agreement could be utilized.

If the USTR determines that action is to be in the form of import restrictions, it must give preference to tariffs over other forms of import restrictions and consider substituting on an incremental basis an equivalent duty for any other form of import restriction imposed. Any action with respect to export targeting must reflect, to the extent possible, the full benefit level of the targeting over the period during which the action taken has an effect.

Coverage of Authority

The term "unjustifiable" refers to acts, policies, or practices which violate or are inconsistent with U.S. international legal rights, such as denial of national treatment or normal trade relations (NTR) treatment, right of establishment, or protection of intellectual property rights (IPR).

The term "unreasonable" refers to acts, policies, or practices which are not necessarily in violation of, or inconsistent with, U.S. international legal rights, but are otherwise unfair and inequitable. In determining whether an act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms must be taken into account, to the extent appropriate. Unreasonable measures include, but are not limited to, acts, policies, or practices which (1) deny fair and equitable (a) opportunities for the establishment of an enterprise, (b) provision of adequate and effective IPR protection, notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), (c) non-discriminatory market access opportunities for U.S. persons that rely upon IPR protection, or (d) market opportunities, including foreign government toleration of systematic anticompetitive activities by or among enterprises in the foreign country that have the effect of restricting, on a basis inconsistent with commercial considerations, access of U.S. goods or services to a foreign market; (2) constitute export targeting; or (3) constitute a persistent pattern of conduct denying internationally-recognized worker rights, unless the USTR determines the foreign country has taken or is taking actions that demonstrate a significant and tangible overall advancement in providing those rights and standards throughout the country or such acts, policies, or practices are not inconsistent with the level of economic development of the country.

The term "export targeting" refers to any government plan or scheme consisting of a combination of coordinated actions bestowed on a specific enterprise, industry, or group thereof, which has the effect of assisting that entity to become more competitive in the export of a class or kind of merchandise.

The term "discriminatory" includes, where appropriate, any act, policy, or practice which denies national treatment or NTR treatment to U.S. goods, services, or investment.

The term "commerce" includes, but is not limited to, services (including transfers of information) associated with international trade, whether or not such services are

related to specific goods, and foreign direct investment by U.S. persons with implications for trade in goods or services.

Petitions and Investigations

Any interested person may file a petition under section 302 with the USTR requesting that action be taken under section 301 and setting forth the allegations in support of the request. The USTR reviews the allegations and must determine within 45 days after receipt of the petition whether to initiate an investigation. The USTR may also self-initiate an investigation after consulting with appropriate private sector advisory committees. Public notice of determinations is required, and in the case of decisions to initiate, publication of a summary of the petition and an opportunity for the presentation of views, including a public hearing if timely requested by the petitioner or any interested person.

In determining whether to initiate an investigation of any act, policy, or practice specifically enumerated as actionable under section 301, the USTR has the discretion to determine whether action under section 301 would be effective in addressing that act, policy, or practice.

Section 303 requires the use of international procedures for resolving the issues to proceed in parallel with the domestic investigation. The USTR must, on the same day as the determination is made, initiate an investigation and request consultations with the foreign country concerned regarding the issues involved. The USTR may delay the request for up to 90 days in order to verify or improve the petition to ensure an adequate basis for consultation.

If the issues are covered by a trade agreement and are not resolved during the consultation period specified in the agreement, if any, then the USTR must promptly request formal dispute settlement under the agreement before the earlier of the close of that consultation period or 150 days after the consultations began. The USTR must seek information and advice from the petitioner, if any, and from appropriate private sector advisory committees in preparing presentations for consultations and dispute settlement proceedings.

USTR Determinations and Implementation

Section 304 sets forth specific time limits within which the USTR must make determinations of whether an act, policy, or practice meets the unfairness criteria of section 301 and, if affirmative, what action, if any, should be taken. These determinations are based on the investigation under section 302 and, if a trade agreement is involved, on the international consultations and, if applicable, on the results of the dispute settlement proceedings under the agreement.

The USTR must make these *determinations*:

(1) within 18 months after the date the investigation is initiated or 30 days after the date the dispute settlement procedure is concluded, whichever is

earlier, in all cases involving a trade agreement;

(2) within 12 months after the date the investigation is initiated in cases not involving trade agreements;

(3) for cases involving TRIPs rights, not later than 30 days after the date that WTO dispute settlement is concluded; or

(4) within 6 months after the date the investigation is initiated in cases involving IPR priority countries if the USTR does not consider that a trade agreement, including TRIPs, is involved, or within 9 months if the USTR determines such cases (1) involve complex or complicated issues that require additional time, (2) the foreign country is making substantial progress on legislative or administrative measures that will provide adequate and effective protection, or (3) the foreign country is undertaking enforcement measures to provide adequate and effective protection.

Before making the determinations, the USTR must provide an opportunity for the presentation of views, including a public hearing if requested by an interested person, and obtain advice from the appropriate private sector advisory committees. If expeditious action is required, the USTR must comply with these requirements after making the determinations. The USTR may also request the views of the International Trade Commission on the probable impact on the U.S. economy of taking the action. Any determinations must be published in the Federal Register.

Section 305 requires the USTR to *implement* any section 301 actions within 30 days after the date of the determination to take action. The USTR may delay implementation by not more than 180 days if (1) the petitioner or, in the case of a self-initiated investigation, a majority of the domestic industry, requests a delay; or (2) the USTR determines that substantial progress is being made, or that a delay is necessary or desirable to obtain U.S. rights or a satisfactory solution. In cases involving IPR priority countries (see discussion below), implementation of actions may be delayed by not more than 90 days beyond the 30 days and only if extraordinary circumstances apply.

Under section 305(b), if the USTR determines to take no action in a case involving an affirmative determination of export targeting, the USTR must take alternative action in the form of establishing an advisory panel to recommend measures to promote the competitiveness of the affected domestic industry. The panel must submit a report on its recommendations to the USTR and the Congress within 6 months. On the basis of this report and subject to the specific direction, if any, of the President, the USTR may take administrative actions authorized under any other law and propose legislation to implement any other actions that would restore or improve the international competitiveness of the domestic industry. USTR must submit a report to the Congress within 30 days after the panel report is submitted on the actions taken and proposals made.

Monitoring of Foreign Compliance; Modification and Termination of Actions

Section 306 requires the USTR to monitor the implementation of each measure undertaken or settlement agreement entered into by a foreign country under section 301. If the USTR considers that a foreign country is not satisfactorily implementing a measure or agreement, the USTR must determine what further action will be taken under section 301. Such foreign non-compliance is treated as a violation of a trade agreement subject to mandatory section 301 action, subject to the same time limits and procedures for implementation as other action determinations. If the USTR considers that the foreign country has failed to implement a recommendation made pursuant to dispute settlement proceedings under the WTO, the USTR must make this determination no later than 30 days after the expiration of the reasonable period of time provided for such implementation in the DSU. Before making the determination on further action, the USTR must consult with the petitioner, if any, and with representatives of the domestic industry concerned, and provide interested persons an opportunity to present views.

Section 307 authorizes the USTR to modify or terminate a section 301 action, subject to the specific direction, if any, of the President, if (1) any of the exceptions to mandatory section 301 action in the case of trade agreement violations or unjustifiable acts, policies, or practices applies; (2) the burden or restriction on U.S. commerce of the unfair practice has increased or decreased; or (3) discretionary section 301 action is no longer appropriate. Before modifying or terminating any section 301 action, the USTR must consult with the petitioner, if any, and with representatives of the domestic industry concerned, and provide an opportunity for other interested persons to present views.

Any section 301 action terminates automatically if it has been in effect for 4 years and neither the petitioner nor any representative of the domestic industry which benefits from the action has submitted to the USTR in the final 60 days of that 4-year period a written request for continuation. The USTR must give the petitioner and representatives of the domestic industry at least 60 days advance notice by mail of termination. If a request for continuation is submitted, the USTR must conduct a review of the effectiveness of section 301 or other actions in achieving the objectives and the effects of actions on the U.S. economy, including consumers.

Information Requests; Reporting Requirements

Under section 308, the USTR is to make available information (other than confidential) upon receipt of a written request by any person concerning (1) the nature and extent of a specific trade policy or practice of a foreign country with respect to particular goods, services, investment, or IPR to the extent such information is available in the Federal Government; (2) U.S. rights under any trade agreement and the remedies which may be available under that agreement and U.S. laws; and (3) past and present domestic and international proceedings or actions

with respect to the policy or practice. If the information is not available, within 30 days after receipt of the request, the USTR must request the information from the foreign government or decline to request the information and inform the person in writing of the reasons.

The USTR must submit a semiannual report to the Congress describing petitions filed and determinations made, developments in and the status of investigations and proceedings, actions taken or the reasons for no action under section 301, and the commercial effects of section 301 actions taken. The USTR must also keep petitioners regularly informed of all determinations and developments regarding section 301 investigations.

IDENTIFICATION OF INTELLECTUAL PROPERTY RIGHTS PRIORITY COUNTRIES (SPECIAL 301)

Section 182 of the Trade Act of 1974, added by section 1303 of the Omnibus Trade and Competitiveness Act of 1988, requires the USTR to identify, within 30 days after submission of the annual National Trade Estimates (foreign trade barriers) report to the Congress required by section 181 the 1974 Act (i.e., by April 30) those foreign countries that (1) deny adequate and effective protection of IPR or fair and equitable market access to U.S. persons that rely upon IPR protection; and (2) those countries under paragraph (1) determined by the USTR to be "priority foreign countries." The USTR is to identify as priority countries only those that have the most onerous or egregious acts, policies, or practices with the greatest adverse impact on the relevant U.S. products, and that are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective IPR protection. In identifying foreign countries, the USTR is to take into account the history of IPR laws and practices of the foreign country as well as efforts of the United States, and the response of the foreign country, to achieve adequate and effective protection and enforcement of IPR. A country may be identified notwithstanding the fact that it may be in compliance with the specific obligations of the TRIPs Agreement. The USTR at any time may revoke or make an identification of a priority country, but must include in the semiannual section 301 report to the Congress a detailed explanation of the reasons for a revocation.

In addition, as a matter of administrative practice, the USTR has established a "priority watch list" of countries whose acts, policies, and practices meet some, but not all, of the criteria for priority foreign country identification. The problems of these countries warrant active work for resolution and close monitoring to determine whether further Special 301 action is needed. Also, the USTR maintains a "watch list" of countries that warrant special attention because they maintain IPR practices or barriers to market access that are of particular concern.

Section 302(b) requires the USTR to initiate a section 301 investigation within 30 days after identification of a priority country with respect to any act, policy, or

practice of that country that was the basis of the identification, unless the USTR determines initiation of an investigation would be detrimental to U.S. economic interests and reports the reasons in detail to the Congress. The procedural and other requirements of section 301 authority generally apply to these cases, except that investigations must be concluded and determinations made on whether the measures are actionable and an appropriate response within a tighter time limit of 6 months, which may be extended to 9 months if certain statutory criteria are met.

IDENTIFICATION OF TRADE LIBERALIZATION PRIORITIES (SUPER 301)

Section 310 of the Trade Act of 1974, as amended by section 1302 of the Omnibus Trade and Competitiveness Act of 1988, required USTR, within 30 days after the National Trade Estimates (foreign trade barriers) report to the Congress in 1989 and 1990, to identify U.S. trade liberalization priorities.

This identification included priority practices as well as priority foreign countries and estimates of the amount by which U.S. exports would be increased if the barrier did not exist. USTR was required to initiate section 301 investigations on all priority practices identified for each of the priority countries within 21 days after submitting the report to the House Ways and Means and Senate Finance Committees. In its consultations with the foreign country, USTR was required to seek to negotiate an agreement which provided for the elimination of, or compensation for, the priority practices within 3 years after the initiation of the investigation. This authority, however, expired in 1990.

On March 3, 1994, President Clinton issued Executive Order 12901 requiring USTR, within 6 months of the submission of the National Trade Estimates report for 1994 and 1995, to review U.S. trade expansion priorities and identify priority foreign country practices, the elimination of which would likely have the most significant potential to increase U.S. exports. On September 27, 1995, President Clinton issued Executive Order 12973, which extended the terms of Executive Order 12901 to 1996 and 1997. The order required USTR to submit to the House Ways and Means and Senate Finance Committees and to publish in the Federal Register a report on the priority foreign country practices identified. The report was not submitted in 1998 because the authority expired in 1997. The authority was renewed March 31, 1999, pursuant to Executive Order 13116, through 2001. The authority was not renewed again.

Under the terms of the executive order, USTR was required to initiate section 301 investigations within 21 days of the submission of the report with respect to all priority foreign country practices identified. The normal section 301 authorities, procedures, time limits, and other requirements generally applied to these investigations. In consultations requested with the foreign country under section 303, USTR was required to seek to negotiate an agreement providing for the elimination of the practices as quickly as possible or, if that was not feasible, compensatory trade benefits. USTR monitored any agreements pursuant to section

306. The semiannual report under section 309 included the status of any investigation and, where appropriate, the extent to which it led to increased U.S. export opportunities.

Section 314(f) of the URAA codified the terms of the executive order for the year 1995 as an amendment to section 310 of the Trade Act of 1974.

FOREIGN DIRECT INVESTMENT

Section 307(b) of the Trade and Tariff Act of 1984 requires the USTR to seek the reduction and elimination of foreign export performance requirements through consultations and negotiations with the country concerned if USTR determines, with interagency advice, that U.S. action is appropriate to respond to such requirements that adversely affect U.S. economic interests. In addition, USTR may impose duties or other import restrictions on the products or services of the country involved, including exclusion from entry into the United States of products subject to these requirements. USTR may provide compensation for such action subject to the provisions of section 123 of the Trade Act of 1974 if necessary or appropriate to meet U.S. international obligations.

Section 307(b) authority does not apply to any foreign direct investment, or to any written commitment relating to foreign direct investment that is binding, made directly or indirectly by any U.S. person prior to October 30, 1984 (date of enactment of the 1984 Act).

FOREIGN ANTICOMPETITIVE PRACTICES

Section 311 of the URAA provides for including an identification of foreign anticompetitive practices, the toleration of which by foreign governments is adversely affecting exports of U.S. goods or services, as part of the National Trade Estimate report to be submitted each year. USTR is to consult with the Attorney General in preparing this section of the report.

Unfair Practices in Import Trade

SECTION 337 OF THE TARIFF ACT OF 1930, AS AMENDED

Section 337 of the Tariff Act of 1930[17] declares unlawful unfair methods of competition and unfair acts in the importation or sale of articles (other than articles relating to certain intellectual property rights), the threat or effect of which is to (1) destroy or substantially injure an industry in the United States; (2) prevent the establishment of such an industry; or (3) restrain or monopolize trade and commerce in the United States. Section 337 also declares unlawful the importation

[17] Public Law 71-361, section 337, approved June 17, 1930, 19 U.S.C. 1337.

or sale of articles that (1) infringe a valid and enforceable U.S. patent or registered copyright; or are made, produced, processed, or mined under a process covered by a valid and enforceable U.S. patent; (2) infringe a valid and enforceable U.S.-registered trademark; (3) infringe a registered mask work of a semiconductor chip product; or infringe exclusive rights in a protected design. For this separate class of intellectual property rights, the importation or sale of infringing articles is unlawful only if an industry in the United States producing the articles protected by the patent, copyright, trademark, mask work, or design exists or is in the process of being established. It is not necessary to establish that the industry is injured by reason of such imports, as is the case with non-intellectual property rights violations. A U.S. industry is considered to exist if there is (1) significant investment in plant and equipment; (2) significant employment of labor or capital; or (3) substantial investment in the exploitation of the patent, copyright, trademark, mask work, or design, including engineering, research and development, or licensing.

The ITC is responsible for investigating alleged violations of section 337. Upon finding a violation, the ITC may issue an exclusion order and/or a cease and desist order, subject to presidential disapproval.

Section 337 is unique among the trade remedy laws in that it is the only one subject to the provisions of the Administrative Procedure Act (APA).[18] All ITC investigations and determinations under section 337 must be conducted on the record after publication of notice and opportunity for hearing in conformity with the APA.[19]

The language of section 337 closely parallels that of section 5 of the Federal Trade Commission Act,[20] and therefore the scope of section 337 has been compared to that of the antitrust and unfair competition statutes. The ITC has significant discretion in determining what practices are "unfair" under section 337. In practice, however, the overwhelming majority of cases dealt with under section 337 has been in the area of patent infringement. Among the few non-patent cases have been cases involving group boycotts, price fixing, predatory pricing, false labeling, false advertising, and trademark infringement.

Whenever, in the course of a section 337 investigation, the ITC has reason to believe that the matter before it involves dumping or subsidization of imports within the purview of the antidumping or countervailing duty laws, it must notify the administering authority of those laws for appropriate action.[21] If the alleged violation of section 337 is based solely on such dumping or subsidization practices, the ITC must terminate (or not initiate) the section 337 investigation. If it is based in part on such practices, and in part on other alleged practices, then the ITC may continue (or initiate) an investigation under section 337. This provision is designed

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[18] Act of June 11, 1946, ch. 324, sections 1-12, 5 U.S.C. 551 et seq.
[19] 19 U.S.C. 1337(c).
[20] Public Law 63-203, approved September 26, 1914, 38 Stat. 717, 15 U.S.C. 45.
[21] 19 U.S.C. 1337(b)(3).

to avoid duplication and conflicts in the administration of the trade remedy laws.

The Audio Home Recording Act of 1992[22] prohibited action under section 337 against alleged copyright infringement based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

Procedure

The ITC is required to investigate any alleged violation of section 337 on complaint under oath or upon its own initiative. The ITC must, within 45 days of initiation, set a target date and conclude its investigation at the earliest practicable time.

In the course of each investigation, the ITC is required to consult with and seek advice and information from the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and other appropriate departments and agencies.

In deciding whether an article has infringed a valid U.S. patent, the ITC applies the same statutory and decisional domestic patent law as would a district court. U.S. patent holders may file parallel actions in Federal district court and the Commission. Respondents sued in both fora under the same underlying cause of action may obtain a stay of district court proceedings until the ITC determination becomes final.

The URAA added a provision permitting respondents to raise counterclaims in section 337 investigations. Such claims, however, would be immediately removed to district court and cannot be litigated at the ITC.

Although damages are not an available remedy at the ITC as they are in district court, the ITC is empowered to issue limited exclusion orders, general exclusion orders, and cease and desist orders, which provide relief at the border. Specifically, if a violation of section 337 is found, the ITC must direct that the foreign articles be excluded from entry into the United States, unless it determines that such articles should not be excluded in consideration of the effect of exclusion on:

(1) the public health and welfare;

(2) competitive conditions in the U.S. economy;

(3) the production of like or directly competitive articles in the United States; and

(4) U.S. consumers.

The URAA added a provision establishing that the ITC is not permitted to issue a general exclusion order (i.e., an exclusion order that affects all shipments of the merchandise under investigation, as opposed to an order that affects merchandise

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[22] Public Law 102-563, approved October 28, 1992, 17 U.S.C. 1008 .

from only those persons determined to be violating section 337) unless: (1) such a general order is necessary to prevent circumvention of specific orders, (2) there is a pattern of violation, and (3) identifying those persons responsible for the infringement is difficult.

In appropriate circumstances, the ITC may issue temporary exclusion orders during the course of an investigation if it determines that there is reason to believe that there is a violation of section 337. In the event of a temporary exclusion order, entry is to be permitted only under bond. If petitioned by a complainant for issuance of a temporary exclusion order, the ITC must determine whether or not to issue such an order within 90 days after initiation of an investigation, with a possible extension of 60 days in more complicated cases. In such circumstances, the ITC may require the complainant to post a bond as a prerequisite for issuing an order. If the ITC later determines that the respondent has not violated these provisions, the bond may be forfeited to the respondent.

In addition to or in lieu of issuing an exclusion order, the ITC may issue an appropriate cease and desist order to be served on the violating party or parties, unless it finds that such order should not be issued in consideration of the effect of such order on the same public interest factors listed above.

The ITC may at any time, upon such notice and in such manner as it deems proper, modify or revoke any cease and desist order, and issue an exclusion order in its place. If a temporary cease and desist order is issued, the ITC may require the complainant to post a bond, which may be forfeited to the respondent if the ITC later determines that the respondent has not violated these provisions.

Any person who violates a cease and desist order issued under this section shall be subject to a civil penalty of up to the greater of $100,000 per day or twice the domestic value of the articles entered or sold on such day in violation of the order.

In the event that a person has been served with notice of proceedings and fails to appear to answer the complaint in cases where the complainant seeks relief limited solely to that person, the ITC must presume the facts alleged by the complainant to be true. If requested by the complainant, the ITC must issue an exclusion order and/or a cease and desist order against the person in default, unless it finds that such order should not be issued for the same public interest reasons listed above. Similarly, if no person appears to contest the investigation and violation is established, the ITC may issue a general exclusion order.

The ITC may order seizure and forfeiture of goods subject to an exclusion order if an attempt has been made to import the goods and the owner or importer has been notified that a further attempt to import the goods would lead to seizure and forfeiture.

Presidential and Judicial Review

Following an ITC determination of a violation of section 337, the President may, within 60 days after receiving notification, disapprove the ITC determination for "policy reasons." The statute does not specify what types of policy reasons may

provide the basis for disapproval. Upon presidential disapproval, actions taken by the ITC cease to have effect. If the President does not disapprove the ITC determination, or if he approves it, then the ITC determination becomes final. Any person adversely affected by a final ITC determination under section 337 may appeal the determination to the U.S. Court of Appeals for the Federal Circuit.

Import Relief (Safeguard) Authorities

SECTIONS 201-204 OF THE TRADE ACT OF 1974, AS AMENDED

Background

Chapter 1 of title II (sections 201-204) of the Trade Act of 1974,[23] as amended, sets forth the authority and procedures for the President to take action, including import relief, to facilitate efforts by a domestic industry which has been seriously injured by imports to make a positive adjustment to import competition.

From the outset of the trade agreements program in 1934, U.S. policy of seeking liberalization of trade barriers has been accompanied by recognition that difficult economic adjustment problems could result for particular sectors of the economy and, if serious injury results from increased competition by not necessarily unfairly traded imports, then domestic industries should be provided a period of relief to allow them to adjust to new conditions of trade. Beginning with bilateral trade agreements in the early 1940s, U.S. trade agreements, and eventually U.S. domestic law, have provided for a so-called "escape clause" or "safeguard" mechanism for import relief. This mechanism, while amended over the years, has provided authority for the President to withdraw or modify concessions and impose duties or other restrictions for a limited period of time on imports of any article which causes or threatens serious injury to the domestic industry producing a like or directly competitive article, following an investigation and determination by the U.S. International Trade Commission (ITC).

Under this basic trade agreements authority in section 350 of the Tariff Act of 1930, the President issued three executive orders setting forth procedures and criteria for escape-clause relief, which governed from 1947 to 1951. Section 7 of the Trade Agreement Extension Act of 1951 contained the first statutory procedure and criteria for escape-clause action, which governed from 1951 until replaced by sections 301, 351 and 352 of the Trade Expansion Act of 1962. The 1962 provisions, which also introduced the concept of trade adjustment assistance (see separate section), were repealed and replaced by sections 201-203 of the Trade Act of 1974. In 1988, the 1974 provisions were rewritten to place a greater emphasis on the responsibility of domestic industry to use the relief period to undertake positive adjustment.

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[23] 19 U.S.C. 2251-2254.

Primarily at U.S. insistence, an escape clause (safeguard) provision modeled after language in the 1947 executive order was included in article XIX of the original General Agreement on Tariffs and Trade (GATT 1947). As a result of the GATT Uruguay Round of multilateral trade negotiations, which resulted in the Agreement Establishing the World Trade Organization, GATT 1947 was replaced by GATT 1994. Article XIX was not changed in GATT 1994.[24] In the course of the negotiations, GATT members negotiated a new Agreement on Safeguards which provides rules for the application of article XIX of GATT 1994. The rules provide for, among other things, greater transparency in procedures and limitations on the duration of relief measures. However, in a departure from GATT 1947 article XIX, which authorized retaliation by members adversely affected by the measure when appropriate compensation was not forthcoming, the Agreement provides that a member country may not exercise its right to take retaliatory action during the first 3 years that a safeguard measure is in effect, provided that the safeguard measure resulted from an absolute increase in imports and otherwise conforms to the Agreement on Safeguards.

World Trade Organization (WTO) Panel Determinations

The United States has imposed safeguard measures on, among others, wheat gluten from the European Union, lamb meat from Australia and New Zealand, line pipe from Korea, and certain steel imports. The causation analysis performed by the ITC in all of these safeguard actions has been successfully challenged in the WTO. In particular, WTO panels and the Appellate Body have found that U.S. law as applied is inconsistent with the Safeguards Agreement because the ITC's causation analysis does not ensure that injury caused by other factors was not attributed to imports. In other words, the panels and the Appellate Body interpret the Safeguards Agreement to require the ITC to separate other sources of injury.

Petitions and Investigations

An entity representative of an industry (including a trade association, firm, union or group of workers) may file a petition under section 202 of the Trade Act of 1974 with the ITC. The petition must include a statement describing the specific purposes for which action is being sought, which may include facilitating the orderly transfer of resources to more productive pursuits, enhancing competitiveness, or other means of adjustment to new conditions of competition. Alternatively, the President,

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[24] The language of GATT article XIX is as follows: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this agreement, including tariff concessions, any product imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product and to the extent and for such time as may be necessary to prevent such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

U.S. Trade Representative, or the House Committee on Ways and Means or Senate Committee on Finance may request an investigation.

Upon petition, request, or on its own motion, the ITC conducts an investigation "to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." Substantial cause is defined as "a cause which is important and not less than any other cause."

In making its determination, the ITC must take into account all relevant economic factors, including certain factors specified in the statute,[25] and must consider the condition of the domestic industry over the course of the relevant business cycle. The ITC may determine to treat as the domestic industry: (1) only the portion or subdivision producing the like or directly competitive article of a producer of more than one article; and (2) only production concentrated in a major geographic area under certain circumstances. The ITC is required, to the extent information is available, in the case of a domestic producer which also imports, to treat as part of the domestic industry only the domestic production of such producer.

A public hearing is required during the course of the investigation. Whenever during the investigation the ITC has reason to believe increased imports are attributable in part to unfair trade practices, then it must promptly notify the agency administering the appropriate remedial law.

Normally the ITC must make its injury determination within 120 days of receipt of the petition or request. However, if the ITC determines that the investigation is extraordinarily complicated, it may take up to 30 additional days to make an injury determination. If the petition alleges that critical circumstances exist, the ITC must first determine, within 60 days of receipt of a petition containing such an allegation, whether critical circumstances exist. The ITC begins the injury phase of its investigation only after it has made its determination with respect to critical circumstances. If the ITC makes an affirmative injury finding, then it must recommend the action that would address the injury and be the most effective in facilitating efforts by the domestic industry to make a positive adjustment; such

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[25] These factors include: with respect to serious injury, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry; with respect to threat of serious injury, a decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, productivity or employment (or increasing underemployment) in the domestic industry concerned; the extent to which firms in the domestic industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development, the extent to which the U.S. market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets; and with respect to substantial cause, an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic producers. The presence or absence of any factor is not necessarily dispositive.

recommended action must be either a tariff, tariff-rate quota, quantitative restriction, adjustment measures, or a combination thereof.

The ITC's remedy recommendation and report must be submitted to the President within 180 days of the petition (within 240 days if critical circumstances are alleged). The report must also be made available to the public, and a summary of the report must be published in the Federal Register.

Adjustment Plans and Commitments

Under title II, as amended, petitioners are encouraged to submit, at any time prior to the ITC injury determination, a plan to promote positive adjustment to import competition. The law provides that positive adjustment occurs when (1) the domestic industry is able to compete successfully with imports after actions taken under section 204 terminate, or the domestic industry experiences an orderly transfer of resources to other productive pursuits; and (2) dislocated workers in the industry experience an orderly transition to productive pursuits.

The domestic industry may be considered to have made a positive adjustment to import competition even though the industry is not of the same size and composition as the industry at the time the investigation was initiated.

Before submitting an adjustment plan, the petitioner and other members of the domestic industry that wish to participate may consult with the USTR and other Federal Government officials for purposes of evaluating the adequacy of the proposals being considered for inclusion in the plan.

In addition, during the ITC investigation, the ITC is required to seek information (on a confidential basis to the extent appropriate) on actions being taken, or planned to be taken, or both, by firms and workers in the industry to make a positive adjustment to import competition. Any party may individually submit to the ITC commitments regarding actions such party intends to take to facilitate positive adjustment to import competition.

Provisional Relief

Under section 202(d) of the Trade Act of 1974, the President may provide provisional relief in the case of imports of a perishable agricultural product, provided that the imported product has been the subject of ITC monitoring for at least 90 days prior to the filing of the petition with the ITC and the ITC has made an affirmative preliminary determination. The ITC has 21 days from the date on which the petition is filed to make its determination and report any finding with respect to provisional relief, and the President has 7 days after receiving an ITC report containing an affirmative determination to determine what, if any, action to take.

Under section 202(d)(2), if critical circumstances are alleged in the petition, the ITC must, within 60 days of receipt of a petition containing such an allegation, determine whether critical circumstances exist and, if so, recommend an appropriate

remedy to the President. The ITC would find critical circumstances to exist when it determines, on the basis of available information, that there is "clear evidence" that increased imports of an article are a substantial cause of serious injury, or the threat thereof, to the domestic industry, and "delay in taking action . . . would cause damage to that industry that would be difficult to repair." After receiving a report containing an affirmative ITC determination, the President has 30 days in which to determine what, if any, action to take.

Provisional relief is to take the form of an increase in, or imposition of, a duty on imports, if such form of relief is feasible and would prevent or remedy the serious injury. Such actions generally remain in effect pending completion of the full ITC investigation and transmission of the ITC's report. However, no provisional relief action may remain in effect for more than 200 days.

Presidential Action

Within 60 days of receiving an affirmative ITC determination and report, the President shall take all appropriate and feasible action within his power which he determines will facilitate efforts by the domestic industry to make a positive adjustment and will provide greater economic and social benefits than costs. Any import relief provided may not exceed the amount necessary to prevent or remedy the serious injury.

In determining what action is appropriate, the President is required to consider a number of factors, including the adjustment plan (if any), individual commitments, probable effectiveness of action to promote positive adjustment, other factors related to the national economic interest, and the national security interest.

The actions authorized to be taken by the President include an increase in or imposition of a duty, imposition of a tariff-rate quota system, a modification or imposition of a quantitative restriction, implementation of one or more adjustment measures (including trade adjustment assistance), negotiation of agreements with foreign countries limiting the export from foreign countries and the import into the United States of an article, and any other action within his power.

The President may take action under this title for an initial period of up to 4 years, and may extend such action, at a level not to exceed that previously in effect, one or more times. However, the total period of relief, including any extensions, may not exceed 8 years.

As provided in section 311 of the North American Free Trade Agreement Implementation Act,[26] a relief action is not to apply to imports of an article when imported from Canada or Mexico unless imports of such article from such country account for a substantial share of imports of such article and contribute importantly to the serious injury or threat thereof. In addition, in accordance with the implementing legislation for the U.S. free trade agreements with Jordan (section

[26] P.L. 103-182, approved December 8, 1993, 19 U.S.C. 3371.

221 of P.L. 107-43), Singapore (section 331 of P.L. 108-78), and Australia (section 331 of P.L. 108-286), the President may exclude from action imports from the FTA partner if such imports are not a substantial cause of serious injury or threat thereof.[27]

The Trade Policy Committee, chaired by the USTR, is required to make a recommendation to the President as to what action the President should take. On the day the President takes action under this title, he must submit to Congress a document describing the action and the reasons for taking the action. If the action taken by the President differs from the action recommended by the ITC, the President shall state in detail the reasons for the difference. If the President decides that there is no appropriate and feasible action to take with respect to a domestic industry, the President is required to transmit to Congress on the day of such decision a document that sets forth in detail the reasons for the decision.

Congress may adopt a joint resolution of disapproval within 90 legislative days under the expedited procedures of section 152 of the Trade Act if the President takes action which is different from that recommended by the ITC or if the President declines to take any action. Under these procedures, resolutions are referred to the House Committee on Ways and Means and the Senate Committee on Finance, which are subject to a motion to discharge if the resolution has not been reported within 30 legislative days. No amendments to the motion or to the resolution are in order. Within 30 days after enactment of such a resolution, the President must proclaim the relief recommended by the Commission.

Monitoring, Modification, and Termination of Action

If presidential action is taken, the ITC is required to monitor developments in the industry, including efforts by the domestic industry to adjust and, if the initial period or an extension of the action exceeds 3 years, submit a report on the results of such monitoring at the midpoint of the initial period or extension, as appropriate. The Commission is required to hold a public hearing in the course of preparing such report.

After receiving an ITC report on the results of such monitoring, the President may reduce, modify, or terminate action if either (1) the domestic industry requests it on the basis that it has made a positive adjustment, or (2) the President determines that changed circumstances warrant such reduction, modification, or termination. Upon request of the President, the ITC must advise the President as to the probable economic effects on the domestic industry of any proposed reduction, modification, or termination of action.

Prior to the termination of relief, the ITC is required, at the request of the President or upon petition of the concerned industry, to conduct an investigation to

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[27] These provisions are reprinted in Chapter 13, which contains the complete legislation implementing these agreements.

determine whether the relief action continues to be necessary to prevent or remedy serious injury and whether there is evidence that the industry is making a positive adjustment to import competition. The ITC must hold a public hearing in the course of each such investigation and transmit its report to the President no later than 60 days before termination of the relief action, unless the President specifies a different date.

After any action taken under this title has terminated, the ITC must evaluate the effectiveness of the action in facilitating positive adjustment by the domestic industry to import competition, and submit a report to the President and to the Congress within 180 days of the termination of the action.

Subsequent Relief Actions

If relief was provided, no new relief action may be taken with respect to the same subject matter for a period of time equal to the period of import relief granted, or for 2 years, whichever is greater.

However, in the case of an action that is in effect for 180 days or less, the President may take a new action with respect to the same subject matter if at least 1 year has elapsed since the previous action went into effect and an action has not been taken more than twice in the 5-year period preceding the effective date of the new action.

SECTION 406 OF THE TRADE ACT OF 1974: MARKET DISRUPTION BY IMPORTS FROM COMMUNIST COUNTRIES

Section 406 of the Trade Act of 1974[28] was established to provide a remedy against market disruption caused by imports from Communist countries. The provision applies to imports from any Communist country, irrespective of whether it has received or currently receives non-discriminatory normal trade relations treatment. Enactment of section 406 resulted from concern that traditional remedies for unfair trade practices, such as the antidumping and countervailing duty laws, may be insufficient to deal with a sudden and rapid influx of substantial imports that can result from Communist country control of their pricing levels and distribution process.

The provisions of section 406 of the Trade Act of 1974, as amended, are in many ways similar to those under sections 201-203 of the Trade Act, except that section 406 provides a lower standard of injury causation and a faster relief procedure, and the investigation focuses on imports from a specific country.

Under section 406(a), the ITC conducts investigations to determine whether imports of an article produced in a Communist country (any country dominated or controlled by communism) are causing market disruption with respect to a

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[28] 19 U.S.C. 2436.

domestically produced article. Market disruption exists whenever imports of an article, like or directly competitive with an article produced by a domestic industry, are increasing rapidly so as to be a significant cause of material injury, or threat thereof, to such domestic industry. Imports are increasing rapidly if there has been a significant increase in imports, either actual or relative to domestic production, during a recent period of time. In making a determination of market disruption, the ITC is required to consider, among other factors, the volume of imports, the effect of imports on prices, the impact of imports on domestic producers, and evidence of disruptive pricing practices or other efforts to unfairly manage trade patterns.

The ITC conducts such investigations at the request of the President or the USTR, upon resolution of either the House Committee on Ways and Means or the Senate Committee on Finance, on its own motion, or upon the filing of a petition by an entity (including a trade association, firm, union, or a group of workers) which is representative of an industry. The Commission must complete its investigation within 3 months, including a public hearing.

If the ITC finds that market disruption exists, it must also recommend to the President relief in the form of rates of duty or quantitative restrictions that will prevent or remedy such market disruption. The President then has 60 days to advise Congress as to what, if any, relief he will proclaim. Any import relief must be proclaimed within 15 days after the determination to provide it, except that the President has an additional 60 days to negotiate an orderly marketing agreement if he decides to provide relief in that form. Relief applies only to imports from the subject Communist country. Relief is limited to a maximum 5-year period subject to one renewal of up to 3 years.

Section 406(c) authorizes the President, prior to an ITC determination, to take temporary emergency action with respect to imports from a Communist country whenever he finds that there are reasonable grounds to believe there is market disruption. When taking such action, the President must also request the Commission to conduct an investigation under section 406(a). Any emergency relief ceases to apply on the day the Commission makes a negative finding or on the effective date of action by the President following an affirmative ITC finding.

SECTIONS 421-423 OF THE TRADE ACT OF 1974, AS AMENDED: MARKET DISRUPTION BY IMPORTS FROM THE PEOPLE'S REPUBLIC OF CHINA

Section 103 of Public Law 106-286, approved October 10, 2000, authorizing the extension of permanent normal trade relations to the People's Republic of China created a new chapter of title IV of the Trade Act of 1974 to implement the anti-surge mechanism established under the U.S. – China Bilateral Trade Agreement (U.S. – China Agreement), concluded on November 15, 1999. This provision replaces section 406 of the Trade Act of 1974, which has not applied to China since China joined the WTO in December 2001.

Section 421 permits the provision of relief to U.S. domestic industries and

workers where products of Chinese origin are being imported in such increased quantities and under such conditions as to cause or threaten to cause market disruption to the domestic producers as a whole of like or directly competitive products. Relief is imposed only to the extent and for such period as the President considers necessary to prevent or remedy the market disruption. Procedures are modeled after Section 406, with certain modifications to conform to language of the U.S. – China Agreement. U.S. industries or workers claiming injury due to import surges from China may file a petition with the ITC, or the ITC can initiate an investigation at the request of the President or on motion of the House Ways and Means Committee or the Senate Finance Committee. According to the U.S. – China Agreement and under the legislation, market disruption occurs when subject imports "are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury or threat of material injury to the domestic industry."

In determining whether market disruption exists, the ITC considers objective factors, including: (1) the volume of imports of the product subject to the investigation; (2) the effect of imports of such product on prices in the United States of like or directly competitive articles, and (3) the effect of imports of such product on the domestic industry producing like or directly competitive articles. The presence or absence of any factor listed above is not necessarily dispositive of whether market disruption exists.

Within 60 days after receipt of the petition, request or motion (90 days, where the petitioner alleges critical circumstances), the ITC is to make a determination as to whether the subject imports are causing or threatening market disruption. Not later than 20 days after the ITC makes an affirmative determination with respect to market disruption, the ITC must issue a report to the President and to the USTR setting forth the reasons for its determination and recommendation(s) of actions necessary to prevent or remedy market disruption. Within 20 days, the USTR publishes a notice of proposed action in the Federal Register, seeking views and evidence on the appropriateness of the proposed action and whether it would be in the public interest. The USTR is also required to hold a hearing on the proposed action.

If the ITC's determination is affirmative with respect to market disruption, the President is required to request consultations with the Chinese to remedy the market disruption. If the United States and China are unable to reach agreement within the 60 day consultation period established in the bilateral agreement and under section 421, then the President is required to decide what action, if any, to take within 25 days after the end of consultations. Any relief proclaimed becomes effective in 15 days. If the President determines that an agreement with China concluded under this section is not preventing or remedying the market disruption at issue, then the President is to initiate new consultations and proceedings under section 421. However, if China is not complying with the terms of the agreement entered into under the U.S. – China Agreement, then the President is required to provide prompt relief consistent with the terms of the agreement.

The entire period from petition to proclamation of relief is 150 days, which is identical to the duration under section 406 of the Trade Act of 1974.

Section 421 also establishes standards for the application of Presidential discretion in providing relief to injured industries and workers. If the ITC makes an affirmative determination on market disruption, there is a presumption in favor of providing relief. That presumption can be overcome if the President finds that providing relief would have an adverse impact on the U.S. economy clearly greater than the benefits of such action, or, in extraordinary cases, that such action would cause serious harm to the national security of the United States.

The provision also sets forth authority to the President to modify, reduce or terminate relief, as well an opportunity for the President to request a report from the ITC on the probable effects of such action. In addition, section 421 allows for extension of relief under certain circumstances.

The President is authorized to provide a provisional safeguard in cases where "delay would cause damage which it would be difficult to repair," as permitted under the U.S.-China Bilateral Agreement. If such circumstances are alleged, the ITC is required to make a determination on critical circumstances and a preliminary determination on market disruption within 45 days of receipt of the petition, request, or motion. If those determinations are affirmative, the President is required to determine whether to provide such provisional relief within 20 days.

Finally, section 422 implements a provision in the U.S.-China Bilateral Agreement concerning trade diversion. That provision addresses circumstances in which a safeguard applied by a third country with respect to Chinese goods "causes or threatens to cause significant diversions of trade" into the United States. If, on the basis of the monitoring results provided by the Customs Service and other reasonably available relevant evidence, the ITC determines that an action by another WTO Member threatens or causes significant trade diversion, the USTR is required to request consultations with China and/or the Member imposing the safeguard. If, as provided in the U.S.-China Bilateral Agreement, consultations fail to lead to an agreement to address the trade diversion within 60 days, the President is required to determine, within 40 days after consultations end, what action, if any, to take to prevent or remedy the trade diversion. The total time from petition to relief under the trade diversion provision is 150 days. Section 422 also requires the ITC to examine changes in imports into the United States from China since the time that the WTO Member commenced the investigation that led to a request for consultations.

The product-specific safeguard is available for 12 years after China's accession to the WTO, or until December 2013.

SECTION 1102 OF THE TRADE AGREEMENTS ACT OF 1979: PUBLIC AUCTION OF IMPORT LICENSES

Section 1102 of the Trade Agreements Act of 1979 authorizes the President to

sell import licenses by public auction, under such terms and conditions as the President deems appropriate. Any regulations prescribed under this authority must, to the extent practicable and consistent with efficient and fair administration, ensure against inequitable sharing of imports by a relatively small number of the larger importers.

Import licenses which are potentially subject to this auction authority are identified in section 1102 by the law authorizing the import restriction. For example, import licenses used to administer a quantitative restriction under the escape clause (section 203 of the Trade Act of 1974), the market disruption clause (section 406 of the Trade Act of 1974) or section 301 of the Trade Act of 1974 may be sold by public auction. Any quantitative import restriction imposed under the International Emergency Economic Powers Act or the Trading With the Enemy Act may also be administered by an auctioned import license. Certain agricultural import quotas, however (such as certain meat quotas, cheese quotas, and dairy quotas) are exempt from the auction authority and therefore may not be administered by means of auctioned licenses.

Trade Adjustment Assistance

CHAPTERS 2, 3, AND 5 OF TITLE II OF THE TRADE ACT OF 1974, AS AMENDED

The trade adjustment assistance (TAA) programs were first established under the Trade Expansion Act of 1962 for the purpose of assisting in the special adjustment problems of workers and firms dislocated as a result of a Federal policy of reducing barriers to foreign trade. As a result of limited eligibility and usage of the programs, criteria and benefits were expanded under title II of the Trade Act of 1974 (Public Law 93-618). The Omnibus Budget Reconciliation Act of 1981 (OBRA) (Public Law 97-35) reformed the program for workers. The amendments, particularly in program eligibility and benefits, were intended to reduce program cost significantly and to shift the focus of TAA from income compensation for temporary layoffs to return-to-work through training and other adjustment measures for the long-term or permanently unemployed.

Sections 2671-2673 of the Deficit Reduction Act of 1984 (Public Law 98-369) amended the program for workers to increase the availability of worker training allowances and the level of job search and relocation benefits, and amended the program for firms to increase the availability of industry-wide technical assistance.

Sections 1421-1430 of the Omnibus Trade and Competitiveness Act of 1988 (OTCA) (Public Law 100-418), enacted on August 23, 1988, made significant amendments in the worker TAA program, particularly concerning the eligibility criteria for cash benefits, funding, and administration. A training requirement as a condition for income support to encourage and enable workers to obtain early reemployment became effective as of November 21, 1988. This replaced a 1986 amendment that instituted a job-search requirement as a condition for receiving cash

benefits. The amendments also expanded TAA eligibility coverage of workers and firms, contingent upon the imposition of an import fee to fund program costs. The OTCA extended TAA program authorization for an additional 2 years until September 30, 1993.

Sections 501-506 of the North American Free Trade Agreement (NAFTA) Implementation Act, Public Law 103-182, approved December 8, 1993, set forth the "NAFTA Worker Security Act," establishing the NAFTA transitional adjustment assistance program. The Trade Adjustment Assistance Reform Act of 2002 eliminated the NAFTA-TAA program as a separate program and consolidated it with the regular TAA program.

TAA Program for Workers

TAA for workers under sections 221 through 250 of the Trade Act of 1974, as amended, consists of trade readjustment allowances (TRAs), employment services, training and additional TRAs allowances while in training, and job search and relocation allowances for certified and otherwise qualified workers. The program is administered by the Employment and Training Administration (ETA) of the Department of Labor through state agencies under cooperative agreements between each state and the Secretary of Labor. ETA processes petitions and issues certifications or denials of petitions by groups of workers for eligibility to apply for TAA. The state agencies act as Federal agents in providing program information, processing applications, determining individual worker eligibility for benefits, issuing payments, and providing reemployment services and training opportunities.

Certification requirements

A two-step process is involved in the determination of whether an individual worker will receive TAA: (1) certification by the Secretary of Labor of a petitioning group of workers in a particular firm as eligible to apply; and (2) approval by the state agency administering the program of the application for benefits of an individual worker covered by a certification.

The process begins by a group of three or more workers, their union, or authorized representative filing a petition with the ETA for certification of group eligibility. To certify a petitioning group of workers as eligible to apply for adjustment assistance, the Secretary must determine that three conditions are met:

(1) a significant number or proportion of the workers in the firm or subdivision of the firm have been or are threatened to be totally or partially laid off;

(2) sales and/or production of the firm or subdivision have decreased absolutely; and

(3) increased imports of articles like or directly competitive with articles produced by the firm or subdivision of the firm have "contributed importantly"

to both the layoffs and the decline in sales and/or production. Such firms are now referred to informally as "directly affected" or "primary" firms.

The OTCA amendments expanded the potential eligibility coverage to include workers in any firm or subdivision of a firm that engages in exploration or drilling for oil or natural gas.

The Trade Adjustment Assistance Reform Act of 2002 enlarged the class of workers eligible for TAA benefits to include those who work for firms that have closed in order to shift production to a country that either has a free trade agreement with the United States (e.g., Mexico or Canada) or is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act. Under the old NAFTA-TAA program, workers in firms that had shifted production to Mexico or Canada had been automatically eligible, and thus the TAA Reform Act changes maintain this provision while expanding its scope as described above and consolidating it into a single program.

The Trade Adjustment Assistance Reform Act of 2002 enlarged the class of workers eligible for TAA benefits to include certain adversely affected secondary workers. A secondary worker is one who works for either 1) a downstream producer that performs value-added production processes such as final assembly or finishing on an article that was the basis for certification for a primary eligible firm, or 2) a supplier that supplies components parts directly to a primary eligible firm for an article that was the basis for certification of the primary eligible firm. To certify a petitioning group of workers in a secondary firm as eligible to apply for adjustment assistance, the Secretary must determine that three conditions are met:

(1) a significant number or proportion of the workers in the firm or subdivision of the firm has become totally or partially separated, or is threatened to become totally or partially separated;

(2) the workers' firm or subdivision is a supplier or downstream producer to a firm or subdivision that employed a group of workers who received a certification of eligibility for a primary firm, and such supply or production is related to the article that was the basis for such certification; and

(3) either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm or subdivision accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm or subdivision contributed importantly to the workers' separation or threat of separation.

With respect to all applicants, the Secretary is required to make the eligibility determination within 40 days after a petition is filed. A certification of eligibility to apply for TAA covers workers who meet the requirements and whose last total or partial separation from the firm or subdivision before applying for benefits occurred within 1 year prior to the filing of the petition.

State agencies must give written notice by mail to each worker to apply for TAA

where it is believed the worker is covered by a certification of eligibility and also must publish notice of each certification in newspapers of general circulation in areas where certified workers reside. State agencies must also advise each adversely affected worker, at the time that worker applies for UI, of TAA program benefits as well as the procedures, deadlines, and qualifying requirements for applying. State agencies must advise each such worker to apply for training before or at the same time the worker applies for TRA benefits, and promptly interview each certified worker and review suitable training opportunities available.

Qualifying requirements for trade readjustment allowances

To receive entitlement to payment of a TAA for any week of unemployment, an individual must be an adversely affected worker or secondary worker covered by a certification, file an application with the State agency, and meet the following qualifying requirements:

(1) The worker's first qualifying separation from adversely affected employment occurred within the period of the certification applicable to that worker, i.e, on or after the "impact date" in the certification (the date on which total or partial layoffs in the firm or subdivision thereof began or threatened to begin, but never more than 1 year prior to the date of the petition), within 2 years after the date the Secretary of Labor issued the certification covering the worker, and before the termination date (if any) of the certification.

(2) The worker was employed during the 52-week period preceding the week of the first qualifying separation at least 26 weeks at wages of $30 or more per week in adversely affected employment with a single firm or subdivision of a firm. A week of unemployment includes the week in which layoff occurs and up to 7 weeks of employer-authorized vacation, sickness, injury, maternity, or military leave, or service as a full-time union representative. Weeks of disability covered by workmen's compensation and, as amended in 1992, weeks of active duty in a military reserve status may also count toward the 26-week minimum.

(3) The worker was entitled to unemployment insurance (UI), has exhausted all rights to any UI entitlement (except for additional compensation that is funded by a state and is not reimbursed from any Federal funds), including any extended benefits (EB) or Federal supplemental compensation (FSC) (if in existence), and does not have an unexpected waiting period for any UI.

(4) The worker must not be disqualified with respect to the particular week of unemployment for EB by reason of the work acceptance and job search requirements under section 202(a)(3) of the Federal-State Extended Unemployment Compensation Act of 1970. All TRA claimants in all states are subject to the provisions of the EB "suitable work" test under that Act (i.e., must accept any offer of suitable work, actively engage in seeking work, and register for work) after the end of their regular UI benefit period as a

precondition for receiving any weeks of TRA payments. The EB work test does not apply to workers enrolled or participating in a TAA-approved training program; the test does apply to workers for whom TAA-approved training is certified as not feasible or appropriate.

(5) The worker must timely be enrolled in, or have completed following separation from adversely affected employment within the certification period, a training program approved by the Secretary of Labor in order to receive basic TAA payments.

The training requirement may be waived by the Secretary for the following reasons: 1) the worker has been or will be recalled by the firm, 2) the worker possesses marketable skills, 3) the worker is within 2 years of retirement, 4) the worker is unable to participate in training for health reasons, 5) the first available enrollment date for training is within 60 days of the determination or there are extenuating circumstances for longer delay, or 6) training is not reasonably available to the worker.

This training requirement to encourage and enable workers to obtain early reemployment became effective under the OTCA amendments as of November 21, 1988; this 1988 amendment replaced a 1986 amendment that instituted a job search requirement as a condition for receiving cash benefits.

Cash benefit levels and duration

A worker is entitled to TRA payments for weeks of unemployment beginning the later of (a) the first week beginning more than 60 days after the filing date of the petition that resulted in the certification under which the worker is covered (i.e., weeks following the statutory deadline for certification), or (b) the first week after the worker's first total qualifying separation.

The TRA cash benefit amount payable to a worker for a week of total unemployment is equal to, and a continuation of, the most recent weekly benefit amount of UI payable to that worker preceding that worker's first exhaustion of UI following the worker's first total qualifying separation under the certification, reduced by any Federal training allowance and disqualifying income deductible under UI law.

The maximum amount of basic TRA benefits payable to a worker for the period covered by any certification is 52 times the TRA payable for a week of total unemployment minus the total amount of UI benefits to which the worker was entitled in the benefit period in which the first qualifying separation occurred (e.g., a worker receiving 39 weeks of UI regular and extended benefits could receive a maximum 13 weeks of basic TRA benefits). UI and TRA payments combined are limited to a maximum 52 weeks in all cases involving extended compensation benefits (i.e., a worker who received 52 or more weeks of unemployment benefits would not be entitled to basic TRA). TRA benefits are not payable to workers participating in on-the-job training.

The eligibility period for collecting basic TRA is the 104-week period that immediately follows the week in which a total qualifying separation occurs. If the worker has a subsequent total qualifying separation under the same certification, the eligibility period for basic TRA moves from the prior eligibility period to 104 weeks after the week in which the subsequent total qualifying separation occurs. An adversely affected worker may also be eligible for an additional 26 weeks of benefits in order to complete a program of remedial education, thus increasing the eligibility period to 130 weeks.

A worker may receive up to 52 additional weeks of TRA benefits after collecting basic benefits (up to a total maximum of 104 weeks) if that worker is participating in approved training. To receive the additional benefits, the worker must apply for the training program within 210 days after certification or first qualifying separation, whichever date is later. Additional benefits may be paid only during the 52-week period that follows the last week of entitlement to basic TRA, or that begins with the first week of training if the training begins after the exhaustion of basic TRA.

A worker participating in approved training continues to receive basic and additional TRA payments during breaks in such training if the break does not exceed 30 days, if the worker was participating in the training before the beginning of the break, resumes participation in the training after the break ends, and the break is provided for in the training schedule. Weeks when TRA is not payable because of this break provision count against the eligibility periods for both basic and additional TRA.

Training and other employment services, job research and relocation allowances

Training and other employment services and job search and relocation allowances are available through state agencies to certified workers whether or not they have exhausted UI benefits and become eligible for TRA payments.

Employment services consist of counseling, vocational testing, job search and placement, and other supportive services, provided for under any other Federal law.

Training, preferably on-the-job, shall be approved for a worker if the following six conditions are met:

(1) there is no suitable employment available;

(2) the worker would benefit from appropriate training;

(3) there is a reasonable expectation of employment following training completion;

(4) approved training is reasonably available from government agencies or private sources;

(5) the worker is qualified to undertake and complete such training; and

(6) such training is suitable for the worker and available at a reasonable cost.

If training is approved, the worker is entitled to payment of the costs from the Secretary directly or through a voucher system, unless they have been paid or are

reimbursable under another Federal law. On-the-job training costs are payable only if such training is not at the expense of currently employed workers. The 1988 amendments added remedial education as a separate and distinct approvable training program.

The OTCA amendments converted training from an entitlement to the extent appropriated funds were available, to an entitlement without regard to the availability of funds to pay the training costs. Approved training is an entitlement in any case where the six criteria for approval are reasonably met, up to an $220 million statutory ceiling on annual fiscal year training costs (including job search and relocation allowances and subsistence payments) payable from TAA funds. Up to this limit workers are entitled to have the costs of approved training paid on their behalf. If the Secretary foresees that the $220 million ceiling would be exceeded in any fiscal year, the Secretary will decide how remaining TAA funds shall be apportioned among the states for the balance of that year.

As a result of the OTCA amendments, costs of approved TAA training may be paid solely from TAA funds, solely from other Federal or state programs or private funds, or from a mix of TAA and public or private funds, except if the worker in the case of a non-governmental program would be required to reimburse any portion of the costs from TAA funds. Duplicate payment of training costs is prohibited, and workers are not entitled to payment of training costs from TAA funds to the extent these costs are paid or shared from other sources. Training may still be approved if the fiscal year TAA funding entitlement limit is reached, provided the training costs are paid from outside sources.

Supplemental assistance is available to defray reasonable transportation and subsistence expenses for separate maintenance when training is not within the worker's commuting distance, equal to the lesser of actual per diem expenses or 50 percent of the prevailing Federal per diem rate for subsistence and prevailing mileage rates under Federal regulations for travel expenses.

Job search allowances are available to certified workers who cannot obtain suitable employment within their commuting area, are totally laid off, and who apply within 1 year after certification or last total layoff, whichever is later, or within 6 months after concluding training. The allowance for reimbursement is equal to 90 percent of necessary job search expenses, based on the same increased supplemental assistance rates described above, up to a maximum amount of $1250. The Secretary of Labor is required to reimburse workers for necessary expenses incurred to participate in an approved job search program.

Relocation allowances are available to certified workers totally laid off at the time of relocation who have been able to obtain an offer of or actual suitable employment only outside their commuting area, who apply within 14 months after certification or last total layoff, whichever is later, or within 6 months after concluding training, and whose relocation takes place within 6 months after application of completion of training. As amended in 1981 and 1984, the allowance is equal to 90 percent of reasonable and necessary expenses for transporting the

worker, family, and household effects, based on the same increased supplemental assistance rates described above, plus a lump sum payment of three times the worker's average weekly wage up to a maximum amount of $1250.

Health coverage tax credit

The Trade Act of 2002 created a Federal tax credit which subsidizes private health insurance coverage for displaced workers certified to receive TAA benefits. The tax credit covers 65 percent of the premiums paid by the worker for qualified health insurance. This credit is referred to as the Health Coverage Tax Credit (HCTC), and the Internal Revenue Service is responsible for its administration. The HCTC is advanceable, meaning that workers can receive the credit when purchasing insurance rather than receiving it after filing their tax returns. The HCTC is also refundable; eligible workers can receive the credit even if they have zero tax liability for the year. To be eligible for the HCTC, a worker must be (1) a recipient of a TRA; (2) an individual certified for TAA benefits who is not yet eligible to receive a TRA because she or he has not exhausted all rights to UC; or (3) a participant receiving benefits under the new Alternative Trade Adjustment Assistance program described in the next section.

The HCTC can be used for limited types of health insurance. It can be applied towards premiums paid to continue employer-sponsored health insurance under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). The HCTC also can be used to purchase an individual health insurance policy (if the worker was covered by an individual policy at least 30 days before becoming unemployed) or to purchase a group policy offered through a spouse's employer. An eligible worker can use the credit to purchase various types of State-based insurance coverage, such as coverage through a State-sponsored high-risk pool, coverage through a health insurance program offered to State employees, and coverage through an arrangement between private entities and the State. State-based coverage must be guaranteed issue (i.e., a plan must be offered to all who apply), cannot limit coverage due to pre-existing conditions, cannot charge higher premiums than those charged to individuals who do not receive the HCTC, and must offer the same benefits as those provided to individuals who do not receive the HCTC.

Funding

Federal funds, as an appropriated entitlement from general revenues under the Federal Unemployment Benefit Account (FUBA) in the Department of Labor, cover the portion of the worker's total entitlement represented by the continuation of UI benefit levels in the form of TRA payments, as well as payments for training and job search and relocation allowances, and state-related administrative expenses. Funds made available under grants to states defray expenses of any employment services and other administrative expenses. For fiscal year 2005, $1.057 billion

has been appropriated for trade readjustment allowances and related administrative expenses. Funding for training, job search and relocation allowances, and related expenses is an annual appropriated entitlement under the Training and Employment Services account of the Department of Labor.

The states are reimbursed from Treasury general revenues for benefit payments and other costs incurred under the program. A penalty under section 239 of the Trade Act of 1974 provides for reduction by 15 percent of the credits for state unemployment taxes which employers are allowed against their liability for Federal unemployment tax if a state has not entered into or has not fulfilled its commitments under a cooperative agreement.

NAFTA Worker Security Act Repealed

The NAFTA Trade Adjustment Assistance program was repealed by the Trade Adjustment Assistance Reform Act of 2002 enacted as part of the Trade Act of 2002 on August 6, 2002. The NAFTA program was consolidated into a single, unified, and expanded TAA program. Workers who were receiving benefits under the NAFTA-TAA program continue to receive benefits and services as before the repeal.

Demonstration Project for Alternative Trade Adjustment Assistance for Older Workers

The Trade Adjustment Assistance Reform Act of 2002 directed the Secretary of Labor to create an alternative TAA program for older workers. Workers eligible for the program must be at least 50 years of age, obtain full-time reemployment from a different firm within 26 weeks of separation from a certified, adversely affected firm, and earn not more than $50,000 per year in the reemployed position.

The Act directs the Secretary to create criteria for a firm's eligibility based upon whether a significant number of workers in the firm are 50 years of age or older, whether the workers possess skills that are not easily transferable, and the competitive conditions of the workers' industry. Benefits to workers under this alternative program are 50 percent of the difference between the wages received by the worker from the new employment and the wages received at the time of separation from the adversely affected firm. Eligible workers may receive assistance up to $10,000 during a two-year period. The program terminates within 5 years of enactment.

TAA Program for Firms

Sections 251 through 264 of the Trade Act of 1974, as amended, contain the procedures, eligibility requirements, benefits and their terms and conditions, and administrative provisions of the TAA program for firms adversely impacted by

increased import competition. The program is administered by the Economic Development Administration within the Department of Commerce. Amendments in 1986 under the COBRA eliminated financial assistance (direct loan or loan guarantee) benefits, increased government participation in technical assistance, and expanded the criteria for firm certification.

Program benefits consist exclusively of technical assistance for petitioning firms which qualify under a two-step procedure: (1) certification by the Secretary of Commerce that the petitioning firm is eligible to apply, and (2) approval by the Secretary of Commerce of the application by a certified firm for benefits, including the firm's proposal for economic adjustment.

To certify a firm as eligible to apply for adjustment assistance, the Secretary must determine that three conditions are met:

(1) a significant number or proportion of the workers in the firm have been or are threatened to be totally or partially laid off;

(2) sales and/or production of the firm have decreased absolutely, or sales and/or production that accounted for at least 25 percent of total production or sales of the firm during the 12 months preceding the most recent 12-month period for which data are available have decreased absolutely; and

(3) increased imports of articles like or directly competitive with articles produced by the firm have "contributed importantly" to both the layoffs and the decline in sales and/or production.

The 1988 amendments expanded potential eligibility coverage of the program to include firms that engage in exploration or drilling for oil or natural gas. Unlike the worker program, this extension applies only prospectively after August 23, 1988.

A certified firm may file an application with the Secretary of Commerce for trade adjustment assistance benefits at any time within 2 years after the date of the certification of eligibility. The application must include a proposal by the firm for its economic adjustment. The Secretary may furnish technical assistance to the firm in preparing its petition for certification and/or in developing a viable economic adjustment proposal.

The Secretary approves the firm's application for assistance only if he determines that its adjustment proposal (a) is reasonably calculated to make a material contribution to the economic adjustment of the firm; (b) gives adequate consideration to the interests of the workers in the firm; and (c) demonstrates that the firm will make all reasonable efforts to use its own resources for economic development.

Benefits

Technical assistance may be given to implement the firm's economic adjustment proposal in addition to, or in lieu of, precertification assistance or assistance in developing the proposal. It may be furnished through existing government agencies or through private individuals, firms, and institutions (including private consulting

services), or by grants to intermediary organizations, including regional TAA Centers. As amended by the COBRA, the Federal Government may bear the full cost of technical assistance to a firm in preparing its petition for certification. However, the Federal share cannot exceed 75 percent of the cost of assistance furnished through private individuals, firms, or institutions for developing or implementing an economic adjustment proposal. Grants may be made to intermediate organizations to defray up to 100 percent of their administrative expenses in providing technical assistance.

The Secretary of Commerce also may provide technical assistance of up to $16 million annually per industry to establish industrywide programs for new product or process development, export development, or other uses consistent with adjustment assistance objectives. The assistance may be furnished through existing agencies, private individuals, firms, universities, and institutions, and by grants, contracts, or cooperative agreements to associations, unions, or other non-profit organizations of industries in which a substantial number of firms or workers have been certified.

Funding

Funds to cover all costs of the program are subject to annual appropriations to the EDA of the Department of Commerce from general revenues. For fiscal year 2005, $12 million was appropriated for the program.

TRADE ADJUSTMENT ASSISTANCE FOR FARMERS

The Trade Adjustment Assistance Reform Act of 2002 created a new TAA program tailored for farmers or agricultural commodity producers (including livestock producers). Unlike the regular TAA program, the Secretary of Agriculture implements the TAA for farmers program. The Secretary issued the final rule implementing the program on August 20, 2003.

The International Trade Commission (ITC) must notify the Secretary of Agriculture when the ITC begins a safeguard investigation of a particular agricultural commodity. The law also requires the Secretary of Agriculture to report to the President the extent to which the adjustment of producers of the affected agricultural commodity may be facilitated through the trade adjustment assistance for farmers program.

The Secretary of Agriculture must provide full information to producers about the benefit allowances, training, and other employment services available and about the petition and application procedures and appropriate filing dates for such benefits. The Secretary is required to provide written notice to each agricultural producer that the Secretary has reason to believe is covered by a certification and to publish notice of the benefits available to certified agricultural commodity producers in newspapers of general circulation in the areas in which such producers reside. The Secretary must also provide information concerning procedures for applying for and

receiving all other Federal assistance services that may be available to workers facing economic distress. The Secretary is directed to make eligibility determinations within 40 days after a petition by a group is made. In order to receive a trade adjustment allowance under this chapter, an agricultural producer's net farm income for the most recent year must be less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this chapter. Also, the producer must:

(1) file an application for such allowance within 90 days after the date on which the Secretary makes a determination and issues a certification of eligibility;

(2) submit to the Secretary sufficient information to establish the amount of the agricultural commodity covered by the application that was produced by the producer in the most recent year;

(3) certify that the producer has not received any cash benefits from the regular TAA program; and

(4) certify that the producer has met with a Department of Agriculture employee or agent to obtain information and technical assistance that will assist the producer in adjusting to import competition with respect to the adversely affected agricultural commodity.

An affected agricultural commodity producer is entitled to adjustment assistance in an amount equal to one-half the difference between 80 percent of the national average price for the affected agricultural commodity for the preceding 5 marketing years and the national average price in the most recent year, multiplied by the amount of the commodity produced by the producer in the most recent year. In determining the amount of adjustment assistance to which an affected agricultural producer is entitled in subsequent years, the national average price of the commodity is determined by using the 5-marketing-year period used to determine the amount of cash benefits for the first certification. The maximum amount of cash benefits an agricultural producer may receive in any 12-month period may not exceed $10,000. An agricultural producer entitled to receive a cash benefit under this chapter is not eligible for any other cash benefit under any other trade adjustment assistance program but is entitled to employment services and training benefits under sections 239 and 240 of chapter 2. Also, the total amount of payments made to an agricultural producer under this chapter during any crop year may not exceed the limitation on counter-cyclical payments set forth in section 1001(c) of the Food Security Act of 1985. The overall spending cap on the program is $90,000,000.

Chapter 3: OTHER LAWS REGULATING IMPORTS

Authorities To Restrict Imports of Agricultural and Textile Products

SECTION 204 OF THE AGRICULTURAL ACT OF 1956, AS AMENDED

Section 204 of the Agricultural Act of 1956, as amended,[1] authorizes the President to negotiate agreements with foreign governments to limit their exports of agricultural or textile products to the United States. The President is authorized to issue regulations governing the entry of products subject to international agreements concluded under this section. Furthermore, if a multilateral agreement is concluded among countries accounting for a significant part of world trade in the articles concerned, the President may also issue regulations governing entry of those same articles from countries which are not parties to the multilateral agreement, or countries to which the United States does not apply the Agreement.

The authority provided under section 204 has been used to negotiate bilateral agreements restricting the exportation of certain meats to the United States,[2] as well as to implement an agreement with the European Communities (EC) restricting U.S. importation of certain cheeses from the EC.[3] Section 204 also provided the legal basis for the GATT Arrangement Regarding International Trade in Textiles, commonly referred to as the Multifiber Arrangement (MFA),[4] for U.S. bilateral agreements with 47[5] textile-exporting nations, and currently provides the basis for U.S. implementation of the Uruguay Round Agreement on Textiles and Clothing (ATC), which replaced the expired MFA. On January 1, 2005, the ATC and bilateral agreements with WTO members terminated, thereby removing many of the specific restrictions for textiles and clothing.

MULTIFIBER ARRANGEMENT (MFA)

The Multifiber Arrangement was a multilateral agreement negotiated under the auspices of the General Agreement on Tariffs and Trade. The MFA provided a general framework and guiding principles for the negotiation of bilateral agreements between textile importing and exporting countries, or for unilateral action by an importing country if an agreement cannot be reached. In effect since 1974, the MFA was established to deal with problems of market disruption in textile trade, while permitting developing countries to share in expanded export

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1 Public Law 84-540, ch. 327, approved May 28, 1956, 70 Stat. 200, as amended by Public Law 87-488, approved June 19, 1962, 76 Stat. 104, 7 U.S.C. 1854 and Public Law 103-465, approved Dec. 8, 1994.
2 Exec. Order No. 11539, June 30, 1970, 35 Fed. Reg. 10733, as amended by Exec. Order No. 12188, Jan. 2, 1980, 45 Fed. Reg. 989.
3 Exec. Order No. 11851, April 10, 1975, 40 Fed. Reg. 16645.
4 Arrangement Regarding International Trade in Textiles, T.I.A.S. 7840 (1973) (expired 1994).
5 In force as of January 1, 2003.

opportunities. It was superceded by the Uruguay Round Agreement on Textiles and Clothing.

Background

The first voluntary agreement to limit exports of cotton textiles to the United States was negotiated with Japan in 1957. Through the 1950's cotton textile imports, especially from Japan, continued to increase and generate pressure for import restraints. In 1956, the Congress passed the Agricultural Act of 1956 which, among other things, provided negotiating authority for agreements restricting imports of textile products. Pursuant to this authority, the United States negotiated a 5-year voluntary restraint agreement on cotton textile exports from Japan, announced in January 1957.

As textile and apparel imports from low-wage developing countries began to rise, pressure mounted for a more comprehensive approach to the import problem. On May 2, 1961, President Kennedy announced a Seven Point Textile Program, one point of which called for an international conference of textile importing and exporting countries to develop an international agreement governing textile trade. On July 17, 1961, a textile conference was convened under the auspices of the GATT. The discussions culminated in the promulgation of the Short-Term Arrangement on Cotton Textile Trade (STA) on July 21, 1961.[6] The STA covered the year October 1, 1961, to September 30, 1962, and established a GATT Cotton Textiles Committee to negotiate a long-range cotton textile agreement.

From October 1961 through February 1962, the STA signatories met in Geneva and negotiated a Long-Term Arrangement for Cotton Textile Trade (LTA), to last for 5 years beginning October 1, 1962.[7] The LTA provided for negotiation of bilateral agreements between cotton textile importing and exporting countries, and for imposition of quantitative restraints on particular categories of cotton textile products from particular countries when there was evidence of market disruption. In June of 1962, section 204 of the Agricultural Act of 1956 was amended to give the President authority to control imports from countries which did not sign the LTA.[8]

In the fall of 1965 the LTA was reviewed, and criticism within the U.S. textile industry mounted with respect to the LTA's failure to cover man-made fiber textiles. In 1967, however, the LTA was extended for 3 additional years with no additional fiber coverage. In 1970, the LTA was again extended for 3 more years.

Meanwhile, multifiber agreements limiting imports not only of cotton but also of wool and man-made fiber textiles were negotiated by the Nixon administration on a bilateral basis. On October 15, 1971, bilateral multifiber agreements were announced with Japan, Hong Kong, South Korea, and Taiwan. A multilateral

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6 T.I.A.S. 4884 (1961) (expired 1962).
7 T.I.A.S. 5240 (1962) (expired 1973).
8 Public Law 87-488, approved June 19, 1962, 76 Stat. 104.

agreement, incorporating the provisions of the bilaterals with Hong Kong, South Korea, and Taiwan, was also signed to allow the United States the authority, under section 204 of the Agricultural Act of 1956 as amended in 1962, to impose quantitative restrictions unilaterally on non-signatory countries.

The following year, in June 1972, efforts to negotiate a multifiber agreement on a broader multilateral basis led to the establishment of a GATT working party to conduct a comprehensive study of conditions of world trade in textiles. The working group submitted its study to the GATT Council early in 1973. In the fall of that year, multilateral negotiations for a multifiber agreement began after passage of a 3-month extension of the LTA. The first Multifiber Arrangement (MFA I) was concluded on December 20, 1973, and came into force January 1, 1974, supplanting the LTA.

MFA provisions

The MFA was modeled after the LTA and provided for bilateral agreements between textile importing and exporting nations under which industrial countries have negotiated quotas on imports of textiles and clothing primarily from developing countries (article 4), and for unilateral actions following a finding of market disruption (article 3).[9] Quantitative restrictions were based on past volumes of trade, with the right, within certain limits, to transfer the quota amounts between products and between years. The MFA also provided generally for a minimum annual growth rate of 6 percent.[10] Quotas already in place had to be conformed to the MFA or abolished within a year. The products covered by MFA I, II, and III included all manufactured products whose chief value is represented by cotton, wool, man-made fibers or a blend thereof. Also included were products whose chief weight is represented by cotton, wool, man-made fibers or a blend thereof. MFA IV expanded product coverage to include products made of vegetable fibers such as linen and ramie, and silk blends as well.

Overall management of the MFA was undertaken by the GATT Textiles Committee, which is made up of representatives of countries participating in the MFA and is chaired by the GATT Director General. A Textile Surveillance Body (TSB) was established to supervise the detailed implementation of the MFA.

MFA I was in effect for 4 years, until the end of 1977. During MFA renewal negotiations in July 1977, the EC succeeded in putting in the renewal protocol a

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9 Market disruption exists when domestic producers are suffering "serious damage" or the threat thereof. Factors to be considered in determining whether the domestic producers are seriously damaged include: turnover, market share, profit, export performance, employment, volume of disruptive and other imports, production, utilization of capacity, productivity, and investments. Such damage must be caused by a sharp, substantial increase of particular products from particular sources which are offered at prices substantially below those prevailing in the importing country.

10 The annual growth rate applies to overall levels of imports from a particular supplier country. Higher or lower growth rates can apply to particular products, as long as the overall growth rate with respect to that supplier country is 6 percent.

provision allowing jointly agreed "reasonable departures" from the MFA requirements in negotiating bilateral agreements. The MFA was then renewed for 4 more years.[11]

MFA II was in effect through December 1981. On December 22, 1981, a protocol was initialed extending the MFA for an additional 4½ years, and providing a further interpretation of MFA requirements in light of 1981 conditions.[12] MFA III expired on July 31, 1986. MFA IV went into effect on August 1, 1986 for a 5-year period. MFA IV was extended on July 31, 1991 for 17 months from August 1, 1991 until December 31, 1992, with the expectation that the results of the GATT Uruguay Round of Multilateral Trade Negotiations would come into force immediately thereafter. On December 10, 1992, the MFA was extended for a fifth time, until December 31, 1993, and then for a final time until December 31, 1994.

URUGUAY ROUND AGREEMENT ON TEXTILES AND CLOTHING

One aim of the Uruguay Round was to integrate the textiles and clothing sector into the GATT. The resulting Agreement on Textiles and Clothing (ATC) established a 10-year phase-out of the quotas established under the MFA, recently completed on January 1, 2005. Although the MFA expired on December 31, 1994, the bilateral agreements negotiated between individual importing and supplier governments remained in force until January 1, 2005. If the signatories to those bilateral arrangements were members of the World Trade Organization (WTO), the quota levels established under those agreements were governed by the ATC. This means that the quotas were adjusted in accordance with ATC rules.

As a general matter, the ATC was designed to generate increased opportunities for trade in the textiles and apparel sector. It liberalized the current trading rules in two ways: by increasing and then removing quotas in three phases over a 10-year transition period and by requiring all participants to provide improved access to their markets.

Thus, on January 1, 1995, each importing signatory to the WTO, including the United States, Canada, and the members of the European Union, was required to "integrate" into normal GATT rules (including GATT 1947's article XIX and the Uruguay Round's Agreement on Safeguards) textile and apparel products accounting for at least 16 percent of the trade covered by the ATC, using 1990 as the base year. Integration meant that any existing quotas on integrated products under MFA rules automatically became void and no new quotas could be imposed upon such products unless there was a determination of serious injury under GATT article XIX, the safeguards provision.

On January 1, 1998, the importing nations were required to integrate another 17 percent of trade, and on January 1, 2002, an additional 18 percent. Beginning in

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11 T.I.A.S. 8939 (1977).
12 T.I.A.S. 10323 (1981).

2005, all textile and apparel trade was covered under normal GATT/WTO rules.

The U.S. Committee for the Implementation of Textile Agreements (CITA) currently was the inter-agency group responsible for administering the U.S. quota program and implementation of ATC. CITA is composed of representatives from the Departments of Commerce, State, Labor, and Treasury, and the Office of the U.S. Trade Representative. The Commerce Department official is chair of the committee and heads the Office of Textiles and Apparel (OTEXA) in the Department of Commerce which implements the terms of the agreements and decisions made by CITA. A primary function of CITA was to monitor imports and to determine when calls for consultations were to be made. The CITA announced in October 1994 which products it would integrate on January 1, 1995.[13]

Under the Uruguay Round Agreements Act (URAA), CITA decided by April 30, 1995 which products will be included in each of the next two integration "tranches," with the most sensitive products to be integrated last.[14] No changes could be made in the integration schedule, unless required by law or in order to carry out U.S. international obligations, or to correct technical errors or reclassifications. On January 1, 2005, all products were fully integrated as scheduled.

Rules of origin

The URAA also directed the U.S. Treasury Department to change by July 1, 1996, the rules of origin for textile and apparel products. Rules of origin determine which country's quotas should be charged for particular imports when manufacturing of the goods occurs in more than one country. The U.S. domestic industry sought the rules change on the ground that suppliers were purposely splitting their manufacturing operations among various countries as a means of avoiding quota restrictions.

For apparel products, the rules change means that the place of assembly will generally determine the origin of a product. Under Customs Service regulations in effect prior to July 1, 1996, the origin of apparel depended upon the complexity of the assembly operation. For garments requiring only simple assembly, such as the sewing together of four or five pieces, the country in which those pieces were cut was usually considered the country of origin. For more tailored garments, the country of assembly was the country of origin under the old rule. According to the new rule, textile products manufactured in several countries are deemed to originate where the "most important" assembly process occurred, regardless of where the product was cut. Under both the earlier rule and the rule established in 1996, the origin of knitted garments is the country in which the knit-to-shape pieces were formed.

For non-apparel products, the country in which the fabric is woven or knit

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13 59 Fed. Reg. 51942

14 60 Fed. Reg. 5625

generally is the country of origin under the new rule. Prior to the URAA changes, the country in which the fabric was printed and dyed and subject to additional "finishing operations" or in which it is cut and then sewn was often the country of origin for quota purposes.

Products covered by the United States-Israel Free Trade Area Agreement are exempt from the rules change.

BILATERAL TEXTILE AGREEMENTS

Under authority of section 204 of the Agricultural Act of 1956, as amended, and in conformity with the MFA and later the ATC, the President negotiated bilateral agreements restricting textile exports from supplier countries. There were 47 such bilateral agreements in force as of December 31, 2003, 27 of which were with members of the World Trade Organization. Provisions of bilateral agreements in effect with WTO members were carried over and remained in effect under the new ATC. Quota levels established under these agreements provided the base levels for the annual growth provisions of the ATC. Bilateral textile agreements with WTO members expired on December 31, 2004, thereby leaving trade in products under those agreements subject to general WTO rules. The United States continues to have agreements (not governed by the ATC) with eight non-WTO members.

Bilateral textile agreements apply to textile products, fiber and fabric, and apparel. Each agreement contains flexible, specific, and/or aggregate limits with respect to the type and volume of textile products that the supplier country can export to the United States. Limits are usually set in terms of square meter equivalents (SME's). They allow, under certain conditions, for carryover (from the prior year to current year within the same product category), carryforward (from the subsequent year to the current year within the same product category), and swing (from one product category to another product category within the same year) of unused portions of quotas. These provisions may be applied only with respect to specific import limits set forth in the bilateral agreement. Each agreement also provides for adjustment of import levels in accordance with specified growth rates.

Under the MFA, before CITA could request consultations with a particular country (or "issue a call") for the purpose of negotiating a quota, it had to determine that imports of a certain category of products from that country were causing—or threatening to cause—"market disruption." Thus, under the MFA, the injury determination was both product and country specific. Under the ATC, the injury had to be only product specific, and once an injury determination was made, a country could seek a quota with any supplier whose exports of that product were "increasing sharply and substantially." If consultations failed to produce an agreement on restrictive levels, and a country was able to demonstrate that such imports were causing or threatening serious damage, the country could

take unilateral action to establish a quota at a level based upon trade during a recent 12-month period. Such quotas were permitted to remain in place for up to 3 years (although the quota had to be increased annually), unless the product was integrated into normal WTO rules before then. All calls were subject to review by the WTO's Textiles Monitoring Board.

TEXTILES AND APPAREL TRADE UNDER FREE TRADE AGREEMENTS

NAFTA.—NAFTA created the first of a number of special rules affecting trade in textiles and essentially serves as a model for future FTAs involving countries with significant levels of trade. The NAFTA textiles rules of origin determine which goods are "originating" and therefore eligible for preferential treatment, i.e., reduced or duty-free entry. Products of Canada or Mexico that do not meet the NAFTA origin rules, or one of the several exceptions to those rules, are not precluded from entering the United States. However, they may be subject to normal (non-preferential) duties or, for Mexican goods, to quota requirements.

A "yarn-forward" rule of origin applies to most textile products, although there are a number of exceptions. Yarn-forward means that the finished textile or apparel product must be made from fabric formed in North America from yarn spun in North America. The agreement itself does not use the term "yarn-forward," because the rule of origin is implemented through a tariff-shift method. Essentially, an annex to the agreement lists various categories of goods by reference to their tariff lines and provides the degree of shift needed for the good to be transformed sufficiently to qualify for NAFTA origination. Thus, the NAFTA rule of origin for most textile and apparel goods in HTS Chapter 61 implicitly sets a "yarn-forward" rule of origin when it states that the good must have changed from another chapter, i.e., the good before transformation must not have begun as a yarn, fabric, or apparel component, which are largely classified in the same chapter as the finished good.

NAFTA also includes "tariff preference levels" (TPLs) that permit a limited number of Canadian and Mexican textile and apparel products to enter the United States each year at the preferential NAFTA tariff rate even though the products do not meet the "yarnforward" origin rules, and therefore are not "originating" goods. These are essentially annual tariff rate quotas. Once imports reach the TPL limit, most-favored-nation (MFN) duties will be applied to any additional non-originating products entered during the rest of the year.

Most quotas on Mexican-made textile and apparel products were eliminated upon implementation of the NAFTA, but a few quotas remained. The remaining quotas applied only to products that did not meet the preferential NAFTA origin rules but were considered to be products of Mexico for other purposes. The remaining U.S. quotas on Mexican goods were removed by the year 2004.

Israel and Jordan.—Unlike NAFTA, the U.S-Jordan FTA and the U.S.-Israel FTA do not have specific textile and apparel rules of origin, largely because trade

with these countries did not warrant the need for negotiating such a complex set of rules. Instead, textile and apparel goods must meet the same rule of origin as other goods: 1) the good must be wholly the growth, product, or manufacture of a party to the agreement, and 2) the party must have contributed at least 35% of the value of the product based upon contribution of materials or processing.

Chile.—The U.S.-Chile FTA uses very similar, sometimes identical, rules of origin for textiles and apparel as in NAFTA. Under Chapter 4 of the FTA, an apparel product must generally meet a tariff shift rule, which implicitly imposes a yarn-forward requirement. To qualify as an originating good imported into the United States from Chile, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Chile from yarn, or fabric made from yarn, that originates in Chile or the United States. There is a limited amount of apparel that may enter the United States duty free, subject to tariff preference level (TPL) caps if it does not meet the rule of origin.

Singapore.—The textile and apparel rule of origin in the U.S.-Singapore FTA is similar to that in the U.S.-Chile FTA. Annex 3A of the FTA states that an apparel product must generally meet a tariff shift rule, which implicitly imposes a yarn-forward requirement. To qualify as an originating good imported into the United States from Singapore, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Singapore from yarn, or fabric made from yarn, that originates in Singapore or the United States. There is a limited amount of apparel that may enter the United States duty free, subject to tariff preference level (TPL) caps, even if it does not meet the rule of origin.

Morocco.— Under the rules in Article 4.3 and Annex 4-A of the FTA, an apparel product must generally meet a tariff shift rule, which implicitly imposes a 'yarn forward' requirement. To qualify as an originating good imported into the United States from Morocco, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Morocco from yarn, or fabric made from yarn, that originates in Morocco or the United States, or both. However, Article 4.3.11 provides a limited exception to this general rule allowing access for 30 million square meter equivalents of apparel that does not meet the yarn forward rule of origin in the first year of the Agreement, phasing down over a ten-year period. Section 203 also includes a de minimis exemption providing that in most cases a textile or apparel good will be considered originating if the total weight of all nonoriginating fibers or yarns is not more than 7 percent of the total weight of the good.

Australia.—The U.S.-Australia FTA follows the Chile/Singapore model. Under chapter 5.1 and Annex 4-A of the FTA, an apparel product must generally meet a tariff shift rule, which implicitly imposes a yarn-forward requirement. To qualify as an originating good imported into the United States from Australia, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Australia from yarn, or fabric made from yarn, that originates in Australia or the United States, or both.

SECTION 22 OF THE AGRICULTURAL ADJUSTMENT ACT OF 1933

Section 22 of the Agricultural Adjustment Act of 1933, as amended (7 U.S.C. 624), authorizes the President to impose fees or quotas on imported products that undermine any U.S. Department of Agriculture (USDA) domestic commodity program. This authority is designed to prevent imports from interfering with USDA efforts to stabilize domestic agricultural commodity prices. However, in the Uruguay Round Agreement on Agriculture, the United States agreed to convert all quotas and fees on imports from any country to which the United States applies the WTO Agreement to tariff-rate quotas. Section 22 authority is available now only for imports from countries to which the United States does not apply the WTO Agreement. As such, Section 22 is inoperable for all practical purposes.

Basic provisions

Under section 22, the Secretary of Agriculture advises the President when the Secretary has reason to believe that—

(1) imports of an article are rendering, or tending to render ineffective, or materially interfering with, any domestic, agricultural-commodity price-support program, or other agricultural program; or

(2) imports of an article are reducing substantially the amount of any product processed in the United States from any agricultural commodity or product covered by such programs.

If the President agrees that there is reason for the Secretary's belief, the President must order an ITC investigation and report. Using this report as his basis, the President must determine whether the statutory conditions warranting imposition of a section 22 quota or fee exist.

If the President makes an affirmative determination, he is required to impose, by proclamation, either import fees (which may not exceed 50 percent ad valorem) or import quotas (which may not exceed 50 percent of the quantity imported during a representative period) sufficient to prevent imports of the product concerned from harming or interfering with the relevant agricultural program.

Application

In the past, section 22 was used to impose import restrictions on 12 different commodities or food product groups: (1) wheat and wheat flour; (2) rye, rye flour, and rye meal; (3) barley, hulled or unhulled, including rolled, ground, and barley malt; (4) oats, hulled or unhulled, and unhulled ground oats; (5) cotton, certain cotton wastes, and cotton products; (6) certain dairy products; (7) shelled almonds; (8) shelled filberts; (9) peanuts and peanut oil; (10) tung nuts and tung oil; (11) flaxseed and linseed oil; and (12) sugars, syrups, and sugar-containing products. Section 22 fees and quotas have since been terminated for most of these

commodities. Prior to implementation of the Uruguay Round Agreement on agriculture in late 1994, import quotas were in place to protect certain cotton, specific dairy products, peanuts, and certain sugar-containing products, such as sweetened cocoa, pancake flours, and ice-tea mixes. Import fees were in place on refined sugar.

AGRICULTURE TRADE UNDER THE URUGUAY ROUND AGREEMENTS ACT

Background

The Uruguay Round Agreement on Agriculture strengthens multilateral rules for trade in agricultural products and requires WTO members to reduce export subsidies, trade distorting domestic support programs and import protection. The Agreement establishes rules and reduction commitments over 6 years for developed countries and 10 years for developing countries on export subsidies, domestic subsidies, and market access. The Agreement is intended to be the beginning of a reform process for world trade in agriculture and provides for the initiation of a second round of negotiations concerning agriculture trade beginning in the year 2000.

Export subsidies must be reduced from 36 percent (budget outlays) and 21 percent (volume) from a 1986-1990 base period for specific products and categories. Trade distorting domestic subsidies must be bound and reduced by 20 percent from a 1986-1990 base period. Non-tariff import barriers are subject to comprehensive tariffication, and minimum or current market access commitments. The United States thus agreed to convert quotas and fees authorized under section 22 of the Agricultural Adjustment Act to tariff-rate equivalents in the form of tariff-rate quotas. In the Uruguay Round, all U.S. agriculture tariffs were bound and subject to specific reduction commitments.

The operation of these rules is linked to particular commitments by each WTO member contained in that WTO member's schedule annexed to the Marrakesh Protocol to the GATT 1994. Each WTO member's schedule sets forth the WTO members' commitments regarding the access it will provide to its market for imports of agriculture products and the maximum amount of domestic support and export subsidies it will provide to agricultural products. Under article 3 of the Agreement, the domestic support and export subsidy commitments in each WTO member's schedule are an integral part of GATT 1994.

Article 2 and annex 1 of the Agreement define agricultural products covered as those products classified in chapters 1-24 of the Harmonized Tariff Schedule (HTS) (excluding fish and fish products) and under 13 headings or subheadings in other chapters of the HTS, including cotton, wool, hides and fur skins.

The United States was obligated to implement its commitments over a 6-year period beginning in 1995. The rights and obligations in the Agriculture Agreement supplement those in GATT 1994, including the Agreements on

Subsidies and Countervailing Measures and Application of Sanitary and Phytosanitary Measures.

Basic provisions

Section 401(a)(1) of the Uruguay Round Trade Agreements Act amends section 22 of the Agricultural Adjustment Act of 1933, such that no quota or fee shall be imposed under this section with respect to any import that is the product of a country or separate customs territory to which the United States applies the WTO Agreements. Accordingly, when products of WTO members only are involved, there would be no need to conduct a section 22 investigation. Section 22 authority is retained with respect to imports from countries and separate customs territories to which the United States does not apply the WTO agreements. These amendments were effective upon entry into force of the WTO Agreement, January 1, 1995.

The conversion of U.S. quantitative import restrictions to tariff-rate quotas and staged tariff reductions was implemented by Presidential Proclamation No. 6763 issued on December 13, 1994. Effective on January 1, 1995, this proclamation amended the HTS of the United States under general authority provided to the President in the Uruguay Round Agreements Act. The President proclaimed tariff-rate quotas for the following products subject to tariffication by the United States: dairy products, sugar, sugar-containing products, peanuts, cotton and beef. In general tariff-rate quotas replaced previously applicable restrictions as of January 1, 1995. In some cases, however, the United States began implementing its increased access commitments after the entry into force of the WTO Agreement, if the quota year for those products began at a different time of year.

Section 404(a) of the Uruguay Round Agreements Act authorizes the President to take such action as may be necessary to implement the tariff-rate quotas set out in the U.S. agricultural tariff concessions in schedule XX of the Agreement and to ensure that imports of agricultural products do not disrupt the orderly marketing of commodities in the United States. Section 404(b) authorizes the President, upon the advice of the Secretary of Agriculture, to temporarily increase the in-quota quantity of an agricultural import that is subject to a tariff-rate quota when the President determines and proclaims that the supply of the same, directly competitive, or substitutable agricultural product will be inadequate because of natural disaster, disease or a major national market disruption to meet domestic demand at reasonable prices.

In administering the tariff-rate quota, the President is authorized to allocate, among supplying countries or customs areas, the in-quota quantity of a tariff-rate quota for any agricultural product, and to modify any allocation as he deems appropriate.

Section 404(e) of the Uruguay Round Agreements Act amends the Caribbean Basin Economic Recovery Act (CBERA), the Andean Trade Preference Act

(ATPA), the Generalized System of Preferences (GSP) statute, and General Note 3(a) to the HTS (relating to insular possessions) to specify that any duty preference afforded these laws will be available only for the in-quota amount of a tariff-rate quota. Over-quota imports from CBERA, ATPA, or GSP countries, or U.S. insular possessions will in all cases be subject to the higher rate of duty. Section 405(b) requires the President, if he determines that it is appropriate, to invoke either a volume-based or price-based special safeguard for agricultural goods and to determine, consistent with article 5, the amount of the additional duty to be imposed, the period during which such duty will be imposed, and any other terms and conditions applicable to the duty.

AGRICULTURE TRADE UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT

Background

NAFTA is the first free trade agreement entered into by the United States that employs the concept of "tariffication" of agricultural quantitative restrictions. Under this method, a country replaces each of its non-tariff barriers with a "tariff-equivalent," which is a tariff set at a level that will provide protection for a product equivalent to the non-tariff barrier that the tariff replaces. In the case of several agricultural goods listed in the tariff schedules of each NAFTA country, the NAFTA countries converted quantitative restrictions to tariffs or tariff-rate quotas.

Pursuant to the NAFTA, U.S. section 22 quotas and fees were converted to tariff-rate quotas, under which "qualifying" Mexican dairy products, cotton, sugar-containing products, and peanuts will enter the duty free up to a certain quantity of imports (the "in quota" quantity.) A "qualifying good" is an agricultural good that meets, based on its Mexican content alone, the NAFTA rules of origin contained in section 202 of the NAFTA Implementation Act.

To a large extent, the NAFTA agriculture agreement amounts to three bilateral agreements rather than a trilateral accord. For agriculture goods traded between United States and Canada, the NAFTA incorporates the agricultural market access provisions of chapter 7 of the United States-Canada Free-Trade Agreement (CFTA). The NAFTA sets out separate agricultural market access agreements between Mexico and the United States and between Mexico and Canada. In addition the NAFTA includes several obligations governing agriculture trade common to all three countries.

Basic provisions

Section 321(b) of the North American Free Trade Agreement Implementation Act authorizes the President, pursuant to the NAFTA, to exempt any "qualifying

good" from any quantitative limitation or fee imposed under section 22 of the Agricultural Adjustment Act for as long as Mexico is a NAFTA country.

As discussed above, the United States agreed to convert its import quotas to tariff rate quotas under section 22 of the Agricultural Adjustment Act for imports from Mexico of dairy products, cotton, sugar-containing products and peanuts. Article 302(4) of the NAFTA permits the allocation of the in-quota quantity under these tariff rate quotas, provided that such measures do not have trade restrictive effects on imports in addition to those caused by the imposition of the tariff-rate quotas. Section 321(c) of the NAFTA Act directs the President to take such action as may be necessary to ensure that imports of goods subject to tariff rate quotas do not disrupt the orderly marketing of commodities in the United States.

Section 321(f) of the Act is a free-standing provision that establishes an end-use certificate requirement for imports of wheat or barley imported into the United States from any foreign country or instrumentality that requires end-use certificates on wheat or barley produced in the United States.

Section 308 of the NAFTA Act amends the CFTA Act, which implemented the tariff "snapback" provided for in article 702 of the CFTA, to provide that the President may impose a temporary duty on imports of a listed Canadian fresh fruit or vegetable if a certain import price and other conditions exist.

Section 309 establishes a price-based snapback for imports of frozen concentrated orange juice into the United States from Mexico. The tariff on imports of Mexican frozen concentrated orange juice in excess of the threshold quantity will "snapback" or revert to the lesser of the prevailing most-favored-nation rate or the rate of duty on that product in effect as of July 1, 1991, if futures prices for frozen concentrated orange juice in the United States fall below a historical average price for 5 consecutive days. This tariff snapback is automatically triggered and removed upon a determination by the Secretary of Agriculture.

AGRICULTURE TRADE UNDER OTHER FREE TRADE AGREEMENTS

Israel.—The U.S.-Israel FTA was one of the first trade agreements negotiated by the United States. Effective January 1, 1995, duties on imports from each country were eliminated. However, Article 6 (Import Restrictions on Agriculture) of the FTA provides, "Import restrictions, other than customs duties, including, but not limited to, quantitative restrictions and fees, based on agricultural policy considerations may be maintained by the Parties." The meaning of the clause continues to be an issue of dispute between Israel and the United States. Israel interprets the clause as permitting "fees" and quantitative restrictions on a variety of specialty crops, including apples, peaches, pears, and almonds. As a result, Israel maintains a system of import levies and TRQs for certain agricultural products. Some of the levies are ad valorem while others are based on weight. All are set at levels well below Israel's MFN commitments. Most of the TRQs allow

a duty-free import into Israel of certain agricultural commodities above the WTO limit.

As a consequence of the disagreement, the United States and Israel concluded a five-year agreement in 1996, which provides for the treatment of U.S. and Israeli agricultural products. Under this agreement, which was extended through 2002 and later through 2008, 88% of U.S. agriculture exports to Israel are duty and quota free. That agreement does, however, continue to place restrictions on a number of specialty product exports deemed politically sensitive by the Israeli government.

Singapore.—Singapore has traditionally been a net importer of agriculture products, and the FTA locks in place Singapore's zero duty rate for U.S. farm products. The United States generally maintained or provided immediate duty-free access for most agricultural goods from Singapore with up to ten-year phase outs and/or tariff rate quotas for more sensitive products such as dairy and cotton. There is no agriculture-specific safeguard in the implementing legislation (Public Law 108-78).

Chile.—Chapter Three of the FTA provides that the Parties will work together in WTO agriculture negotiations to eliminate export subsidies. Other notable provisions on agricultural trade address rules on subsidized exports between the Parties and mutual recognition of grading, quality, or marketing measures. For sugar, the chapter provides that each Party's access to the other's market is limited to the amount of its net trade surplus. Under the FTA, Chile and the United States will gradually harmonize their wine import duties at the lowest rates in either country and then eliminate all duties on bilateral trade in wine.

Recognizing the special conditions agricultural products face, Chapter Three of the FTA, and Section 201(c) of the implementing legislation (Public Law 108-77), also set out a transitional tariff "snap-back" mechanism that allows a Party to impose a temporary duty on specified agricultural products under certain conditions. Once tariffs on a product reach zero, the Parties may no longer use the snap-back for that product. The temporary duty may not exceed normal trade relations/ most-favored-nation (NTR/MFN) rates. The safeguard is price-based, automatic, and will remain in effect throughout the 12-year transition period. Prices for imports of commodities subject to the safeguard will automatically be assessed a tariff uplift if the import value of the commodity falls below the trigger price established in the agreement.

Morocco.—The FTA includes several provisions designed to eliminate barriers to trade in agricultural products, while providing adjustment periods, TRQs, and safeguards for producers of import-sensitive agricultural products.

Under the FTA, each Party will eliminate export subsidies on agricultural goods destined for the other country. If a third country subsidizes exports to a Party, the other Party may initiate consultations with the importing Party to develop measures the importing Party may adopt to counteract such subsidies. If the importing Party agrees to such measures, the exporting Party must refrain from

applying export subsidies to its exports of the good to the importing Party. The Agreement also includes safeguard procedures to aid domestic industries that are facing increased imports or imports below a price threshold of certain agricultural goods. For the United States, such goods include canned olives, dried onion and garlic, canned fruit, processed tomato products, and orange juice.

Section 202(b) of the implementing legislation (Public Law 108-302) contains provisions regarding the imposition of safeguard measures on imports of agricultural goods specified in Annex 3-A of the Agreement. Section 202(b)(1) establishes the basic authority for such safeguards. Section 202(b)(2) of the bill explains how the additional duties are to be calculated. The United States may apply the additional duties to shipments of any such good whose price is below the threshold ("trigger price") for the good set out in Annex 3-A. The rate of additional duty under the safeguard increases as the difference increases between the unit import price of a shipment and the trigger price specified in Annex 3-A.

Section 202(b)(3) of the bill implements Article 3.5.3 of the Agreement by establishing that no additional duty may be applied on a good if, at the time of entry, the good is subject to a measure under the bilateral safeguard mechanism established under Subtitle A of Title III of the bill or under the safeguard procedures set out in Chapter 1 of Title II of the Trade Act of 1974. Section 202(b)(4) of the bill provides that agricultural safeguard provisions cease to apply with respect to a good on the date on which duty-free treatment must be provided to that good under the Agreement. Section 202(b)(5) of the bill provides that if an agricultural safeguard good is subject to a tariff-rate quota, any additional agricultural safeguard duties may be applied only on over-quota imports of the good.

Australia.—The FTA includes several provisions designed to eliminate barriers to trade in agricultural products, while providing adjustment periods and safeguards for producers of import sensitive agricultural products. In addition, the United States and Australia have agreed to work together in WTO agriculture negotiations to: (1) substantially improve market access; (2) reduce, with a view to phasing out, all forms of export subsidies; (3) develop disciplines eliminating state trading enterprises' monopoly export rights; and (4) substantially reduce trade-distorting domestic support.

Key U.S. agricultural products that received immediate tariff elimination from Australia include: soybeans and oilseeds products, fruits, vegetables, nuts, pork products, and processed food products such as soups and bakery products. U.S. dairy farmers are granted immediate duty-free access to the Australian market, but access for Australian dairy farmers is capped by permanent tariff rate quotas for sensitive products. The United States provided no additional market access for sugar from Australia, and no beef product imports from Australia receive duty free treatment prior to January 1, 2023.

Under the FTA, each Party will eliminate export subsidies on agricultural goods destined for the other country. If a third country subsidizes exports to a Party, the

other Party may initiate consultations with the importing Party to develop measures the importing Party may adopt to counteract such subsidies. If the importing Party agrees to such measures, the exporting Party must refrain from applying export subsidies to its exports of the good to the importing Party.

The FTA includes safeguard procedures to aid domestic industries that are facing increased imports or imports below a price threshold of certain agricultural goods. A Party may not apply a safeguard measure to a good that is already the subject of a safeguard under either Chapter Nine (Safeguards) of this Agreement or Article XIX of GATT 1994 and the WTO Safeguards Agreement. All safeguard measures must be applied and maintained in a transparent manner, and the Party applying such a measure must, upon request, consult with the other Party concerning the application of the measure.

Section 202 of the U.S.-Australia FTA Implementation Act implements the agricultural safeguard provisions of Article 3.4 and Annex 3-A of the Agreement. Article 3.4 permits the United States to impose an agricultural safeguard measure, in the form of additional duties, on imports from Australia of an agricultural good listed in the U.S. schedule to Annex 3-A of the Agreement. The U.S. schedule, in turn, provides for three different types of agricultural safeguards. The first (set out in Section A of Annex 3-A) applies to horticulture goods specified in the Annex. The second (set out in Section B of Annex 3-A) applies to certain beef goods imported into the United States above specified quantities during the period from January 1, 2013 through December 31, 2022. The third (set out in Section C of Annex 3-A) applies to the same categories of beef goods imported into the United States above specified quantities and the monthly average index price in the United States falls below the specified "trigger" price beginning January 1, 2023.

Section 202(a) of the bill provides the overall contour of the safeguard rules, including definitions of terms used in respect of the three safeguard provisions. Section 202(a)(2) defines the applicable normal trade relations/most-favored-nation ("NTR/MFN") rate of duty for the purposes of the agricultural safeguards. Under the Agreement, the sum of the duties assessed under an agricultural safeguard and the applicable rate of duty in the U.S. schedule may not exceed the general NTR/MFN rate of duty. No safeguard may be applied to a product that has received duty free treatment.

The price-based horticultural safeguard consists of a schedule of eligible horticultural goods and their respective "trigger" prices, as well as a methodology for determining the amount of an additional safeguard duty. The U.S. horticulture schedule includes goods such as dried onion and garlic, canned fruit, processed tomato products, and various juices. In years 9 through 18, the United States will impose a quantity-based safeguard measure on certain beef imports when such imports exceed an established volume "trigger." The safeguard measure will remain in force until the end of the calendar year in which the measure applies.

Starting in year 19 of the Agreement, the United States. will impose a price-based safeguard on certain beef imports when the U.S. monthly average

index price for beef falls below a trigger price that is calculated at 6.5 percent less than the average of the previous 24 monthly average index prices.

MEAT IMPORT ACT OF 1979

The Meat Import Act of 1979, as amended, required the President to impose quotas on imports of beef, veal, mutton, and goat meat when the aggregate quantity of such imports on an annual basis was expected to exceed a prescribed trigger level. As a matter of practice, the import-limiting effect of the Meat Import Act was achieved, prior to the conclusion of the Uruguay Round, through the negotiation of voluntary restraint agreements with major supplier countries of the covered products. Section 403 of the Uruguay Round Act repealed the Meat Import Act of 1979 in order to conform to U.S. commitments under the Agreement on Agriculture not to maintain this type of quantitative import restriction. The Uruguay Round Act substitutes a tariff-rate quota on meat imports for the previous import restrictions.

RECIPROCAL MEAT INSPECTION REQUIREMENT

Section 4604 of the Omnibus Trade and Competitiveness Act of 1988[15] amends section 20 of the Federal Meat Inspection Act (21 U.S.C. 620) to authorize strict enforcement of all standards which are applicable to meat articles in domestic commerce, for meat articles imported into the United States. If the Secretary of Agriculture determines that a foreign country applies meat inspection standards that are not related to public health concerns about end-product quality which are substantiated by reliable analytical methods, the Secretary must consult with the U.S. Trade Representative and they shall make a recommendation to the President as to what action should be taken. The President may require that a meat article produced in a plant in such foreign country may not be permitted entry into the United States unless the Secretary determines that the meat article has met the standards applicable to meat articles in commerce within the United States. The annual report required generally under section 20 of the Federal Meat Inspection Act shall include the name of each foreign country that applies standards for the importation of meat articles from the United States that are not based on public health concerns.

Enactment of this provision resulted from congressional concern over the European Community's (EC) hormone ban, which since 1989 has effectively banned all meat exports from the United States to the EC that were produced from livestock treated with hormones, despite scientific evidence establishing the safety of U.S. production methods. At the time of enactment, bilateral consultations with the EC were underway, and Congress wanted to strengthen the Administration's

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15 Public Law 100-418, approved August 23, 1988, 102 Stat. 1107, 1408, amending section 20 of Public Law 90-201, 21 U.S.C. 620.

authority to respond to the EC action. The authority added by section 4604 was intended to be used either in addition to, or instead of, other authorities (such as section 301 of the Trade Act of 1974).

SUGAR TARIFF-RATE QUOTAS UNDER HARMONIZED TARIFF SCHEDULE AUTHORITIES

Additional U.S. note 5 to chapter 17 of the Harmonized Tariff Schedule of the United States (HTS) authorizes the Secretary of Agriculture, in consultation with other agencies, to establish, for each fiscal year, the quantity of sugars and syrups that may be entered at the lower tariff rates under two tariff-rate quotas (TRQ's). The TRQ's cover sugars and syrups described in HTS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.90, and 2106.90. This authority was proclaimed to implement the results of the Uruguay Round of multilateral trade negotiations as reflected in the provisions of schedule XX (United States), annexed to the Agreement Establishing the World Trade Organization.[16]

Background

The United States has always been a net importer of sugar, at times importing more than half of the nation's sugar consumption. However, sugar imports have been restricted almost continuously since 1934 in order to maintain and foster the domestic sugarcane and sugar beet industries. From the enactment of the Jones Costigan Sugar Act of 1934[17] through the expiration of the Sugar Act of 1948 on December 31, 1974,[18] sugar imports were restricted by a statutory quota. Historically, this system of import protection has maintained a U.S. price for sugar well above the world price.

Shortly before the expiration of the Sugar Act of 1948, an absolute import quota was proclaimed by President Ford, although the quota quantity was so large as to be non-restrictive.[19] The quota derived from a note that had been negotiated in the Annecy (1949) and Torquay (1951) Rounds of multilateral trade negotiations and was proclaimed as a headnote to the Tariff Schedule of the United States (TSUS) following the conclusion of the Kennedy Round (1963-1967). On May 5, 1982, President Reagan modified this headnote quota to: (1) make it restrictive; (2) allocate the quota among supplying countries in accordance with their shares of the U.S. market during the period from 1975 through 1981; and (3) authorize the Secretary of Agriculture to establish and modify the quota amount in subsequent

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16 Pres. Proc. No. 6763, Dec. 23, 1994, 60 Fed. Reg. 1007.
17 Public Law 73-213, ch. 263, approved May 9, 1934, 48 Stat. 670.
18 Public Law 80-388, ch. 519, approved August 8, 1947, 61 Stat. 922. See also the Sugar Act of 1937, Public Law 75-414, ch. 898, approved September 1, 1937, 50 Stat. 903.
19 Pres. Proc. No. 4334, November 16, 1974, 39 Fed. Reg. 40739.

periods.[20]

By 1988, the quota had been reduced to the lowest ratio of imports to domestic production in the nation's history. The government of Australia challenged the legality of the sugar import quota under the provisions of the General Agreement on Tariffs and Trade (GATT), and in 1989, a GATT dispute settlement panel found the quota illegal. In 1990, President Bush issued Proclamation No. 6179[21] to convert the absolute import quota into a tariff-rate quota, thereby bringing it into conformity with the GATT TRQ panel decision. During the Uruguay Round of multilateral trade negotiations, the quota was reconverted into two TRQ's, one for imports of raw cane sugar and the other for imports of refined sugar, including syrups. The United States agreed to bind its minimum total sugar/syrups TRQ at 1,139,195 metric tons (MT). In addition, the United States agreed to reduce the second tier (over quota) tariff rates by 15 percent over 6 years.[22]

Under the tariff-rate quota system, the Secretary of Agriculture establishes the quota quantity that can be entered at the lower tier of tariff rates, and the USTR allocates this quantity among the 40 eligible sugar exporting countries. The quantities allocated to beneficiary countries under the GSP, the CBI and the ATPA receive duty-free treatment. Certificates of Quota Eligibility (CQE) are issued to the exporting countries and must be executed and returned with the shipment of sugar in order to receive quota treatment.[23] Imports of raw cane sugar are permitted in addition to the quota quantity on condition that such sugar is to be refined and used in the production of certain polyhydric alcohols or to be re-exported in refined form or in sugar-containing products.[24]

The quantity of sugar which may be imported duty free from Mexico is governed by paragraphs 13-22 of section A of annex 703.2 of the North American Free Trade Agreement (NAFTA). Since 1982, Mexico has been included within a basket category known as the "other specified countries and areas" and has been allocated a minimum quota amount, currently set at 7,258 MT raw value. The NAFTA guarantees the greater of this access or Mexico's net surplus production, but no greater than 25,000 MT during the first 6 years or 250,000 MT during the remaining 8 years of the NAFTA implementation period. Additional sugar may enter at a duty rate that is being eliminated in stages through 2008. During each of the first 14 years of the NAFTA, Mexico and the United States will jointly determine whether either has been or is projected to be a net surplus producer.[25] This formula is stated in a NAFTA side agreement between Mexico and the United States but is disputed by Mexico. Mexico claims the side agreement is invalid and significantly understates the quantity of sugar it can legally export to the United

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20 Pres. Proc. No. 4941, May 5, 1982, 47 Fed. Reg. 19661.

21 Pres. Proc. No. 6179, September 13, 1990, 55 Fed. Reg. 38293.

22 See Pres. Proc. No. 6763, December 23, 1994.

23 See 15 CFR part 2011.

24 See additional U.S. note 6 to chapter 17 of the HTS and 7 CFR part 1530

25 For purposes of the NAFTA formulas, high fructose corn syrup (HFCS) is included in determining the consumption of sugar.

States. Because the United States recognizes and adheres to the side agreement by limiting sugar imports from Mexico, Mexico has retaliated using various methods to prevent the import of U.S. high fructose corn syrup; such Mexican retaliatory methods as dumping orders and discriminatory taxes on U.S. high fructose corn syrup have been the basis of various WTO disputes brought by the United States against Mexico. All sugar imports from Mexico will enter duty free after the 14-year transition period.

As with any product subject to strict import restrictions, circumvention of the sugar TRQ is a concern for U.S. Customs officials. After one importer was found to be engineering a fake product by mixing sugar with molasses for the purpose of avoiding the sugar TRQ, Congress clarified the definition of sugar in the Trade Act of 2002. Preexisting law provided for a product to be classified as sugar in HTS 1702.90.05 if it contained no more than 6% non-sugar solids excluding foreign substances. The new sugar definition clarifies that molasses is a foreign substance that should be excluded for purposes of determining whether the product has 6% or more non-sugar solids. In addition, the Secretary of Agriculture and Commissioner of Customs are to continuously monitor certain imports of sugar and sugar-containing products for circumvention of the sugar tariff-rate quota.[26]

IMPORT PROHIBITIONS ON CERTAIN AGRICULTURAL COMMODITIES UNDER MARKETING ORDERS

SECTION 8e OF THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

Section 8e of the Agricultural Adjustment Act, as amended,[27] restricts the importation of certain specified commodities which do not meet relevant grade, size, quality or maturity requirements imposed under the marketing order in effect for such commodity. The specified commodities include tomatoes, raisins, olives (other than Spanish-style green olives), prunes, avocados, mangoes, limes, grapefruit, green peppers, Irish potatoes, cucumbers, oranges, onions, walnuts, dates, filberts, table grapes, eggplants, kiwifruit, nectarines, plums, pistachios, and apples.

Any restriction under this authority may not be made effective until after the Secretary of Agriculture gives reasonable notice (of not less than 3 days) and receives the concurrence of the U.S. Trade Representative. The Secretary of Agriculture may promulgate such rules and regulations as he deems necessary, to carry out the provision of this section. Whenever the Secretary of Agriculture finds that the application of the restrictions under a marketing order to an imported commodity is not practicable because of variations in characteristics between the domestic and imported commodity, he/she must establish with respect to the

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26 Section 5203 of the Trade Act of 2002, Public Law 107-210.

27 7 U.S.C. 608e-1.

imported commodity such grade, size, quality, and maturity restrictions by varieties, types, or other classification as he/she finds will be equivalent or comparable to those imposed upon the domestic commodity under such order.

Section 4603 of the Omnibus Trade and Competitiveness Act of 1988 amended section 8e to provide additional authority for the Secretary to establish an additional period of time (not to exceed 35 days) for restrictions to apply to imported commodities, if the Secretary determines that such additional period of time is necessary to effectuate the purposes of the Act and to prevent the circumvention of the requirement of a seasonal marketing order. In making this determination, the Secretary must consider: (1) the extent to which imports during the previous year were marketed during the period of the marketing order and such imports did not meet the requirements of the marketing order; (2) if the importation into the United States of such commodity did, or was likely to, circumvent the grade, size, quality or maturity standards of a seasonal marketing order; and (3) the availability and price of commodities of the variety covered by the marketing order during any additional period the marketing order requirements are to be in effect.

Section 1308 of the Food, Agriculture, Conservation, and Trade Act of 1990 (the "1990 farm bill") amended section 8e to require the Secretary to consult with the USTR prior to any import restriction or regulation being made effective. The USTR must advise the Secretary within 60 days of being notified, to ensure that the proposed grade size, quality, or maturity provisions are not inconsistent with U.S. international obligations. If the Secretary receives the concurrence of the USTR, the proposed prohibition or regulation may proceed.

Authorities to Restrict Imports Under Certain Laws

MARINE MAMMAL PROTECTION ACT OF 1972, AS AMENDED

The Marine Mammal Protection Act (MMPA), enacted in 1972,[28] places a ban on the importation of marine mammals and marine mammal products, except in limited circumstances, such as for scientific research. The MMPA also directs the Secretary of the Treasury to ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards. In carrying out the ban, the Secretary, in the case of yellowfin tuna harvested with purse seine nets in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States, must require that the government of the exporting nation provide certain documentary evidence relating to that country's marine mammal conservation programs. The Secretary must also require the government of any intermediary nation from which yellowfin tuna or

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28 Public Law 92-522, approved October 21, 1972, 16 U.S.C. 1361 et seq.

tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under the Act.

In 1984, the MMPA was amended to require that each nation wishing to export tuna to the United States document that it has adopted a dolphin conservation program "comparable" to that of the United States, and that the average rate of mortality of its purse seine fleet is comparable to that of the U.S. fleet. If these requirements are not met, an embargo on the import of yellowfin tuna and tuna products from that nation will be invoked. In 1988, the MMPA was further amended with respect to these "comparability" provisions by requiring that the regulatory programs of other nations in the eastern tropical Pacific tuna fishery be at least as restrictive as those of the United States. The 1988 amendments also require that the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States certify and provide reasonable proof that it has acted to prohibit the importation of tuna and tuna products from embargoed nations.

As a result of amendments to the MMPA made by the International Dolphin Conservation Program Act of 1997, the trade restrictions for intermediary countries were eliminated and provisions were put in place to lift the embargoes on yellowfin tuna harvested by setting purse seine nets on dolphins in the eastern Pacific Ocean. Since then, the embargoes were lifted for Ecuador and Mexico, and other countries including Peru and El Salvador have begun the process to have their embargoes lifted.

INTERNATIONAL DOLPHIN CONSERVATION PROGRAM ACT

The International Dolphin Conservation Program Act (Public Law 105-52), approved August 15, 1997, established the International Dolphin Conservation Program to implement into U.S. law the Declaration on Panama concerning tuna fishing in the Eastern Tropical Pacific Ocean.

In 1992, Eastern Tropical Pacific nations concluded the La Jolla Agreement, a non-binding international agreement establishing an International Dolphin Conservation Program under the auspices of the Inter-American Tropical Tuna Commission. The agreement established annual limits on incidental dolphin mortality, required observers on tuna vessels, established a review panel to monitor fleet compliance, and created a scientific research and education program and advisory board. The agreement established a dolphin mortality limit for each vessel, and when that limit was reached, such vessel would be required to discontinue "setting on dolphins" for the remainder of the year.

In October 1995, 12 nations signed the Declaration of Panama, including the Unites States, Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, and Venezuela. The Panama Declaration endorses the

success of the La Jolla Agreement and adjusts the marketing policy of dolphin safe tune in recognition of this success. In exchange for modifications to U.S. law, foreign signatories agreed to modify and formalize the La Jolla Agreement as a binding agreement. Signatories agreed to adopt conservation and management measures to ensure long-term sustainability of tuna and living marine resources, assess the catch and bycatch of tuna and take steps to reduce or eliminate the bycatch, implement the binding agreement through enactment of domestic legislation, enhance mechanisms for reviewing compliance with the International Dolphin Conservation Program, and establish annual quotas for dolphin mortality limiting total annual dolphin mortality to fewer than 5,000 animals.

The International Dolphin Conservation Program Act implements the Declaration of Panama in U.S. law by changing the circumstances under which the import ban on yellowfin tune in section 101 of the MMPA would be imposed. Specifically, the bill permits importation of yellowfin tuna if the harvesting nation complies with international standards, as follows: (1) the tuna was harvested by vessels of a nation that participates in the International Dolphin Conservation Program, the harvesting nation is either a member of has initiated steps to become a member of the Inter-American Tropical Tuna Commission, and the nation has implemented its obligations under the Program and the Commission; and (2) total dolphin mortality permitted under the Program is limited.

ENDANGERED SPECIES ACT OF 1973, AS AMENDED

The Endangered Species Act[29] authorizes the Secretary of the Interior to create lists of species or subspecies which are considered endangered or threatened, and to prohibit the importation or interstate sale of these species or subspecies.

TARIFF ACT OF 1930, AS AMENDED: WILD MAMMALS OR BIRDS

Section 527 of the Tariff Act of 1930, as amended,[30] prohibits the importation of any wild mammal or bird, alive or dead, or any part of product of any wild mammal or bird, if the laws or regulations of the country where the wild mammal or birdlives restrict its "talking, killing, possession, or exportation to the United States," unless the wild mammal or bird is accompanied by a certification of the U.S. consul that it "has not been acquired or exported in violation of the laws or regulations of such country. . ."

Any mammal or bird, alive or dead, or any part of product thereof, imported into the United States in violation of the above is subject to seizure and forfeiture under the customs laws. The import prohibition in the Tariff Act of 1930 does not apply in the case of (1) articles the importation of which is prohibited by any other law;

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29 Public Law 93-205, approved December 28, 1973, 16 U.S.C. 1531 et seq.
30 19 U.S.C. 1527.

(2) articles imported for scientific or educational purposes, or are migratory; or (3) certain migratory game birds.

AFRICAN ELEPHANT CONSERVATION ACT

Title II of the Endangered Species Act Amendments of 1988 (Public Law 100-478) contained the African Elephant Conservation Act,[31] requiring the Secretary of the Interior to establish a moratorium on the importation of raw and worked ivory from an ivory producing country that does not meet specific criteria, including being a party to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES).

RHINOCEROS AND TIGER CONSERVATION ACT OF 1994, AS AMENDED

Section 7 of the Rhinoceros and Tiger Conservation Act of 1994,[32] as amended by the Rhino and Tiger Product Labeling Act,[33] prohibits selling, importing, or exporting, or attempting to sell, import, or export, any product, item or substance intended for human consumption containing or purporting to contain any substance derived from any species of rhinoceros or tiger.

SECTION 8 OF THE FISHERMEN'S PROTECTIVE ACT OF 1967, AS AMENDED ("PELLY AMENDMENT")

Under section 8 of the Fishermen's Protective Act of 1967, as amended (the so-called "Pelly Amendment"),[34] the President, based on certain findings by the Secretary of Commerce or the Secretary of the Interior, has the discretionary authority to impose import sanctions on any products from any country which conducts fishery practices or engages in trade which diminishes the effectiveness of international programs for fishery conservation or international programs for endangered or threatened species.

HIGH SEAS DRIFTNET FISHERIES ENFORCEMENT ACT

The High Seas Driftnet Fisheries Enforcement Act was enacted in 1992[35] to assist in the international enforcement of U.N. Resolution Number 46-215, which prohibits large-scale driftnet fishing on the high seas after December 31, 1992. The Act sets forth certain import sanctions applicable to countries whose nationals or vessels engage in driftnet fishing on the high seas on or after December 31,

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31 16 U.S.C. 4201-4245.
32 15 U.S.C. 5301-5306.
33 Public Law 105-312, approved October 30, 1998.
34 Public Law 93-205, approved December 28, 1973, 22 U.S.C. 1978.
35 Public Law 102-582, approved November 2, 1992.

1992, and lays out the procedures to be followed in applying those import sanctions.

Specifically, the Act requires the Secretary of Commerce not later than December 31, 1992, and periodically thereafter, to identify each country the nationals or vessels of which conduct large-scale driftnet fishing beyond the exclusive economic zone of any country and to notify the President and that country of the identification. The President must enter into consultations within 30 days with any country so identified to obtain its agreement to effect the immediate termination of the large-scale driftnet fishing. If these consultations have not been satisfactorily concluded within 90 days, the President shall direct the Secretary of the Treasury to prohibit the importation of shellfish, fish and fish products, and sport fishing equipment from the country in question. If such country has not terminated its large-scale driftnet fishing within 6 months after its identification or has retaliated against the United States for any initial import sanctions taken against it, such country shall be subject to additional import sanctions, at the President's discretion, under the Fishermen's Protective Act of 1967, as amended.

WILD BIRD CONSERVATION ACT OF 1992

The Wild Bird Conservation Act of 1992[36] establishes various bans on the importation of exotic birds. For those birds listed on any of the three appendices on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the nature of the ban depends on how threatened is the particular species of bird. There is an immediate import ban for birds that have been identified under CITES as being under immediate threat. For all other birds listed by CITES, an import ban goes into effect 1 year after the date of enactment of the Act. During this 1 year, the Secretary of the Interior is authorized to suspend the importation of such species on an emergency basis under certain conditions. None of the import bans will apply to species of birds that are included on an approved list of species to be maintained by the Secretary. To be included on such an approved list, the species must either be regularly bred in captivity in a qualified facility or be protected under a conservation program in the country of origin that meets specifically enumerated criteria.

For exotic birds not listed under the CITES agreement, the Secretary is authorized to impose an import ban or quota on such species if he finds such action is necessary for the conservation of the species.

The Act also authorizes the Secretary to allow, through the issuance of import permits, the importation of any exotic bird upon determination that such importation is not detrimental to the species' survival and that the bird is being

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36 Public Law 102-440, approved October 23, 1992.

imported for certain enumerated purposes, such as scientific research or cooperative breeding programs.

ATLANTIC TUNAS CONVENTION ACT OF 1995

In 1966, the International Convention for the Conservation of Atlantic Tunas (ICCAT) was established, and the U.S. Senate ratified ICCAT in 1967. The Atlantic Tunas Convention Act (ATCA), which authorizes U.S. involvement in ICCAT, was enacted in 1975. ATCA authorizes the Secretary of Commerce to administer and enforce ICCAT and ATCA, including the promulgation of regulations to establish open and closed seasons, fish size requirements and catch limitations, incidental catch restrictions, and observer coverage. In addition, the Secretary is authorized to prohibit the entry into the United States of any fish subject to regulations recommended by ICCAT and taken in a manner which would diminish the effectiveness of ICCAT's conservation efforts.

The Atlantic Tunas Convention Act of 1995 made certain changes to the ATCA concerning the identification and notification of countries violating the terms of ICCAT recommendation. Specifically, the legislation made no change to the ATCA authority to restrict imports of fish if fished in a manner that tends to diminish the effectiveness of a recommendation by the ICCAT, instead of imposing additional, and in some cases mandatory, standards. The Act added provisions requiring Commerce to identify, notify, and publish a list of countries whose fishing vessels are fishing or have fished during the previous year in the Convention area in a manner inconsistent with the objectives of an ICCAT recommendation. In addition, it provided that the President may enter into consultations with identified nations. The purpose of the Act was to lead to the development of an international consensus concerning multilateral management of Atlantic tunas, instead of expanding the circumstances under which unilateral sanctions are authorized.

SECTION 609 OF PUBLIC LAW 101-162: CONSERVATION OF SEA TURTLES

Section 609 of Public Law 101-162, a bill making appropriations for the Departments of Commerce, Justice, State, the Judiciary, and related agencies for fiscal year 1990,[37] called upon the Secretary of State, in consultation with the Secretary of Commerce, to initiate negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with foreign governments of such countries which are engaged in commercial fishing operations likely to affect adversely sea turtles. Section 609 further provided that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States, unless the President

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37 Public Law 101-162, approved November 21, 1989.

certified to Congress by May 1, 1991, and annually thereafter, that the harvesting nation has a regulatory program and an incidental rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles.

In 1991, the State Department issued guidelines for assessing the comparability of foreign regulatory programs with the U.S. program.[38] To be found comparable, a foreign nation's program had to include a commitment to require all shrimp trawl vessels to use turtle excluder devices (TEDs) at all times, or alternatively, a commitment to engage in a statistically reliable and verifiable scientific program to reduce the mortality or sea turtles associated with shrimp fishing. The 1991 guidelines also determined that the scope of section 609 was limited to the wider Caribbean/western Atlantic region and that the import restriction did not apply to aquaculture shrimp, the harvesting of which does not adversely affect sea turtles.

In 1993, the State Department issued revised guidelines providing that to receive a certification in 1993 and subsequent years, affected nations had to maintain their commitment to require TEDs on all commercial Shrimp trawl vessels by May 1, 1994.

In December 1995, the U.S. Court of International Trade (CIT) found that the 1991 and 1993 guidelines were contrary to law in limiting the geographical scope of section 609 and directed the State Department to prohibit the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology that may affect adversely sea turtles by May 1, 1996.[39]

In April 1996, the State Department published revised guidelines[40] to comply with the CIT order of December 1995. The new guidelines extended section 609 to shrimp harvested from all foreign nations. The State Department further determined that as of May 1, 1996, all shipments of shrimp and shrimp products into the United States were to be accompanied by a declaration attesting that the shrimp or shrimp product in question was harvested "either under conditions that do not adversely affect sea turtles . . . or in waters subject to the jurisdiction of a nation currently certified pursuant to section 609."

In October 1996, the CIT ruled that the embargo on shrimp and shrimp products enacted by section 609 applied to all "shrimp products harvested in the wild by citizens or vessels of nations which have not be certified".[41] The Court found that the 1996 guidelines were contrary to section 609 when allowing, with a Shrimp Exporter's Declaration form, imports of shrimp from non-certified countries if the shrimp was harvested with commercial fishing technology that did not adversely affect sea turtles. The CIT also refused to postpone the worldwide enforcement of section 609.[42]

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38 56 Fed. Reg. 1051 (January 10, 1991).

39 *Earth Island Institute v. Warren Christopher*, 913 F. Supp. 559 (CIT 1995).

40 61 Fed. Reg. 17342 (April 19, 1996).

41 *Earth Island Institute v. Warren Christopher*, 942 Fed. Supp. 597 (CIT 1996).

42 *Earth Island Institute v. Warren Christopher*, 948 Fed. Supp. 1062 (CIT 1996).

In 1997, Thailand, Malaysia, Pakistan, and India filed a challenge in the World Trade Organization (WTO) to the U.S. restrictions on imports of shrimp and shrimp products harvested in a manner harmful to endangered species of sea turtles. A dispute settlement panel ruled in favor of the complainants on April 6, 1998, finding that the U.S. import restrictions were inconsistent with WTO rules. The United States appealed the decision, and on October 12, 1998, the Appellate Body of the WTO reversed the panel ruling, confirming that WTO rules allow countries to condition access to their markets on compliance with certain policies such as environmental conservation, and agreeing that the U.S. "shrimp-turtle law" was a permissible measure adopted for the purpose of sea turtle conservation. The Appellate Body, however, found fault with certain aspects of the U.S. implementation of the statute. In particular, it found that the State Department's procedures for determining whether countries meet the requirements of the law did not provide adequate due process, because exporting nations were not afforded formal opportunities to be heard and were not given formal written explanations of adverse decisions. The Appellate Body also found that the United States had unfairly discriminated between the complaining countries and Western Hemisphere nations by not exerting as great an effort to negotiate a sea turtle conservation agreement with the complaining countries and by not providing them the same opportunities to receive technical assistance.

On November 25, 1998, the United States indicated its intention not only to comply with the panel rulings but also the firm commitment of the United States to protect endangered species of sea turtles. In July 1999, the State Department revised its procedures, pursuant to the panel decision, to provide more due process to countries apply for certification under section 609. The United States also provided the complaining countries with additional technical assistance in the adoption of sea turtle conservation measures. In July 2000, the State Department completed negotiations with the countries of the Indian Ocean and Southeast Asia region on the multilateral Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia (the MOU). In July 2001, the United States and the countries of the region completed negotiations on the associated Conservation and Management Plan. The first meeting of the Signatories to the MOU was held in Bangkok, Thailand in January 2003.

On October 23, 2000, Malaysia requested that the original WTO panel examine whether the United States fully implemented the panel's recommendations, arguing that it was necessary for the United States to repeal its "shrimp-turtle law" in order to comply. The other complaining countries in the WTO panel proceedings did not join Malaysia in the request. On May 16, 2001, the panel found that the United States had complied with the original Appellate Body report,

a decision that was appealed by Malaysia and upheld by the Appellate Body on October 22, 2001.

National Security Import Restrictions

SECTION 232 OF THE TRADE EXPANSION ACT OF 1962

Section 232 of the Trade Expansion Act of 1962, as amended,[43] authorizes the President to impose restrictions on imports which threaten to impair the national security. This authority has been used by the President to impose quotas and fees on imports of petroleum and petroleum products from time to time and to embargo imports of refined petroleum products from Libya. Public Law 96-223 (imposing a windfall profit tax on domestic crude oil) amended section 232 to authorize the Congress to disapprove by joint resolution an action of the President to adjust oil imports. On June 9, 1995, the President found, pursuant to section 232, that oil imports threaten to impair the national security but determined not to take action to adjust imports of petroleum because the costs of such an adjustment to the economy outweighed the benefits.[44]

On April 28, 2000, the President pursuant to section 232, concurred with the findings of the Secretary of Commence that imports of crude oil threaten to impair the national security. He also accepted the Secretary's recommendation that trade remedies not be imposed but that existing policies to enhance conservation and limit the dependence on foreign oil be continued.[45]

Section 232 as amended requires the Secretary of Commerce to conduct immediately an investigation to determine the effects on national security of imports of an article, upon the request of any U.S. government department or agency, application of an interested party, or upon his own motion. The Secretary must report the findings of his investigation and his recommendations for action or inaction to the President within 270 days after beginning the investigation. If the Secretary finds the article "is being imported * * * in such quantities or under such circumstances as to threaten to impair the national security," he must so advise the President. The President must decide within 90 days after receiving the Secretary's report whether to take action. If the President decides to take action, he must implement such action within 15 days, and take such action for such time as he deems necessary to "adjust" the imports of the article and its derivatives so imports will not threaten to impair the national security. The President must

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43 Public Law 87-794, approved October 11, 1962, 19 U.S.C. 1862, amended by section 127 of the Trade Act of 1974, Public Law 93-618, approved January 3, 1975, by section 402 of the Crude Oil Windfall Profit Tax Act of 1980, Public Law 96-223, approved April 2, 1980, and further amended by section 1501 of the Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, approved August 23, 1988.

44 60 Fed. Reg. 30,514 (June 9, 1995).

45 36 Weekly Comp. Pres. Doc. 945.

submit a written statement to the Congress within 30 days explaining action taken and the reasons therefor.

Upon initiation of an investigation, the Secretary of Commerce must immediately notify the Secretary of Defense, and consult with him on methodological and policy questions. Upon request of the Secretary of Commerce, the Secretary of Defense must provide an assessment of the defense requirements of any article subject to investigation.

The Secretary of Commerce must hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation if it is appropriate and after reasonable notice. The Secretary must also seek information and advice from, and consult with, other appropriate agencies. Among the factors which the Secretary and the President must consider are domestic production needs for projected national defense requirements; domestic industry capacity to meet these requirements; existing and anticipated availability of resources, supplies, and services essential to the national defense; the growth requirements of such industries, supplies, services; imports in terms of their quantities, availability, character, and use as they affect such industries and U.S. capacity to meet national security requirements; the impact of foreign competition on the economic welfare of domestic industries; and any substantial unemployment, revenue declines, loss of skills or investment, or other serious effects resulting from displacement of any domestic products by excessive imports.

SECTION 233 OF THE TRADE EXPANSION ACT OF 1962

Section 233 of the Trade Expansion Act of 1962[46] was added by section 121 of the Export Administration Amendments of 1985 (Public Law 99-64) as a means of enforcing national security export controls imposed under that Act. The provision was amended by section 2447 of the Omnibus Trade and Competitiveness Act of 1988, to conform to sanctions authority added to the Export Administration Act.

Under section 233 as amended, any person who violates any national security export control imposed under section 5 of the Export Administration Act of 1979, or any regulation, order, or license issued under that section, may be subject to controls imposed by the President on imports of goods or technology into the United States.

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46 19 U.S.C. 1864.

Balance of Payments Authority

SECTION 122 OF THE TRADE ACT OF 1974

Section 122 of the Trade Act of 1974[47] authorizes the President to increase or reduce restrictions on imports into the United States to deal with balance of payments problems. Tighter restrictions in the form of an import surcharge (not to exceed 15 percent ad valorem), import quota, or a combination of the two may be imposed for up to 150 days (unless extended by act of Congress) whenever fundamental international payments problems make such restrictions necessary to deal with large and serious U.S. balance of payments deficits, to prevent an imminent and significant depreciation of the dollar, or to cooperate with other countries in correcting an international balance of payments disequilibrium.

Existing imports restrictions may be eased for a period of up to 150 days (unless extended by act of Congress) through a reduction in the rate of duty on any article (not to exceed 5 percent ad valorem), an increase in the value or quantity of imports subject to any type of import restriction, or a suspension of any import restriction. Such restrictions may be eased whenever fundamental international payments problems require special measures to deal with large and serious balance of payments surpluses or to prevent significant appreciation of the dollar. Trade liberalizing measures must be broad and uniform as to articles covered. The President may not, however, liberalize imports of those products for which increased imports will cause or contribute to material injury to domestic firms or workers, impairment of national security, or otherwise be contrary to the national interest.

Certain conditions also are placed on the President's use of import restrictions for balance of payments purposes. Quotas may be imposed only if international agreements to which the United States is a party permit them as a balance of payments measure and only to the extent that the imbalance cannot be dealt with through an import surcharge. If the President determines that import restrictions are contrary to the national interest, he may refrain from imposing them but must inform and consult with Congress.

Section 122(d) requires that import restrictions be applied on a non-discriminatory basis; it also requires that quotas aim to distribute foreign trade with the United States in a manner that reflects existing trade patterns. If the President finds, however, that the purposes of the provision would best be served by action against one or more countries with large and persistent balance of payment surpluses, he may exempt all other countries from such action. This section also expresses the sense of Congress that the President seek modifications in international agreements to allow the use of surcharges instead of quotas for balance of payments adjustment purposes. If such international reforms are

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47 Public Law 93-618, approved January 3, 1975; 19 U.S.C. 2132.

achieved, the President's authority to exempt all but one or two surplus countries from import restrictions must be applied in a manner consistent with the new international rules.

Section 122(e) provides that import restrictions be of broad and uniform application as to produce coverage, unless U.S. economic needs dictate otherwise. Exceptions under this section are limited to the unavailability of domestic supply at reasonable prices, the necessary importation of raw materials and similar factors, or if uniform restrictions will be unnecessary or ineffective (i.e., if products already are subject to import restrictions, are in transit, or are subject to binding contracts). The section prohibits the use of balance of payments authority or the exceptions authority to protect domestic industries from import competition. Any quantitative restriction imposed may not be more restrictive than the level of imports entered during the most recent representative period, and must take into account any increase in domestic consumption since the most recent representative period.

The President is authorized to modify, suspend, or terminate any proclamation issued under the section, either during the initial 150-day period or during any subsequent extension by act of Congress.

Background

Anticipating that oil-consuming nations would face large balance of payments deficits in an era of rapidly increasing oil prices, and believing that neither a reduction in the price of oil nor the necessary international monetary cooperation were certain to take place, Congress considered it necessary to authorize the President to impose surcharges or other import restrictions for balance of payments purposes, even though Congress assumed that under existing circumstances such authority was not likely to be used.[48] The use of surcharges for balance of payments purposes had gained de facto acceptance among industrialized GATT member countries during the two decades preceding the 1974 Trade Act, but explicit GATT rules had never been adopted.

When it passed the Trade Act of 1974, Congress urged the President to seek changes in international agreements allowing the use of surcharges as well as (and in preference to) quotas for balance-of-payments adjustment purposes and providing rules for their use.[49] The Tokyo Round of GATT multilateral trade negotiations in 1979 adopted, as part of the so-called Framework Agreement, the Declaration on Trade Measures Taken for Balance-of-Payments Purposes,[50] which elaborated on the rules for the use of import restrictions for balance-of-payments adjustments. While this Declaration noted the wide use, for balance-of-payments adjustments, of import restrictions other than quotas (which

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48 Senate Report 93-1298 at 87-88.

49 Senate Report 93-1298 at 88.

50 MTN/FR/W/20/Rev. 2, reprinted in House Doc. 96-153, pt. I, at 626.

alone are addressed in the GATT) and implicitly sanctioned it, it still did not fundamentally alter GATT rules in this area by explicitly allowing such other restrictions.

The balance-of-payments issue was revisited in the Omnibus Trade and Competitiveness Act of 1988, which stated as one of the principal negotiating objectives of the United States the development of "rules to address large and persistent global current account imbalances of countries."[51]

The Understanding on the Balance-of-Payments Provisions of the General Agreements on Tariffs and Trade 1994 specifically provides for (and gives preference to) "price-based measures" for balance-of-payments adjustments, including import surcharges and deposit requirements, and limits the imposition of new quantitative restrictions. The Understanding also provides that preference should be given to those measures which have the least disruptive effect on trade, and that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports, may not exceed what is necessary to address the balance-of-payments situation, and must be applied in a transparent manner. Finally, the Understanding sets forth consultation procedures for the use of all restrictive import measures taken for balance-of-payments purposes. Article XII of the General Agreement on Trade in Services permits members to adopt or maintain restrictions on trade in services in the event of serious balance-of-payments and external financial difficulties.[52]

Product Standards

U.S. policy regarding the application of standards and certification procedures to imported products is based on the Uruguay Round Agreement on Technical Barriers to Trade and its U.S. implementing legislation as part of the Uruguay Round Agreements Act,[53] chapter 9 of the North American Free Trade Agreement and its U.S. implementing legislation as part of the North American Free Trade Agreement Implementation Act,[54] and the Agreement on Technical Barriers to Trade under the General Agreement on Tariffs and Trade (GATT) and its U.S. implementing legislation under title IV of the Trade Agreement Act of 1979.[55]

Differences in product standards, listing and approval procedures, and certification systems often can impede trade and can be manipulated to discriminate against imports. Imports may be tested to determine whether they conform with domestic standards under conditions more onerous than those applicable to domestic products. Certification systems, which indicate whether

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51 Public Law 100-418, section 122(d)(4), section 1101(b)(5); 19 U.S.C. 2901(b)(5).

52 The United States prevailed in a WTO change to certain import restrictions by India on more than 2,700 tariff items. The WTO found that these restrictions were no longer justified under the balance-of-payments exceptions. India agreed to remove all restrictions by April 2001.

53 Public Law 103-465, approved December 8, 1994.

54 Public Law 103-182, approved December 8, 1993.

55 Public Law 96-39, approved July 26, 1979, 19 U.S.C. 2531-2573.

products conform to standards, may limit access for imports or may discriminate by denying the right of a certification mark on imported products. Prior to the 1979 Agreement, however, there was virtually no multilateral cooperation or supervision to promote international harmonization and to discourage nationalistic discriminatory practices.

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

The Agreement on Technical Barriers to Trade,[56] commonly referred to as the Standards Code, was one of the agreements on non-tariff measures concluded during the 1973-1979 Tokyo Round of GATT multilateral trade negotiations. The Code went into force on January 1, 1980. The Code does not attempt to create standards for individual products, or to set up specific testing and certification systems. Rather, it establishes, for the first time, international rules among governments regulating the procedures by which standards and certification systems are prepared, adopted and applied, and by which products are tested for conformity with standards. The Code was a major U.S. negotiating objective during the Tokyo Round, particularly given the formation of a European regional electrical certification system closed to outside suppliers.

The Standards Code seeks to eliminate national product standardization and testing practices and certification procedures as barriers to trade among the signatory countries and to encourage the use of open procedures in the adoption of standards. At the same time, it does not limit the ability of countries to reasonably protect the health, safety, security, environment, or consumer interests of their citizens. Generally, U.S. standards-setting processes have followed these basic norms, whereas other countries' standards-related activities have generally been closed to participation from foreign countries; these signatories are obliged to change their practices in order to comply with Code principles.

The Code's provisions are applicable to all products, both agricultural and industrial. They are not applicable to standards involving services, technical specifications included in government procurement contracts, or standards established by individual companies for their own use. The Code addresses governmental and non-governmental standards, both voluntary and mandatory, developed by central governments, state and local governments, and private sector organizations. Only central governments, however, are directly bound by Code obligations, whereas regional, state, local, and private organizations are subject to a second level of obligation whereby signatories "shall take such reasonable measures as may be available to them" to ensure compliance.

The Code is prospective, applying to new and revised standards-related activities. If a signatory country believes, however, that an existing regulation developed and put into effect before the Code came into force conflicts with the

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56 MTN/NTM/W/192 Rev. 5, reprinted in House Doc. No. 96-153, pt. I, at 211.

basic tenets of the Code, then that signatory may use the Code's dispute settlement mechanism to help resolve the problem.

The Standards Code contains the following key provisions obligating signatories to follow several general principles pertaining to standards-related activities:

(1) The most important and fundamental principle obligates signatory governments not to develop, intentionally or unintentionally, product standards, technical regulations, or certification systems which create unnecessary obstacles to foreign trade. The Code recognizes nations' sovereign right to formulate standards and certification systems to protect life, health and environment, but such regulations should be as least disruptive as possible to international trade.

(2) The second fundamental principle is that national or regional certification systems are to grant access to foreign or non-member signatory suppliers under conditions no less favorable than those granted to domestic or member country suppliers, a major change in most signatory policies. Signatories can no longer refuse to give their national certification marks to imported products, provided that the imported products fully meet the technical requirements of the certification system. Also regional certification bodies must be open to suppliers from all Code signatories.

(3) Signatories must provide foreign imported products the same treatment as domestic goods with respect to standards, technical regulations, and testing and certification procedures, i.e., an extension of the national treatment provision of GATT which prohibits discrimination against imported products.

(4) When developing new or revising existing product standards or technical regulations, governments are to use existing or proposed international standards as the basis where it is appropriate. Other signatories may request an explanation if a government fails to follow this principle.

(5) Whenever appropriate, signatories are encouraged to specify technical regulations and standards in terms of performance rather than design or descriptive characteristics.

If a foreign product must be tested to determine whether it meets domestic standards before it can be imported, the Code provides a number of criteria that signatories are to follow to ensure non-discriminatory treatment. For example, foreign goods should not have to undergo costlier or more complex testing than domestic products in comparable situations. In addition, signatories are obligated to use the same methods and administrative procedures on imported as well as domestic goods. The Code does not obligate signatories to recognize test results or certification marks from another country. It does, however, encourage signatories to accept, whenever possible, test results, certifications or marks of conformity from foreign bodies, or self-certification from foreign producers even when the test methods differ from their own, provided that the importing country is satisfied that the exporting country's products meet the required standards.

Another important element of the Standards Code is the obligation of signatories to open up the process of developing or applying standards and certification procedures to each other. Governments must make available proposed mandatory or voluntary standards and certification procedures for comment during the drafting stage by other signatories before they become final regulations. Each signatory government must establish an inquiry point to respond to all reasonable questions from other signatories concerning their central, local, and state government standards and certification procedures.

Finally, the Code establishes a Committee of Signatories which meets periodically to oversee implementation and administration of the Agreement, as well as to discuss any new issues or problems which arise. The Committee may set up panels of experts or working parties as required to conduct Committee business or handle disputes.

URUGUAY ROUND AGREEMENT ON TECHNICAL BARRIERS TO TRADE

As part of the Uruguay Round, the signatories built on experience gained under the 1979 Standards Code in the Agreement on Technical Barriers to Trade (TBT Agreement). Much of the new Agreement restates, clarifies, or expands the 1979 Code.

The inclusion of the new Agreement as one of the WTO agreements means that all WTO members will be automatically bound by the Agreement, whereas a number of countries had chosen not to join the Standards Code. In addition, the Agreement will be enforceable through the WTO Dispute Settlement Understanding, unlike the 1979 Code, which contained a separate procedure limiting response to Code violations to withdrawing concessions under the Code.

The new Agreement seeks to eliminate barriers in the form of national product standardization and testing practices and conformity assessment procedures. At the same time, it permits signatories to protect the health, safety, security, environment, or consumer interests of their citizens. Like the 1979 Code, the Agreement obligates signatories to take reasonable measures to secure compliance by local government and non-governmental bodies.

With respect to technical regulations, the Agreement establishes rules covering the preparation, adoption, and application of technical regulations. The Agreement specifies that technical regulations are not to be more trade-restrictive than necessary to fulfill a legitimate objective. A complaining member must identify a specific alternative measure that is reasonably available. In addition, each government is required to review periodically its technical regulations in light of the Agreement's requirements. Each government is to use relevant international standards as a basis for technical regulations, except where they would be an ineffective or inappropriate means to fulfill the government's legitimate objectives. The Agreement recognizes the concept of equivalency between countries' technical regulations. It carries forward the procedural

requirements of the Code to assure transparency. Finally, it reflects an expansion beyond the Code with respect to the issuance of technical regulations by local and non-governmental bodies. WTO members must provide notice of technical regulations issued by local bodies at the next level below central governments, and must take active measures in support of observance by local government and non-governmental bodies.

With respect to standards, central government bodies are required to comply with the terms of the Code of Good Practice for the Preparation, Adoption and Application of Standards. Other standardizing bodies are not bound by the Code of Good Practice, but each central government must take reasonable measures to ensure their compliance.

The new Agreement updates and expands disciplines regarding conformity assessment procedures. Whereas the 1979 Code applied only to testing, the new Agreement applies to all aspects of conformity assessment, including laboratory accreditation and quality system registration. Central governments are required to take reasonable measures to apply these same disciplines to local governments and non-governmental bodies.

The Agreement on the Application of Sanitary and Phytosanitary Measures (S&P Agreement) establishes a number of general requirements and procedures to ensure that a sanitary or phytosanitary measure is in fact to protect human, animal, and plant life and health from risks of plant- or animal-borne pests or diseases, or additives, contaminants, toxins, or disease-causing organisms in foods, beverages, or feedstuffs. While the TBT Agreement relies on a non-discrimination test, the S&P Agreement relies on whether a measure has a basis in science and is based on a risk assessment. Discrimination is allowed as long as it is not arbitrary or unjustifiable.

THE NORTH AMERICAN FREE TRADE AGREEMENT

Chapter 9 of the NAFTA establishes rules on standards-related measures among the United States, Mexico, and Canada. The provisions are based on the text of the then-draft Uruguay Round Agreement on Technical Barriers to Trade and the United States-Canada Free-Trade Agreement. The rules apply only to standards-related measures that may directly or indirectly affect trade in goods or services between the NAFTA countries and to measures taken by NAFTA countries concerning those standards-related measures. In addition, chapter 7 of the NAFTA covers sanitary and phytosanitary measures.

TITLE IV OF THE TRADE AGREEMENTS ACT OF 1979, AS AMENDED

Congress approved the Agreement on Technical Barriers to Trade under section 2 of the Trade Agreements Act of 1979. Title IV of that Act implements the

obligations of the Standards Code in U.S. law.[57] Since U.S. practices were already in conformity with the Code, title IV did not amend, repeal, or replace any existing law. It does ensure that adequate structures exist within the Federal Government to inform the U.S. private sector about the standards-related activities of other nations, facilitate the ability of the United States to comment on foreign standards-making and certifications, and process domestic complaints on foreign practices. Title IV was then amended to reflect U.S. obligations under the Uruguay Round Agreement on Technical Barriers to Trade and the NAFTA.

Section 402 of the 1979 Act requires all Federal agencies to abide by the above-described principles and provisions of the Agreement. In addition, section 403 states the "sense of Congress" that no State agency and no private person should engage in any standards-related activity, i.e., development or implementation of product standards or certification system, that creates unnecessary obstacles to foreign trade, and requires the President to "take such reasonable measures as may be available" to promote their observance of Agreement obligations.

The U.S. Trade Representative (USTR) is designated to coordinate U.S. trade policies related to standards, and discussions and negotiations with foreign countries on standards issues, and to oversee implementation of the Agreement. The Departments of Agriculture and Commerce are required to work with the USTR on agricultural and non-agricultural issues respectively and to establish technical offices to fulfill a number of functions, particularly supplying notices to interested parties of proposed foreign government standards and receiving and transmitting private sector comments. The Department of Commerce maintains the National Center for Standards and Certification within the National Bureau of Standards as the national inquiry point required under the Code.

Title IV contains provisions concerning administrative and judicial proceedings regarding standards-related activities. No private rights of action are created by title IV; private parties can petition the U.S. government to invoke provisions of the Agreement against practices of other signatories.

Subtitle E sets forth governing standards and measures under the NAFTA. Subtitle F contains provisions concerning U.S. participation in international standardsetting activities.

Government Procurement

U.S. policy on government purchases of foreign goods and services is based on the Buy American Act of 1933[58] the multilateral Agreement on Government Procurement under the 1994 WTO and General Agreement on Tariffs and Trade (GATT), and its implementing legislation under title III of the Trade Agreements

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57 19 U.S.C. 2531-2573.

58 Act of March3, 1933, ch. 212, title III, 47 Stat. 1520, 41 U.S.C. 10a-10d.

Act of 1979,[59] as amended by the Uruguay Round Agreements Act. The "Buy American Act of 1988" (title VII of the Omnibus Trade and Competitiveness Act of 1988)[60] established standards and procedures to prohibit procurement from foreign countries whose governments discriminate against U.S. products or services in awarding contracts. In addition, separate provisions in appropriation acts and other legislation apply more restrictive Buy American-type provisions on particular types of purchases.

Governments are among the world's largest purchasers of non-strategic goods. Most of this vast market has traditionally been closed to foreign producers by means of formal and informal administrative systems of national discrimination in favor of domestic producers. Although U.S. preferences for domestic suppliers are clearly set out by law and regulation, other countries usually have achieved their discrimination by highly invisible administrative practices and procedures.

BUY AMERICAN ACT

The Buy American Act of 1933, as implemented by Executive Orders 10582 and 11051, requires the U.S. government to purchase domestic goods and services unless the head of the agency or department involved determines the prices of the domestic supplies are "unreasonable" or their purchase would be inconsistent with the U.S. public interest. Executive Order 10582, issued in 1954, states that if the domestic price of a good or service is 6 percent or more above the foreign price, then it is to be considered unreasonable and the foreign product may be purchased. The order also permits agencies to use a differential above 6 percent if it would serve the national interest. The Department of Defense has been using a 50 percent differential since 1962 for its procurement, except this differential is waived on military purchases under reciprocal Memoranda of Understanding (MOUs) with NATO countries. The order also indicated that a differential could be applied in cases where a domestic bid generated employment in a labor surplus area as designated by the Secretary of Labor. No specific percentage was stated, but generally a 12 percent differential has been allowed for bids which benefit economically distressed areas. These price differentials may be waived under section 301(a) of the Trade Agreements Act of 1979 for articles covered by the GATT Agreement on Government Procurement from signatory countries.

U.S.-made products are defined by law as those manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States. By regulations, "substantially all" has been defined to mean that more than 50 percent of the component costs of a product has been incurred in the United States.

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59 Public Law 96-39, title III, approved July 26, 1979, 19 U.S.C. 2511-2518.

60 Public Law 100-418, title VII, approved August 23, 1988, 41 U.S.C. 10a note.

1979 GATT AGREEMENT ON GOVERNMENT PROCUREMENT

The first Agreement on Government Procurement, also known as the Government Procurement Code,[61] was concluded as one of the agreements on non-tariff measures during the 1975-1979 Tokyo Round of GATT multilateral trade negotiations. The Code went into effect on January 1, 1981 and remained in force until the 1994 WTO Agreement on Government Procurement went into effect on January 1, 1996.

Because not all objectives were achieved in the original Code and revisions might be necessary in light of actual experience, the signatories agreed to renegotiations beginning at the end of 1984 to broaden the coverage and improve the operation of the Code. The GATT Committee on Government Procurement completed the first phase of these renegotiations in November 1986 with agreement (1) on a Protocol of Amendments to improve the functioning of the Code, effective January 1, 1988; (2) to continue negotiations on increasing the number of entities (government agencies) and procurements covered by the Code, particularly in the sectors of telecommunications, heavy electrical and transportation equipment; and (3) to continue to work towards the coverage of service contracts under the Code. The second phase of Code renegotiations began in February 1987 and continued in the context of the Uruguay Round of GATT multilateral trade negotiations.

The 1979 Code was designed to discourage discrimination against foreign suppliers at all stages of the procurement process, from the determination of the characteristic of the product to be purchased to tendering procedures, to contract performance. The Code prescribed specific rules on the drafting of the specifications for goods to be purchased, advertising of prospective purchases, time allocated for the submission of the bids, qualification of suppliers, opening and evaluation of bids, awards of contracts, and on hearing and reviewing protests.

Signatories were to publish their procurement laws and regulations and make them consistent with the Code rules. Purchasing entities had discretion in their choice of purchasing procedures, provided they extended equitable treatment to all suppliers and allow the maximum degree of competition possible.

Each government agency covered by the Code was required to publish a notice of each proposed purchase in an appropriate publication available to the public, and to provide all suppliers with enough information to permit them to submit responsive tenders. Losing bidders were to be informed of all awards and be provided upon request with pertinent information concerning the reasons they were not selected and the name and relative advantages of the winning bidder. Signatories must also provide data on their procurements on an annual basis.

The adoption or use of technical specifications which act to create unnecessary obstacles to international trade was prohibited. The Code mandated the use, where

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61 MTN/NTM/W/211/Rev. 2, reprinted in House Doc. No. 96-153, pt. I, at 69.

appropriate, of technical specifications based on performance rather than design, and of specifications based on recognized national or international standards. While the Code did not prohibit the granting of an offset or the requirement that technology be licensed as a condition of award, signatories recognize that offsets and requirements for licensing of technology should be limited and used in a non-discriminatory way.

The Code was largely self-policing. Rules and procedures were structured to help provide solutions to problems between potential suppliers and procuring agencies. As a next step, the Code provided for bilateral consultations between the procuring government and the government of the aggrieved supplier. As a last resort, the Code dispute settlement mechanism under the Committee of Signatories provided for conciliation or establishment of a fact-finding panel.

Coverage of the agreement

The Code applied solely to those agencies listed by each signatory in an annex on contracts valued above a specific minimum contract value expressed in terms of Special Drawing Rights (SDR). The original Code established a threshold value of 150,000 SDR; the 1988 Protocol of Amendments to the Code lowered the minimum contract value to SDR 130,000.

The benefits of the Code applied to purchases of goods originating in the territory of signatory countries. As a result of the 1988 amendments, leasing contracts were also subject to the Code. It did not apply to government services except those incidental to the purchase of goods, construction contracts, purchases by Ministries of Agriculture for farm support programs or human feeding programs such as the U.S. school lunch program. Procurements by state and local governments, including those with Federal funds such as under the Surface Transportation Act, were not subject to the Code.

For the United States, the Code dids not apply to the Department of Transportation, the Department of Energy, the Tennessee Valley Authority, the Corps of Engineers of the Department of Defense, the Bureau of Reclamation of the Department of the Interior, and the Automated Data and Telecommunications Service of the General Services Administration (GSA). In addition, government chartered corporations which are not bound by the Buy American Act, such as the U.S. Postal Service, COMSAT, AMTRAK, and CONRAIL, were not covered.

United States Code coverage also did not apply to set-aside programs reserving purchases for small and minority businesses, prison and blind-made goods, or to the requirements contained in Department of Defense and GSA Appropriations Acts that certain products (i.e., textiles, clothing, shoes, food, stainless steel flatware, certain specialty metals, buses, hand tools, ships, and major ship components) be purchased only from domestic sources.

On April 13, 1993, the United States and European Union reached an agreement in Marrakesh under the GATT Government Procurement Code to nearly double to $200 billion the bidding opportunities available on a bilateral basis.

1994 WTO Agreement on Government Procurement

The 1994 Government Procurement Agreement negotiated in the Uruguay Round makes important improvements in the Tokyo Round Code, which required central government agencies in member countries to observe non-discriminatory, fair, and transparent procedures in the purchase of certain goods. The new Agreement covers the procurement of both goods and services, including construction services, and applies to purchases by subcentral governments and government-owned enterprises, as well as central governments.

In addition to improvements in coverage, the Agreement also requires members to follow significantly improved procurement procedures. It prohibits the use of offsets unless a country specifically negotiates an exception to the Agreement in its schedule. The Agreement requires the establishment of a domestic bid challenge system and introduces added flexibility to accommodate advances in procurement techniques.

The Agreement allows each signatory to negotiate coverage on a reciprocal, bilateral basis with the other signatories. The United States concluded comprehensive coverage packages with several countries. The United States will apply the new Agreement to specified U.S. subcentral governments and government-owned entities only for those countries that opened their government procurement markets in sectors of high priority to the United States, although it may expand coverage with other signatories in the future.

The Agreement applies to purchases by government entities above certain special drawing right (SDR) thresholds[62]:

Central government purchases
- Goods and services: 130,000 SDRs ($175,000)
- Construction services: 5 million SDRs ($6,725,000)

Subcentral government purchases
- Goods and services: 355,000 SDRs ($477,000)
- Construction services: 5 million SDRs ($6,725,000)

Government-owned enterprise purchases
- Goods and services: 400,000 SDRs ($538,000)
- Construction services: 5 million SDRs ($6,725,000)

During the negotiations, each signatory negotiated the exclusion of certain procurement from the obligations imposed by the new Agreement. In the case of the United States, these exclusions carry forward those in the U.S. schedule to the

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62 68 Fed. Reg. 70861 (December 19, 2003). Executive Order 12260 requires the United States Trade Representative to set the U.S. dollar thresholds for application of Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511).

1979 Code. In addition, certain states excluded specified procurement, and set-asides on behalf of small and minority businesses are also excluded. The 1994 Agreement applies to all U.S. executive branch agencies with certain exceptions, including the Federal Aviation Administration.

Signatories to the 1994 Code include the following members of the 1979 Code—Canada, European Communities, Hong Kong, China, Iceland, Israel, Japan, Korea, Liechtenstein, the Kingdom of the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, and the United States. The United States terminated its participation in the 1979 Code on the entry into force of the 1994 Code on January 1, 1996.

GOVERNMENT PROCUREMENT UNDER FREE TRADE AGREEMENTS

NAFTA.—The NAFTA signatories agreed to eliminate buy national restrictions on the majority of non-defense related purchases by their Federal governments of goods and services provided by firms in North America. The Agreement marked the first time that Mexico had committed to eliminate discriminatory government procurement practices.

The Agreement applies only to purchases above a specified threshold:[63]

(1) Purchases of goods over $25,000 by U.S. Federal agencies from Canadian suppliers and vice versa;

(2) For other Federal Government procurement in the three countries, purchases of goods and services over $58,550 and purchases of construction services over $7,611,532; and

(3) For Federal Government-owned enterprises, purchases of goods and services over $292,751 and purchases of construction services over $9,368,478.

The Agreement does not apply to certain kinds of purchases by the U.S. government including purchases under small or minority business set-aside programs, certain national security, agriculture, and Agency for International Development procurements, and procurements by state and local governments.

Chile.—The Agreement obligates each Party to accord national treatment to the procurement of goods, services, and suppliers of the other Party. Above certain monetary thresholds, the Agreement applies to procurement by 20 Chilean central government and 13 Chilean regional government entities, and by 79 entities of the United States Government-including the General Services Administration, departments of the Federal Government, and independent agencies, boards, and commissions. The thresholds are:

(1) For national government procurement in the two countries, purchases of goods and services over $58,550 and purchases of construction services over $6,725,000; and

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63 68 Fed. Reg. 70861 (December 19, 2003).

(2) For government-owned enterprises, purchases of goods and services over $292,751 and purchases of construction services over $6,725,000.

The applicability of the Agreement to certain goods procured for national security purposes is restricted. The Agreement also covers procurement by 341 Chilean municipalities and 37 U.S. States, above certain monetary thresholds and subject to specified conditions. The equivalent thresholds for purchases for these "sub-central" government entities, i.e., Chilean municipalities and U.S. state government agencies, are set at $477,000 for purchases of goods and services and $6,725,000 for purchases of construction services.

Singapore.—Singapore made commitments on non-discrimination in government services procurements, based on a "negative list" approach in which U.S. firms gain nondiscriminatory access unless specifically excluded. The agreement also reinforces WTO commitments to strong and transparent disciplines on procurement procedures. Finally, monetary thresholds for government procurement disciplines are lowered, thus expanding the contracts that are subject to FTA disciplines. The thresholds are:

(1) For national government procurement in the two countries, purchases of goods and services over $58,550 and purchases of construction services over $6,725,000; and

(2) For government-owned enterprises, purchases of goods and services over $292,751 and purchases of construction services over $6,725,000.

Australia.—Chapter Fifteen of the Agreement establishes rules that certain government entities, listed in Annex 15-A of the Agreement, must follow in procuring goods and services. The Chapter's rules will apply whenever these entities undertake procurements valued above thresholds specified in Annex 15-A. The thresholds are:

(1) For national government procurement in the two countries, purchases of goods and services over $58,550 and purchases of construction services over $6,725,000; and

(2) For government-owned enterprises, purchases of goods and services over $292,751 and purchases of construction services over $6,725,000.

Australia has covered all major procuring entities such as Department of Defense, Department of Transport and Regional Services, Department of Communications, Information Technology and the Arts, and Department of Prime Minister and Cabinet. Australia has also covered 31 administrative and public bodies including important agencies such as the Reserve Bank of Australia, Australian Broadcasting Authority, and Australian Nuclear Science and Technology Organization.

In order to comply with its obligations under Chapter Fifteen, the United States must waive the application of certain federal laws, regulations, procedures and practices that ordinarily treat foreign goods and services and suppliers of such goods and services less favorably than U.S. goods, services, and suppliers. Section 301(a) of the Trade Agreements Act of 1979 (19 U.S.C. 2511(a))

authorizes the President to waive the application of such laws, regulations, procedures, and practices with respect to "eligible products" of a foreign country designated under section 301(b) of that Act.

The term "eligible product" in section 301(a) of the Trade Agreements Act is defined in section 308(4)(A) of that Act for goods and services of countries and instrumentalities that are parties to the WTO Agreement on Government Procurement and countries that are parties to NAFTA. Section 401 of the implementing bill amends the definition of "eligible product" in section 308(4)(A) of the Trade Agreements Act, providing that, for a party to a free trade agreement that entered into force for the United States after December 31, 2003, and prior to January 2, 2005, an "eligible product" means "a product or service of that country or instrumentality which is covered under the free trade agreement for procurement by the United States." This amended definition coupled with the President's exercise of his authority under section 301(a) of the Trade Agreement Act will allow procurement of products and services of Australia and other Parties to FTAs that entered into force during the specified time period.

Morocco.—The Agreement prohibits Moroccan government procurers from discriminating against U.S. firms, or favoring Moroccan firms, when purchasing more than $175,000 in goods or services or $6,725,000 in construction services. Morocco has covered 30 central government entities in its government procurement offer. The list of 30 entities includes Morocco's largest government procurers, such as the Ministries of Defense, Foreign Affairs, Interior, and the Prime Minister's Office. The Agreement covers all of Morocco's provinces and prefectures – the U.S. equivalent of states. The provisions are important because the Moroccan government is heavily involved in the Moroccan economy. The Agreement opens up 136 Moroccan administrative and public bodies to U.S. contractors, including the National Office of Electricity, the National Office of Airports, the National Office of Potable Water, the National Railroad Office, and the Office of Ports Utilization.

U.S. implementation of the Morocco FTA procurement provisions relied upon a legislative amendment in the U.S.-Australia Free Trade Agreement Implementation Act that provided for coverage for all countries with free trade agreements that entered into force by January 2005. Because Morocco delayed implementation, the agreement did not enter into force by the January 2005 deadline, and therefore, the Morocco procurement provisions are not currently effective at the time of this writing. Thus, future legislation will be needed to cover Morocco.

TITLE III OF THE TRADE AGREEMENTS ACT OF 1979, AS AMENDED

Congress approved the first Agreement on Government Procurement under section 2 of the Trade Agreements Act of 1979 and amended that statute in the Uruguay Round and NAFTA implementing bills to reflect U.S. obligations under

those agreements. Title III of that Act implements the obligations of the Code in U.S. law with respect to purchases by covered government entities.[64]

Executive Order 12260, issued on December 31, 1980, requires all U.S. government agencies covered by the Code to observe its provisions. Section 301 of the 1979 Act authorizes the President to waive the application of discriminatory government procurement law, such as the Buy American Act, and labor surplus set-asides that are not for a small business. The waiver authority applies only to purchases covered by the Code and only to foreign countries designated by the President that meet one of four statutory conditions basically requiring the country to provide appropriate reciprocal, competitive government procurement opportunities to U.S. products and suppliers, unless the country is a least developed country.

Buy American Act preferences still apply to contracts below the SDR threshold, purchases by non-covered entities, and procurement from countries not eligible for a waiver regardless of contract size. Special Buy American-type restrictions under other laws (e.g., small business set asides, required domestic sourcing of particular goods) are also not affected.

Section 302 of the 1979 Act, as amended, is designed to encourage other countries to participate in the Code and provide appropriate reciprocal competitive opportunities. For this purpose, the President is required, after the date on which any waiver first takes effect, to prohibit the procurement of products otherwise covered by the Code from non-designated countries. The President may, however, (1) waive the prohibition on procurement of products by a foreign country or instrumentality that has not yet become a party to the Agreement but has agreed to apply transparent and competitive procedures to its government procurement equivalent to those in the Agreement and to maintain and enforce effective prohibitions on bribery and other corrupt practices in connection with government procurement; (2) authorize agency heads to waive prohibitions on a case-by-case basis when in the national interest; and (3) authorize the Secretary of Defense to waive the prohibition for products of any country which enters into a reciprocal procurement agreement with the Department of Defense. All such waivers are subject to interagency review and general policy guidance.

Section 303 authorizes the President to waive as of January 1, 1980, the application of the Buy American Act for purchases by any government entity of civil aircraft and related articles irrespective of value from countries party to the GATT Agreement on Trade in Civil Aircraft.

Section 304 sets forth negotiating objectives in conjunction with the renegotiation of the Code within 3 years to improve its operation and broaden the coverage. This negotiation is ongoing. The President is directed to seek more open and equitable foreign market access and the harmonization, reduction, or elimination of devices distorting government procurement trade. The President

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64 19 U.S.C. 2511-2518.

must also seek equivalent competitive opportunities in developed countries for U.S. exports in appropriate product sectors as the United States affords their products, such as in the heavy electrical, telecommunications, and transport equipment sectors. The President must report to the committees of jurisdiction during the renegotiations if he determines they are not progressing satisfactorily and are not likely to result within 12 months in expanded agreement coverage of principal developed country purchasers in appropriate product sectors. The President is also directed to indicate appropriate actions to seek sector reciprocity with such countries in government procurement, and may recommend legislation to prohibit procurement by entities not covered by the Code from such countries.

Title III of the 1979 Act, as amended, also contains a number of reporting requirements to the Congress on various aspects of the Code and its economic impact and implementation.

TITLE VII OF THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, AS AMENDED

Background

Title VII of the Omnibus Trade and Competitiveness Act of 1988 ("Buy American Act of 1988")[65] as amended by the Uruguay Round Agreements Act, amended both the Buy American Act of 1933 and title III of the Trade Agreements Act of 1979 to address discrimination by foreign governments in the procurement of U.S. products or services. Title VII statutory authority ceased to be effective on April 30, 1996. On March 31, 1999, President Clinton issued Executive Order 13116, which reinstituted Title VII procedures.

Title VII prohibits U.S. government procurement of products and services from certain parties, including (1) signatories "not in good standing" to the Agreement; (2) signatories in good standing that discriminate against U.S. firms in their government procurement of products or services not covered by the Agreement; and (3) non-signatories to the Agreement whose governments discriminate against U.S. products or services in their procurement.

In the case of countries that discriminate on procurement not covered by the Agreement, prohibitions are to be imposed when a foreign government maintains a significant and persistent pattern or practice of discrimination against procurement of U.S. products or services that results in identifiable harm to U.S. business. In cases of signatories to the Agreement, Federal agencies would be prohibited from procuring only non-Agreement covered products from these countries unless that country has also been designated as a country "not in good standing."

Least developed countries are exempt from the procurement prohibition, as are

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65 41 U.S.C. 10a note.

products and services procured and used by the Federal Government outside the United States and its territories. A prohibition may also be waived, on a contract-by-contract or class of contracts basis, when in the public interest or to avoid the creation of a monopoly situation. The President or head of a Federal agency may also authorize the award of a contract or class of contracts, notwithstanding a prohibition, if insufficient competition exists to assure the procurement of products or services of requisite quality at competitive prices. Normally the Congress must be notified at least 30 days before the prohibition is waived on a contract or class of contract.

The President must submit to appropriate congressional committees, by April 30 each year, a report on the extent to which countries discriminate against U.S. products or services in making government procurements. The report must identify (1) signatories to the Agreement that are not in compliance with its requirements; (2) signatories to the Agreement whose products and services are acquired in significant amounts by the U.S. government, who are in compliance with the Agreement, but maintain a significant and persistent pattern or practice of discrimination in the government procurement of products and services not covered by the Agreement which results in identifiable harm to U.S. businesses; (3) non-signatories to the Agreement whose products or services are acquired in significant amounts by the U.S. government and who maintain in their government procurement a significant and persistent pattern or practice of discrimination which results in identifiable harm to U.S. businesses; (4) non-signatories to the Agreement, which fail to apply transparent and competitive procedures equivalent to those in the Agreement, and whose products and services are required in significant amounts by the U.S. government; and (5) non-signatories to the Agreement which fail to maintain and enforce effective prohibitions on bribery and other corrupt practices in connection with government procurement, and whose products and services are required in significant amounts by the U.S. government. The law requires the President to take into account a number of specific factors in identifying countries and to describe the practices and their impact in the annual report.

By the date the annual report is submitted, the U.S. Trade Representative (USTR) must request consultations with any identified country, unless that country was also identified in the preceding annual report. If the country is a signatory identified as not in compliance with the Agreement and does not comply within 60 days after the annual report is issued, the USTR must request formal dispute settlement proceedings under the Agreement, unless they are already underway pursuant to a previous identification. If dispute settlement is not concluded within 18 months or has concluded and the country has not taken action required as a result of the procedures to the satisfaction of the President, the country is considered "not in good standing" and the President is required to revoke the waiver of Buy American restrictions granted under the Trade Agreements Act of 1979, as amended. The President will not limit procurement

from the foreign country if, before the end of 18 months following initiation of dispute settlement, the country has complied with the Agreement, has taken action recommended as a result of the procedures to the satisfaction of the President, or the procedures result in a determination requiring no action by the country. The President may also terminate the sanctions and reinstate a waiver at any time under such circumstances.

Within 60 days after the annual report is issued, the President must impose the procurement prohibition on any country identified as discriminating on procurements not covered by the Agreement and which has not eliminated its discriminatory procurement practices. The President may terminate the sanctions at such time as he determines the country has eliminated the discrimination.

With respect to either category of countries, if the President determines that imposing or continuing the sanctions would harm the U.S. public interest, the President may modify or restrict the application of the sanctions to the extent necessary to impose appropriate limitations that are equivalent in their effect to the discrimination against U.S. products or services in government procurement by that country.

The President also cannot impose sanctions if it would (1) limit U.S. government procurement to, or create a preference for, products or services of a single supplier; or (2) create a situation where there could be or are an insufficient number of actual or potential bidders to assure U.S. government procurement of goods or services of requisite quality at competitive prices.

By April 30 of each year, the President must submit to the Congress a general report on actions taken under title VII, including an evaluation of the adequacy and effectiveness of such actions as a means toward eliminating foreign discriminatory government procurement practices against U.S. businesses and, if appropriate, legislative recommendations for enhancing the usefulness of title VII or any other measures to eliminate or respond to foreign discriminatory foreign procurement practices.

Chapter 4: LAWS REGULATING EXPORT ACTIVITIES

Export Controls

Background

Through statute, Congress has authorized the President to control the export of various commodities. The three most significant programs for controlling different types of exports deal with nuclear materials and technology, defense articles and services, and non-military dual-use goods and technology. Under each program, licenses of various types are required before an export can be undertaken. The Nuclear Regulatory Commission is responsible for the licensing of nuclear materials and technology under the Atomic Energy Act. The Department of State is responsible for the licensing of exports of defense articles and services and maintains the Munitions Control List under the Arms Export Control Act.

Export licensing requirements for most commercial goods and technical data are authorized by the Export Administration Act under the jurisdiction of the Bureau of Industry and Security in the Department of Commerce. The three basic purposes of export controls are to protect the national security, to further U.S. foreign policy interests, and to protect commodities in short supply. The Secretary of Defense is authorized to review certain applications for national security purposes while the Secretary of State reviews specified license applications for foreign policy purposes.

The export of goods or technical data subject to the Commerce Control List (CCL) must be authorized by licenses (either individual validated licenses or bulk licenses authorizing multiple shipments) which are granted on the basis of such factors as intended end-use and the probability and likely effect of diversion to military use. Exports and reexports from a foreign country of U.S.-origin commodities and technical data or of foreign products containing U.S.-origin components or technology are also regulated.

The foreign policy export control authority was used by President Carter to embargo the export of grain to the Soviet Union after the 1979 Soviet invasion of Afghanistan. President Reagan used it again in 1981 until late 1983, following the imposition of martial law in Poland, to embargo sales by U.S. firms and their foreign subsidiaries of oil and gas transmission and refining commodities and technology for use by the Soviet Union on its natural gas pipeline to Western Europe. Crime control and detection instruments and equipment are subject to control for foreign policy reasons to countries which may engage in persistent gross violations of human rights. Certain other goods and technology are controlled to seven countries (Libya, Iran, Iraq, Syria, North Korea, Sudan, and Cuba) due to their repeated support of international terrorism.

Sanctions against international terrorism were revised and strengthened as amendments to the Export Administration Act of 1979 under the Anti-Terrorism

and Arms Export Amendments Act of 1989[1] and the National Defense Authorization Act for Fiscal Year 1991.[2]

The short supply control authority was used to help control raw materials prices during the Korean conflict. In 1973 President Nixon prohibited soybean exports as a response to rapidly increasing prices. The export of crude oil carried on the Trans-Alaska Pipeline is prohibited. Exports of crude oil and refined and unprocessed western red cedar harvested from Federal or state lands are subject to validated licensing requirements.

The U.S. government has employed export controls continuously since 1940. The first controls were imposed to avoid or mitigate the scarcity of various critical commodities during World War II and to assure their equitable distribution within the U.S. economy and to U.S. allies. Export controls were expected to terminate after shortages created by World War II were substantially eliminated. However, the cold war led to enactment of the Export Control Act of 1949,[3] designed to control all U.S. exports to Communist countries.

The Export Control Act of 1949 provided for the control of items in short supply, for controls to further U.S. foreign policy goals, and for the examination of exports to Communist countries which might have military application. The 1949 Act, amended and extended as appropriate, remained in effect for 20 years. The 1949 Act was then replaced by the Export Administration Act of 1969,[4] which was in turn replaced by the Export Administration Act of 1979.

The 1969 Act maintained the basic export control system set up by the Export Control Act, but called for a removal of controls on goods and technologies that were freely available from foreign sources and that were only marginally of military value. The 1969 Act was amended in 1972, 1974, and 1977.[5]

A significant expansion of controls was brought about in 1977 when Congress amended the 1969 Act to authorize the control of goods and technology exported by any person subject to the jurisdiction of the United States, thus permitting the Department of Commerce to exercise control over foreign-origin goods and technical data reexported by U.S.-owned or U.S.-controlled companies abroad. Anti-boycott policies (originally established by Congress in 1965) were also substantially strengthened in 1977.[6]

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[1] Public Law 101-222, section 4, approved December 12, 1989.
[2] Public Law 101-510, section 1702, approved November 5, 1990.
[3] Public Law 81-11, approved February 26, 1949.
[4] Public Law 91-184, approved December 30, 1969.
[5] Public Law 93-500, Public Law 95-52.
[6] Public Law 95-52, approved June 22, 1977.

EXPORT ADMINISTRATION ACT OF 1979

The Export Administration Act of 1979[7] as reauthorized and amended in 1985 and 1988 replaced the 1969 Act as amended, which expired on September 30, 1979. The 1979 Act provides the broad and primary authority for controlling the export from the United States to potential adversary nations of civilian goods and technology which could contribute significantly to the military capability of controlled countries (consisting of Communist countries, as defined in section 620(f) of the Foreign Assistance Act of 1961) if diverted to military application (national security controls under section 5). Like the previous law, the 1979 Act also authorized the President to impose export controls for foreign policy reasons or to fulfill international obligations (foreign policy controls under section 6) and to protect the domestic economy from an excessive drain of scarce materials and to reduce the inflationary impact of foreign demand (short supply controls under section 7). The Act also continues the 1977 anti-boycott program (section 8) which prohibits U.S. persons from taking action with the intent to comply with, further, or support any foreign country boycott against any country friendly to the United States (primarily Arab states against Israel).

In its 1979 review of the Export Administration Act of 1969, the Congress made substantial changes in the statute. Separate and distinct procedures and criteria were established for imposing national security and foreign policy controls. Precise time deadlines were set for the processing of export license applications. Development of a "militarily critical technologies list" (MCTL) was mandated, both as a means of reviewing the adequacy and focus of the existing commodity control list of categories of goods and technologies subject to Commerce export controls, and as a possible means of arriving at a more limited control list containing only the most militarily significant technologies. Foreign availability of goods controlled by the United States was, for the first time, made a factor in decisions to license such items for export.

The Act also formally authorized U.S. participation in the informal multilateral export control body known as COCOM (Coordinating Committee on Multilateral Export Controls) in which the NATO countries (with the exception of Iceland) and Japan also participated. From 1950 to 1994, COCOM[8] attempted to coordinate the export control policies of the Western allies with respect to Communist countries. Representatives of the participating governments met periodically to set guidelines for controls on exports to Communist countries. The 1979 Act directed the President to negotiate with other COCOM governments in an effort to reach

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[7] Public Law 96-72, as amended by Public Law 96-533, Public Law 97-145, Public Law 98-108, Public Law 98-207, Public Law 98-222, Public Law 99-64, Public Law 99-399, Public Law 99-441, Public Law 99-633, Public Law 100-180, Public Law 100-418, Public Law 100-449, Public Law 101-222, and Public Law 101-510, 50 U.S.C. App. 2401.

[8] The Wassenaar Arrangement, established in 1996, is the post cold-war successor organization to COCOM and performs many of the same functions as its predecessor.

agreement on reducing the scope of export controls, holding periodic high-level meetings on COCOM policy, publishing the list of items controlled by COCOM, and introducing more effective procedures for enforcing COCOM export controls.

The 1979 Act authorized the administration of export controls until September 30, 1983. The Act was extended temporarily three times during the 98th Congress, through October 15, 1983, subsequently through February 28, 1984, and finally until March 30, 1984,[9] while the Congress considered proposals for major changes in the law. During the lapses in authority in 1983 and after the 1979 Act terminated on March 30, 1984, and House-Senate differences could not be resolved prior to congressional adjournment on October 12, 1985, the President administered export controls under the authority of the International Emergency Economic Powers Act and Executive Order 12470 of March 30, 1984, as an interim method of control until new authority could be passed by Congress. The Export Administration Amendments Act of 1985[10] which reauthorized the 1979 Act for 4 years until September 30, 1989, with comprehensive amendments, was enacted on July 12, 1985.

EXPORT ADMINISTRATION AMENDMENTS ACT OF 1985

The 1985 Act left intact the basic structure of U.S. national security, foreign policy, and short-supply export controls. The main goals of the 1985 Act were to improve U.S. export competitiveness and to promote national security interests through stricter controls and better enforcement.

Increased U.S. competitiveness was to be achieved by easing the total licensing burden on U.S. businesses. Export licensing requirements were eliminated in the case of certain relatively low-technology items, and the Secretary of Commerce was directed to review and revise the commodity control list at least once a year. The approval process for license applications was to be streamlined as well. The 1985 amendments also addressed the issue of foreign availability by specifying a process to provide for the review and decontrol of goods found to be widely available and unable to be brought under control.

The promotion of national security interests was to be achieved by providing stricter controls for the export of critical items and strengthening the enforcement of U.S. export controls. The 1985 Act required the United States to undertake negotiations with COCOM countries to achieve greater coordination and compliance with multilateral controls, fewer exceptions to the control list, and strengthened and uniform enforcement. It created new criminal offenses against illegal diversions and added to the broad range of sanctions against violators of U.S. export controls.

The Act also restrained the President's authority to impose new foreign policy

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[9] Public Law 98-108, approved October 1, 1983; Public Law 98-207, approved December 5, 1983; Public Law 98-222, approved February 29, 1984.

[10] Public Law 99-64.

export controls, particularly to embargo agricultural exports. Additional requirements for consultations with industry and Congress prior to the imposition of foreign policy controls and greater attention to specified criteria, including the foreign availability of competing products, are to be considered prior to decisions to extend, expand, or impose export controls.

The 1985 Act also imposed limitations on, but did not entirely eliminate, the discretion of the President to impose foreign policy controls on exports subject to existing contracts. The Act prohibits controls on exports of goods or technology under existing contracts except where the President determines and certifies to the Congress that a breach of the peace poses a serious and direct threat to U.S. strategic interests and the prohibition or curtailment of such contracts would be instrumental in remedying the situation posing the direct threat.

The Act set forth stiffer penalties for violators and granted new powers for enforcement to the Department of Commerce and the U.S. Customs Service and clarified the respective roles of these agencies. Commerce retained the primary responsibility for licensing and domestic enforcement whereas Customs was given primary responsibility for enforcement at all U.S. ports of exit and entry as well as all enforcement responsibility overseas.

The Act created a new Under Secretary of Export Administration and two Assistant Secretaries in the Department of Commerce[11] and a new National Security Council Office in the Department of Defense. Congress also directed that an Office of Foreign Availability be established in the Department of Commerce.

OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988

Congressional dissatisfaction with the implementation of the Export Administration Amendments Act of 1985 led to the introduction of new legislation during both the 99th and 100th Congresses. The Omnibus Trade and Competitiveness Act of 1988[12] contained major revisions of the Export Administration Act of 1979. Like the 1985 amendments, the 1988 Act emphasized the reduction of export disincentives and the strengthening of export enforcement. A clarification of the dispute resolution process was also a part of the Act. The authorization date for the Export Administration Act was extended by 1 year to September 30, 1990.

The 1988 Act provided for the reduction of export disincentives through a streamlining of licensing requirements, control list reduction, and improved procedures for making foreign availability determinations. The 1988 Act also provided for the use of distribution licenses for multiple exports to the People's Republic of China.

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[11] On April 18, 2002, the Department of Commerce, through an internal organizational order, changed the name of the "Bureau of Export Administration," which contained these positions, to the "Bureau of Industry and Security."

[12] Public Law 100-418, title II, subtitle D, approved August 23, 1988.

The 1988 Act provided for stronger enforcement of U.S. and multilateral export controls.

In the case of persons convicted of violations of the Export Administration Act of 1979 or the International Emergency Economic Powers Act,[13] the Department of Commerce was authorized to bar such persons from applying for or using export licenses. Such authority was also extended to parties related through affiliation, ownership, control, or position of responsibility to any person convicted of violations.

In response to the sale by Toshiba Machine Company of Japan and Kongsberg Trading Company of Norway of advanced milling machinery to the Soviet Union, the Congress passed the Multilateral Export Control Enhancement Amendments Act.[14] Section 2443 of that Act requires the President to impose, for a period of 3 years, a ban on U.S. government contracting with and procurement from the two cited companies and their parent companies. That section also required the President to prohibit the importation of all products produced by Toshiba Machine Company and Kongsberg Trading Company for a period of 3 years. The sanctions required by section 2443 were imposed by President Reagan on December 27, 1988[15] and remained in effect until December 28, 1991.

EXPIRATION OF THE EXPORT ADMINISTRATION ACT OF 1979

The Export Administration Act of 1979 expired on September 30, 1990. The 101st Congress passed legislation (H.R. 4653) to reauthorize the Act, but the President exercised a pocket-veto in November 1990. During the 102d Congress, the House and Senate passed bills and produced a conference report reauthorizing the Export Administration Act of 1979. The conference report failed to be considered before the 102d Congress adjourned sine die. On September 30, 1990, the President began exercising the authorities provided in the International Emergency Economic Powers Act to continue in effect the existing system of export controls.

During the 103d Congress, the Export Administration Act was extended twice. On March 27, 1994, Public Law 103-10, the Export Administration Fiscal Year 1994 Authorization bill, extended the Act through June 30, 1994.[16] Public Law 103-277 provided for an additional extension until August 20, 1994 as discussions between the Administration and the Congress continued on revisions to the Act.[17] Because the Congress did not take final action on a revised Export Administration Act before the close of the session, the President once again used the International

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[13] Public Law 95-223, approved December 28, 1977.
[14] Public Law 100-418, sections 2441-2447, approved August 23, 1988.
[15] Executive Order 12661, dated December 27, 1988; "Implementing the Omnibus Trade and Competitiveness Act of 1988 and Related International Trade Matters."
[16] Public Law 103-10, approved March 27, 1994.
[17] Public Law 103-277, approved July 5, 1994.

Emergency Economic Powers Act authorities to continue the existing export control system. On August 19, 1994, President Clinton issued an executive order continuing the export control regulations provided under the Act.[18] The President announced a continuation of the emergency on August 15, 1995 (60 Fed. Reg. 42,767) and again on August 14, 1996 (61 Fed. Reg. 42,527).

The President continued the national emergency on August 13, 1997 (62 Fed. Reg. 43,629) and in subsequent years. On November 13, 2000 the President signed into law an extension of the Export Administration Act of 1979 until August 20, 2001.[19] Upon the expiration of this extension, the President once again issued executive orders to continue the export control system including Executive Order 13222, issued on August 10, 2004 (69 Fed. Reg. 48763).

Multiple attempts to revive the Export Administration Act were made while the President was using executive orders to continue export control regulation. In the 104th Congress, the House passed the Omnibus Export Administration Act of 1996 (H.R. 361) on July 16, 1996, after hearings and consideration by the Committee on International Relations, the Committee on Ways and Means, and by the Committee on National Security. On July 17, 1996, the bill was received by the Senate and referred to the Committee on Banking, Housing and Urban Affairs, which held a hearing but took no further action. Export control legislation (H.R. 1942) was introduced in the 105th Congress, but no action was taken. In the 106th Congress, the Export Administration Act of 1999 (S. 1712) was introduced by Senator Michael P. Enzi. On September 23, 1999 the Senate Banking Committee voted unanimously (20-0) to report this legislation to the Senate floor (S.Rept. 106-180). However, action by the Senate on S. 1712 was not taken due to the concerns of several Senators about the bill's impact on national security.

Export control legislation was again introduced in the 107th Congress. On January 23, 2001, Senator Enzi introduced the Export Administration Act of 2001 (S. 149). Hearings were held on this legislation by the Senate Banking Housing and Urban Affairs Committee in February 2001, and the measure was reported favorably for consideration by the Senate by a vote of 19-1 on March 22, 2001 (S.Rept. 107-10). The Senate debated the legislation on September 4-6, 2001, and it passed with three amendments by a vote of 85-14.

The House version of the Export Administration Act, H.R. 2581, was introduced on July 20, 2001 by Representative Benjamin Gilman. On August 1, the House International Relations Committee passed the legislation with 35 amendments. The House Armed Services Committee (HASC) and the House Permanent Select Committee on Intelligence (HPSCI) received H.R. 2581 through sequential referral. On March 6, 2002, HASC further amended H.R. 2581 and reported out the legislation by a vote of 44-6 (H.Rept. 107-297). The legislation received no further consideration in the 107th Congress. In the 108th Congress, Representative Dreier introduced EAA legislation (H.R. 55), but no action was taken on it.

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[18] Executive Order 12924, dated August 19, 1994; "Continuation of Export Control Regulations."
[19] Public Law 106-508.

THE NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 1998

Among the range of products subject to export controls, recent congressional attention has been focused upon the foreign sale of high performance computers (HPCs). The National Defense Authorization Act for FY 1998[20] (NDAA98), passed by the 105th Congress, imposed special conditions on the export of HPCs. The benchmark used for gauging HPC computing performance is the standard known as millions of theoretical operations per second (MTOPS). Section 1211(a) of the NDAA98 requires exporters to provide prior notification to the Secretary of Commerce before exporting HPCs above the MTOPS threshold to Tier III[21] countries. Under this provision of NDAA98, exports of these HPCs are subject to the approval of the Secretaries of Commerce, Defense, Energy, and State. Section 1213 imposes post-shipment verification requirements for these HPCs, and section 1211(d) requires the President to notify Congress of any adjustment in the MTOPS threshold levels.

Each version of Export Administration Act in the 107th Congress provided for the repeal of NDAA98 export control provisions. Repeal of these provisions would not remove MTOPS as a regulatory standard, but would remove the statutory requirement to use MTOPS. The President would still be able to modify MTOPS thresholds or implement a new standard for control. In May 2003, the House defeated and amendment to the 2004 National Defense Authorization Act that would have repealed the NDAA 98 provisions.

Export Promotion of Goods and Services

EXPORT ENHANCEMENT ACT OF 1988

The Export Enhancement Act, enacted under title XXIII of the Omnibus Trade and Competitiveness Act of 1988,[22] includes provisions which establish in statute the United States and Foreign Commercial Service in the International Trade Administration of the Department of Commerce. The basic purpose of the Service is to promote the export of U.S. goods and services, particularly by small- and medium-sized businesses, and to promote and protect U.S. business interests abroad. Section 2306 requires the Service to make a special effort to encourage U.S. exports of goods and services to Japan, South Korea, and Taiwan.

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[20] Public law 105-85, section 1211, approved November 18, 1997.

[21] For HPCs, the Commerce Department organized countries of destination into 4 tiers with increasing levels of export control. These range from a no-license policy for HPC exports to Tier 1 countries to the virtual embargo for exports to Tier 4 countries. Tier 3 countries were subject to a dual control system distinguishing between civilian and military end-users and end-uses until 2000.

[22] Public Law 100-418, approved August 23, 1988, 15 U.S.C. 4721 et seq.

Section 2303 authorizes the Secretary of Commerce to establish a market development cooperator program in the International Trade Administration to develop, maintain, and expand foreign markets for U.S. non-agricultural goods and services. The program is implemented through contracts with non-profit industry organizations, trade associations, state departments of trade and their regional associations, and private industry firms or groups of firms (all referred to as "cooperators"). The Secretary was also directed to establish, as part of the program, a partnership program with cooperators under which cooperators may detail individuals to the Service for 1 to 2 years. This program is modeled after a similar program established by the Foreign Agricultural Service in the late 1950's to develop overseas commercial market opportunities for American agricultural exports.

In order to facilitate exporting by U.S. businesses, section 2304 requires the Secretary to provide assistance for trade shows in the United States which bring together representatives of U.S. businesses seeking to export goods or services, particularly participation by small businesses, and representatives of foreign companies or governments seeking to buy such U.S. goods or services. Sections 2312 and 2313 added to the Act made by title II of the Export Enhancement Act of 1992[23] expanded export promotion efforts. Section 2312 establishes in statute the Trade Promotion Coordinating Committee (TPCC) and directs it to coordinate the export promotion and export financing activities of the Federal Government and to develop a government-wide strategic plan for carrying out Federal export promotion and financing programs, including establishment of priorities. The Chair of the TPCC must submit an annual report to the Congress on the strategic plan developed. Section 2313 states the U.S. policy to foster the export of U.S. environmental technologies, goods, and services, and establishes the Environmental Trade Promotion Working Group within the TPCC for this purpose.

The Jobs Through Export Expansion Act of 1994 amended section 2313 to provide for the establishment of an environmental technologies trade advisory committee, including representatives of the private sector and the states, to advise the TPCC working group. The amendment also requires the working group to develop export plans for five priority countries and the placement of environmental technology specialists in each of the priority countries.[24]

FAIR TRADE IN AUTO PARTS ACT OF 1988

The Fair Trade in Auto Parts Act of 1988, sections 2121-2125 of the Omnibus Trade and Competitiveness Act of 1988,[25] required the Secretary of Commerce to establish an initiative to increase the sale of U.S.-made auto parts and accessories to Japanese markets, including to U.S. subsidiaries of Japanese firms. The Secretary

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[23] Public Law 102-429, approved October 21, 1992.
[24] Public Law 103-392, approved October 22, 1994, 15 U.S.C. 4701 note.
[25] Public Law 100-418, approved August 23, 1988, 15 U.S.C. 4701.

also was required to establish a Special Advisory Committee to advise and assist the Secretary in carrying out the initiative to increase U.S. auto parts sales in Japanese markets. The authorities granted under sections 2121-2125 expired on December 31, 1998.

In response to low sales of U.S. auto parts and accessories to Japanese auto firms based both in Japan and in the United States, Congress adopted the Fair Trade in Auto Parts Act of 1988. This action followed negotiations in 1986-87 between the U.S. and Japanese governments aimed at improving U.S. access to the Japanese auto parts markets. The provision was intended to provide for a longer-term effort to increase data collection, information exchange, and generally improved U.S. market access in the Japanese auto parts sector.[26] The U.S.-Japan Automotive Agreement expired on December 31, 2000.

Agricultural Export Sales and Promotion

To help finance sales of U.S. farm commodities abroad, the U.S. Department of Agriculture (USDA) administers several sales and credit programs. These include the concessional sales program under the authority of the Agricultural Trade Development and Assistance Act of 1954, as amended, commonly known as Public Law 480,[27] and the commercial programs of the Commodity Credit Corporation (CCC).

PUBLIC LAW 480

Public Law 480 was reauthorized through the end of 2007 by the Farm Security and Rural Investment Act of 2002.[28] Title I of Public Law 480 authorizes sales of U.S. agricultural commodities to developing countries or private entities for dollars on credit terms or for local currencies. Credit is provided at concessional interest rates for repayment periods up to 30 years. The Secretary of Agriculture may allow a grace period of up to 5 years before repayment must begin. Title II authorizes donations of U.S. agricultural commodities for emergency humanitarian relief and for development projects. Title II is implemented primarily through U.S. private voluntary organizations or cooperatives and the United Nations World Food Program. Title III authorizes donations to governments of least developed countries for direct feeding programs, emergency food reserves, and recipient government sales which are used to finance economic development activities. As a result of reforms made by Public Law 104-127, USDA is responsible for administering title I, while the U.S. Agency for International Development (USAID) is responsible for administering titles II and III.

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[26] Market Oriented Sector Specific Talks on Transportation Machinery, initiated on August 26, 1986 and concluded on August 18, 1987.

[27] Public Law 83-480, approved July 10, 1954, 7 U.S.C. 1701-1736d.

[28] Public Law 107-171, approved May 2, 2002.

EXPORT CREDIT GUARANTEE AND EXPORT PROMOTION PROGRAMS

USDA, using the resources of the Commodity Credit Corporation (CCC), offers both commercial credit and export promotion programs designed to maintain and expand overseas markets for U.S. farm products.

In operating two export credit guarantee programs, the CCC guarantees U.S. banks against defaults on payments due from foreign banks on the agricultural export sales they finance. Guarantees are made against political risks such as warfare, expropriation, exchange controls, and other foreign government actions, and against economic risks such as a foreign bank failure or a country's debt repayment problems. The U.S. banks deal directly with foreign purchasers to set loan repayment terms and interest rates, but must meet certain requirements to qualify for CCC guarantees.

The GSM-102 program guarantees credits for up to 3 years for commercial export sales of U.S. agricultural commodities from privately owned stocks. The GSM-103 program guarantees credits for longer periods of 3 to 10 years. The Farm Security and Rural Investment Act of 2002 ("the farm bill") authorized the CCC to make available $5.5 billion in credit guarantees for each fiscal year 2002 through 2007. The Secretary of Agriculture is given flexibility to allocate these funds between short-term (up to 3 years) and intermediate-term (3 to 10 years) guarantees. In addition, the farm bill authorizes another $1 billion of export credit guarantees or direct credits for fiscal years 2002 through 2007 for countries that are classified as "emerging markets." Emerging markets are countries taking steps toward a market-oriented economy and have potential to become viable commercial markets for U.S. agricultural exports.[29]

Title III of the Agricultural Trade Act of 1978, as amended by the Uruguay Round Trade Agreements Act of 1994[30] and the 2002 farm bill,[31] authorizes the export enhancement program (EEP).

The EEP was first established by the Congress in the Food Security Act of 1985[32] (the 1985 farm bill) to counter foreign exporters' use of subsidies as a means of increasing their agricultural exports. The Uruguay Round Agreements Act revised the definition of the EEP "to encourage the commercial sale of U.S. agricultural commodities in world markets at competitive prices." The Uruguay Round Agreements Act also provided that EEP would be "carried out in a market sensitive manner" and "not limited to responses to unfair trade practices."[33] Under EEP, the CCC makes cash bonuses available to private U.S. exporters on a bid basis to compensate them for making competitively-priced sales in overseas markets. The

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[29] Public Law 107-171, approved May 2, 2002.
[30] Public Law 103-465, approved December 8, 1994, 19 U.S.C. 3501 note.
[31] Public Law 107-171, approved May 2, 2002.
[32] Public Law 99-198, approved December 23, 1985.
[33] Public Law 103-465, approved December 8, 1994, 7 U.S.C. 5601 note.

2002 farm bill reauthorized EEP for fiscal years 2002 through 2007 and set the annual maximum spending level at $478 million. However, the FY2003 omnibus appropriations legislation limits EEP spending in fiscal year 2002 to $28 million.[34]

The CCC also administers the market access program (MAP) in order to "encourage the development, maintenance, and expansion of commercial export markets for agricultural commodities through cost-share assistance to eligible trade organizations that implement a foreign market development program." The MAP was established under the 1996 farm bill as the successor to the market promotion program (MPP) authorized by the 1990 farm bill. MPP had replaced the targeted export assistance program (TEA) of the Food Security Act of 1985. Unlike the TEA, priority is no longer accorded to exports which encounter unfair trade practices or barriers in foreign markets.

The 2002 farm bill also authorizes the foreign market development program (FMDP) through 2007. Prior to its authorization in the 1996 farm bill, FMDP was funded through appropriations for USDA's Foreign Agricultural Service. While MAP promotes primarily exports of high value agricultural products, including branded products, FMDP promotes exports of bulk agricultural commodities.

[34] Public Law 108-7, approved February 20, 2003.

Chapter 5: AUTHORITIES RELATING TO POLITICAL OR ECONOMIC SECURITY

A. Economic Authorities in National Emergencies

INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT

In 1977, Congress passed the International Emergency Economic Powers Act (IEEPA).[1] The Act grants the President authority to regulate a comprehensive range of financial and commercial transactions in which foreign parties are involved but allows the President to exercise this authority only in order "to deal with an unusual and extraordinary threat, which has its source in whole or in part outside the United States, to the national security, foreign policy, or economy of the United States, if the President declares a national emergency . . . with respect to such threat."

Background

Public Law 95-223, of which IEEPA constitutes title II, redefined the President's authorities to regulate international economic transactions in times of national emergency, until then provided by section 5(b) of the Trading With the Enemy Act (TWEA) (50 App. U.S.C. 5(b)), by eliminating TWEA's applicability to national emergencies[2] and instead providing such authorities in a separate statute of somewhat narrower scope and subject to congressional review.

The authorities initially granted to the President under IEEPA broadly parallel those contained in section 5(b) of the TWEA but are somewhat fewer and more circumscribed. While under the TWEA the existence of any declared national emergency, whether or not connected with the circumstances requiring emergency action, was used as the basis for such action, the IEEPA allows emergency measures against an external threat only if a national emergency under the National Emergencies Act has been declared with respect to the same threat.[3] Nevertheless, the President's authorities under the IEEPA still remain extensive and, as noted below, were further enhanced in 2001 by the USA Patriot Act, Public Law 109-56 (Oct. 26, 2001). Under IEEPA the President may "by means of instructions, licenses, or otherwise . . . investigate, regulate, prevent, or prohibit" virtually any foreign economic transaction, from import or export of goods and currency, to transfer of exchange or credit. The only international transactions exempted from this authority are personal communications not involving a transfer of anything of value; charitable donations of necessities of life to relieve human suffering (except

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[1] Public Law 95-223, title II, approved December 28, 1977, 91 Stat. 1626, 50 U.S.C. 1701-1706.

[2] Title I of Public Law 95-223 also provides for the continuation in force, through annual presidential extensions, of certain measures implemented on the basis of national emergencies declared under the TWEA. For further detail, see section on the Trading With the Enemy Act.

[3] Public Law 94-412.

in certain circumstances); the importation to or expatriation from any country of information and informational materials, such as publications, not otherwise controlled by export control law or prohibited by espionage law; or personal transactions ordinarily incident to travel.

IEEPA was amended by section 106 of the USA Patriot Act, Public Law 107-56 (Oct. 26, 2001), to enhance its authorities. First, the Patriot Act clarified that the broad authorities granted to the President in the IEEPA include the power to block property during the pendency of an investigation. It also allows the President to confiscate and vest property of any foreign country or foreign national that has planned, authorized, aided, or engaged in armed hostilities with or attacks against the United States. In addition, the USA Patriot Act provides that in any judicial review of a determination made under the authorities section of IEEPA, if that determination was based on classified information, such information may be submitted to the reviewing court *ex parte* and *in camera.*

IEEPA requires the President to consult with Congress, whenever possible, before declaring a national emergency, and regularly while it remains in force. Once a national emergency goes into effect, the President must submit to Congress a detailed report explaining and justifying his actions and listing the countries against which such actions are to be taken, and why. The President is also required to provide Congress periodic follow up reports every six months with respect to the actions taken since the last report and report any change in information previously reported. IEEPA programs are established pursuant to a Declaration of National Emergency under the National Emergencies Act. [4] They can be terminated by the President and are typically continued annually on the anniversary date of the declaration of the national emergency if the President determines it is necessary.

Application

Since its enactment, the authority conferred by IEEPA has been exercised on various occasions and for different purposes. For example IEEPA has been used to impose a variety of economic sanctions on foreign countries, as well as to block property and prohibit transactions with specially designated persons, such as persons who commit, threaten to commit or support terrorism; persons indicted as war criminals by the International Criminal Tribunal for the former Yugoslavia; persons who threaten international stabilization efforts in the Western Balkans; and persons undermining democratic processes or institutions in Zimbabwe. In addition, IEEPA has been used to continue in force the authority of the Export Administration Act during several periods when statutory authority has lapsed. Below are some examples of the application of the IEEPA authorities.

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[4] Public Law 94-412.

Iran

In response to the seizure of the American Embassy and hostages in Teheran, President Carter, using IEEPA authority on November 14, 1979, declared a national emergency and ordered the blocking of all property of the government of Iran and of the Central Bank of Iran within the jurisdiction of the United States.[5] The measure and its later amendments were implemented through Iranian Assets Control Regulations (31 CFR 535). Sanctions against Iran were broadened on April 7, 1980,[6] and April 17, 1980,[7] to constitute eventually an embargo on all commercial, financial, and transportation transactions with Iran, with minimal exceptions. The trade embargo was revoked by President Carter on January 19, 1981, after the release of the Teheran hostages, but the national emergency has remained in effect and has been extended.[8]

President Clinton invoked his authority under IEEPA and other statutes on March 15, 1995 to prohibit the entry of any U.S. person or any entity controlled by a U.S. person into a contract involving the financing or overall supervision and management of the development of the petroleum resources located in Iran.[9] The President imposed additional sanctions on May 8, 1995.[10] The sanctions were then amended in 1997.[11] As discussed below, additional sanctions on Iran were imposed by the Iran and Libya Sanctions Act.[12]

Extensions of Export Control Regulations

Just as with the TWEA, the IEEPA authority also has been used on several occasions to continue in force the administration of export controls when extensions of the Export Administration Act of 1979 (EAA) have not been enacted in time to continue the export control authority in force by statutory extension. Upon the expiration of the EAA on October 15, 1983, President Reagan used the IEEPA authority to declare a national emergency and to continue in force the existing

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[5] Executive Order 12170, 44 Fed. Reg. 65729.
[6] Executive Order 12205, 45 Fed. Reg. 24099.
[7] Executive Order 12211, 45 Fed. Reg. 26685.
[8] Following Iranian attacks on U.S. flag ships in the Iran-Iraq war, an embargo was reimposed on October 29, 1987 (Executive Order 12613, 52 Fed. Reg. 41,940), on imports of goods and services from Iran under the authority of section 505 of the International Security and Development Cooperation Act of 1985 (22 U.S.C. 2349aa-9) and implemented through Iranian Transactions Regulations (31 CFR part 560). The embargo is still in force, although was eased somewhat to allow some agricultural trade in 2000. (31 CFR 560.535, 65 Fed. Reg. 25642, 25643). In 2004, some publishing activities were allowed to resume between the two countries. (31 CFR. 515.577, 31 CFR 538.529, and 31 CFR 560.538).
[9] Executive Order 12957, 60 Fed. Reg. 14615.
[10] Executive Order 12959, 60 Fed. Reg. 24757. See also discussion on the Iran and Libya Sanctions Act of 1996.
[11] Executive Order 13059, 62 Fed. Reg. 44531; 34 Weekly Comp. Pres. Doc. 2324 (Nov. 16, 1998); 31 CFR Part 560.
[12] Public Law 99-83, 22 U.S.C. 2349.

regulations for the administration of export controls.[13] After the EAA was temporarily extended by law[14] retroactively to October 15, 1983, and through February 29, 1984, the President revoked its extension under the IEEPA and rescinded the declaration of economic emergency.[15] On February 29, 1984, the EAA was again extended by law[16] through March 30, 1984, when the authority for administering the export control provisions again had to be extended by the President under the IEEPA authority upon the declaration of a national economic emergency.[17] The extension and the declared emergency remained in force during the protracted, if unsuccessful, House-Senate attempts at resolving the disagreements on the reauthorization of the EAA during the 98th Congress, and in the 99th Congress until July 12, 1985, when the EAA was again extended by law,[18] the executive extension of export controls was revoked and the emergency rescinded.[19] The President invoked the IEEPA authority on September 30, 1990 to maintain existing export controls upon expiration of the EAA on that date, pending enactment of further reauthorizing legislation.

The 1990 extension of the export control authority under the IEEPA was maintained in force by means of annual continuations of the export control emergency until legislation was passed in the 106th Congress.[20] Upon expiration of this authority on August 20, 2001, President Bush continued the national emergency under Executive Order 13222.[21]

Nicaragua

On May 1, 1985, President Reagan, under his IEEPA powers, declared a national emergency because of the "Nicaraguan government's aggressive activities in Central America" and prohibited all imports of Nicaraguan goods and services, all exports to Nicaragua (other than those destined for the organized democratic resistance) and transactions related thereto, and all activities of Nicaraguan ships and aircraft at U.S. sea- and airports.[22] The declaration of emergency and the imposed sanctions were terminated on March 13, 1990.[23]

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[13] Executive Order 12444, 48 Fed. Reg. 48215.
[14] Public Law 98-207, 97 Stat. 1391.
[15] Executive Order 12451, 48 Fed. Reg. 56563.
[16] Public Law 98-222, 98 Stat. 36.
[17] Executive Order 12470, 49 Fed. Reg. 13099.
[18] Export Administration Act of 1979, Reauthorization; Public Law 99-64, 1985, 99 Stat. 120.
[19] Executive Order 12525; 50 Fed. Reg. 28757.
[20] Public Law 106-508.
[21] 66 FR 44025.
[22] Executive Order 12513, 50 Fed. Reg. 18629. The embargo is implemented by Nicaraguan Trade Control Regulations (31 CFR part 540).
[23] Executive Order 12707, 55 Fed. Reg. 9707.

South Africa

IEEPA was also used by President Reagan to declare a national emergency with respect to South Africa because of its "policy and practice of apartheid" and impose, using also several other authorities, effective on October 11, 1985, an embargo on certain trade (including specifically the importation of krugerrands) and financial transactions with the government of South Africa.[24] The embargo, implemented through South African Transactions Regulations (31 CFR 545), was later greatly expanded, and additional economic sanctions were imposed by the Comprehensive Anti-Apartheid Act of 1986,[25] upon the enactment of which the President allowed the declaration of the South African emergency to expire.[26]

Under the South African Democratic Transition Support Act of 1993, Congress repealed certain sections of the Comprehensive Anti-Apartheid Act and provided for the total repeal of the Act upon certification by the President that an interim government, elected on a non-racial basis through free and fair elections, had taken office in South Africa.[27] President Clinton sent such certification to Congress on June 8, 1994.[28]

Libya

President Reagan similarly used the IEEPA authority, among several others, to impose economic sanctions on Libya because of Libyan-supported terrorist attacks on the Rome and Vienna airports. On January 7, 1986, he declared a national emergency and prohibited all trade (with minimal exceptions) and transportation transactions with Libya, extension of credit to the Libyan government, and personal travel to or within Libya.[29] On the following day, he ordered the blocking of all property and interests of the Libyan government and its instrumentalities in the United States.[30] These measures are implemented by Libyan Sanctions Regulations (31 CFR 550). Also in 1992 the President used IEEPA authority to place restrictions on air travel to and from Libya. [31] As discussed below additional sanctions were imposed on Libya by the Iran and Libya Sanctions Act of 1996. [32] In response to Libya's commitments and actions to abandon its weapons of mass destruction programs and cooperate in efforts against international terrorism, on

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[24] Executive Order 12532, 50 Fed. Reg. 36861; Executive Order 12535, 50 Fed. Reg. 40325.
[25] Public Law 99-440, 100 Stat. 1086, 22 U.S.C. 5001 et seq.
[26] Weekly Compilation of Presidential Documents, v. 23, no. 36, September 14, 1987, p. 997.
[27] Public Law 103-149, 22 U.S.C. 5001 note.
[28] Message to the Congress on Elections in South Africa, 30 Weekly Compilation of Documents 1258 (June 8, 1994).
[29] Executive Order 12543, 51 Fed. Reg. 875.
[30] Executive Order 12544, 51 Fed. Reg. 1235.
[31] Executive Order 12308. 57 Fed. Reg. 14319.
[32] Public Law 99-83, 22 U.S.C. 2349.

September 20, 2004, President George W. Bush terminated the national emergency declared in respect to Libya and ended most sanctions. [33]

Panama

President Reagan, on April 8, 1988, under the IEEPA authority, declared a national emergency with respect to Panama and ordered the imposition of economic sanctions on that country[34] because of "the actions of Manuel Antonio Noriega and Manuel Solis Palma, to challenge the duly constituted authorities of the government of Panama." The order involved the blocking of all property and interests of the government of Panama, including all its agencies and instrumentalities and controlled entities, that are or may come within the United States. The blocking applies specifically to payments of transfers of any kind or financial transactions for the benefit of the Noriega-Solis regime from the United States or by any physical or legal U.S. person located in Panama. The order, implemented through Panamanian Transactions Regulations (31 CFR 565), was revoked on April 5, 1990.[35]

Iraq and Kuwait

On August 2, 1990, in response to the Iraqi invasion of Kuwait, President Bush, declared a national emergency and, using IEEPA authorities, blocked Iraqi and Kuwaiti government property and prohibited all transactions with Iraq, except exports and imports of informational materials and donations to relieve human suffering.[36] Additional restrictions, including a prohibition of all transactions with Kuwait, were imposed a week later. Regulations implementing the restrictions were promulgated with respect to Kuwait on November 30, 1990, and with respect to Iraq on January 18, 1991.[37] The Kuwaiti sanctions were revoked on July 25, 1991, after the liberation of Kuwait.[38] On March 20, 2003 the President took additional steps with respect to the national emergency and, using the authorities of IEEPA as amended by the USA Patriot Act, ordered the confiscation and vesting of certain property of the Government of Iraq and its agencies, instrumentalities, and controlled entities that had been blocked in the United States.[39] On July 29, 2004 President George W. Bush terminated the national emergency and lifted most of the related economic sanctions by Executive Order 13350.[40]

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[33] Executive Order 13357, 69 Fed. Reg. 56665.
[34] Executive Order 12635, 53 Fed. Reg. 12134.
[35] Executive Order 12710, 55 Fed. Reg. 13099.
[36] Executive Order 12722, 55 Fed. Reg. 31803 and Executive Order 12723, 55 Fed. Reg. 31805.
[37] Kuwaiti Assets Control Regulations, 55 Fed. Reg. 49856, 31 CFR 570; Iraqi Sanctions Regulations, 56 Fed. Reg. 2112, 31 CFR 575.
[38] Executive Order 12771, 56 Fed. Reg. 35993.
[39] Executive Order 13290, 68 Fed. Reg. 14307.
[40] Executive Order 13350, 69 Fed. Reg. 46055

Threats Related to Chemical, Biological and Nuclear Weapons

President Bush also used his authority under the IEEPA and other acts to declare a national emergency on November 16, 1990 with respect to the threat posed to the national security and foreign policy of the United States by the proliferation of chemical and biological weapons.[41] Under this declaration, the President ordered that trade sanctions be imposed against foreign persons determined by the Secretary of State as having used or made substantial preparations to use chemical or biological weapons in violation of international law. This order was implemented under the Export Administration Regulations on Proliferation Controls.[42]
The national emergency was expanded by President Clinton to include the proliferation of nuclear weapons on November 14, 1994[43] through Executive Order 12938. On July 28, 1998 President Clinton amended this Executive Order imposing, among other measures, an import ban on certain foreign persons determined by the Secretary of State to have engaged in activities related to the proliferation of weapons of mass destruction.[44] Later on June 26, 2000, President Clinton used IEEPA to specifically address the accumulation of weapons-usable fissile material by the Russian Federation, by issuing Executive Order 13159 (65 Fed. Reg. 39279). This Executive Order blocked property of the Russian Federation relating to the disposition of highly enriched uranium extracted from nuclear weapons in order to protect the property from legal action and help facilitate an international agreement between the United States and Russia relating to the conversion of highly enriched uranium from nuclear weapons for use in commercial nuclear reactors.[45]

Haiti

President Bush used his authority under IEEPA and other acts on October 4, 1991 to declare a national emergency with respect to the illegal seizure of power from the democratically elected government of Haiti.[46] Under this declaration, all property and interests of the de facto regime in Haiti were blocked. The order was expanded by the President on October 28, 1991 to prohibit trade and other transactions with Haiti.[47] These measures were subsequently implemented by the Haitian Transactions Regulations.[48] After the signing of the Governors Island Agreement on July 3, 1993, U.S. trade restrictions against Haiti were suspended, and new financial and other transactions with the government of Haiti were authorized consistent with

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[41] Executive Order 12735, 55 Fed. Reg. 48587.
[42] 15 CFR part 778.
[43] Executive Order 12938, 59 Fed. Reg. 59099.
[44] Executive Order 13094, 63 Fed. Reg. 40803; 31 CFR Part 539.
[45] Executive Order 13159, 65 Fed. Reg. 39279.
[46] Executive Order 12775, 56 Fed. Reg. 50641.
[47] Executive Order 12779, 56 Fed. Reg. 55975.
[48] 31 CFR part 580.

U.N. Security Council Resolution 861. The rule, however, did not unblock property of the government of Haiti that was blocked before August 30, 1993. Due to the failure of the de facto regime in Haiti to fulfill its obligations under the Governors Island Agreement, the restrictions against trade, as well as financial and other transactions, with Haiti were reimposed on October 19, 1993.[49] In response to the restoration of the democratically elected government of Haiti, President Clinton terminated the national emergency on October 14, 1994.[50]

The Former Yugoslavia and the Balkans

In response to the involvement of Serbia and Montenegro with groups attempting to seize territory in Croatia and Bosnia-Herzegovina, President Bush declared a national emergency under the IEEPA and other authorities on May 30, 1992, blocking all property and interests of the governments of Serbia and Montenegro in the United States.[51] Additional orders were later issued by the President to prohibit trade and other transactions with Serbia and Montenegro.[52] The orders were implemented in the Federal Republic of Yugoslavia (Serbia and Montenegro) (FRY(S&M)) Sanctions Regulations (31 CFR 585). The emergency with respect to Serbia and Montenegro was expanded in scope on October 25, 1994 to include the Bosnian Serb military and the areas of the Republic of Bosnia and Herzegovina under the control of those forces.[53] In conjunction with the acceptance by the various relevant parties of the Dayton peace accords, on December 27, 1995, President Clinton directed the suspension of sanctions against the FRY(S&M) while keeping previously blocked property blocked.[54]

On June 9, 1998, in response to the actions of the FRY (S&M) in Kosovo, President Clinton declared a second national emergency under the IEEPA blocking the property and interests in property of the governments of the FRY (S&M) as well as the governments of Serbia and Montenegro.[55] Subsequently, President Clinton also imposed a broad trade embargo on the FRY (S&M).[56] In response to a peaceful democratic transition begun in the FRY (S&M) by newly elected leaders, on January 17, 2001, President Clinton lifted and modified, with respect to future transactions, most of the economic sanctions imposed against the FRY (S&M) while imposing continuing restrictions on certain persons, including persons under

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[49] Presidential Notice of September 30, 1993 (58 Fed. Reg. 51563); Haitian Transactions Regulations, 31 CFR part 580.
[50] Executive Order 12932, 59 Fed. Reg. 52403.
[51] Executive Order 12808, 57 Fed. Reg. 23299.
[52] Executive Order 12810, 57 Fed. Reg. 2,347; Executive Order 12831, 58 Fed. Reg. 5253; Executive Order 13121, 64 Fed. Reg. 24021.
[53] Presidential Notice of May 25, 1994 (59 Fed. Reg. 27,429); Executive Order 12934, 59 Fed. Reg. 54119.
[54] Presidential Determination 96-7 of December 27, 1995 (61 Fed. Reg. 2887).
[55] Executive Order 13088, 63 Fed. Reg. 32109.
[56] Executive Order 13121, 64 Fed. Reg. 24021.

open indictment for war crimes by the International Criminal Tribunal for the Former Yugoslavia (ICTY).[57] Previously blocked property remained blocked.

In October 2001 and February 2003, significant amounts of previously blocked property were unblocked pursuant to general licenses issued by the Department of the Treasury.[58] Both the 1992 national emergency relating to Bosnia & Herzegovina and the 1998 national emergency relating to Kosovo were revoked. On June 26, 2001, in response to extremist violence and acts obstructing multilateral stabilization efforts in the Western Balkans region, President George W. Bush declared a national emergency under the IEEPA blocking the property of persons determined to be engaged in such violent and obstructionist activities.[59]

Angola

On September 26, 1993, President Clinton declared a national emergency under the IEEPA and other acts with respect to the actions and policies of the National Union for the Total Independence of Angola (UNITA).[60] As a result of this emergency, the President's order prohibited the sale or supply of arms and related material or petroleum and petroleum products to Angola, except through designated points of entry. These restrictions, implemented by the UNITA (Angola) Sanctions Regulations, were revoked on May 6, 2003.[61]

Persons Disrupting the Middle East Peace Process

President Clinton also invoked his authority under the IEEPA and other acts to declare a national emergency on January 23, 1995 with respect to the disruption of the Middle East peace process by foreign terrorists.[62] In this declaration, the President prohibited all transactions with persons designated by the Secretary of State, in coordination with the Secretary of the Treasury and the Attorney General, as having committed or posing a significant risk of committing acts of violence to disrupt the Middle East peace process.

Burma

President Clinton issued IEEPA declarations with respect to Burma's repression of democratic oppression (Executive Order 13047 (62 FR 28301)) on May 22, 1997. This Executive Order sought to prohibit new investments in Burma, and

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[57] Executive Order 13192, 66 Fed. Reg. 7379.
[58] *See* 66 Fed. Reg. 50506; 67 Fed. Reg. 78973.
[59] Executive Order 13219, 66 Fed. Reg. 34777.
[60] Executive Order 12865, 58 Fed. Reg. 51,005.
[61] UNITA (Angola) Sanctions Regulations, 58 Fed. Reg. 64,904, 31 CFR part 590; Executive Order 13098, 63 Fed. Reg 44771.
[62] Executive Order 12947, 60 Fed. Reg. 5,079.

additional sanctions against Burma were established by the Burmese Freedom and Democracy Act of 2003, as discussed below.

Sudan

On November 3, 1997, President Clinton used IEEPA authority to block Sudan government property and prohibit certain transactions with Sudan because of Sudan's support for international terrorism, ongoing efforts to destabilize neighboring governments, and the prevalence of human rights violations.[63] Congress later responded with legislation to address a problem U.S. companies were experiencing in locating high quality gum arabic in countries outside of Sudan. [64] The legislation, passed in 2000, required that requests for licenses to import the highest commercial grade of gum arabic from Sudan be promptly considered, and that the Secretaries of State and Treasury (in consultation with the Secretary of Commerce and heads of other appropriate agencies) should consider whether adequate quantities of this grade of gum arabic are available in countries other than Sudan.

Afghanistan, the Taliban, and International Terrorism

On July 4, 1999, President Clinton used his IEEPA authority against the Taliban in Afghanistan.[65] This emergency was terminated by President Bush on July 3, 2002[66] when he added the Taliban and Mohammed Omar to the list of terrorists and supporters of terrorism contained in the Annex to Executive Order 13224, Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism.[67] This Executive Order 13224 was issued by the President on September 23, 2001 following the attacks of September 11, 2001 and declares a national emergency with respect to the grave acts of international terrorism. In this Executive order, the President blocked all property and interests in property and prohibited U.S. persons from engaging in any transactions with 27 persons identified in the Annex to the order.[68] He further delegated authority to the Secretary of State to name additional foreign persons against whom these sanctions would be imposed upon a determination, in consultation with the Secretaries of Treasury and Homeland Security[69] and the Attorney General, that such foreign persons have committed or pose a significant risk of committing acts of terrorism

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[63] Executive Order 13067, 62 Fed. Reg. 59989.
[64] Public Law 106-476.
[65] Executive Order 13129, 64 Fed. Reg. 36750. The President continued the emergency on July 5, 2000 (65 Fed. Reg. 41549).
[66] Executive Order 13268, 67 Fed. Reg. 44751.
[67] Executive Order 13224, 66 Fed. Reg. 49079.
[68] Since amended by Executive Order 13268, supra.
[69] The Secretary of Homeland Security was added to the consultation process on January 23, 2003 by Executive Order 13284, 68 Fed. Reg. 4075.

that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States. The President further delegated authority to the Secretary of the Treasury to name additional persons against whom these sanctions would be imposed upon a determination, in consultation with the Secretaries of State and Homeland Security[70] and the Attorney General, that such persons are owned and controlled by, operating for or on behalf of, assisting, sponsoring, providing financial, material, technological support or services, or are otherwise associated with persons named pursuant to the Order and subjected to the Order's sanctions. Since the issuance of the Executive Order, hundreds of additional persons have been designated.

Trade in Illicit Diamonds: Sierra Leone and Liberia

On January 18, 2001, President Clinton declared a national emergency in response to the insurgent Revolutionary United Front's illicit trade in diamonds by prohibiting, with limited exception, the importation of rough diamonds from Sierra Leone into the United States (Executive Order 13194 (66 FR 7389)). President Bush, in response to the Government of Liberia's complicity in this illicit trade, expanded the scope of the national emergency on May 22, 2001, and prohibited the importation of rough diamonds from Liberia (Executive Order 13213 (66 FR 28829)). Congress passed legislation, The Clean Diamond Trade Act of 2003, on this issue as discussed below.[71]

Trafficking in Persons

On October 28, 2000, Congress passed legislation that would authorize the exercise of IEEPA authority in the case of trafficking in persons.[72] Under Section 111 of the Trafficking Victims Protection Act of 2000, the President is authorized to use IEEPA powers to address any foreign person that plays a significant role in a severe form of trafficking in person, directly or indirectly in the United States, as well as certain foreign persons that assist, support, provide goods or services to, or are owned, controlled, directed, by or acting on behalf of a person playing a significant role in a severe form of trafficking. The President is also authorized to delegate the authorities granted under this section. [73]

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[70] The Secretary of Homeland Security was added to the consultation process on January 23, 2003 by Executive Order 13284, 68 Fed. Reg. 4075.
[71] Public Law 108-19, 19 U.S.C. 3901-13.
[72] Section 111 of Public Law 106-386.
[73] Section 111 of Public Law 106-386.

TRADING WITH THE ENEMY ACT

The Trading With the Enemy Act[74] (TWEA) prohibits trade with any enemy or ally of an enemy during time of war. From enactment in 1917 until 1977, the scope of the authority granted to the President under this Act was expanded to provide the statutory basis for control of domestic as well as international financial transactions and was not restricted to trading with "the enemy." In response to the use of the Act's authority under section 5(b) during peacetime for domestic purposes that were often unrelated to a preexisting declared state of emergency, Congress amended the Act in 1977. In 1977 Congress removed from the TWEA the authority of the President to control economic transactions during peacetime emergencies.[75] Similar authorities, though more limited in scope and subject to the accountability and reporting requirements of the National Emergencies Act,[76] were conferred upon the President by the International Emergency Economic Powers Act, enacted in 1977 as title II of Public Law 95-223.[77] Presidential authority during wartime to regulate and control foreign transactions and property interests were retained under the Trading With the Enemy Act. In addition, the 1977 legislation authorized the continuation of various foreign policy controls implemented under the Trading With the Enemy Act, such as trade embargoes and foreign assets controls. The retention of such existing controls, however, was made subject to one-year extensions conditioned upon a presidential determination that the extension is in the national interest.

Background

The Trading With the Enemy Act was passed in 1917 "to define, regulate, and punish trading with the enemy." The Act was designed to provide a set of authorities for use by the President in time of war declared by Congress. In its original 19 sections, the TWEA provided general prohibitions against trading with the enemy; authorized the President to regulate and prohibit international economic transactions by means of license or otherwise; established an office to administer U.S.-held foreign property; and set up procedures for claims to such property by non-enemy persons, among other provisions. The original 1917 Act appeared not to

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[74] Public Law 65-91, ch. 106, 40 Stat. 411, 50 App. U.S.C. 1-44.
[75] Public Law 95-223, title I.
[76] The National Emergencies Act provided a statutory role for Congress in the declaration and termination of national emergencies. Public Law 94-412, 90 Stat. 1255, 50 U.S.C. 1601 et seq.
[77] See discussion of International Emergency Economic Powers Act, supra.

authorize the control of domestic transactions and limited its use to wartime exigencies.

Over the years, through use and amendment of section 5(b), the basic authorizing provision, the scope of presidential actions under the TWEA was greatly expanded. First, the Act was expanded to control domestic as well as international transactions. Second, the authorities of the Act were used to apply to presidentially declared periods of "national emergency" as well as war declared by Congress. From 1933, when Congress retroactively approved President Roosevelt's declaration of a national banking emergency by expanding the use of section 5(b) to include national emergencies, until 1977, when Congress amended section 5(b) by passage of title I of Public Law 95-223, the President was authorized in time of war or national emergency to:

(1) regulate or prohibit any transaction in foreign exchange, any banking transfer, and the importing or exporting of money or securities;

(2) prohibit the withdrawal from the United States of any property in which any foreign country or national has an interest;

(3) vest, or take title to, any such property; and

(4) use such property in the interest and for the benefit of the United States.[78]

The Trading With the Enemy Act did not provide a statement of findings and standards to guide the administration of section 5(b). There was no provision in the Act for congressional participation or review or for presidential reporting at specified periods for actions undertaken under section 5(b). There was no fixed time period for terminating a state of emergency. Nor was there any practical constraint on limiting actions taken under emergency authority to measures related to the emergency.

Application

By 1977 a state of national emergency had been declared by the President on four occasions and left unrescinded. In 1933 President Roosevelt declared a national emergency to close the banks temporarily and to issue emergency banking regulations. In 1950 President Truman declared a national emergency in connection with the Korean conflict. President Nixon declared a national emergency in 1970 to deal with the Post Office strike and another in 1971 based on the balance-of-payments crisis. As one measure to remedy this crisis, President Nixon at the same time imposed an import surcharge without specifically referring to section 5(b), but later did take recourse to it as an additional authority when the action was challenged in court.[79]

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[78] Public Law 95-223.

[79] In mid-1974, the U.S. Customs Court found the President's action unconstitutional with respect to all invoked authorities, but this decision was later reversed on appeal with respect to section 5(b). U.S. v. Yoshida International, 526 F.2d 560 (C.C.P.A. 1975). The surcharge was terminated after having been in force for somewhat over 4 months, long before the lower court's decision.

Based on these states of emergency, Presidents have used the powers of section 5(b) to deal with a number of varied events. In 1940 and 1941, President Roosevelt used section 5(b) to freeze the U.S.-held assets of the Axis powers and countries occupied by them to prevent their falling into the hands of the enemy powers. In August 1941, President Roosevelt, under section 5(b) authority, ordered the imposition of consumer credit controls by the Federal Reserve Board as an anti-inflationary measure. These executive uses by President Roosevelt were retroactively ratified by Congress.

The 1950 Korean emergency has been used in conjunction with section 5(b) powers for a wide range of controls among them the imposition of a total embargo on transactions with China and North Korea in December 1950 which was extended to North Vietnam in May 1964 and to Cambodia and South Vietnam in April 1975.[80] In 1968, President Johnson, citing the authority of section 5(b) and the continued existence of the 1950 emergency, imposed foreign direct investment controls on U.S. investors. These controls remained in effect until they were eliminated by legislation in 1974. During the period 1969 through 1976, Presidents have invoked the 1950 and 1971 emergencies to extend temporarily export control regulations.

Four sets of regulations controlling international transactions with specific countries, imposed under the former national emergency authority of section 5(b) and during the Korean national emergency, continued in effect after 1977 pursuant to the 1-year extension authority of title I of Public Law 95-223. First, under the Foreign Assets Control Regulations, virtually all transactions between the United States and North Korea, Vietnam, and Cambodia were prohibited unless licensed by the Department of the Treasury. The regulations also blocked all assets of those countries held in the United States.

Later, the embargo with respect to Cambodia and Vietnam was lifted, and the property of these countries in the United States was unblocked.[81] On October 21, 1994, the United States and North Korea agreed, in the context of broader negotiations, to begin reducing barriers to trade and investment. Based on these mutual commitments, a limited number of restrictions under the embargo against North Korea was lifted.[82] On June 19, 2000, all but a few of the remaining restrictions on trade with North Korea were lifted in order to improve overall bilateral relations and encourage North Korea to continue to refrain from testing long-range missiles.[83]

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[80] In mid-1971, trade embargo on China was in practice lifted, and on January 31, 1980, the applicability of any restrictive measures imposed under section 5(b) was terminated with respect to China (45 Fed. Reg. 7224).

[81] Foreign Assets Control Regulations; Unblocking of Cambodian Assets, 59 Fed. Reg. 60558, 31 CFR part 500; Foreign Assets Control Regulations, Unblocking of Vietnamese Assets, 60 Fed. Reg. 12885, 31 CFR part 500.

[82] Foreign Assets Control Regulations, North Korean Travel and Financial Transactions; Information and Informational Materials, 60 Fed. Reg. 8933, 31 CFR part 500.

[83] Foreign Assets Control Regulations, 65 Fed. Reg. 38165, 31 CFR part 500.

Second, the Cuban Assets Control Regulations,[84] based on section 5(b) as well as on foreign assistance legislation, (see also section on the embargo on transactions with Cuba) impose a ban on virtually all transactions in which Cuba or Cuban nationals have an interest.

Third, Transaction Control Regulations,[85] prohibiting any person within the United States[86] from engaging in any trade or trade-financing transaction involving transfer of strategic commodities from a foreign country to a Communist country (still including formerly Communist countries), are also based on section 5(b) of the Trading With the Enemy Act.

Fourth, the wartime anti-Axis Foreign Funds Control Regulations,[87] issued under the authority of section 5(b), remained in effect in part until the remaining sanctioned countries of Estonia, Latvia, and Lithuania achieved their independence and were removed from the sanctioned country list on September 29, 1992.[88]

B. Embargo on Transactions with Cuba

While almost totally restrictive controls had been placed on U.S. exports to Cuba even earlier,[89] under the general authority of the Export Control Act of 1949, specific authority for a total trade embargo on Cuba was contained in section 620(a) of the Foreign Assistance Act of 1961.[90] Based on this authority "to establish and maintain a total embargo upon all trade between the United States and Cuba," President Kennedy proclaimed the embargo and directed the Secretaries of the Treasury (for imports) and of Commerce (for exports) to implement it. Both Secretaries were also given the authority to modify the embargo in the national interest.[91]

The export embargo already being in force, the added ban on imports from Cuba was implemented through Cuban Import Regulations,[92] to which were subsequently added, in general terms, all transactions falling within the authority of the Trading With the Enemy Act (TWEA), based on the specific addition of TWEA to the statutory authority for the regulations.[93] Under this broader authority, Cuban Assets Control Regulations applicable to imports from Cuba as well as, in great detail, to non-trade transactions with Cuba were promulgated.[94] After several changes, these regulations still remain in force. The embargo on transactions with Cuba is

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[84] 31 CFR part 515.
[85] 31 CFR part 505.
[86] Any "person within the United States" includes foreign subsidiaries of U.S. firms.
[87] Formerly 31 CFR part 520.
[88] Foreign Funds Control Regulations, 60 Fed. Reg. 33725, 31 CFR part 520.
[89] 25 Fed. Reg. 1006.
[90] Public Law 87-195, 22 U.S.C. 2370(a)(1).
[91] Proclamation 6447, 27 Fed. Reg. 1085.
[92] 31 CFR 515, 27 Fed. Reg. 1085.
[93] 27 Fed. Reg. 2765.
[94] 28 Fed. Reg. 6974.

implemented at present for exports by the Export Administration Regulations (15 U.S.C. 768-799.2), particularly sections 770, 785.1, and 799.1, and for imports and other transactions by the Cuban Assets Control Regulations (15 CFR 515). (These regulations were later codified by the Cuban Liberty and Democratic Solidarity Act, discussed below. A ban on imports from Cuba and a tightening of the regulations on non-tourist travel to Cuba was included in the Trade Sanctions Reform and Export Enhancement Act of 2000, discussed below.)

The provisions of section 620(a) of the Foreign Assistance Act of 1961 and the regulatory exercise with respect to Cuba of authorities under the TWEA, the International Emergency Economic Powers Act, and the Export Administration Act of 1979, however, were preempted by the Cuban Democracy Act of 1992 (title XVII of the National Defense Authorization Act of 1992)[95] to the extent that they have been either restated or modified by provisions of that Act. Section 1705 of the Act specifically permits donations of food to Cuban non-governmental organizations and individuals; with some exceptions and, subject to specific licenses and end-use verification, exports of medicines and medical supplies and equipment; providing telecommunications services and appropriate facilities, and issuing licenses for related payments; direct mail service between the United States and Cuba; and assistance for promoting non-violent democratic change in Cuba.

On the other hand, section 1706 enacts specific restrictions: it prohibits the issuance of licenses for any transactions of American-owned firms in foreign countries with Cuba, previously permitted by the relevant regulation;[96] requires specific license for a ship to load or unload any freight in a U.S. port if it has traded, within the past 180 days, with a Cuban port; or to enter a U.S. port or obtain ship stores if it is carrying goods or passengers to or from Cuba, or Cuban goods. These restrictions do not apply to activities allowed by sections 1705 or 1707 of the Act, or to transactions in informational materials unless subject to national security or espionage controls. The President is required to set strict controls on remittances to Cubans for the purpose of financing their travel to the United States.

The law authorizes a relaxation of the embargo by permitting humanitarian aid to Cuba under foreign assistance and Food-for-Peace legislation if the President determines that the Cuban government has made and is implementing commitments to hold free elections and respect internationally recognized worker rights and basic democratic freedoms, and is not materially supporting groups in other countries seeking violent overthrow of the government. The President also is authorized to waive the restrictions of section 1706 if he determines that the Cuban government has taken steps that provide various political, human rights, and economic freedoms, and is directed to take various actions (including steps to end the trade embargo) to assist a freely and democratically elected Cuban government. The Act empowers the Secretary of the Treasury to enforce its provisions under the authority

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[95] Public Law 102-484, 22 U.S.C. 6001 et seq.
[96] Public Law 104-114; 31 CFR 515 and 559.

of the TWEA, to which provisions for civil penalties, forfeitures, and judicial review are added.

THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT

In 1996, the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act was enacted to further strengthen U.S. sanctions against Cuba.[97] The legislation, which is commonly referred to as "Helms-Burton" or the "LIBERTAD Act," contains a number of new sanction provisions. Title I of the Act provides that the Cuban embargo as in force on March 1, 1996 (including the executive branch discretion contained therein), is to remain in effect until the President takes certain steps outlined in section 204 of the Act to suspend or terminate the embargo based on the existence of a transition government or a democratically elected government in Cuba.

In title III, the Helms-Burton legislation allows U.S. nationals, including Cuban-Americans who became US. citizens after their properties were confiscated, to sue for money damages in U.S. Federal court those persons who traffic in their confiscated property. The President has the authority to delay implementation of title III provisions for a period of up to 6 months at a time if he determines that such a delay would be in the national interest and would expedite a transition to democracy in Cuba. On July 16, 1996, the President announced that he would allow title III to go into effect, but would suspend for 6 months the right of individuals to file lawsuits. In making his announcement, the President indicated that the liability of foreign companies under Helms-Burton would be established during the suspension period and that legal action could be taken against them immediately upon the lifting of the suspension. Since then, the right to bring a cause of action under title III has been suspended by the President at 6 month intervals.

Under the provisions in title IV of the Helms-Burton legislation, certain aliens involved in the confiscation or trafficking of U.S. property in Cuba, a claim to which is owned by a U.S. citizen, are denied U.S. visas and excluded from the United States. The ban applies to corporate officers, principals, or shareholders with a controlling interest of an entity involved in this activity. It also applies to the spouses, minor children, and agents of aliens who are excluded under the provision. This provision of the Act is mandatory and is waiveable on a case-by-case basis for travel to the United States only for humanitarian medical reasons or for purposes of litigation of an action under title III. On June 12, 1996, the guidelines for implementing title IV provisions were published in the Federal Register.[98] This notice stipulated that the admission sanction would not apply to persons merely having business dealings with persons excluded under the title's provisions. To date, the State Department has applied the visa provision to a number of executives and their families from three companies because of their investment in confiscated U.S.

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[97] Public Law 104-114; 222 U.S.C. 6021 et seq.

[98] 61 Fed. Reg. 30655.

property in Cuba: Grupos Domos, a Mexican telecommunications company; Sherritt International, a Canadian mining company; and BM Group, an Israeli citrus company. In 1997, Grupos Domos disinvested from U.S.-claimed property, and as a result its executives are again eligible to enter the United States. Action against executives from STET, an Italian telecommunications company was averted by a July 1997 agreement in which the company agreed to pay the U.S.-based ITT Corporation for the use of ITT-claimed property in Cuba for 10 years.

In addition to these major provisions, section 103 of the Helms-Burton legislation prohibits loans, credits, or other financing by any U.S. national, U.S. agency, or permanent resident alien for financing transactions involving any property confiscated by the Cuban government, the claim to which is owned by a U.S. national (except for financing by the U.S. national owning such a claim for a transaction permitted by U.S. law). Section 106(d) of the Act requires that U.S. assistance for independent states of the former Soviet Union be withheld by an amount equal to the sum of assistance and credits provided (on or after March 12, 1996) in support of intelligence facilities in Cuba, including the facility at Lourdes, Cuba. However, Russia closed its Lourdes facility in August 2002.

Section 104 of the Act requires the United States to vote against Cuba's admission to the international financial institutions (IFIs) until the President has submitted a determination that a democratically elected government is in power. The provision also requires the reduction of U.S. payment to any IFI if it approves a loan or other assistance to Cuba over the opposition of the United States. Finally, title II of the law contains numerous conditions for determining when a "transition" government and a "democratic" government is in power in Cuba, conditions which would qualify Cuba for various types of U.S. assistance and would lead to suspension of U.S. trade sanctions against Cuba.

C. Economic Sanctions Against Libya, Iran, and Iraq (Including Broader Provisions Against International Terrorism)

THE INTERNATIONAL SECURITY AND DEVELOPMENT COOPERATION ACT OF 1985

Section 504 of the International Security and Development Act of 1985[99] gives the President specific authority to prohibit all imports to the United States from Libya or the export to Libya of any goods or technologies subject to U.S. jurisdiction. As noted above and discussed in the following section, on September 20, 2004, President George W. Bush ended most sanctions applied under this and other legislative authority against Libya in response to that nation's efforts to end its weapons of mass destruction programs and cooperate in efforts against international terrorism.[100] Section 505 of the International

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[99] Public Law 99-83, 22 U.S.C. 2349 aa-8, aa-9.

[100] Executive Order 13357, 69 Fed. Reg. 56665.

Security and Development Act of 1985[101] also gives the President broader discretionary authority to restrict or ban imports from any country which the United States determines "supports terrorism or terrorist organizations or harbors terrorists or terrorist organizations." The section requires advance consultations with Congress before invoking the authority and a semi-annual report to Congress with respect to actions taken since the last report and any changes which may have occurred since the last report.

IRAQ SANCTIONS ACT OF 1990

The Iraq Sanctions Act of 1990 was enacted as part of the Foreign Operations, Export Financing, and Related Program Appropriations Act for Fiscal Year 1991,[102] in response to Iraq's invasion of Kuwait on August 2, 1990. The Act makes a number of declarations concerning Iraq's invasion of Kuwait and requires the President to consult with the Congress on U.S. actions taken in response.

Section 586C enacts into law the trade embargo and other economic sanctions imposed on Iraq by presidential executive order under authority of the International Emergency Economic Powers Act and the National Emergencies Act.[103] Those sanctions entailed a near-total prohibition on transactions between the United States and Iraq, including a ban on: imports and exports; most travel and fulfillment of contracts; and credits and loans. The executive orders also froze all assets of the governments of Iraq and Kuwait. Section 586C requires the President to notify Congress at least 15 days before the termination of any of the above sanctions. Section 586E imposes civil and criminal penalties on persons violating the executive orders.

The Iraq Sanctions Act also imposes sanctions on Iraq beyond those imposed by executive order. Section 586G imposes a wide range of sanctions, including a ban on the following transactions: arms sales; exports of certain goods and technology, including nuclear technology and equipment; U.S. government credits and credit guarantees; and other forms of assistance. Those sanctions may be waived by the President if he makes a certification of fundamental changes in Iraqi leadership, policies, or actions, under criteria set forth in section 586H.

The Act contains provisions aimed at increasing compliance by third countries with U.N. Security Council sanctions against Iraq. Section 586D denies assistance under the Foreign Assistance Act of 1961 or the Arms Export Control Act to any country not in compliance with the U.N. sanctions, subject to certain exceptions. It also authorizes the President to ban imports into the United States from any country

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[101] Public Law 99-83, 22 U.S.C. 2349 aa-8, aa-9.

[102] Public Law 101-513; sections 586 through 586J. Note that the sections numbers for this Act as passed by the Congress, such as "586J," were enacted in a different format than is typical of legislation and that the section headings in this document reflect this fact.

[103] Executive Orders 12724 and 12725, and, to the extent that they were still in effect on the date of enactment, Executive Orders 12722 and 12723.

that has not imposed a ban on trade with Iraq, if he considers that such action would promote the effectiveness of the U.N. and U.S. sanctions against Iraq. Section 586I denies export licenses for super-computer exports to any country the President determines is assisting Iraq to improve its capabilities in rocket technology or chemical, biological, or nuclear weapons.

The Iraq Sanctions Act mandates a number of studies and reports to Congress concerning international exports to Iraq of nuclear, biological, chemical and ballistic missile technology; Iraq's offensive military capability; and third country sanctions against Iraq.

On May 7, 2003 President George W. Bush suspended the Iraq Sanctions Act following United States military action in Iraq. [104]

IRAN-IRAQ ARMS NON-PROLIFERATION ACT OF 1992

The Iran-Iraq Nonproliferation Act of 1992, under Section 1604, requires the President to impose sanctions against persons that he determines to be engaged in transferring goods or technology so as to contribute knowingly and materially to efforts by Iran or Iraq to acquire chemical biological, nuclear or destabilizing types or amounts of certain advanced conventional weapons. [105] Section 1605 of this act similarly addresses activities of foreign governments, as opposed to persons. Mandatory sanctions are applied if the President makes a finding under either section and require that the President prohibit, for a period of two years, the U.S. government from entering into procurement agreements with, or issuing license for exporting to or for, a sanctioned country or person. In the case of countries sanctioned under these provisions, the President must also suspend U.S. assistance; instruct U.S. representatives in international financial institutions to oppose multilateral assistance; suspend coproduction or codevelopment projects that the U.S. government might have with the sanctioned government for one year; suspend most technical exchange agreements involving military or dual-use technology; and prohibit the exportation of U.S. Munitions List items for one year. In addition, the Act provides that the President may, except in the case of urgent humanitarian assistance, exercise his authorities under the International Emergency Economic Powers Act (IEEPA) with respect to the sanctioned country. The President may waive the requirement to impose the mandatory sanctions described above if he determines that such a waiver is essential to the national interests of the United States and provides 15 days

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[104] 68 Fed. Reg. 26459.

[105] 50 U.S.C. 1701 note. Section 1408 of Pub. Law 104-106 amended sections 1604 and 1605 to apply not just to chemical, biological and nuclear weapons..

notice to certain Congressional Committees. Finally, Section 1603 makes the sanctions in Section 586G(a) of the Iraq Sanctions Act of 1990 (described above) related to foreign military sales, commercial arms sales, exports of certain goods and technology, and restrictions related to nuclear equipment materials and technology, also fully applicable against Iraq.

THE IRAN AND LIBYA SANCTIONS ACT OF 1996

U.S. imports of goods and services of Iran have been prohibited since 1987. In May 1993 President Clinton articulated a policy of "dual containment" of Iran and Iraq. Administration officials said that Iran needed to be isolated because of its: (1) support for international terrorism; (2) efforts to undermine the Arab-Israeli peace process; (3) attempts to subvert other governments in the Middle East; (4) programs to develop weapons of mass destruction; and (5) poor human rights record. On March 15, 1995, the President declared a national emergency to respond to Iran's actions and policies and issued an executive order prohibiting U.S. persons from entering contracts to finance or manage Iran's petroleum resources.

On April 30, 1995, after an internal policy review found that continued trade with Iran was undermining U.S. efforts to isolate Iran, President Clinton announced that he would impose significant new economic sanctions on Iran. Executive Order 12959, issued May 8, prohibits trade in goods, services, or technology with Iran, re-export to Iran of U.S. goods or technology from third countries controlled for export, as well as any financing, loans, or related services for trade with Iran. New investment is also prohibited in Iran. The prohibitions also apply to foreign branches of U.S. companies. However, the ban provides for the licensing of crude oil swap arrangements with Iran in the Caspian Sea and Central Asia, and does not prohibit the importation to the United States of Iranian oil that is refined outside Iran.

Out of a concern that the trade ban did not succeed in shifting international attitudes toward Iran, the President signed the Iran and Libya Sanctions Act[106] on August 5, 1996, which mandates sanctions against foreign investment in the petroleum sectors of Iran and Libya as well as exports of weapons, oil equipment, and aviation equipment to Libya in violation of U.N. Resolutions 748 and 883. Congressional findings in this legislation state that the efforts of the government of Iran to acquire weapons of mass destruction and the means to deliver them, as well as its support for international terrorism, endanger the interests of the United States. In the case of Libya, Congress found that Libya's failure to comply with U.N. Resolutions 731, 748, and 883, its support of international terrorism, and its efforts to acquire weapons of mass destruction constitute a threat to international peace and security that endangers the national security of the United States.

Under the Iran and Libya Sanctions Act, the President must impose, on any

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[106] Public Law 104-172, 50 U.S.C. 1701.

foreign person (individual, firm or government enterprise) that invests more than $40 million in any one year in the petroleum resources of Iran or Libya, or violates the U.N. prohibited transactions with Libya, at least two of the following six sanctions: (1) denial of Export-Import Bank loans for U.S. exports to the sanctioned entity; (2) denial of specific U.S. licenses for exports to the sanctioned entity (assuming the exports require a license to be exported); (3) denial of U.S. bank loans of over $10 million in one year to the sanctioned entity; (4) disallowing a sanctioned entity, if it is a financial institution, to serve as a primary dealer in U.S. government bonds or as a repository of U.S. government funds; (5) import sanctions taken by the President in accordance with the International Emergency Economic Powers Act (IEEPA); and (6) prohibition on U.S. government procurement from or contracting with the sanctioned person.

The law provides for the waiving of sanctions for firms of countries that join a multilateral sanctions regime against Iran and lowers the threshold of permissible investment from $40 million to $20 million for firms of countries that do not join such a regime. The Act "sunsets" in 5 years.

The ILSA Extension Act of 2001 extended the authorities of the Iran and Libya Sanctions Act of 1996 until 2006. [107] The Act lowers the investment threshold for mandatory sanctions against persons investing in petroleum resources in either country from $40,000,000 to $20,000,000. It also requires the President to transmit a report to Congress between 24 and 30 months after the date of enactment concerning 1) the effectiveness of the law in achieving its national security policy objectives, 2) its effect on humanitarian interests in Iran and Iraq, and 3) the impact on other U.S. security and economic interests, including relations with nations friendly to the United States and on the U.S. economy. The President waived the Act's application to Libya on April 23, 2004 in response to that nation's commitments, noted above, related to its weapons programs and to cooperating on counter-terrorism efforts.

EMERGENCY PROTECTION FOR IRAQI CULTURAL ANTIQUITIES ACT OF 2004

Title III of the Miscellaneous Trade and Technical Corrections Bill of 2004 (Public Law 108-429) authorized the President to exercise authority under section 304 of the Convention on Cultural Property Implementation Act (CCPIA) (19 U.S.C. 2603) until September 30, 2009, with respect to any archeological or ethnological material of Iraq and without regard to whether Iraq is a State Party under the CCPIA.[108] Under this law, "archaeological or ethnological material of Iraq" means cultural property of Iraq and other items of archaeological, historical, cultural, rare scientific or religious importance illegally removed from the Iraq National Museum, the National Library of Iraq, and other locations in Iraq, since the adoption of United Nations Security

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[107] Public Law 107-24.
[108] Public Law 108-429; 19 U.S.C. 2603.

Council Resolution 661 of 1990.[109] Prior law under subsection 304(c) of the CCPIA gave the President such authority only if a member country of the Convention on Cultural Property requested action to protect against illegal trade in such cultural material.

D. Sanctions Against Countries Related to Counternarcotics Efforts

NARCOTICS CONTROL TRADE ACT

Provisions in Effect from 1986 to 2001

The Drug Enforcement, Education, and Control Act of 1986[110] contains a number of measures to respond to the serious problem of illegal drug smuggling into the United States and the growing threat of foreign sourced drug production. Among these measures are revisions to many basic customs laws to deter illegal drug imports and to increase enforcement capabilities of the U.S. Customs Service against drug traffic.

Title IX of the Act amended the Trade Act of 1974 by adding title VIII, entitled the "Narcotics Control Trade Act," to create new authority for the President to take appropriate trade actions as of March 1 of each year against uncooperative major drug-producing or drug-transit countries. Section 806 of the Foreign Relations Authorization Act, fiscal years 1988 and 1989,[111] and section 4408 of the Anti-Drug Abuse Act of 1988[112] expanded the sanctions available and the criteria for determining and certifying that a country has cooperated fully with the United States. Similar criteria apply under the Foreign Assistance Act of 1961 for denying foreign aid to uncooperative countries.

For every major drug-producing or drug-transit country, the President is authorized to exercise discretion to deny to any or all of its products preferential tariff treatment under the Generalized System of Preferences (GSP), the Caribbean Basin Initiative (CBI), or any other law; to raise or impose duties of up to 50 percent ad valorem on any or all of its products; to suspend air carrier transportation to or from the United States and the country and to terminate any air service agreement with the country; to withdraw U.S. personnel and resources from participating in any arrangement with the country for customs preclearance; or to take any combination of these actions considered necessary to achieve the

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[109] Adopted by the UN Security Council on August 6, 1990.
[110] Public Law 99-570.
[111] Public Law 100-204, 19 U.S.C. 2492.
[112] Public Law 100-690.

objectives of the Act.

Such sanctions do not apply if the President determines and certifies to the Congress, at the time the annual report required by section 481(e) of the Foreign Assistance Act of 1961 or section 489A after September 30, 1994 is submitted, that during the previous year the country has cooperated fully with the United States or has taken adequate steps on its own: (1) in satisfying goals agreed to in a bilateral or multilateral narcotics agreement with the United States; (2) in preventing illegal drugs from being sold illegally to U.S. government personnel or their dependents or from being transported into the United States; (3) in preventing and punishing the laundering of drug-related profits or monies; and (4) in preventing and punishing bribery and other public corruption which facilitate production, processing, or shipment of illegal drugs.

A country that would not otherwise qualify for certification may be exempted from sanctions if the President determines and certifies to the Congress that the vital national interests of the United States require that sanctions not be applied. A country designated as a major drug-producing or drug-transit country in the previous year may not be determined to be cooperating fully unless it has in place a bilateral or multilateral narcotics agreement.

The Congress may disapprove the President's certification and require the application of sanctions through enactment of a joint resolution within 45 legislative days. Actions remain in effect until the President submits a certification of full cooperation and Congress does not enact a joint resolution of disapproval within 45 legislative days.

In addition, section 803 prohibits the President from allocating any quota for imports of sugar to any country which has a government involved in illegal drug trade or which is failing to cooperate with the United States in narcotics enforcement activities.

The Urgent Assistance for Democracy in Panama Act of 1990[113] deemed the conditions under the Narcotics Control Trade Act to have been satisfied by Panama, because of U.S. vital national interests and because the Endara government had indicated its willingness and was taking steps to cooperate fully with the United States to control narcotics production, trafficking, and money laundering. Consequently, GSP and CBI trade benefits removed under the Noriega regime by presidential proclamation on March 23, 1988 were restored to the new government of Panama.

Revisions to the Drug Certification Process after 2001

Following complaints from many countries about the unilateral and non-cooperative nature of the drug certification process, a movement to modify the process developed in Congress in 2000.[114] In January 2002, President George

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[113] Public Law 101-243, section 103.

[114] For a detailed discussion of the Congressional concerns and the processes summarized here, see

W. Bush signed the Foreign Operations Appropriations Act for FY2002,[115] which contained a one-year suspension of the drug certification procedures, along with new requirements. Under the new requirements, the President was required to designate and withhold assistance from major illicit drug producing and trafficking countries that had, over the past 12 months, "failed demonstrably" to make substantial efforts to adhere to their obligations under international counter-narcotics agreements. The President could, however, waive the sanctions and continue to provide assistance to a country that met the "fail demonstrably" criteria, if the President determined that assistance to that country was vital to the national interest of the United States and notified Congress of this determination. Using these procedures, on February 23, 2002, the President designated three countries—Afghanistan, Burma, and Haiti—as having "failed demonstrably" under these standards but granted national interest waivers to Afghanistan and Haiti.

Continuing these reform efforts, in September 2002 the President signed the Foreign Relations Authorization for FY2003,[116] establishing permanent new requirements for drug certification procedures. These new procedures require that, not later than September 15 of each year, the President shall make a report identifying the major drug transit and drug producing countries. At the same time, the President is required to designate any of the named countries that "failed demonstrably," during the previous twelve months, to make substantial efforts to adhere to certain international counter-narcotics agreements and to take other counter-narcotics measures. Assistance to these countries would be withheld from any designated countries unless the President determines that the provision of assistance to that country is vital to the national interest or that country has subsequently made substantial counter-narcotics efforts. The new legislation also gave the president the option of using the drug certification and sanctions procedures that had been in place prior to their suspension in 2002. As the new law came into effect with little time to implement the new procedures, a transition rule in the legislation provided that for FY2003, the required report had to be submitted at least 15 days before foreign assistance funds could be obligated or expended.

CRS Report of Congress RL32038, Drug Certification/Designation Procedures for Illicit Narcotics Producing and Transit Countries, K. Larry Storrs, updated Sept. 20, 2004.

[115] Public Law 107-115.

[116] Public Law 107-228.

E. Sanctions Related to Missile Proliferation and the Use of Chemical or Biological Weapons[117]

SECTION 73 OF THE ARMS EXPORT CONTROL ACT

Section 73 of the Arms Export Control Act (AECA) provides authorities for the President to impose sanctions on any foreign person that he determines has knowingly exported, transferred, facilitated, conspired to or otherwise engaged or attempted to engage in the trade of Missile Technology Control Regime (MCTR) equipment or technology that contributes to the acquisition, design, development of production of missiles in a country that is not a MTCR adherent and would be subject to U.S. jurisdiction under the AECA if it was U.S. equipment or technology. Mandatory sanctions following such a Presidential determination include denying any government contracts or licenses related missile technology to the sanctioned person for two years. If the item involved in export, transfer or trade is listed under category I of the MCTR Annex, the President shall deny the sanctioned person, for two years, all U.S. Government contracts as well as any licenses for the transferring items on the U.S. Munitions List to that person. In addition, if the President determines the export, transfer or trade has substantially contributed to the missile design, development, or production efforts of a country that is not an MCTR adherent, the President shall prohibit for not less than two years, the importation into the United States of products produced by the sanctioned person, unless these products are subject to the exceptions noted below.

Section 73 provides, however, that the sanctions noted above will generally not apply to any export, transfer, or trading activity that either is authorized by the laws of an MCTR adherent or is made to an end user in a country that is an MCTR adherent. In addition, the Act prevents the imposition of sanctions and terminates existing sanctions on foreign persons if an MCTR adherent is taking or has taken appropriate judicial or enforcement actions with regards to the acts under review and President makes a certification to certain Congressional committees. The Act also allows the Secretary of State, in consultation with the Secretaries of Defense and Commerce, to issue advisory opinions on whether certain activities would subject a person to sanctions under this section, and provides that anyone who relies in good faith on an advisory opinion stating that their activities are not subject to such sanctions shall not be sanctioned under Section 73 for those activities.

Section 73 also contains additional waiver provisions and exceptions. In cases where no advisory opinion has been issued, the President may waive the application of sanctions under this section if he determines that it is essential to the national security of the United States and notifies and reports to certain

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[117] This section does not repeat the sanctions on specific countries dealing with these issues, such as those discussed in the section on Iraq and Iran above.

Congressional committees. The President may also waive such sanctions if he certifies to Congress that a product or service involved is essential to the national security of the United States and there are either not other sources from which to acquire the product in a reliable fashion or the need for the product or services cannot be met in a timely fashion by improved manufacturing processes or technological requirements. In addition, the section specifically exempts foreign persons supplying: certain defense articles or services that are essential to the national security of the United States and that might be difficult to otherwise acquire; products or services provided under previously existing contracts; spare parts and certain types of component parts; routine service and maintenance services (to the extent that alternate sources are not readily or reasonably available); and information and technology essential to U.S. products or production.

CHEMICAL AND BIOLOGICAL WEAPONS CONTROL AND WARFARE ELIMINATION ACT OF 1991

The Chemical and Biological Weapons Control and Warfare Elimination Act of 1991[118] establishes U.S. sanctions and encourages international sanctions against countries that use chemical or biological weapons in violation of international law or against its own nationals. If the President determines that a government of a foreign country has engaged in these activities, the President is required to terminate arms sales and financing, foreign assistance (except humanitarian, food, and agricultural assistance), U.S. government credit or financial assistance, and certain exports to that government. Additional sanctions would apply unless the President determines and certifies within three months that the government has met the following conditions: it is no longer using these weapons in violation of international law or against its own nationals; it has provided reliable assurances that it will not in the future engage in any such activities; and it is willing to allow certain inspections to ensure that the government has not engaged in such activities. If after three months the President does not make such a determination, the President must impose at least three of the following sanctions, namely to: 1) vote against the extension of any loan or financial or technical assistance to the country by an international financial institution; 2) prohibit U.S. bank loans (except for those for purchasing food or agricultural products); 3) impose additional export restrictions; 4) impose restrictions on imports from that country; 5) downgrade or suspend diplomatic relations; or 6) restrict aviation access to and from the United States. The President may waive the application of any provision of this act if he determines that it is in the national interest of the United States and reports this to the appropriate Congressional committees. In addition, the President may lift

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[118]Public Law 102-182.

any sanctions imposed under the act after one year, if the government of the foreign country has met the conditions listed above, and is making restitution to those affected by its use of these weapons.

SECTION 81 OF THE ARMS EXPORT CONTROL ACT

Section 305 of the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 amended the Arms Export Control Act at section 81 to provide for sanctions to deny government procurement, U.S. Government contracts, and imports from foreign persons who knowingly and materially contribute, through exports from the United States or another country, or other transactions, to foreign efforts to use, develop, produce, stockpile, or otherwise acquire chemical or biological weapons. Foreign persons are subject to sanctions if the recipient country has used chemical or biological weapons in violation of international law or against its own people, or has made preparations to take such actions. Foreign persons are also subject to sanctions if the recipient country has been determined to be a supporter of international terrorism or if the foreign country, project or entity involved has been designated by the President as being subject to the provisions of this section.

The imposition of sanctions may be delayed for up to 180 days if the President is in consultations with the sanctioned person's government on specific and effective steps by that government to terminate the sanctionable activities. The President is not required to impose sanctions on goods and services if they are: provided under a contract existing before he published his intent to impose sanctions or if the goods or services involved are spare parts; component parts essential to U.S. products or production; routine service and maintenance that is not otherwise readily or reasonably available; information and technology essential to U.S. products or production; or medical and humanitarian goods or services. In the case of defense articles or services, the President is also not required to apply the sanctions if: 1) the President determines that sanctioned person is a sole source provider of essential articles or services and alternate sources are not readily or reasonably available; or 2) the President determines that such articles or services are essential to national security under defense coproduction agreements.

The sanctions may be terminated after 12 months if the President determines and certifies to Congress that the sanctioned person has ceased to aid or abet efforts by foreign governments, projects, or entities to acquire chemical or biological weapons. The President may also waive the application of any sanction under this section 12 months after the sanction's imposition if he determines that such a waiver is essential to the national security interest of the United States and provides Congress with a certification of this determination and a report and notification of his intent to issue a waiver 20 days before it takes effect.

F. Sanctions Exemptions for Food and Medicine

On April 28, 1999, President Clinton announced that existing unilateral economic sanctions programs would be amended to modify licensing policies to permit case-by-case review of specific proposals for the commercial sale of agriculture commodities and products, as well as medicine and medical equipment, where the United States has the discretion to do so.[119] Licenses are issued by the Treasury's Office of Foreign Assets Control.

TRADE SANCTIONS REFORM AND EXPORT ENHANCEMENT ACT OF 2000

The "Trade Sanctions Reform and Export Enhancement Act of 2000" was enacted as title IX of Public Law 106-387, the FY 2001 agriculture appropriations bill.[120] The Act made two principal changes to existing U.S. unilateral agricultural and medical sanctions that have been imposed for foreign policy or national security purposes. First, the Act required the President to terminate within 120 days after enactment (February 25, 2001), subject to certain exceptions, any unilateral agricultural or medical sanctions imposed for foreign policy or national security reasons that were in effect on the date of enactment. (With respect to Cuba, the Act did not affect requirements for the export and reexport of medicines and medical devices set forth in the Cuban Democracy Act of 1992.) Unilateral agricultural or medical sanctions are defined by the Act not to include any multilateral regime where the other members of that regime have agreed to impose substantially equivalent measures or a mandatory decision of the United Nations Security Council. The Act contains certain other exceptions with respect to circumstances related to war, use of force, hostilities, items used to facilitate development or production of biological and chemical weapons and items controlled under the Arms Export Control Act, the Export Administration Act.

The Act prohibits the availability of any U.S. governmental assistance, or financing by the U.S. government or a private person, of commercial exports to Iran, Libya, North Korea or Sudan, or exports to Cuba. In the case of Cuba, sales must be paid for by cash in advance or through financing by third country financial institutions. In the case of Iran, Libya, North Korea and the Sudan, the legislation authorizes the President to waive this prohibition for national security or humanitarian reasons.

Second, the Act prohibits the licensing of travel-related transaction for travel to, from or within Cuba for tourist activities. In particular, licensed travel to Cuba may not include travel for tourist activities which are defined in the Act as any activity with respect to travel to, from, or within Cuba that is not authorized in 31 Code of Federal Regulations 515.560(a) or in any section referred to in 515.560(a).

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[119] 64 Fed. Reg. 41784; 31 CFR Parts 538, 550, and 560.
[120] Public Law 106-387.

With respect to new unilateral sanctions, the Act prohibits the imposition of unilateral agricultural sanctions or medical sanctions unless; (1) no later than 60 days before the proposed sanction is imposed the President submits a reports to Congress that describes the activity proposed to be prohibited, restricted, or conditioned, and describes the actions by the foreign country or foreign entity that justify the sanction; and (2) a joint resolution is enacted stating the approval of the Congress for the President's report. The Act sunsets any unilateral agricultural or medical sanction that is imposed not later than 2 years after the effective date of the sanction unless the President submits another report to Congress and another joint resolution is enacted.

G. Sanctions Against Sudan

THE SUDAN PEACE ACT

In addition to the legislation relating to gum arabic imports enacted on November 9, 2002 and discussed in the IEEPA section above, President Bush signed the Sudan Peace Act, which requires the President to certify to Congress, on a semi-annual basis, whether the Government of Sudan and the Sudan People's Liberation Movement are negotiating in good faith and that negotiations should continue. Under the Act, the President is required to implement, after consultations with Congress, certain sanctions if President determines and certifies to Congress: 1) that the Government of Sudan has not engaged in good faith negotiations "to achieve a permanent, just and equitable peace agreement, or has unreasonably interfered with humanitarian efforts," (these sanctions "shall not apply," however, if the President also certifies that the Sudan People's Liberation Movement has not engaged in good faith negotiations); or 2) that the Government of Sudan is not in compliance with a the terms of a permanent, negotiated peace agreement between the parties. Specifically, the President would be required to: 1) instruct U.S. executive directors in the international financial institutions to continue to vote against loans, credits, guarantees, or extension of any of these, to the Government of Sudan; 2) take steps to deny the Government of Sudan access to oil revenues; and 3) seek a U.N. Security Council Resolution to impose an arms embargo on the Government of Sudan. The President can lift these sanctions if he certifies to Congress that the Government of Sudan has resumed good faith negotiations or comes into compliance with a peace agreement.

THE COMPREHENSIVE PEACE IN SUDAN ACT OF 2004

Congress later passed the Comprehensive Peace in Sudan Act of 2004 ("Comprehensive Peace Act"), which was signed by the President on December 23, 2004 (Public Law 108-497). The Comprehensive Peace Act expresses the sense of Congress that the Sudan Peace Act should remain in effect and be extended to

include the Darfur region of Sudan.[121] In addition, the Comprehensive Peace in Sudan Act, requires the President, notwithstanding the determinations required under the Sudan Peace Act, to implement sanctions specified in that Act and to block assets of appropriate senior officials of the Government of Sudan within 30 days of the passage of the Comprehensive Peace Act. The President is, however, given the authority to waive these sanctions if he determines and certifies to appropriate Congressional committees that such a waiver is in the national interest of the United States.[122]

H. Sanctions to Address the Illicit Diamond Trade

CLEAN DIAMOND TRADE ACT OF 2003

The Clean Diamond Trade Act of 2003 (Public Law 108-19) establishes measures for the importation and exportation of rough diamonds.[123] The Act provides that the President implement the "Kimberley Process Certification Scheme," an international agreement to regulate the trade of rough diamonds in order to prevent African conflict diamonds from being used to fuel rebel activities. The Act mandates the President ban non-compliant trade and prescribes civil and criminal penalties for violators. The Act also authorizes the President to "direct the appropriate agencies of the United States Government to make available technical assistance to countries seeking to implement the Kimberley Process Certification Scheme," while also urging the President to "work with Participants to strengthen the Kimberley Process Certification Scheme through the adoption of measures for the sharing of statistics on the production of and trade in rough diamonds."

The Act requires the Administration to submit an annual report, "not later that 1 year after the date of the enactment of this Act and every 12 months thereafter for such period as this Act is in effect." On August 6, 2004, the State Department submitted an annual report reviewing the practices, standards, and procedures of the United States Kimberley Process Authority.

The Act also requires that no later than 24 months after the effective date of the Act, the Comptroller General of the United States is to transmit a report to the Congress on the "effectiveness of the provisions of this Act in preventing the importation or exportation of rough diamonds that is prohibited under section 4" and any recommendations pertaining to the Act.

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[121]Public Law 108-19.
[122]Public Law 108-19.
[123]Public Law 108-497.

I. Sanctions Against Burma

BURMESE FREEDOM AND DEMOCRACY ACT OF 2003

On July 28, 2003, President George W. Bush signed the Burmese Freedom and Democracy Act of 2003.[124] This Act condemns the State Peace and Development Council (SPDC), which the Act cites as having failed to transfer power to the National League for Democracy following elections in Burma in 1990 and engaging in a range of human rights violations. The Act imposes a ban on Burmese imports to the United States and instructs the Secretary of the Treasury to have U.S. officials at international financial institutions oppose and vote against the expansion of loans or financial assistance to Burma. The Act also includes measures to: track assets in U.S. financial institutions owned by certain individuals and groups cited in the Act; authorize the President to freeze those assets; authorize the President to deny visas to certain individuals cited; encourage the Secretary of State to highlight the record of the SPDC to the international community and encourage other nations to restrict resources to the SPDC; and authorize the President to provide assistance to democracy activists in Burma . The President is given the authority to waive the import sanctions if he finds such a waiver to be in the national interest of the United States and reports this to appropriate committees in Congress. The import sanctions in the Act will terminate after one year unless the Congress passes a joint renewal resolution, and these sanctions can also be terminated if the President certified to Congress that certain conditions are met relating in three specific areas: Burma's human rights record; transition to a democratic government; and efforts against narcotics. The President can also terminate any provision of the act upon the request of a democratically elected government if the conditions in these three areas were met. On July 7, 2004 the Congress renewed the import restrictions contained in the Act for an additional year, pursuant to renewal provisions in the initial Act.[125]

J. Sanctions Against Syria

SYRIAN ACCOUNTABILITY AND LEBANESE SOVEREIGNTY RESTORATION ACT OF 2003

On December 12, 2003, the Syrian Accountability and Lebanese Sovereignty Restoration Act of 2003 was enacted.[126] The Act states that it will be U.S. policy that the U.S. Secretary of State will continue to list Syria as a state sponsor of terrorism until that country: ends its support for terrorists, including support for Hizballah and other terrorist groups operating in Lebanon; stops hosting terrorist groups; and comes into full compliance with U.S. law relating to terrorism and U.N.

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[124] Public Law 108-61.
[125] H.J. Res. 97, July 7, 2004.
[126] Public Law 108-175.

Security Council Resolution 1373. The Act requires that the President prohibit the export to Syria of any item on the U.S. Munitions List of the Commerce Control List of dual-use items under the Export Administration Regulations, until the President certifies to Congress that Syria meets the requirements of the Act. It also requires that the President impose two or more sanctions from a menu of economic and diplomatic options, including: prohibiting the export to Syria of most U.S. products; prohibiting U.S. businesses from investing or operating in Syria; restricting the range of U.S. travel by Syrian diplomats; prohibiting Syria-owned or –controlled aircraft from taking off from, landing in, or flying over the United States; reducing the U.S. diplomatic contacts with Syria; and blocking transactions with regard to any property in which the Government of Syria has an interest, by a person, or with respect to any property, subject to U.S. jurisdiction. The President is authorized to waive the sanctions if he finds it in U.S. national security interest to do so.

K. Sanctions Against Belarus

THE BELARUS DEMOCRACY ACT OF 2004

Enacted on October 20, 2004, the Belarus Democracy Act expresses the sense of Congress that no funds of the Export-Import Bank, Overseas Private Development Corporation, or the Trade and Development Agency should be made available for projects in Belarus until certain democracy and human rights conditions are met. [127]

L. The Hong Kong Policy Act and Taiwan's Accession to the WTO

On July 1, 1997, China assumed sovereignty over Hong Kong according to the terms of the Sino-British Joint Declaration of 1994. The question of how Hong Kong will continue to fare under Chinese rule is important to U.S. interests because of: (1) the large U.S. economic presence in Hong Kong and; (2) any adverse developments in Hong Kong will affect U.S.-China relations. Under the Sino-British Joint Declaration, China committed to preserving a high degree of autonomy under the so-called "one-China, two-systems" policy.

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[127] Public Law 108-347.

The Hong Kong Policy Act which was passed by Congress in 1992 sets forth declarations and conditions for how the United States should conduct bilateral relations with Hong Kong after July 1, 1997.[128] This legislation: (1) declares that support for democratization is a fundamental principle of the United States that should apply to U.S. policy toward Hong Kong after 1997; (2) declares U.S. support for the Sino-British Joint Declaration and makes a number of findings of what is provided for under this agreement; (3) requires that the United States apply the same laws toward Hong Kong after 1997 as were in force before then, but permits the President to suspend the application of any law beginning in July 1, 1997, if he determines that China is not giving Hong Kong sufficient autonomy, and; (4) requires the Secretary of State to report to Congress every 18 months on the situation in Hong Kong, including the development of its democratic institutions.

As part of legislation granting China unconditional normal trade relations upon its accession to the WTO, Congress included a provision which states the sense of Congress that immediately upon approval of China's accession by the WTO General Council, the United States should request that the Council consider Taiwan's accession as the next order of business during the same Council session. Furthermore, the legislation provides that the United States should be prepared to aggressively counter any effort by any WTO Member to block Taiwan's accession after approval of the PRC's accession.[129] Recognizing Taiwan's important position in the global trading system, WTO trade ministers approved Taiwan's WTO membership in November 2001. Taiwan became a WTO member on January 1, 2002.

M. Section 27 of the Merchant Marine Act, 1920 (Jones Act)

The Jones Act is a cabotage law that restricts the transportation of property by water between points in the United States, its possessions and territories (with very few exceptions) to vessels built and (if applicable) substantially repaired in U.S. shipyards, owned by U.S. citizens, manned by U.S. citizen crews, and registered in the United States. The first act passed by the First Congress was a cabotage measure that made it extremely expensive for foreign-flag, foreign-built vessels to operate in our coasting trades. Early cabotage laws (1789, 1790, 1817) were, it is claimed, in response to similar laws enforced by England, France, and other European countries.

During World War I, U.S. cabotage prohibitions were relaxed temporarily, but reinstated in 1920 by section 27 of the Merchant Marine Act, 1920, now usually referred to as the Jones Act. The penalty for violation is forfeiture of the cargo.

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[128] Public Law 102-383, approved October 5, 1992.

[129] Title VI of Public Law 106-286, approved October 10, 2000.

The law continues to be questioned by U.S. trading partners for its discriminatory impact, and many WTO members have requested during trade negotiations that the United States liberalize its access for marine transportation services.

N. Section 721 of the Defense Production Act of 1950, as amended ("Exon/Florio")

The proposed purchase in 1988 of an 80 percent share of Fairchild Semiconductor Corporation by Fujitsu, Ltd. sparked congressional interest concerning takeovers of American firms by foreign companies which raise national security considerations. Section 5021 of the Omnibus Trade and Competitiveness Act of 1988 amended title VII of the Defense Production Act of 1950[130] to add provisions (commonly known as "Exon/Florio," the chief congressional sponsors) because of concerns that the Federal Government lacked specific authority to prevent such acquisitions.

The provisions authorize the President, after he makes certain findings, to take actions for such time as he considers appropriate to suspend or prohibit any acquisition, merger, or takeover of a person engaged in interstate commerce in the United States by or with foreign persons so that such control will not threaten to impair the national security. To activate this authority, the President has to find that there is credible evidence that leads him to believe the foreign interest exercising control might take action that threatens to impair the national security and that other laws do not provide adequate and appropriate authority to protect the national security in the matter. The President has to report the findings to the Congress with a detailed explanation.

In making any decision to exercise the authority under this provision, the President may consider such factors as: (1) domestic production needed for projected national defense requirements; (2) the capability and capacity of domestic industries to meet national defense requirements; and (3) the control of domestic industries and commercial activities by foreign citizens as it affects the capability and capacity of the United States to meet the requirements of national security. The standard of review is "national security"; the provision affects only overseas investment flowing into the United States and is not intended to authorize investigations of investments that could not result in foreign control of persons engaged in interstate commerce nor to have any effects on transactions which are outside the realm of national security.

Among the actions available to the President is the ability to suspend a transaction. The President may also seek appropriate relief in the district courts of the United States in order to implement and enforce the provisions, including broad injunctive and equitable relief including, but not limited to divestment relief.

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[130] 50 U.S.C. App. 2170, as added by Public Law 100-418, section 5021, approved August 23, 1988.

Chapter 6: RECIPROCAL TRADE AGREEMENTS

Reciprocal Trade Agreement Objectives and Authorities

Section 2103 of the Bipartisan Trade Promotion Authority Act of 2002, included in the Trade Act of 2002,[1] provides authorities for the President to enter into reciprocal trade agreements with foreign countries to reduce or eliminate tariff or nontariff barriers and other trade-distorting measures. The Act replaced similar authorities in the Omnibus Trade and Competitiveness Act of 1988,[2] which in turn replaced similar authorities under section 102 of the Trade Act of 1974[3] that expired on January 3, 1988. Except for the authority to proclaim modifications in U.S. tariffs under multilateral agreements, trade agreements entered into under section 2103 are subject to congressional approval of implementing legislation under special expedited procedures, previously called "fast track." The basic purpose of the section 2103 authorities is to provide the means to achieve U.S. negotiating objectives set forth under section 2102 of the 2002 Act in bilateral, regional, and multilateral negotiations.

In addition, there are special trade agreement authorities that apply in limited circumstances or to deal with specific situations: (1) trade agreements entered into under section 123 of the Trade Act of 1974,[4] as amended by the 1988 Act, to grant new concessions as compensation for import relief actions or any judicial or administrative tariff reclassification; (2) withdrawal, suspension, or modification of trade agreement obligations under section 125 of the Trade Act of 1974;[5] (3) agreements with major state trading regimes acceding to the World Trade Organization (WTO); (4) trade agreements and remedies under sections 1371-1382 of the Omnibus Trade and Competitiveness Act of 1988[6] to obtain more open foreign market access in telecommunications trade; and (5) bilateral trade agreements with certain Communist countries providing for nondiscriminatory (most-favored-nation) treatment under certain conditions.

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[1] Public Law 107-210, approved August 6, 2002, 19 U.S.C. 3801-3813.
[2] Public Law 100-418, approved August 23, 1988, 19 U.S.C. 2902. These authorities expired on June 1, 1993, except that on July 2, 1993, section 1102 was amended to extend the fast track procedures to April 16, 1994 for the sole purpose of concluding the Uruguay Round negotiations. Public Law 103-49, approved July 2, 1993, 19 U.S.C. 2902(e).
[3] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2112.
[4] Public Law 93-618, 19 U.S.C. 2133.
[5] Public Law 93-618, 19 U.S.C. 2135.
[6] Public Law 100-418, 19 U.S.C. 3101.

TRADE NEGOTIATING OBJECTIVES

Section 2102(a) establishes a number of overall negotiating objectives for concluding trade agreements. Section 2102(b) establishes the principal trade negotiating objectives, which cover trade barriers and distortions, services, foreign investment, intellectual property, transparency, anti-corruption, regulatory practices, electronic commerce, agriculture, labor and the environment, dispute settlement and enforcement, extended WTO negotiations, trade remedy laws, border taxes, textiles, and the worst forms of child labor.

Section 2102(c) sets forth certain priorities for the President to address. These provisions include labor and environmental issues, especially reporting and capacity building; protection of legitimate health or safety, essential security, and consumer interests; reporting on the effectiveness of dispute settlement remedies; and establishing consultative mechanisms to examine the trade consequences certain currency movements.

In determining whether to enter into negotiations with a particular country, section 2102(e) requires the President to take into account whether that country has implemented its obligations under the Uruguay Round Agreements.

Section 1124 of the 1988 Act[7] requires the Secretary of the Treasury to take action to initiate bilateral currency negotiations on an expedited basis with a foreign party to trade agreement negotiations if the Secretary advises the President during the course of those negotiations that the country satisfies the criteria under section 3004(b) of the 1988 Act relating to exchange rate manipulation.

Sections 131, 135 and 315 of the Uruguay Round Agreements Act[8] provide U.S. objectives for seeking a WTO working party on worker rights; extended negotiations in financial services, telecommunications, and civil aircraft; and intellectual property right protection. More specifically, section 131 requires the President to seek the establishment of a WTO working party to examine the relationship of international trade and worker rights. Section 135 sets forth principal U.S. negotiating objectives for the extended negotiations in the WTO on financial services, basic telecommunications, and trade in civil aircraft. Section 315 sets forth objectives for the Administration to pursue in the field of intellectual property, which include accelerating the implementation of the TRIPs agreement, seeking the enactment of effective intellectual property rights laws abroad, and securing fair, equitable and nondiscriminatory market access opportunities for U.S. intellectual property based industries.

The NAFTA Implementation Act includes a provision regarding congressional intent for future free trade agreements. In this regard, section

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[7] Public Law 100-418, 22 U.S.C. 5304 note.

[8] Public Law 103-465, approved December 8, 1994, 19 U.S.C. 3551, 3555, 3581.

108 of the Act[9] sets forth considerations and preliminary procedures for possible future free trade area agreements and accession by foreign countries to NAFTA. Article 2204 of the NAFTA sets forth the basis for the accession of any country or group of countries. In the United States, accession would require congressional approval and implementing legislation. Section 108 stipulates that congressional approval of NAFTA with respect to Canada or Mexico does not constitute approval of its extension to other countries. Section 108 also requires the President to report to Congress on his recommendations for future trade agreement countries and sets forth general U.S. negotiating objectives for accession.

Section 409 of the Trade and Development Act of 2000 (Public Law 106-200) contains specific agricultural negotiating objectives of the United States for the World Trade Organization's negotiations on agriculture mandated by the Uruguay Round Trade Agreements. Section 409 also mandates consultations with Congress at specific points during the negotiations.

GENERAL TARIFF AUTHORITY

Since enactment of the Reciprocal Trade Agreements Act of 1934, Congress periodically has delegated authority to the President to negotiate and to proclaim reductions in tariffs under reciprocal trade agreements, subject to specific conditions and limitations, without requiring further congressional action. The most recent grant of such authority was contained in section 2103(a) of the Bipartisan Trade Promotion Authority Act of 2002.[10]

Section 2103(a) of the Act provides the President the authority to proclaim, without Congressional approval, certain duty modifications. Specifically, for tariff rates that exceed 5 percent ad valorem, the President is not authorized to reduce any rate of duty to a rate less than 50 percent of the rate of duty applying on the date of enactment. Rates at or below 5 percent ad valorem may be reduced to zero. Any duty reduction that exceeds 50 percent of an existing duty higher than 5 percent or any tariff increase must be approved by Congress.

In addition, section 2103(a) does not allow the use of tariff proclamation authority for import sensitive agriculture.

Staging authority requires that duty reductions on any article may not exceed 3 percent per year, or one-tenth of the total reduction, whichever is greater, except that staging is not required if the International Trade Commission determines there is no U.S. production of that article. These limitations would not apply to reciprocal agreements to eliminate or harmonize duties negotiated under the auspices of the World Trade Organization, such as so-called "zero-for-zero" negotiations.

The Uruguay Round Agreements Act provides certain limited, residual proclamation authority to the President with respect to tariffs. Specifically,

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[9] Public Law 103-182, approved December 8, 1993, 19 U.S.C. 3317.

[10] See also the discussion on specific trade agreement authorities, which follows.

section 111(a) provides very limited authority to the President to modify duties, change duty staging, and increase duties "as the President determines to be necessary or appropriate to carry out schedule XX." In addition, section 111(b)(1) provides that, subject to consultation and layover requirements, the President may proclaim tariff modification or staged rate reduction if the United States so agrees in a WTO negotiation and if it applies to the duty on an article in a tariff category that "was the subject of reciprocal duty elimination" (so-called "zero-for-zero elimination") "or harmonization negotiations" during the Uruguay Round.[11] Acceleration of staging on other categories of tariffs would not be permitted under this authority. Finally, section 111(b)(2) provides that the President may make modifications necessary to correct "technical errors" in schedule XX.

The North American Free Trade Agreement Implementation Act of 1993 also provides some limited proclamation authority with respect to tariffs. Specifically, section 201(a) provides the President with the very limited authority to modify duties, change duty staging, and increase duties as he "determines to be necessary or appropriate to carry out or apply" the Agreement. In addition, section 201(b) provides that, subject to consultation and layover requirements, the President may proclaim: tariff modifications or continuations, or staged rate modifications if the United States, Canada, and Mexico agree; continuation of duty-free treatment; and increased duties "as the President determines to be necessary or appropriate to maintain the general level of reciprocity and mutually advantageous concessions with respect to Canada and Mexico provided for by the Agreement."

The Uruguay Round Agreements Act also provides authority for the President to increase duties on articles from countries which are not WTO members. Section 111(c) of the Act[12] authorizes the President, after congressional consultation, to increase duties on imports from countries that are not members of the WTO, or to which the United States does not apply the WTO, if he determines that the country is not according adequate trade benefits to the United States, including substantially equivalent competitive opportunities. The maximum rate of duty that may be proclaimed is the higher of the pre-Uruguay Round most-favored-nation (MFN) rate or the MFN rate of duty that will apply under the Uruguay Round schedule XX.

TRADE AGREEMENT AUTHORITY

Agreements on tariff and non-tariff barriers. In addition to the tariff proclamation authority in section 2103(a), the Bipartisan Trade Promotion Authority Act of 2002 authorizes the President at section 2103(b)(1) to enter

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[11] This authority was used by the President in implementing U.S. obligations under the Information Technology Agreement concluded in December 1996. Pres. Proc. No. 7011, June 30, 1997, 62 Fed. Reg. 35909.

[12] Public Law 103-465, 19 U.S.C. 3521.

into a trade agreement with a foreign country whenever he determines that any duty or other import restriction or any other barrier to or distortion of international trade unduly burdens or restricts the foreign trade of the United States or adversely affects the U.S. economy, or the imposition of any such barrier or distortion is likely to result in such a burden, restriction, or effect. The agreement must provide for the reduction or elimination of such barrier or other distortion or prohibit or limit the imposition of such a barrier or distortion.

Conditions. Section 2103(b)(2) provides that the special implementing bills procedures may be used only if the agreement makes progress in meeting the applicable objectives set forth in section 2102(a) and (b) and the President satisfies the consultation requirements set forth in section 2104.

Bills qualifying for trade authorities procedures. Section 2103(b)(3)(A) provides that bills implementing trade agreements may qualify for trade promotion authority TPA procedures only if those bills consist solely of the following provisions:

(1) Provisions approving the trade agreement and statement of administrative action; and

(2) Provisions necessary or appropriate to implement the trade agreement.

Time period. Sections 2103(a)(1)(A) and 2103(b)(1)(C) extend trade promotion authority to agreements entered into before July 1, 2005. An extension until July 1, 2007, is permitted unless either House of Congress passed a disapproval resolution, as described under section 2103(c).

OTHER TRADE AGREEMENT AUTHORITIES

Sections 123 and 125 of the Trade Act of 1974, as amended by the Trade and Tariff Act of 1984 and the Omnibus Trade and Competitiveness Act of 1988, as well as section 111 of the Uruguay Round Agreements Act and section 201 of the North American Free Trade Agreement Implementation Act, contain authorities to enter into and/or to proclaim changes in U.S. duties under trade agreements in certain specific limited circumstances.

Compensation agreements

Section 123 of the Trade Act authorizes the President to enter into trade agreements granting new concessions and to proclaim modifications or continuation of existing duties or duty-free treatment as he determines required or appropriate as compensation to foreign countries for restrictions imposed as import relief under section 203 of the Trade Act or for any judicial or administrative tariff reclassification. No duty reduction can exceed 30 percent of its existing level. The purpose of such concessions is to meet international obligations under the WTO to maintain the general level of reciprocal and mutually advantageous concessions with countries whose trade is adversely affected by import relief measures or certain tariff reclassifications, and provide

an alternative to the right of such countries under the WTO to take retaliatory action.

Termination and withdrawal authority

Section 125 of the Trade Act contains the traditional requirement that every trade agreement entered into is subject to termination or withdrawal within 3 years after its effective date, or upon 6 months advance notice thereafter. The President may terminate any proclamation at any time.

Section 125(c) provides the President explicit domestic legal authority to proclaim increased duties or other import restrictions as he deems necessary or appropriate to implement U.S. international trade agreement rights or obligations to withdraw, suspend, or modify any trade agreement concessions.

Section 125(d) authorizes the President to withdraw, suspend, or modify substantially equivalent trade agreement obligations and proclaim increased duties or other import restrictions in response to withdrawal suspension, or modification by foreign countries of trade obligations benefiting the United States without granting adequate compensation (i.e., "self-compensation" authority). This authority was used in November 1982 by President Reagan to suspend most-favored-nation status for Poland indefinitely, based upon Poland's nonfulfillment of trade obligations undertaken in its accession to the GATT, and in view of increased repression of the Polish people by the martial law government.

No duty increase imposed under section 125(d) can exceed the higher of 50 percent or 20 percent ad valorem above the rate existing on January 1, 1975. Public hearings are required prior to taking any action, or promptly thereafter if expeditious action is necessary.

Section 125(e) requires duties or other import restrictions to remain in effect at negotiated levels for 1 year after U.S. termination of, or withdrawal from, a trade agreement, unless the President proclaims restoration of the previous level. The President must submit his recommendations to the Congress within 60 days as to the appropriate rates of duty on all affected articles. This provision prevents automatic, sudden "snapbacks" to higher preagreement duties that could create serious economic impact.

Accession of major state trading regimes to the WTO

Section 1106 of the Omnibus Trade and Competitiveness Act of 1988,[13] as amended, requires the President to determine, before any major foreign country accedes to the WTO, whether state trading enterprises (1) account for a significant share of that country's exports or of its goods subject to import competition, and (2) whether those enterprises unduly burden or restrict or

[13] Public Law 100-418, 19 U.S.C. 2905.

adversely affect U.S. trade or the U.S. economy or are likely to have such results. If both determinations are affirmative, the WTO cannot apply between the United States and that country until either (1) the country enters into an agreement with the United States for its state trading enterprises to operate in accordance with commercial considerations, or (2) Congress approves fast track legislation submitted by the President extending application of the WTO to the country.

Trade Promotion Authority Implementing Procedures

In contrast to traditional tariff proclamation authority, nontariff barrier agreements entered into under section 102 of the Trade Act of 1974, or section 2103 of the 2002 Act cannot enter into force for the United States and become binding as a matter of domestic law unless and until the President complies with specific requirements for consultation with Congress and implementing legislation approving the Agreement and any changes in U.S. law is enacted into law.

The purpose of the approval process is to preserve the constitutional role and fulfill the legislative responsibility of Congress with respect to agreements which often involve substantial changes in domestic laws. The consultation and notification requirements prior to entry into an agreement and introduction of an implementing bill ensure that congressional views and recommendations with respect to provisions of the proposed agreement and possible changes in U.S. law or administrative practice are fully taken into account and any problems resolved in advance of formal congressional action. At the same time, the procedure ensures certain and expeditious action on the results of the negotiation and on the implementing bill with no amendments.

TRADE PROMOTION AUTHORITY PROCEDURES

Under section 2105 of the Bipartisan Trade Promotion Authority Act of 2002, the President is required, at least 90 days before entering into an agreement, to notify Congress of his intent to enter into the agreement. Section 2105(a) also establishes a new requirement that the President, within 60 days of signing an agreement, submit to Congress a preliminary list of existing laws that he considers would be required to bring the United States into compliance with agreement.

Section 2105(b) provides that trade promotion authority would not apply if both Houses separately agree to a procedural disapproval resolution within any 60-day period stating that the Administration failed to notify or consult with Congress, which is defined as failing or refusing to consult in accordance with section 2104 or 2105, failing to develop or meet guidelines under section 2107(b), failure to meet with the Congressional Oversight Group, or the agreement fails to make progress in achieving the purposes, policies, priorities,

and objectives of the Act. Such a resolution may be introduced by any Member of the House or Senate. Only one such privileged resolution is permitted to be considered per trade agreement per Congress.

Section 2105(a) requires the President, after entering into agreement, to submit formally the draft agreement, the implementing legislation, and a statement of administrative action to Congress, with no time limit to do so, but the submission must be made on a date on which both Houses are in session. The procedures of section 151 of the Trade Act of 1974 then apply. Specifically, on the same day as the President formally submits the legislation, the bill is to be introduced (by request) by the Majority Leaders of the House and the Senate. After formal introduction of the legislation, the House Committees of jurisdiction have 45 legislative days to report the bill. The House is required to vote on the bill within 15 legislative days after the measure was reported or discharged from the Committees. Fifteen additional days are provided for Senate Committee consideration (assuming the implementing bill was a revenue bill), and Senate floor action is required within 15 additional days. Accordingly, the maximum period for Congressional consideration of the implementing bill from the date of introduction is 90 legislative days.

Once the bill has been formally introduced, no amendments are permitted either in Committee or floor action, and a straight "up or down" vote is required. In considering legislation to implement free trade agreements with Chile, Singapore, Australia, and Morocco under the Act, the implementing bills were developed by the Committees of jurisdiction together with the Administration before formal introduction, and the Committees held informal mark-up sessions.

Section 2105 also specifies that any trade agreement or understanding with a foreign government (oral or written) not disclosed to Congress will not be considered part of trade agreement approved by Congress and shall have no effect under U.S. law or in any dispute settlement body.

Finally, section 2105(b)(3) requires the Secretary of Commerce, in consultation with the Secretaries of State and Treasury, the Attorney General, and the United States Trade Representative, to transmit to Congress a report setting forth the strategy of the executive branch to address concerns of Congress regarding whether dispute settlement panels and the Appellate Body of the WTO have added to obligations or diminished rights of the United States, as described in section 2101(b)(3). This report was issued by the Secretary of Commerce prior to December 31, 2002, as required by the Act.

Section 2108 requires the President to submit to Congress a plan for implementing and enforcing any trade agreement resulting from the Act. The report is to be submitted simultaneously with the text of the agreement and is to include a review of the Executive Branch personnel needed to enforce the agreement as well as an assessment of any U.S. Customs Service infrastructure improvements required. The range of personnel to be addressed in the report is very comprehensive, including U.S. Customs and Department of Agriculture border inspectors, and monitoring and implementing personnel at USTR, the

Departments of Agriculture, Commerce, and the Treasury, and any other agencies as may be required.

Section 2109 states that the grant of trade promotion authority is likely to increase the activities of the primary committees of jurisdiction, and the creation of the Congressional Oversight Group under section 2107 will increase the participation of a broader Members of Congress in the formulation of U.S. trade policy and oversight of the U.S. trade agenda. Accordingly, the provision specifies that the primary committees of jurisdiction should have adequate staff to accommodate these increases in activities.

Section 2111 requires the International Trade Commission (ITC), within one year following enactment of the Act, to issue a report regarding the economic impact of the following trade agreements: (1) The U.S.-Israel Free Trade Agreement; (2) the U.S.-Canada Free Trade Agreement; (3) the North American Free Trade Agreement (NAFTA); (4) The Uruguay Round Agreements, which established the World Trade Organization; and (5) The Tokyo Round of Multilateral Trade Negotiations. The ITC issued the report in compliance with the Act.

The congressional consultation requirements and fast track/trade promotion authority procedures applied to the implementing legislation for the Tokyo Round of GATT multilateral trade negotiations in 1979, the United States-Israel Free Trade Agreement, the United States-Canada Free-Trade Agreement, the North American Free Trade Agreement, the Uruguay Round of GATT multilateral trade negotiations (including the Agreement Establishing the World Trade Organization), the United States-Chile Free Trade Agreement, the United States-Singapore Free Trade Agreement, the United States-Australia Free Trade Agreement, and the United States-Morocco Free Trade Agreement.

Special fast track procedures under section 3(c) of the Trade Agreements Act of 1979 also applied to implementation of changes in the Tokyo Round Agreements and to the United States-Canada Free-Trade Agreement for an initial 30-month period. Section 3(c), which currently applies to implementation of changes in the United States-Israel Free Trade Agreement and the GATT Agreement on Civil Aircraft,[14] requires the President to submit a draft bill and statement of any administrative action to the Congress whenever he determines it is necessary or appropriate to amend, repeal, or enact a statute to implement any requirement, amendment, or recommendation concerning an agreement. The President is required to consult at least 30 days in advance with the House Committee on Ways and Means and the Senate Committee on Finance and any other committees of jurisdiction on the subject matter and implementation.

The legislative procedures under sections 151-154 of the 1974 Act continue to apply to (1) resolutions approving bilateral commercial agreements extending normal trade relations (NTR) treatment to countries which are subject to the provisions of title IV of the Trade Act of 1974; (2) joint resolutions

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[14] Public Law 96-39, approved July 26, 1979, 19 U.S.C. 2504.

disapproving annual presidential determinations to extend authority to waive freedom of emigration requirements under title IV; (3) joint resolutions disapproving presidential reports of country compliance with freedom of emigration requirements under title IV; (4) joint resolutions disapproving presidential import relief actions under section 203 of the Trade Act of 1974 which differ from recommendations of the International Trade Commission; and (5) joint resolutions withdrawing congressional approval of the WTO Agreement after 5 years and every 5 years thereafter. While the procedures applicable to implementing bills and resolutions and to joint disapproval resolutions are similar, the time periods for committee and House and Senate consideration differ (shorter periods for disapproval resolutions), and the overall time periods for congressional consideration is generally subject to the terms of the statute involved.

TRADE PROMOTION AUTHORITY CONSULTATIONS AND ASSESSMENT

Section 2102(d) of the Act requires that USTR consult closely and on a timely basis with the Congressional Oversight Group appointed under section 2107. In addition, USTR is required to consult closely (including immediately before the initialing of an agreement) with the congressional advisers on trade policy and negotiations appointed under section 161 of the Trade Act of 1974, as well as the House Committee on Ways and Means, the Senate Committee on Finance, and the Congressional Oversight Group. With regard to negotiations concerning agriculture trade, USTR is also required to consult with the House and Senate Committees on Agriculture.

Section 2104 of the Act establishes a number of requirements that the President consult with Congress. Specifically, section 2104(a)(1) requires the President to provide written notice and consult with the relevant committees at least 90 calendar days prior to entering into negotiations. Section 2104(a)(c) also provides that President shall meet with the Congressional Oversight Group established under section 2107 upon a request of a majority of its members. Trade promotion authority would not apply to an implementing bill if both Houses separately agree to a procedural disapproval resolution within any 60-day period stating that the Administration has failed to notify or consult with Congress.

Section 2104(b)(1) establishes a special consultation requirement for agriculture. Specifically, before initiating negotiations concerning tariff reductions in agriculture, the President is to assess whether U.S. tariffs on agriculture products that were bound under the Uruguay Round Agreements are lower than the tariffs bound by that country. In his assessment, the President is also required to consider whether the tariff levels bound and applied throughout the world with respect to imports from the United States are higher than U.S. tariffs and whether the negotiation provides an opportunity to address any such

disparity. The President is required to consult with the Committees on Ways and Means and Agriculture of the House and the Committees on Finance and Agriculture, Nutrition and Forestry of the Senate concerning the results of this assessment and whether it is appropriate for the United States to agree to further tariff reductions under such circumstances and how all applicable negotiating objectives would be met.

Section 2104(b)(2) provides special consultations on import sensitive agriculture products. Specifically, before initiating negotiations on agriculture and as soon as practicable with respect to the Free Trade Area of the Americas and WTO negotiations, USTR is to identify import sensitive agriculture products and consult with the Committees on Ways & Means and Agriculture of the House and the Committees on Finance and Agriculture, Nutrition, and Forestry in the Senate concerning whether any further tariff reduction should be appropriate, whether the identified products face unjustified sanitary or phytosanitary barriers, and whether nations producing identified products maintain export subsidies or distorting policies that distort trade and impact of policies on U.S. producers. USTR is also to request that the International Trade Commission prepare an assessment of the probable economic effects of any such tariff reduction on the U.S. industry producing the product and on the U.S. economy as a whole. USTR is to then notify the Committees of those products for which it intends to seek tariff liberalization as well as the reasons. If USTR commences negotiations and then identifies additional import sensitive agriculture products, or a party to the negotiations requests tariff reductions on such a product, USTR is to notify the Committees as soon as practicable of those products and the reasons for seeking tariff reductions.

Section 2106 exempts agreements resulting from ongoing negotiations with Chile or Singapore, an agreement establishing a Free Trade Area of the Americas, and agreements concluded under the auspices of the WTO from prenegotiation consultation requirements of section 2104(a) only. However, upon enactment of H.R. 3009, the Administration is required to consult as to those elements set forth in section 2104(a) as soon as feasible.

Section 2104(c) establishes a special consultation requirement for textiles. Specifically, before initiating negotiations concerning tariff reductions in textiles and apparel, the President is to assess whether U.S. tariffs on textile and apparel products that were bound under the Uruguay Round Agreements are lower than the tariffs bound by that country. In his assessment, the President is also required to consider whether the tariff levels bound and applied throughout the world with respect to imports from the United States are higher than U.S. tariffs and whether the negotiation provides an opportunity to address any such disparity. The President is required to consult with the Committee on Ways and Means of the House and the Committee on Finance of the Senate concerning the results of this assessment and whether it is appropriate for the United States to agree to further tariff reductions under such circumstances and how all applicable negotiating objectives would be met.

In addition, section 2104(d) requires the President, before entering into any trade agreement, to consult with the relevant Committees concerning the nature of the agreement, how and to what extent the agreement will achieve the applicable purposes, policies, and objectives set forth in the Act, and all matters relating to implementation under section 2105, including the general effect of the agreement on U.S. laws.

Section 2014(d)(3) requires the President, at least 180 calendar days before the day on which he enters into a trade agreement, to report to the Committees on Ways and Means and the Committee on Finance the range of proposals advanced in trade negotiations and may be in the final agreement that could require amendments to title VII of the Tariff Act of 1930 or to chapter 1 of title II of the Trade Act of 1974; and how these proposals relate to the objectives described in section 2102(b)(14). Section 2104 also provides a mechanism for any Member in the House or Senate to introduce at any time after the President's report is issued a nonbinding resolution which states that the proposed changes to U.S. trade remedy laws are inconsistent with the Act's negotiating objectives on trade remedies in section 2102(b)(14). The resolution is to be referred to the Ways and Means and Rules Committees in the House and the Finance Committee in the Senate, and is privileged on the floor if it is reported by the Committees. Only one resolution (either a nonbinding resolution on trade remedies or a disapproval resolution for failure to consult) per agreement is eligible for the trade promotion authority procedures contained in sections 152 (d) and (e) of the Trade Act of 1974. The one resolution quota is satisfied for the House only after the Ways and Means Committee reports a resolution, and for the Senate only after the Finance Committee reports a resolution.

Uruguay Round Agreements

The Uruguay Round Agreements represented the culmination of negotiations among 125 countries over an 8-year period launched in Punta del Este, Uruguay in September 1986 under the auspices of the GATT and concluded in Geneva, Switzerland on December 15, 1993. On that date President Clinton provided the Congress the required 120-day advance notice of his intention to enter into the Agreements. The Agreements were signed in Marrakesh, Morocco on April 15, 1994 by 111 countries, including the United States, thereby undertaking the commitment to bring the results before their respective legislatures for approval.

Sections 1101-1103 of the Omnibus Trade and Competitiveness Act of 1988, as extended by Public Law 103-49, set forth U.S. negotiating objectives and authority and implementing procedures necessary for U.S. participation. As required by Public Law 103-49, the private sector advisory committees established under section 135 of the Trade Act of 1974 submitted their reports assessing the Agreements to the President, the USTR and the Congress on January 14, 1994.

On September 27, 1994, President Clinton sent a letter of transmittal to the House and Senate covering: (1) transmittal of the final texts of the Uruguay Round agreements, including the Agreement establishing the World Trade Organization; (2) the draft implementing bill and Statement of Administrative Action; and (3) supporting documents, as required by section 1103 of the 1988 Act.[15]

As provided under section 151 of the Trade Act of 1974,[16] as amended, the implementing legislation was introduced in the House on September 27 as H.R. 5110 by Majority Leader Gephardt, for himself and Minority Leader Michel by request, and jointly referred to eight committees of jurisdiction for a period ending October 3, 1994. On November 29, 1994, H.R. 5110 passed the House and was sent to the Senate for consideration, where it passed on December 1. On December 8, 1994, the bill was signed into law by the President.

The Uruguay Round Agreements are the broadest, most comprehensive trade agreements in history. The Agreements cut global tariffs by more than one-third, and reduce or eliminate numerous nontariff measures, such as quotas, restrictive licensing systems, and discriminatory product standards.

The agreements also contain multilateral rules covering such matters as technical barriers to trade, trade-related investment measures (TRIMs), rules of origin, import licensing procedures, safeguards, trade-related aspects of intellectual property rights (TRIPs), antidumping/countervailing duties, agriculture trade, and government procurement. In addition, the General Agreement on Trade in Services (GATS) establishes a framework of rules for trade and investment in services sectors, including most-favored-nation (MFN) and national treatment, market access, transparency, and the free flow of payments and transfers. Many of these agreements are addressed in detail in other chapters of this book.

The Agreement Establishing the World Trade Organization establishes an international organization which encompasses the existing GATT institutional structure and extends it to the new Uruguay Round disciplines on services, intellectual property, and investment.

The Understanding on Rules and Procedures Governing the Settlement of Disputes creates new procedures for settlement of disputes arising under any of the Uruguay Round agreements and provides time limits for each step in the process. The Understanding creates a more automatic process, including the right to a panel, adoption of panel reports unless there is a consensus to reject the report, appellate legal review on request, time limits for country conformity with panel rulings and recommendations, and authorization of retaliation if such limits are not met.

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[15] Public Law 100-418, 19 U.S.C. 2903.
[16] Public Law 93-618, 19 U.S.C. 2191.

URUGUAY ROUND AGREEMENTS ACT

The Uruguay Round Agreements Act approves the trade agreements resulting from the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT) entered into by the President on April 15, 1994. The legislation and the Statement of Administrative Action (SAA) proposed to implement the Agreements were submitted to the Congress on September 27, 1994.

The legislation contained general provisions on: (1) approval and entry into force of the Uruguay Round Agreements, and the relationship of the Agreements to U.S. laws (section 101 of the Act[17]); (2) authorities to implement the results of tariff negotiations (section 111 of the Act[18]); (3) procedures regarding implementation of dispute settlement proceedings affecting the United States and oversight of activities of the World Trade Organization (WTO) (sections 121-130 of the Act[19]); and (4) objectives regarding extended Uruguay Round negotiations and other related provisions (sections 131, 135 and 315 of the Act[20]).

Specifically, sections 121-130 of the Act[21] contain procedural requirements for notice, consultation, and reporting to ensure access to, and advice by, congressional committees, private sector advisory committees, and the public regarding the dispute settlement mechanism under the WTO. In order to ensure that the WTO continues the practice followed by the GATT of decision-making by consensus, USTR must consult with Congress before any vote is taken in the WTO that would substantially affect U.S. rights or obligations under the Agreement or another multilateral trade agreement, or potentially entails a change in Federal or state law. Within 30 days after the end of any year in which the WTO takes such a vote, USTR will submit a report to the appropriate congressional committees describing the decision, U.S. efforts to achieve consensus, country voting, how the decision affects the United States, and the President's response. The dispute settlement procedures set forth in the Act also include a provision requiring USTR to inform, consult, and report to Congress, private sector advisory committees, and the public during each stage of the process. Promptly after the establishment of a panel, USTR will publish a notice in the Federal Register identifying the parties to the dispute, setting forth the major issues raised and the legal basis of the complaint, identifying the specific measures cited in the request for the panel, and seeking written comments from the public on the issues raised. The USTR will take into account any advice received from Congress and the advisory committees and the written comments in preparing U.S. submissions to the panel or Appellate Body.

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[17] Public Law 103-465, 19 U.S.C. 3511.
[18] Public Law 103-465, 19 U.S.C. 3521.
[19] Public Law 103-465, 19 U.S.C. 3531-3538.
[20] Public Law 103-465, 19 U.S.C. 3551, 3555, and 3581.
[21] Public Law 103-465, 19 U.S.C. 3531-3538.

In addition, USTR is required to submit an annual report to the Congress on the structure, budget and activities of the WTO, and details of dispute settlement actions.

The legislation contains a number of other provisions which affect the administration of U.S. trade laws. Included in the legislation are provisions amending the U.S. antidumping and countervailing duty laws in response to the Uruguay Round Antidumping and Subsidies/Countervailing Measures Agreements. The legislation implement in U.S. domestic law various provisions of the Uruguay Round Agreements relating to import safeguard measures; foreign trade barriers and unfair trade practices in import trade (section 337 of the Tariff Act of 1930); textiles and apparel trade; government procurement; and technical barriers to trade (product standards). Also included are provisions implementing the Agreement on Agriculture and the Agreement on Trade-Related Aspects of Intellectual Property Rights. The legislation also contains provisions extending expiring programs and amendments to certain customs laws related to the Uruguay Round Agreements, conforming amendments to various laws to reflect the implementation of the Agreements, as well as a number of revenue and other non-trade provisions to meet budgetary offset requirements. These provisions are discussed in greater detail in other chapters of this book.

Post Uruguay Round Negotiations

The GATS was the first multilateral, legally enforceable agreement covering trade and investment in services. The GATS was designed to reduce or eliminate governmental measures that prevent services from being freely provided across national borders or that discriminate against locally-established service firms with foreign ownership. After the WTO went into effect, negotiations continued and were given a new negotiating mandate in November 2001 as part of the Doha Development Round of WTO negotiations.

Information Technology Agreement

During the December 1996 WTO Ministerial Meeting in Singapore, trade ministers from 28 WTO-member countries endorsed an agreement liberalizing market access in the information technology industry. This Information Technology Agreement (ITA) eliminated tariffs on information technology products by the year 2000 on a wide range of technology products. The ITA was finalized on March 26, 1997, and entered into force on July 1, 1997. As of this writing, the ITA has 63 participants representing over 95 percent of global trade in this sector.

ITA product coverage includes computers and computer equipment, semiconductors and integrated circuits, computer software products, telecommunications equipment, semiconductor manufacturing equipment and

computer-based analytical instruments. Some limited staging up to 2005 was granted on a country-by-country basis for individual products. The ITA, thus far, is the only global sectoral agreement in which participating governments have agreed on a uniform list of products on which all duties will be eliminated. The products subject to the ITA were covered by the residual proclamation authority provided by section 111(b) of the Uruguay Round Agreements Act and, thus, no additional implementing authority was necessary.[22]

Work to review possibilities for expanding product coverage continues, as do efforts to address non-tariff measures affecting trade in ITA-covered products.

WTO Basic Telecommunication Services Agreement

As part of the GATS, WTO members have made both basic and value-added telecommunications commitments. Specifically, the Fourth Protocol to the GATS—generally referred to as the WTO Basic Telecommunications Services Agreement—is the legal instrument embodying basic telecommunications services commitments of seventy WTO members under the GATS. The agreement entered into force on February 6, 1998, and since that time, additional WTO members have made telecommunications services commitments, some upon their accession to the WTO. Due in large part to this agreement, mutually advantageous market opportunities for U.S. telecommunications equipment and service suppliers expanded greatly.

The WTO basic telecommunications services agreement built upon the Annex on telecommunications, part of the General Agreement on Trade in Services (GATS), itself a component of the Uruguay Round Final Act. The Annex requires WTO members to ensure that all service suppliers seeking to take advantage of scheduled commitments have reasonable and non-discriminatory access to, and the use of, public basic telecommunications networks and services. The agreement covers basic telecommunications services only. Participants agreed at the start of the talks to disregard differences in how countries might define "basic" telecommunications, and to negotiate on all public and private information (voice or data) from sender to receiver. Whereas the Annex on telecommunications addresses access to existing services and networks by users, the WTO basic telecommunications agreement addresses the ability to enter telecommunications markets and sell services. Examples of the services covered by this agreement include voice telephony, data transmission, telex, telegraph, facsimile, private leased circuit services (i.e., the sale or lease of transmission capacity), fixed and mobile satellite systems and services, cellular telephony, mobile data services, paging, and personal communications systems. WTO services negotiations now underway may expand existing commitments to cover a broader range of telecommunications sub-sectors.

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[22] Pres. Proc. No. 7011, June 30, 1997, 62 Fed. Reg. 35,909.

1997 Financial Services Agreement

With respect to extended negotiations on financial services, the United States, because of insufficient market-opening commitments from many of its trading partners, committed in July 1995 to protect the existing investments of foreign financial service providers in the United States but reserved the right to provide differing levels of treatment with respect to any new activities by such providers, or with respect to new entrants to the U.S. financial services market. The interim agreement expired at the end of 1997. Negotiations were renewed in April 1997 and ended December 1997 with a new agreement that covered 95 percent of the global financial services market as measured in revenue. Of the seventy WTO Members that made improved commitments in financial services during these negotiations, 53 countries met the original deadline of January 29, 1999, for completing domestic ratification procedures and notifying their acceptance of the 1997 Agreement—the Fifth Protocol to the GATS, and three still have not ratified their commitments.

The 1997 Financial Services Agreement opened world financial services markets to an unprecedented degree. Fifty-two countries guaranteed broad market access terms across all insurance sectors-encompassing life, non-life, reinsurance, brokerage and auxiliary services. Another fourteen countries committed to open critical sub-sectors of their insurance markets of particular interest to U.S. industry. Fifty-nine countries committed to permit 100 percent foreign ownership of subsidiaries or branches in banking. And forty-four countries guaranteed to allow 100 percent foreign ownership of subsidiaries or branches in the securities sector.

The United States has efforts underway as part of the current round of WTO/GATS negotiations to build upon the results of the 1997 negotiations. In December 2000, the United States submitted an initial financial services sectoral proposal to the GATS Council in Special Session as part of a package of U.S. sectoral proposals.

Maritime Services

With respect to maritime services, the United States (and most other countries) did not table an offer. The negotiations were suspended on June 28, 1996, without an agreement. The United States continues to suspend its NTR obligations in this sector but has received requests from trading partners for market access during the Doha Development Round of WTO negotiations.

WTO "Built-in-Agenda" on Agriculture and Services

The so-called built-in-agenda was an integral part of the Uruguay Round Agreements and constituted an important element in the balance of rights and obligations of the commitments of WTO members. The built-in agenda called

for the resumption of negotiations by the year 2000 to further liberalize trade in agriculture and services, as well as the examination of government procurement practices and enforcement of intellectual property rights. The WTO Ministerial conference that was hosted by the United States in Seattle, Washington, from November 30 through December 4, 1999, was to have formally launched these negotiations but members countries could not reach agreement.

New GATS negotiations began at the start of 2000 and aimed to reduce or eliminate the adverse effects on trade in services of measures as a means of providing effective market access. The deadline for submission of negotiating and other proposals for new GATS discussions was set for December 2000 and in July 2000, the United States presented a broad proposal.

Global talks on agriculture were launched in 2000 under the mandate of Article 20 of the Uruguay Round's Agriculture Agreement. At the Fourth WTO Ministerial Conference in Doha in November 2001, WTO Members agreed to a new mandate for trade in agriculture, known as the "three pillars," which included "substantial improvements in market access, reductions of, with a view toward phasing out, all forms of export subsidies; and substantial reductions in trade-distorting domestic support programs." In addition, the Doha Development Agenda (DDA) committed Members to both a March 31, 2003 deadline for establishing reform modalities, such as tariff and subsidy reduction formulas, to serve as the basis of the negotiation, as well as the submission of a draft of specific Member commitments by the Fifth Ministerial Conference in Cancun, scheduled for September 2003. This deadline was missed as were other negotiating deadlines, but, at the time of this writing, efforts to reach modalities is scheduled for mid-year 2005.

Upon the enactment of Presidential Trade Promotion Authority, the United States wasted no time taking the lead and has tabled far-reaching and aggressive reform proposals for world agricultural trade, including provisions for a specific deadline for WTO Members to eliminate all trade-distorting subsidies and tariffs. Agricultural trade liberalization is now closely tied to the success of the current Round of negotiations. By mandate, the Doha Round negotiations were to have been completed by January 1, 2005, but delays have caused member countries to consider 2006 as a more practical deadline.

U.S. WTO Dispute Settlement Fund

Section 5201 of the Trade Act of 2002 (P.L. 107-210) established in the U.S. Treasury a fund for the payment of WTO dispute settlements. The Act authorizes the U.S. Trade Representative to provide total or partial settlements pursuant to WTO dispute proceedings. If the total or partial settlement is not more than $10,000,000, the Trade Representative is to certify to the Secretary of the Treasury that the settlement is in the best interests of the United States. If the total or partial settlement is more than $10,000,000, the Trade Representative is to certify to the U.S. Congress. The fund authorizes an initial

appropriation of $50,000,000 plus those amounts equivalent to settlements recovered by the United States pursuant to WTO dispute proceedings. Amounts appropriated to the fund are authorized to remain available until expended.

Specific Foreign Trade Barriers

SECTIONS 181 AND 182 OF THE TRADE ACT OF 1974, AS AMENDED

Section 181 of the Trade Act of 1974,[23] added by section 303 of the Trade and Tariff Act of 1984 and amended by the Omnibus Trade and Competitiveness Act of 1988 and the Uruguay Round Agreements Act, requires an annual report on foreign trade barriers and their impact, known as the National Trade Estimates report. The USTR, through the interagency trade mechanism, must identify, analyze, and estimate the impact on U.S. commerce of foreign acts, policies, and practices which constitute significant barriers to or distortions of U.S. exports of goods or services and U.S. foreign direct investment. The report must also include information on any action taken (or reasons for no action taken) to eliminate any measure identified, as well as information with respect to section 301, negotiations or consultations with foreign governments, and foreign anticompetitive practices that adversely affect U.S. exports. The report is submitted to the appropriate committees of the House and to the Senate Committee on Finance. After submission of the report, the USTR must consult and take into account the views of these congressional committees. Section 182 of the Trade Act of 1974,[24] as added by section 1303(b) of the 1988 Act and amended by the North American Free Trade Agreement Implementation Act and the Uruguay Round Agreements Act, requires the USTR to identify priority foreign countries that deny adequate and effective protection or fair and equitable market access for U.S. intellectual property rights, for purposes of action under section 301 (see further description under chapter 2).

TELECOMMUNICATIONS TRADE ACT OF 1988

The Telecommunications Trade Act of 1988, under sections 1371-1382 of the Omnibus Trade and Competitiveness Act of 1988 and as amended by the Uruguay Round Agreements Act, provides specific trade negotiating authority and remedies to address the lack of foreign market openness in telecommunications trade. The Telecommunications Act requires the U.S. Trade Representative to investigate and designate foreign priority countries, taking into account acts, policies, and practices that deny mutually advantageous market opportunities to U.S. telecommunications exporters and their subsidiaries. Countries may be added or deleted from the list of designated countries at any time.

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[23] Public Law 93-618, 19 U.S.C. 2241.
[24] Public Law 93-618, 19 U.S.C. 2242.

The President is required to negotiate with the priority countries, drawing from a list of general and specific negotiating objectives, for the purpose of entering into bilateral or multilateral agreements that provide mutually advantageous market opportunities. If no agreement is reached, the Act requires the President to take whatever authorized actions are appropriate and most likely to achieve the general negotiating objectives, as defined by the specific objectives established by the President. The actions authorized are broadly similar to authorities available to the USTR under section 301 of the Trade Act of 1974, as amended.

The Telecommunications Trade Act requires the USTR to conduct annual reviews to determine if a country has violated a telecommunications trade agreement or otherwise denies mutually advantageous market opportunities. In the case of an affirmative determination, it shall be treated as a trade agreement violation under section 301 of the Trade Act of 1974, as amended. In general, that section requires that in cases involving foreign violations of trade agreements or other "unjustifiable" practices, the USTR must take retaliatory action in an amount equivalent in value to the foreign burden or restriction on U.S. commerce. Certain waivers are available to the USTR, under which no retaliation is required.

Negotiating authority was provided concomitant with the general trade agreement authority provided in the Omnibus Trade and Competitiveness Act of 1988 (i.e., until its expiration in 1993). Compensation authority also is provided, in the event that action is taken that violates U.S. obligations under the WTO.

Background and reviews in 2001-2002

The Telecommunications Trade Act was intended to address the imbalance in market access for telecommunications goods and services between the United States and other countries that arose from increased deregulation of the U.S. market and court-ordered divestiture by American Telephone and Telegraph (AT&T) of its local operating companies on January 1, 1984. These actions resulted in a U.S. market virtually devoid of barriers to the entry of foreign competitors. At the same time, however, major foreign markets were characterized by strict government regulations, procurement policies, standards, and other practices that resulted in limited competitive opportunities for U.S. and other foreign firms in those markets. Although the period authorized for telecommunications trade negotiations is coterminous with multilateral trade negotiating authority in the 1988 Act, the separate negotiating authority is designed to permit increased flexibility in negotiating agreements in telecommunications trade. It permits the USTR to focus on priority countries whose barriers or practices pose the greatest impediment to market access by U.S. telecommunications firms and to tailor the negotiating priorities to address the specific circumstances in each country.

In the 2005 section 1377 annual review, the main issues identified were existing practices or prospective concerns relating to: 1) excessive interconnection rates for mobile networks in Germany, Japan, Mexico, Peru, and Switzerland; (2) restrictions on access to and use of leased lines in Germany and submarine cable capacity in India; (3) excessive regulatory requirements in China, Colombia, and India; (4) burdensome testing and certification requirements in Mexico and Korea; and (5) limitations on suppliers' choice of technology in China and Korea.

Most-Favored-Nation (Nondiscriminatory) or Normal Trade Relations Treatment

Nondiscriminatory treatment of trading partners has been a basic element of international trade for several centuries, although its scope, application, and terminology in U.S. law have changed as the complexity of trade among the nations has increased. Nondiscriminatory treatment and the principle underlying it are often referred to as the "most-favored-nation" (MFN) treatment or principle. While the MFN principle remains firmly in place as a fundamental concept governing U.S. trade relations, the term "most-favored-nation" was replaced with the term "normal trade relations" in all U.S. trade laws and regulations in 1998.[25] This was done to clear up confusion and more clearly reflect the principles of U.S. trade policy. In the following summary, the term "MFN" is retained to describe the international obligation, while "NTR" is used to describe U.S. law since 1998.

MFN had its origins in international commercial agreements, whereby the signatories extend to each other treatment in trade matters which is no less favorable than that accorded to a nation which is the "most favored" in this respect. The effect of such treatment is that all countries to which it applies are "the most favored" ones; hence, all are treated equally. In the context of U.S. tariff legislation, NTR means that the products of a country given such treatment are subject to lower rates of duty (found in column 1 of the Harmonized Tariff Schedule (HTS) of the United States), which have resulted from various rounds of reciprocal tariff negotiations. Products from countries not eligible for NTR under U.S. law are subject to higher rates of duty (found in column 2 of the HTS), which are essentially the rates of duty enacted by the Tariff Act of 1930.

Prior to 1934, the United States accorded MFN treatment to its trading partners reciprocally only within the scope of commercial agreements containing an MFN clause. Section 350 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1934, in effect required the nondiscriminatory application to all countries of tariff and trade concessions granted in bilateral agreements, whether or not those countries had agreements with the United States containing the MFN clause.

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[25] Public Law 105-206, approved July 22, 1998.

By becoming a signatory of the General Agreement on Tariffs and Trade, the United States, as of January 1, 1948, also accepted the basic obligation of GATT Article I to accord unconditional MFN status to all other signatories. Thus, MFN or NTR status is extended by the United States to foreign countries as a matter not only of U.S. domestic law but also as an international obligation.

The unconditional and unlimited MFN policy was changed after the enactment of section 5 of the Trade Agreements Extension Act of 1951,[26] which directed the President to withdraw or suspend MFN status from the Soviet Union and all countries under the control of international communism. This action was prompted by the outbreak of the Korean War and the support that these countries were giving to North Korea and China. As implemented, this directive was applied to all then-existing Communist countries except Yugoslavia.

In December 1960, President Eisenhower revoked the suspension of MFN status with respect to Poland. President Kennedy suspended MFN status with respect to Cuba in May 1962, pursuant to a new legislative requirement contained in section 401 of the Tariff Classification Act of 1962.[27] The Tariff Classification Act also enacted the new Tariff Schedules of the United States, which for the first time, included in a general headnote a current list of countries without MFN status. Section 231 of the Trade Expansion Act of 1962,[28] as amended by section 402 of the Foreign Assistance Act of 1963, expanded the scope of the suspension of MFN status by applying it to "any country or area dominated by Communism," unless the President determined that the continued application of MFN status to Communist countries to which it was being applied at the time of the enactment of the Trade Expansion Act (i.e., to Poland and Yugoslavia) was in the national interest. The President made such a determination for both countries in March 1964.

The statutory provisions affecting the U.S. MFN policy and its practical implementation remained unchanged thereafter until enactment of the Trade Act of 1974. Subsequent amendments to U.S. MFN policy were made in the Customs and Trade Act of 1990.[29] As discussed above, "MFN" terminology was changed to "NTR" in all trade laws and regulations in the Internal Revenue Service Restructuring and Reform Act of 1997.[30]

The Normal Trade Relations or MFN principle under present law

The basic statute currently in force with respect to the NTR treatment of U.S. trading partners is section 126 of the Trade Act of 1974.[31] Section 126 contains

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[26] Public Law 49-50, ch. 141, approved June 16, 1951.
[27] Public Law 87-566, approved May 24, 1962.
[28] Public Law 87-794, approved October 11, 1962, 19 U.S.C. 1351.
[29] Public Law 101-382, approved August 20, 1990.
[30] Public Law 105-206, approved July 22, 1998.
[31] Public Law 93-618, 19 U.S.C. 2136.

the general requirement that any duty or other import restriction proclaimed to carry out any trade agreement applies on an MFN basis to products of all foreign countries, except as otherwise provided by law. The key provision embodying such exceptions with respect to tariff treatment is General Note 3(b) of the HTS, which contains the list of countries denied NTR tariff status with respect to their exports to the United States.

Other measures, most notably the Generalized System of Preferences, the Caribbean Basin Initiative, the African Growth and Opportunity Act, the Andean Trade Preferences Act, the various free trade agreements, and tariff treatment of least developed developing countries, provide specifically for application of preferential duty treatment for eligible countries and products under certain circumstances. This preferential tariff status grants terms that are more favorable than those granted to other countries which otherwise receive NTR treatment from the United States.

With respect to nontariff measures, section 1103(a) of the Omnibus Trade and Competitiveness Act of 1988 requires the President to recommend to the Congress that benefits and obligations of a particular agreement apply solely to the parties to that agreement or not apply uniformly to all parties, if such application is consistent with the Agreement. The Agreement on Subsidies and Countervailing Duties and the Agreement on Government Procurement, negotiated during the Tokyo Round of GATT multilateral trade negotiations, were implemented by the United States on a non-MFN basis. The renegotiated plurilaterial GATT Government Procurement Agreement will continue to be implemented on a non-MFN basis.

Nonmarket economy countries

The Trade Act of 1974 repealed section 231 of the Trade Expansion Act of 1962. Title IV of the Trade Act of 1974,[32] as amended, presently regulates the extension of NTR tariff treatment to nonmarket economy countries. Section 401 directs the President to continue to deny NTR treatment to any country to which it was denied on the date of the enactment of the Trade Act (i.e., all Communist countries as of January 3, 1975, except Poland and Yugoslavia). Section 402 also denies NTR treatment (as well as access to U.S. government credits, or credit or investment guarantees) to any nonmarket economy country ineligible for NTR treatment on the date of enactment of the Trade Act and which the President determines denies or seriously restricts or burdens its citizens' right to emigrate.

A country subject to the ban imposed by section 401 may gain NTR status only by fulfilling two basic conditions: (1) compliance with the requirements of the freedom of emigration provisions under section 402 of the Trade Act; and (2) conclusion of a bilateral commercial agreement with the United States under

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[32] Public Law 93-618, as amended by Public Law 96-39, Public Law 100-418, and Public Law 101-382, 19 U.S.C. 2431.

section 405 of the Trade Act providing reciprocal nondiscriminatory treatment.

The provisions of section 402, commonly referred to as the Jackson-Vanik amendment, allow a non-NTR, nonmarket economy country to receive NTR status (and access to U.S. financial facilities) only if the President determines that it permits free and unrestricted emigration of its citizens. If the President determines that a country is in full compliance with the Jackson-Vanik freedom of emigration requirements, he must submit a report to the Congress by June 30 and December 31 of each year that such country receives NTR treatment, describing the nature of the country's emigration laws and policies. The country's NTR status may be revoked if a joint resolution disapproving the December 31 compliance report is enacted into law within 90 legislative days of the delivery of the report to Congress. If such a resolution is enacted, the country's NTR status is rescinded, effective 60 calendar days after enactment.

Section 402 also authorizes the President to waive the requirements for full compliance of the particular country with the Jackson-Vanik requirements, if he determines that such waiver will substantially promote the objectives of the freedom of emigration provisions and if he has received assurances that the emigration practices of the country will lead substantially to the achievement of those objectives. The President may, at any time, terminate by executive order any waiver granted under authority of section 402.

The President's waiver authority is subject to annual renewal. The renewal procedure under section 402(d)(1) requires the President, if he determines that waiver authority extension will substantially promote freedom of emigration objectives, to submit to the Congress a recommendation for a 12-month extension of the waiver authority within 30 days prior to its expiration (i.e., by June 3 each year), together with his reasons for the recommendation and a determination with respect to each country for which a waiver is in effect that the continuation of the waiver will substantially promote the freedom of emigration objectives.

Under the terms of the 1974 Act, as amended, the extension of the waiver authority for an additional 12-month period is automatic unless a joint resolution disapproving such extension either generally or with respect to a specific country is enacted into law within 60 days after the expiration of the previous waiver authority. The enactment of such resolution would rescind the waiver authority (and with it the grant of the NTR status) with respect to countries covered by the resolution, effective 60 days after its enactment.

Presidential authority to extend NTR status to a country excluded under section 401 may be utilized only as long as a bilateral commercial agreement between the United States and the country involved remains in force. Sections 404 and 405 of the Trade Act of 1974 as amended authorize the President to conclude such agreements, which must contain various provisions, including safeguards against disruptive imports, intellectual property rights, trade promotion, and consultations. Agreements and implementing proclamations can take effect only if a joint resolution of approval is enacted into law under the fast

track procedures of section 151 of the Trade Act. Agreements may remain in force for no more than 3 years, renewable for additional 3-year periods (without any congressional approval) if past operation has been found satisfactory.

Current provisions providing for the use of joint resolutions to approve trade agreements with nonmarket economy countries and to disapprove presidential waivers and compliance reports were adopted as part of the Customs and Trade Act of 1990. The amendments were made in response to a 1983 Supreme Court ruling in *Immigration and Naturalization Service v. Chadha et al.*, which raised serious questions about the constitutionality of the use of concurrent or one-house resolutions for congressional approval and disapproval actions, as previously provided for in the Jackson-Vanik amendment. The court ruled that any action of a legislative nature must be taken by both houses of Congress and presented to the President for signature or veto.

Application of NTR treatment

Afghanistan

Afghanistan is not subject to title IV of the Trade Act of 1974. However, NTR status for Afghanistan was suspended by presidential proclamation effective February 14, 1986, under the authority provided by section 1118 of the Continuing Appropriations Act for fiscal year 1986.[33] The law gave the President the authority to restore NTR status to the products of Afghanistan only if he provides written notice of such restoration to the Congress at least 30 days prior to the date on which such restoration takes effect. On May 3, 2002, the President notified the Congress that he issued a proclamation restoring NTR status to the products of Afghanistan. The proclamation took effect on June 6, 2002.

Albania

On May 14, 1992, a bilateral trade agreement was signed with Albania, and a Presidential waiver was issued on May 20. A joint resolution approving the granting of NTR treatment to the products of Albania was enacted on August 26, 1992.[34] On December 5, 1997, Albania was found to be in full compliance with the Jackson-Vanik requirements, but its trade status remained subject to semi-annual compliance reviews, which were favorably determined continuously. Public Law 106-200, signed into law on May 19, 2000, authorized the President to determine that title IV should no longer apply to Albania and to extend non-discriminatory treatment (normal trade relations treatment) to Albania. Pursuant to Public Law 106-200, the President issued Proclamation 7326 on June 29, 2000, determining that title IV of the Trade Act of 1974 should no

[33] Public Law 99-190, approved December 19, 1985.
[34] Public Law 102-363.

longer apply to Albania and declaring the extension of nondiscriminatory NTR treatment to the products of that country.

Armenia

Armenia first received conditional normal trade relations from the United States on April 6, 1992 under a Presidential waiver from the freedom of emigration requirements in Title IV of the Trade Act of 1974. On June 3, 1997, Armenia was found to be in full compliance with the Jackson-Vanik requirements, but its trade status remained subject to semi-annual compliance reviews, which were favorably determined continuously. Public Law 108-429, signed into law on Dec. 3, 2004, authorized the President to determine that title IV should no longer apply to Armenia and to extend non-discriminatory treatment (normal trade relations treatment) to Armenia. Pursuant to Public Law 108-429, the President issued Proclamation 7860 on January 7, 2005, determining that title IV should no longer apply to Armenia and declaring the extension of nondiscriminatory NTR treatment to the products of that country.

Azerbaijan

NTR tariff status was extended to Azerbaijan on April 21, 1995 under the Jackson-Vanik waiver provision. On June 3, 1997, the President determined that Azerbaijan was in full compliance with the Jackson-Vanik requirements, but its trade status remains subject to semi-annual compliance reviews, which have been favorably determined continuously.

Belarus

In February 1993, the NTR status of Belarus was restored under the waiver provision of title IV by acceding to the U.S.-Soviet Union trade agreement of June 1, 1990. The President renewed Belarus' waiver every year until 2001. In 2001, Belarus' Jackson-Vanik waiver was not extended by the June 3, 2001 deadline (apparently through an oversight) and was issued anew on July 2, 2001.[35] The waiver has been continuously issued since then.

Bulgaria

The President issued a waiver from the freedom of emigration requirements for Bulgaria on January 22, 1991. A bilateral trade agreement providing NTR treatment for products of Bulgaria was submitted to the Congress on June 25, 1991. A joint resolution approving the extension of NTR treatment to Bulgaria

[35] Executive Order 13220; 66 F.R. 35527.

was passed by the Congress in October 1991 and signed by the President on November 13, 1991.[36]

Bulgaria continued to receive NTR treatment under a presidential waiver from the Jackson-Vanik freedom of emigration criteria until the President found the country to be in full compliance with the statutory requirements on June 3, 1993. On January 5, 1996, H.R. 2853 was introduced to provide the President with the authority to determine that title IV should no longer apply with respect to Bulgaria and to extend unconditional NTR status to the products of that country. H.R. 2853 passed the House on March 5, 1996 and the Senate on June 28. The bill was signed into law by the President on July 18, 1996.[37] On September 27, the President issued a proclamation effective October 1, 1996 removing the application of title IV from Bulgaria and extending unconditional NTR treatment to the products of that country.

Cambodia

Because of the wording of the initial NTR status-suspending provision and its mandatory continuation by section 401, Cambodia's NTR status was not subject to the terms and conditions of the Jackson-Vanik amendment. Specifically, the original administrative suspension in 1951 and its enactment as part of the Trade Expansion Act of 1962 applied to "any part of Cambodia, Laos, or Vietnam which may be under Communist domination or control." This qualified application of the suspension, based on the actual situation in each country involved, was in effect at the time of enactment of section 401, which predated the compete Communist takeover of Cambodia in May 1975. The language of the provision was not changed until enactment of the Harmonized Tariff Schedule (HTS) in the Omnibus Trade and Competitiveness Act of 1988, which listed "Kampuchea" in General Note 3(b) among those countries whose products were denied NTR treatment. Upon the formation of the freely elected Royal Cambodian government in 1993, the United States and Cambodia negotiated an agreement on bilateral trade relations and intellectual property rights protection, calling for a reciprocal extension of NTR status. On May 16, 1995, H.R. 1642 was introduced to amend the HTS by striking "Kampuchea" to allow for an extension of unconditional NTR treatment to Cambodia upon the effective date of a Federal Register notice that a trade agreement obligating reciprocal NTR treatment had entered into force. The bill also required the President to report to Congress, no later than 18 months after the date of enactment, on trade relations between the United States and Cambodia under the bilateral agreement. H.R. 1642 passed the House on July 11, 1996 and the Senate on July 25. The bill was signed into law by the President on September 25.[38] As of October 25, 1996, the products of Cambodia were extended unconditional NTR treatment pursuant to a

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[36] Public Law 102-157.
[37] Public Law 104-182, approved July 18, 1996.
[38] Public Law 104-203, approved September 25, 1996.

Federal Register notice published by the U.S. Trade Representative that a bilateral trade agreement between the United States and Cambodia was signed on October 4.

Cuba

Cuba remains subject to title IV. In addition, a comprehensive trade embargo applies (see Chapter 5).

Czech Republic and Slovakia

On February 20, 1990, the President issued a waiver for Czechoslovakia, making that country eligible to receive U.S. government credits and credit and investment guarantees. Following congressional approval of a trade agreement, NTR treatment was extended to Czechoslovakia on November 17, 1990. The President continued the waiver on June 3, 1991, and then issued a determination on October 16 that Czechoslovakia's emigration policies were in full compliance with the Jackson-Vanik freedom of emigration requirements.

Sections 1 and 2 of Public Law 102-182, signed on December 4, 1991, provided for full normalization of NTR trading relations with Czechoslovakia, based on findings of its respect for fundamental human rights, policy of free emigration, and the political and economic reforms undertaken by Czechoslovakia. Section 2 of that law authorized the President to terminate the application of title IV of the Trade Act of 1974 and extend NTR status to Czechoslovakia. Unconditional NTR treatment was granted to Czechoslovakia on April 14, 1992. Following the dissolution of Czechoslovakia in 1993, the independent countries of the Czech Republic and Slovakia retained their NTR status, having assumed the rights and obligations of the earlier agreement between the United States and Czechoslovakia.

People's Republic of China

China first received conditional NTR treatment in 1980 under a Presidential waiver from the freedom of emigration requirements in title IV of the Trade Act of 1974, and that treatment has never been interrupted.

Congress approved in the 106th Congress legislation to grant permanent normal trade relations to China (P.L. 106-286). However, that legislation did not take effect until the President certified the terms of China's accession to the World Trade Organization. On June 1, 2001, the President announced his intention to waive for another year the freedom of emigration requirements in title IV of the Trade Act of 1974 with respect to the People's Republic of China, thereby granting NTR treatment to China between July 1, 2001 and June 30, 2002 (H. Doc. 107-79).

On November 13, 2001, the House received a message from the President certifying that the terms and conditions for accession of China to the WTO are at least equivalent to those agreed to in the November 15, 1999 bilateral agreement between the United States and China. On December 27, 2001, the President granted permanent nondiscriminatory treatment (permanent NTR treatment) pursuant to P.L. 106-286.

P.L. 106-286 included a provision codifying the import surge mechanism negotiated as part of the 1999 U.S.-China Bilateral Agreement. Procedures for this new "import surge mechanism" are modeled after Section 406 of the Trade Act of 1974, as amended, with certain changes to conform to the requirements of the bilateral trade agreement. The legislation also: (1) establishes clear standards for the application of Presidential discretion in providing relief to injured industries and workers; (2) authorizes the President to provide a provisional safeguard in cases where "delay would cause damage which it would be difficult to repair," as permitted under the U.S.-China Bilateral Agreement; (3) implements a provision in the Agreement concerning trade diversion; and (4) establishes a Congressional-Executive Commission on China to focus on monitoring human rights, including internationally recognized core labor standards and religious freedom. The legislation also included provisions that: (1) require USTR to submit an annual report on China's compliance with WTO obligations; (2) provide that the United States will seek an annual review of China's compliance with its WTO obligations in the WTO as part of China's Protocol of Accession; (3) establish a task force on the prohibition on the importation of products of forced or prison labor; and (4) authorize additional resources for monitoring and enforcing China's compliance with trade agreements. The legislation also contained a sense of Congress that the accession of Taiwan and the People's Republic of China to the WTO should be considered at the same WTO General Council meeting. Finally, the legislation contained a number of other provisions not in the jurisdiction of the Committee, such as the authorization of funds to assist the development of rule of law and democracy in China. P.L. 106-286 was signed into law by the President on October 10, 2000.

Georgia

Georgia first received conditional normal trade relations from the United States in August 1993 under a Presidential waiver from the freedom of emigration requirements in title IV of the Trade Act of 1974. On June 3, 1997, Georgia was found to be in full compliance with the Jackson-Vanik requirements, but its trade status remained subject to semi-annual compliance reviews, which were favorably determined continuously.

On June 12, 2000, Georgia became a member of the World Trade Organization. Public Law 106-476, signed into law on November 9, 2000, authorized the President to extend unconditional normal trade relations to

Georgia. The President extended unconditional normal trade relations to Georgia on December 29, 2000.

German Democratic Republic (East Germany)

Section 142 of the Customs and Trade Act of 1990 authorized the President to extend NTR treatment to the German Democratic Republic (East Germany), thus superseding the requirements of title IV, in light of the rapid progress then being made toward German reunification. However, the Congress expressed the strong view that such action should not be taken before NTR status was granted to Czechoslovakia under authority of title IV, since Czechoslovakia had followed all the procedures required by that title. The authority of section 142 was never used, however. The President issued a waiver for East Germany on August 15, 1990; that formerly independent country received NTR status on October 3, 1990 as part of a reunified Germany.

Hungary

On October 25, 1989, Hungary became the first country ever found in full compliance with the title IV freedom of emigration requirements, thereby becoming eligible for open-ended NTR status, as long as the trade agreement remained in force and Hungary remained in full compliance.

Sections 1 and 2 of Public Law 102-182, signed on December 4, 1991, provided for full normalization of NTR trading relations with Hungary, based on findings of its respect for fundamental human rights, policies of free emigration, and the political and economic reforms undertaken by Hungary. Section 2 of that law authorized the President to terminate the application of title IV of the Trade Act of 1974 and extend NTR status to Hungary. Unconditional NTR treatment was granted to Hungary on April 14, 1992.

Kazakhstan

In February 1993, Kazakhstan had its NTR status restored under the waiver provision of title IV by acceding to the U.S.-Soviet Union trade agreement of June 1, 1990. On December 5, 1997, the President determined that Kazakhstan is in full compliance with the Jackson-Vanik requirements, but its trade status remains subject to semi-annual compliance reviews which have been favorably determined continuously.

Kyrgyzstan

Kyrgyzstan first received conditional normal trade relations from the United States in August 1992 under a Presidential waiver from the freedom of emigration requirements in the Jackson-Vanik amendment to the Trade Act of

1974. On December 5, 1997, Kyrgyzstan was found to be in full compliance with the Jackson-Vanik requirements, but its trade status remained subject to semi-annual compliance reviews, which were favorably determined continuously. Public Law 106-200, signed into law on May 18, 2000, authorized the President to extend unconditional normal trade relations to Kyrgyzstan. On June 29, 2000, the President determined that title IV of the Trade Act of 1974 should no longer apply to Kyrgyzstan.

Laos

Laos was not subject to title IV of the Trade Act of 1974. However, Laos did not receive NTR status because it was included in the Harmonized Tariff Schedule (HTS) of the United States in General Note 3(b) on the list of countries whose products are subject to column 2 (non-NTR) tariff rates. On Dec. 3, 2004, the President signed into law legislation passed by Congress (Public Law 108-429) to amend the HTS by striking "Laos" to allow for an extension of unconditional NTR treatment to Laos upon the effective date of a Federal Register notice that a trade agreement obligating reciprocal NTR treatment had entered into force. As of February 4, 2005, the products of Laos were extended unconditional NTR treatment pursuant to a Federal Register notice published on February 11, 2005 that a bilateral agreement between the United States and Laos entered into force on February 4, 2005.

Moldova

Moldova first received conditional normal trade relations from the United States in July 1992 under a Presidential waiver from the freedom of emigration requirements in title IV of the Trade Act of 1974. On June 3, 1997, Moldova was found to be in full compliance with the Jackson-Vanik requirements, but its trade status remained subject to semi-annual compliance reviews, which have been favorably determined continuously. Moldova became a member of the World Trade Organization on July 26, 2001, and the United States has invoked the WTO non-application clause because it does not extend unconditional NTR to Moldova.

Mongolia

The President issued a waiver from the freedom of emigration requirements for Mongolia on January 23, 1991. A bilateral trade agreement providing NTR treatment for products of Mongolia was submitted to the Congress on June 25, 1991. A joint resolution approving the extension of NTR treatment to Bulgaria

was passed by the Congress in October 1991 and signed by the President on November 13, 1991.[39]

On September 4, 1996, Mongolia was found to be in full compliance with the Jackson-Vanik requirements, but its trade status remained subject to semi-annual compliance reviews, which were favorably determined continuously. Public Law 106-36, signed into law on June 25, 1999, authorized the President to determine that title IV of the Trade Act of 1974 should no longer apply to Mongolia.

Pursuant to Public Law 106-36, the President issued Proclamation 7207 on July 1, 1999, determining that title IV of the Trade Act of 1974 should no longer apply to Mongolia and declaring the extension of nondiscriminatory treatment to the products of that country.

Poland

Poland is exempt from denial of NTR under title IV of the Trade Act of 1974, but its unconditional NTR status was suspended by presidential proclamation effective November 1, 1982, under the authority of section 125(d) of the Trade Act. On February 23, 1987, President Reagan restored NTR status to Poland by presidential proclamation as part of the last stage of removing sanctions imposed on Poland in 1982 in response to its action against Solidarity.

Romania

In 1988, the President did not exercise the annual waiver authority with respect to Romania, issuing a proclamation on June 28, announcing his decision to allow the waiver to expire and to withdraw NTR treatment in response to the decision by the government of Romania to renounce the renewal of NTR subject to the terms of Jackson-Vanik. Romania's NTR status and its eligibility for U.S. government-supported export credits expired on July 3, 1988. On March 11, 1992, the Department of State issued a statement announcing that it had informed the Romanian government that the United States was prepared to sign a new bilateral trade agreement in light of Romania's progress toward democratic pluralism and a market economy and its desire for closer bilateral relations. The President issued a waiver from the freedom of emigration requirements for Romania on August 17, 1991, and signed a new bilateral trade agreement on April 3, 1992. However, in view of the concerns raised about the Romanian government's continued commitment to democratic reform, House consideration of H.J. Res. 512, approving the extension of NTR treatment to Romania, was defeated on September 30. H.J. Res. 228, approving the extension of NTR, was reintroduced on July 13, 1993. In recommending approval, the House Ways and Means Committee report noted that there had been substantial

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[39] Public Law 102-158.

progress on democratization and human rights, and additional significant improvements had been made since 1992. The resolution was subsequently passed by the House on October 12, and the Senate on October 21. H.J. Res. 228 was approved by the President and signed into law on November 2, 1993.

Romania continued receiving NTR treatment under a presidential waiver from the Jackson-Vanik freedom of emigration criteria until the President found Romania to be in full compliance with those requirements on May 19, 1995. On March 26, 1996, H.R. 3161 was introduced to provide the President with the authority to determine that title IV should no longer apply with respect to Romania and to extend unconditional NTR status to that country. Upon recommending approval of the bill, the Committee noted that Romania is a member of the World Trade Organization (WTO) and that an extension of unconditional NTR is necessary in order for the United States to avail itself of all rights under the WTO with respect to Romania. H.R. 3161 passed the House on July 17, 1996 and the Senate on July 19. The bill was signed into law by the President on August 3.[40] On November 7, 1996, the President issued a proclamation removing the application of title IV from Romania and extending unconditional NTR treatment to the products of that country.

Russia

In June 1992, Russia had its NTR status restored under the waiver provision of title IV by acceding to the U.S.-Soviet Union trade agreement of June 1, 1990. On September 24, 1994, the President determined that Russia is in full compliance with the Jackson-Vanik requirements, but its trade status remains subject to semi-annual compliance reviews, which have been favorably determined continuously.

Serbia and Montenegro (Former Yugoslavia)

The former Yugoslavia is not subject to title IV of the Trade Act of 1974. In response to the armed conflict and atrocities in the former Yugoslavia, legislation was initiated and passed late in the 102nd Congress withdrawing NTR treatment from Serbia and Montenegro; the other four newly-independent republics of Bosnia-Hercegovina, Croatia, Macedonia, and Slovenia were unaffected by the legislation and retain NTR status. The legislation authorizes the President to restore NTR status to these two republics if he certifies to the Congress that certain conditions are fulfilled. The President made this certification and NTR status was restored to Serbia and Montenegro as of December 4, 2003.[41]

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[40] Public Law 104-171, approved August 3, 1996.
[41] 68 F.R. 64410

Former Soviet Union including Estonia, Latvia, and Lithuania

The Bush Administration entered into negotiations for a new bilateral trade agreement with the Soviet Union in response to the advent of "perestroika" and "glasnost" under the leadership of Soviet President Gorbachev, the subsequent collapse of communist regimes in Eastern and Central Europe, substantial increases in emigration rates, and to encourage further reforms. That agreement with its side letters was signed by Presidents Bush and Gorbachev on June 1, 1990. The President issued a waiver from the freedom of emigration requirements for the Soviet Union on December 29, 1990 and again on June 3, 1991. However, Soviet violence and economic sanctions against the independence movements in the Baltic states and Soviet republics resulted in delay of the submission of the Agreement to the Congress until August 2, 1991. Following independence of the Baltic states in September, the President resubmitted the trade agreement and presidential proclamation on October 9 and a new joint resolution was introduced omitting references to Estonia, Latvia, and Lithuania. The joint resolution approving the extension of NTR treatment to the products of the Soviet Union was passed by the Congress in November and signed into law on December 9, 1991. Subsequently, bilateral trade agreements granting reciprocal NTR treatment have been signed with governments of the newly-independent republics of the former Soviet Union.[42] No further congressional action was required because these agreements ratified by the republics reflected only technical changes in the previously approved original agreement signed by the former Soviet Union.

Title IV of the Trade Act of 1974 applied to the Baltic states of Estonia, Latvia, and Lithuania by virtue of their forcible incorporation into the former Soviet Union. Following restoration of their independence from the Soviet Union on September 6, 1991, legislation[43] extended NTR treatment to the products of the three Baltic states, notwithstanding title IV or any other provision of law, and terminated the application of title IV to these countries.

Tajikistan

In November 1993, Tajikistan had its NTR status restored under the waiver provision of title IV by acceding to the U.S.-Soviet Union trade agreement of June 1, 1990. On December 5, 1997, the President determined that Tajikistan is in full compliance with the Jackson-Vanik requirements, but its trade status remains subject to semi-annual compliance reviews, which have been favorably determined continuously.

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[42] As of this writing, bilateral trade agreements have been signed and ratified and conditional NTR treatment granted to the 12 republics of Russia, Ukraine, Kyrgyzstan, Moldova, Armenia, Belarus, Georgia, Kazakhstan, Tajikistan, Turkmenistan, and Uzbekistan, and Azerbaijan.

[43] Public Law 102-182, title I, approved December 4, 1991.

Turkmenistan

In October 1993, Turkmenistan had its NTR status restored under the waiver provision of title IV by acceding to the U.S.-Soviet Union trade agreement of June 1, 1990. On December 5, 1997, the President declared that Turkmenistan is in full compliance with the Jackson-Vanik requirements, but its trade status remains subject to semi-annual compliance reviews, which have been favorably determined continuously.

Ukraine

In June 1992, Ukraine had its NTR status restored under the waiver provision of title IV by acceding to the U.S.-Soviet Union trade agreement of June 1, 1990. On June 3, 1997, the President determined that Ukraine is in full compliance with the Jackson-Vanik requirements, but its trade status remains subject to semi-annual compliance reviews, which have been favorably determined continuously.

Uzbekistan

In January 1994, Uzbekistan had its NTR status restored under the waiver provision of Title IV by acceding to the U.S.-Soviet Union trade agreement of June 1, 1990. On December 5, 1997, the President determined that Uzbekistan is in full compliance with the Jackson-Vanik requirements, but its trade status remains subject to semi-annual compliance reviews, which have been favorably determined continuously.

Vietnam

Vietnam first received a Presidential waiver in 1998 from the freedom of emigration requirements in title IV of the Trade Act of 1974. The President has renewed Vietnam's waiver every year since that time. During the 107th Congress, the House defeated two resolutions which would have disapproved Presidential waiver determinations for Vietnam.

Prior to Congressional approval of the bilateral trade agreement between the United States and Vietnam, Vietnam was ineligible under title IV of the Trade Act of 1974 to receive NTR treatment from the United States. Thus, the practical effect of the Jackson-Vanik waivers at that time was to make Vietnam eligible for certain U.S. government credits, or investment or credit guarantee programs, provided that Vietnam met the relevant program criteria. These programs, which lie outside the jurisdiction of the Committee on Ways and Means, included the Overseas Private Investment Corporation, the Export-Import Bank, and agricultural credit programs administered by the U.S. Department of Agriculture.

In July 2000, the United States and Vietnam signed the U.S. – Vietnam bilateral trade agreement (BTA). On June 8, 2001, the President transmitted the BTA to Congress for its approval. Congressional approval of the BTA makes Vietnam eligible for NTR treatment (in addition to the access to certain U.S. government credit programs), subject to annual renewal under title IV of the Trade Act of 1974. Approval procedures are covered by permanent fast track provisions in the Trade Act of 1974, which are triggered by the transmittal of the agreement to Congress by the President.

On June 12, 2001, identical bills were introduced in the House and Senate (by request) to grant NTR status to Vietnam by approving the BTA. On September 6, 2001, the House approved the legislation, and the Senate followed suit on October 3, 2001. On October 16, 2001, the President signed the resolution into law (P.L. 107-052). NTR treatment for the products of Vietnam became effective on December 10, 2001.

North American Trade Relations

Section 1102 of the Omnibus Trade and Competitiveness Act of 1988[44] authorized the President to enter into multilateral or bilateral trade agreements, before June 1, 1993 (extended until April 15, 1994, only for the GATT Uruguay Round of Multilateral Trade Negotiations) to reduce or eliminate tariff or nontariff barriers and other trade-distorting measures, subject to congressional consultation requirements under sections 1102 and 1103 and approval of implementing legislation under special fast track procedural rules of the House and Senate under section 151 of the Trade Act of 1974. The authorities provided the means to achieve the negotiating objectives set forth under section 1101 of the 1988 Act.

On August 12, 1992, President Bush announced the completion of negotiations of a comprehensive North American Free Trade Agreement (NAFTA). On September 18, the President officially notified Congress of his intention to enter into the Agreement, accompanied by reports of 38 private sector advisory committees on the draft Agreement as required by section 135 of the Trade Act of 1974, as amended. This notice was followed on October 7 by the initialing of the draft legal text by the trade ministers of the three participating countries in San Antonio, Texas. The Agreement was signed on December 17, the expiration of the 90-day minimum notice period.

Also on December 17, President-elect Clinton stated that he could not support the NAFTA as negotiated without additional side agreements covering the environment, workers, and import surges. On August 13, 1993, U.S. Trade Representative Michael Kantor announced completion of these supplemental agreements. He also announced a basic agreement on a new institutional structure for funding environmental infrastructure projects in the U.S.-Mexico

[44] Public Law 100-418, approved August 23, 1988, 19 U.S.C. 2901 note.

border region, the North American Development Bank. The NAFTA side agreements were signed in a White House ceremony on September 14, 1993. On November 4, 1993, President Clinton sent two letters of transmittal to the Congress covering: (1) the NAFTA text, together with the draft implementing bill, Statement of Administrative Action and supporting documents as required under section 1103(a) of the 1988 Act for congressional approval; and (2) the NAFTA supplemental agreements.

As provided under section 151 of the Trade Act of 1974, the implementing legislation was introduced as H.R. 3450 in the House and S. 1627 in the Senate on November 4. On November 17, the House passed H.R. 3450. On November 20, the Senate passed the bill. The bill was then signed by the President and became public law on December 8, 1993. On December 15, 1993, President Clinton issued Presidential Proclamation 6641 to implement as of January 1, 1994 the tariff modification provisions under the North American Free Trade Agreement as provided for under section 1102(a) of the 1988 Act.[45]

NORTH AMERICAN FREE TRADE AGREEMENT

The North American Free Trade Agreement creates the world's largest market for goods and services. The cornerstone of the Agreement is the phased-out elimination of all tariffs on trade between the United States, Canada, and Mexico. With respect to United States-Canada bilateral trade, all tariffs were eliminated by 1999, as was agreed in the United States-Canada Free-Trade Agreement. As for United States-Mexico bilateral trade, most tariffs were eliminated by 2004, although a few U.S. tariffs on potentially import-sensitive items will not be completely eliminated until 2009. The NAFTA also reduces or eliminates a number of nontariff barriers to trade, liberalizes restrictions on investment and services, sets forth strong and comprehensive rules on intellectual property, and extends to the three countries the international dispute settlement system established under the United States-Canada Free-Trade Agreement for review of national determinations of dumping and subsidy practices.

NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT OF 1993

The North American Free Trade Agreement Implementation Act of 1993[46] approved the Agreement (but not the supplemental agreements) and Statement of Administrative Action submitted to the Congress on November 4, 1993 and includes provisions which are necessary or appropriate to implement the Agreement in U.S. domestic law. U.S. law prevails over the Agreement if there is a conflict. The Agreement establishes a Federal-state consultation process concerning NAFTA obligations affecting state laws. The Act establishes a Federal-state consultation process to achieve conformity of state laws with the

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[45] Proclamation No. 6641, 58 Fed. Reg. 68,191 (1993).
[46] Public Law 103-182, approved December 8, 1993, 19 U.S.C. 3301 note.

Agreement. No person other than the United States has a cause of action or defense under the Agreement.

The President is authorized to proclaim the modifications in U.S. duties to implement the scheduled phaseout and elimination of all tariffs required under various provisions of the NAFTA and to maintain the general level of concessions. The rules of origin in the Act, which are to ensure application of NAFTA preferential tariff treatment only to goods originating in Mexico or Canada, are enacted in the statute. The legislation implements U.S. obligations under the NAFTA to eliminate customs merchandising processing fees, restrict duty drawback, and revise country-of-origin marking requirements; amends penalties and recordkeeping requirements to enforce NAFTA rules of origin and other customs requirements; and required monitoring of television and color picture tube imports for five years.

The legislation also includes procedures and criteria for applying bilateral and global import relief measures on Canadian and Mexican articles; implements NAFTA obligations that apply to certain agricultural commodities, intellectual property rights protection, temporary entry of business persons, standards and sanitary and phytosanitary measures, and corporate average fuel economy; and authorizes the waiver of discriminatory government purchasing restrictions on NAFTA-covered procurement.

The legislation implements into U.S. domestic law the institutional provisions of the NAFTA establishing binational panel and extraordinary challenge committee review of final antidumping and countervailing duty determinations, in lieu of domestic judicial review, including procedures and criteria for the selection of panelists appointed by the United States, and special procedures for the selection of Federal judges for panels and committees. Objectives for future negotiations with NAFTA countries on subsidies and special procedures for industries facing subsidized competition pending development of subsidy rules are also included.

Institutional provisions include authorization of a U.S. section of the NAFTA Secretariat, requirements relating to selection of dispute settlement panelists, and a preliminary process for considering possible future country accession to NAFTA, subject to congressional approval.

Other provisions include the establishment of a NAFTA transitional adjustment assistance program of comprehensive benefits, including training and income support, for workers who may be laid off due to increased U.S. imports from Mexico or Canada or a shift in production to Mexico or Canada, and authorizes state self-employment assistance programs. Also included are a comprehensive report by the President on the operation and economic impact of the NAFTA after 3 years, a response to actions affecting U.S. cultural industries, a report on the impact of the NAFTA on motor vehicle exports to Mexico, a response to discriminatory tax measures, and authorization of a Center for the Study of Western Hemisphere Trade.

With respect to the supplemental agreements, the legislation authorized U.S. participation in, and appropriations for, the Commissions on Labor Cooperation, Environmental Cooperation, and Border Environment Cooperation. It also includes provisions relating to U.S. membership in the North American Development Bank.

United States-Israel Trade Relations

Title IV of the Trade and Tariff Act of 1984[47] amended section 102(b) of the Trade Act of 1974 to authorize the President to enter into a bilateral reciprocal trade agreement with Israel specifically providing for elimination or reduction of U.S. duties on products of that country as well as nontariff barriers, subject to congressional consultations and approval of implementing legislation under the expedited procedures of sections 102 and 151-154 of the Trade Act. As amended by section 401, the requirements for advance consultations and 90-day advance notice to Congress of intent to enter into a trade agreement did not apply to a bilateral agreement with Israel. Title IV also contains basic provisions of U.S. laws required to be applied to the administration of the Agreement.

On November 29, 1983, President Reagan and Israeli Prime Minister Shamir agreed to proceed with bilateral negotiations on a United States-Israel free trade area, which the Israeli government originally proposed in 1981. Negotiations by the U.S. Trade Representative began in mid-January 1984 on the elements of an agreement to eliminate tariffs and other trade-distorting practices between the two countries. The Agreement on the Establishment of a Free Trade Area Between the government of the United States of America and the government of Israel was signed on April 22, 1985. The President transmitted to the Congress on April 29 the text of the Agreement, a draft implementing bill, a statement of administrative action, and an explanation of the effects on existing law. The United States-Israel Free Trade Area Implementation Act of 1985[48] approved the free trade area agreement with changes in U.S. laws necessary and appropriate for its domestic implementation. The implementing bill was passed by both Houses of Congress in May and signed into law on June 11, 1985.

TITLE IV OF THE TRADE AND TARIFF ACT OF 1984

In addition to providing the basic authority for a bilateral free trade area agreement with Israel, title IV of the Trade and Tariff Act of 1984, as amended, sets forth the rule-of-origin requirements that would apply to such an agreement as well as the application of import relief laws.

Section 402 requires that any trade agreement entered into under section 102(b) with Israel provide for the reduction or elimination of duties only on

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[47] Public Law 98-573, title IV, approved October 30, 1984.
[48] Public Law 99-47, approved June 11, 1985, 19 U.S.C. 2112.

articles that meet rule-of-origin requirements similar to those under the Caribbean Basin Initiative (CBI):

(1) The article must be the growth, product or manufacture of Israel or foreign materials or components must be substantially transformed into a new or different article grown, produced, or manufactured in Israel. Related provisions are designed to prevent qualification of minor pass-through operations and transshipments;

(2) The article must be imported directly from Israel into the U.S. customs territory; and

(3) At least 35 percent of the total value of the article must consist of materials produced in Israel plus direct cost of processing operations performed in Israel, of which 15 percent may be U.S. content.

Sections 403 and 406 of the 1984 Act make clear that existing trade laws available to domestic industries for relief from injurious import competition or unfair trade practices continue to apply to imports under the trade agreement with Israel. As under the CBI legislation, the President may suspend the reduction or elimination of any duty under the trade agreement with Israel and proclaim a duty as import relief under section 203 of the Trade Act of 1974 or as a national security measure under section 232 of the Trade Expansion Act of 1962. Alternatively the President may establish a margin of preference or maintain the duty reduction or elimination on Israeli articles while imposing relief on imports from other sources. The U.S. International Trade Commission must state in its report to the President on import relief investigations involving Israeli articles covered in a trade agreement whether and to what extent its injury findings and recommended relief apply to imports from Israel.

Section 404 of the Trade and Tariff Act of 1984 applies a special procedure similar to that established under the CBI whereby petitions may be filed with the Secretary of Agriculture for emergency relief on perishable products from Israel pending action on a petition filed for normal import relief action. The Secretary must determine and report to the President within 14 days a recommendation for emergency action if he has reason to believe an agricultural perishable product from Israel is being imported in such increased quantities as to be a substantial cause or threat of serious injury to the U.S. industry. The President must determine within 7 days whether to take emergency action, which consists of withdrawing the reduction or elimination of duty and restoring the original rate pending final action on the import relief petition.

UNITED STATES-ISRAEL FREE TRADE AREA AGREEMENT

The free trade area with Israel was the first such arrangement negotiated by the United States with any foreign country aside from the bilateral free trade arrangement with Canada in the automotive sector only. The Agreement is an

adjunct to existing multilateral obligations of both parties under the GATT/WTO; existing rights and obligations between the countries under the GATT or other agreements continue to apply unless specifically modified by the terms of the Agreement.

The main element of the Agreement is the reciprocal elimination of tariffs on all products traded between the two countries by January 1, 1995, and the elimination of other restrictive regulations of commerce on bilateral trade as provided under Article XXIV of the GATT 1994 for free trade areas. Duties were eliminated by both countries over 10 years in four staging categories depending on the relative import sensitivity of articles for domestic producers. Duties on certain products were eliminated immediately as of September 1, 1985.

The Agreement also prohibits the introduction of new duties or quantitative restrictions in bilateral trade unless they are permitted by the Agreement or by the GATT. The government of Israel undertook specific commitments concerning the reduction and elimination of its export subsidy programs and limited its GATT right as a developing country to apply duties to protect infant industries. Both parties must review their veterinary and plant health rules to insure nondiscrimination and not undue trade obstruction, undertook limitations on the duration of temporary restrictions that might be imposed in serious balance-of-payments situations, and reaffirmed existing bilateral obligations on intellectual property rights. The Agreement prohibits the imposition of import licensing requirements except in certain circumstances and of export or domestic purchase performance requirements on investment. The Agreement requires both countries to waive their Buy National restrictions on government procurement contracts valued $50,000 or more for articles or services covered by the 1979 GATT Agreement on Government Procurement.

The Agreement contains various safeguard provisions consistent with title IV of the Trade and Tariff Act of 1984 to permit import relief measures under certain circumstances, and rule-of-origin requirements to ensure that free trade area benefits accrue only to the two parties. Import restrictions other than customs duties may also be maintained based on agricultural policy considerations. A Joint Committee reviews and administers the Agreement and provides for dispute settlement.

In 1996, the United States and Israel entered into the Agreement on Trade in Agricultural Products (ATAP), an adjunct to the 1985 FTA Agreement. The ATAP expired on December 31, 2002 and was renewed in 2004. Because of concern that Israel has failed to implement obligations of the Trade Agreement in the area of agriculture, section 3105 of P.L. 107-210 required USTR to submit a report to Congress on this topic in January 2003.

UNITED STATES-ISRAEL FREE TRADE AREA IMPLEMENTATION ACT OF 1985

The United States-Israel Free Trade Area Implementation Act of 1985 approved the United States-Israel Free Trade Area Agreement and statement of administrative action submitted to the Congress on April 29, 1985 and made necessary and appropriate changes in U.S. laws for its domestic implementation.[49] U.S. statutes prevail if a provision of the Agreement is in conflict. No private rights of action or remedies are created. Expedited legislative approval procedures apply to subsequent changes in U.S. statutes to implement requirements, amendments, or recommendations under the Agreement.

The President is authorized to proclaim the modifications or continuance of existing duties or duty-free treatment to implement the schedule for U.S. duty elimination under the Agreement. Tariff elimination was completed as of January 1, 1995. The President may withdraw, suspend, or modify any duty or duty-free treatment or proclaim additional duties necessary to maintain the general level of concessions under the Agreement.

The implementing legislation also amended title III of the Trade Agreements Act of 1979 to lower the threshold contract value to $50,000 or more on which the President may waive Buy American restrictions on eligible products or services from Israel covered by the GATT Agreement on Government Procurement. As amended by the Uruguay Round Agreements Act, the $50,000 threshold may be applied to the broader central government entity coverage of goods and services under the 1994 GATT Agreement if there is a reciprocal agreement from Israel.

WEST BANK AND GAZA STRIP FREE TRADE BENEFITS

In an exchange of letters on October 17, 1995, among the United States, the government of Israel, and the Palestinian Authority, the U.S. Trade Representative agreed to seek statutory authority to proclaim elimination of existing duties on articles of the West Bank and Gaza Strip. The Palestinian Authority agreed to accord U.S. products duty-free access to the West Bank and Gaza Strip, to prevent illegal transshipment of goods not qualifying for duty-free access, and to support all efforts to end the Arab economic boycott of Israel. Because the authority given to the President to proclaim reductions in tariffs without congressional action contained in section 1102(a) of the Omnibus Trade and Competitiveness Act of 1988 had expired, new proclamation authority was required to implement the terms of the exchange of letters.

Accordingly, Congress passed legislation amending the United States-Israel Free Trade Area Implementation Act of 1985, adding a new section to provide the President proclamation authority to modify tariffs on products from the West

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[49] Public Law 99-47, approved June 11, 1985, 19 U.S.C. 2112 note.

Bank, Gaza Strip and qualifying industrial zones.[50] The provision applies to areas designated as industrial parks between the Gaza Strip and Israel and between the West Bank and Israel. The effect of the provision is to offer to goods from the West Bank, Gaza Strip, and qualifying industrial zones (located between Israel and Jordan or Israel and Egypt) the same tariff treatment as is offered to Israel under the United States-Israel Free Trade Agreement. The provision applies the same rule-of-origin requirements as to products from the West Bank, Gaza Strip, and qualifying industrial zones as are already applicable to products from Israel.

United States-Canada Trade Relations

Section 102(b) of the Trade Act of 1974, as amended by section 401 of the Trade and Tariff Act of 1984, authorized the President to enter into bilateral reciprocal trade agreements with foreign countries to eliminate or reduce tariffs on bilateral trade as well as nontariff barriers if certain procedural requirements were met.

On July 25, 1988, the President transmitted to the Congress a copy of the United States-Canada Free Trade Agreement, a statement of administrative action, proposed implementing legislation, and a statement of how the Agreement serves the interests of U.S. commerce. The implementing legislation passed the House on August 9 and the Senate on September 19, and was signed into law by the President on September 28, 1988. The Agreement entered into force on January 1, 1989.

On January 1, 1994, the North American Free Trade Agreement entered into force, covering trade among the United States, Canada, and Mexico. The Agreement contains provisions suspending the overlapping provisions of the two agreements until such time as Canada may terminate its participation in the NAFTA.

UNITED STATES-CANADA FREE-TRADE AGREEMENT

At the time, the United States-Canada Free-Trade Agreement was one of the most comprehensive bilateral trade agreements ever negotiated, creating one of the world's largest internal markets for goods and services. The two Federal governments agreed to ensure that state, provincial, and local governments take necessary actions in areas under their jurisdiction to implement the Agreement. Each party agreed to accord national interest treatment to the goods, services, and investment of the other party to the extent provided in the Agreement.

The central provision of the Agreement is the phased out elimination of tariffs on all goods traded between the two countries within 10 years, by January 1, 1998, in three staging categories. The Agreement contains rules of origin based primarily on changes in tariff classifications to determine that only products

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[50] Public Law 104-234, approved October 2, 1996.

with sufficient content originating in either or both countries receive the benefits of preferential tariff treatment. Customs user fees and duty drawback programs were phased out by 1994 for bilateral trade; duty waivers linked to performance requirements, except certain waivers affecting automotive trade, and duty remission programs for autos were terminated by 1988.

The Agreement eliminates and prohibits import and export quotas or other restrictions, unless specifically permitted by the Agreement or by the General Agreement on Tariffs and Trade (GATT), and liberalizes or harmonizes laws and regulations relating to technical standards. Other Agreement provisions liberalize barriers affecting agriculture, automotive products, wine and distilled spirits, energy, government procurement, services, investment, temporary entry for business persons, and financial services. Certain "cultural industries" are exempt from the Agreement. Temporary import relief actions may be taken on a bilateral or global basis under certain circumstances to safeguard domestic industries from import-related injury.

Institutional provisions are included for the avoidance or settlement of disputes between the two parties concerning the interpretation or application of the Agreement. A major element of the Agreement is establishment of a mechanism for review by binational panels and extraordinary challenge committees of final antidumping and countervailing duty determinations on products of the two countries in lieu of judicial review by courts of either party using the request of either party.

UNITED STATES-CANADA FREE-TRADE AGREEMENT IMPLEMENTATION ACT OF 1988

The United States-Canada Free-Trade Agreement Implementation Act of 1988[51] approved the Agreement and statement of administrative action submitted to the Congress on July 25, 1988 and sets forth the relationship between obligations under the Agreement and U.S. laws. The legislation also makes changes in U.S. laws necessary or appropriate to implement obligations under the Agreement, sets forth negotiating objectives and authorities for further U.S.-Canada trade liberalization, and specifies procedures for domestic implementation of future changes in the Agreement. Technical amendments to various provisions were included in the Customs and Trade Act of 1990.[52]

U.S. laws prevail over the Agreement if there is a conflict. No person other than the United States has a cause of action or defense under the Agreement. Changes in U.S. law necessary or appropriate to implement an amendment to the Agreement could be approved under the fast track congressional procedures during the 30-month period after the Agreement entered into force. Certain actions may be implemented by presidential proclamation subject to prior consultation and 60 calendar day congressional layover requirements.

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[51] Public Law 100-449, approved September 28, 1988, 19 U.S.C. 2112 note.
[52] Public Law 101-382, approved August 20, 1990.

The President was authorized to proclaim the modifications in U.S. rates of duty necessary to implement the scheduled phaseout and elimination of all tariffs on trade with Canada within 10 years. The rules of origin set forth in the Agreement to ensure application of preferential tariff treatment only to goods originating in Canada are enacted in the statute. The legislation implements U.S. obligations under the Agreement to phase out customs user fees on Canadian goods, to eliminate drawback with certain exceptions, and to exempt Canada from the lottery ticket embargo; provides penalties and recordkeeping requirements to enforce the rules of origin; and includes a reporting and monitoring requirement on the consistency of Canadian production-based duty remission programs with the GATT and the Agreement.

The legislation also implements in U.S. domestic law various provisions of the Agreement concerning particular economic sectors, including agricultural products (authority to impose temporary duties on imports of fresh fruits and vegetables, exemption of Canadian meat from any import limitations under the Meat Import Act (now repealed), authority to exempt grain and grain products and sugar-containing products from Canada from section 22 import quotas); exports to Canada of Alaskan oil; exemption of Canadian uranium from U.S. enrichment restrictions; a lower contract threshold ($25,000) for exemption from Buy American restrictions on government procurement of articles from Canada covered by the GATT Agreement on Government Procurement; temporary entry of business persons; and extension of financial services. The legislation also includes procedures and criteria for the application of bilateral or global safeguard measures on Canadian articles as temporary relief from import-related injury.

The implementing legislation sets forth various U.S. negotiating objectives to expand the Agreement with respect to services, investment, intellectual property rights, automotive products, procurement, Canadian agricultural transportation subsidies, potato trade, and enforcement of U.S. rights against Canadian controls on fish. Objectives and authority to negotiate an agreement on subsidies and special procedures for industries facing subsidized competition pending development of subsidy rules are also included.

The legislation also contains revisions to U.S. law to implement the institutional provisions of the Agreement establishing binational panel and extraordinary challenge committee review, upon request, of final antidumping and countervailing duty determinations, in lieu of judicial review. The statute includes procedures and criteria for the selection of the panelists appointed by the United States, establishes the U.S. Secretariat, and authorizes appropriations for administrative expenses.

The NAFTA incorporates or otherwise carries forward most provisions of the United States-Canada FTA or supersedes the bilateral agreement in certain areas, such as rules of origin. The United States and Canada suspended the operation of the bilateral agreement upon entry into force of the NAFTA for the two countries for such time as the two governments remain parties to the

NAFTA. As provided in section 107 of the NAFTA Implementation Act, certain provisions of the United States-Canada FTA Implementation Act are suspended; other provisions of that Act which carry out U.S. obligations under the United States-Canada FTA that are in effect under the NAFTA remain in place or are amended by the NAFTA Implementation Act.

United States-Jordan trade relations

In 1996, the Congress took a major step to widen trade with Jordan when it passed H.R. 3074, West Bank and Gaza Strip Free Trade Benefits (P.L. 104-234). This legislation, *inter alia*, expanded the scope of the U.S.-Israel Free Trade Agreement as it extended duty-free treatment to products from qualifying industrial zones (QIZs) between Israel and Jordan and between Israel and Egypt. QIZs are designed to further Arab-Israeli economic and social cooperation by providing duty-free access to the U.S. market for goods produced with certain levels of Israeli, Jordanian, Egyptian, or Palestinian content. Since 1996, the U.S. Trade Representative has designated ten QIZs in Jordan. The first Jordanian QIZ, established in 1998, has grown from 1,800 employees and eight firms to more than 7,000 employees and 50 firms.

Progress continued in 1997, when the United States and Jordan signed a bilateral investment treaty. This event was a reflection of Jordan's efforts to transform its economy, including streamlining its investment and customs procedures, creating tax and investment incentives, and reducing tariffs. A follow-up Trade and Investment Framework Agreement was signed between the two countries in 1999.

UNITED STATES-JORDAN FREE TRADE AGREEMENT

Negotiations for a United States-Jordan Free Trade Agreement (FTA) began in June 2000 and were concluded on October 24, 2000, when U.S. Trade Representative Charlene Barshefsky and Jordanian Deputy Prime Minister Mohammed Halaiqah signed the agreement. President Clinton transmitted the agreement to the Congress on January 6, 2001 (H.Doc. 107-15). The Jordanian parliament ratified the agreement in May 2001.

On July 23, 2001, United States Trade Representative Robert Zoellick and Jordanian Ambassador Marwan Muasher exchanged formal and official letters which discussed the implementation of the agreement's dispute settlement procedures. In the letters, both countries stated their intention not to apply the agreement's dispute settlement enforcement procedures in a manner that results in blocking trade. The letters also stated that bilateral consultations and other procedures (i.e., alternative mechanisms) would be appropriate measures to help secure compliance without recourse to traditional trade sanctions.

The United States-Jordan Free Trade Agreement is comprehensive and has seven major sections:

Tariff Elimination: The FTA will eliminate tariffs on virtually all trade between the two countries within 10 years. The tariff reductions are in four stages: Tariffs of less than 5 percent are phased out in two years; those between and 5 and 10 percent are eliminated in four years, those between 10 and 20 percent will be gone in five years, and those that were more than 20 percent will be eliminated in 10 years.

Services: Jordan already enjoyed near complete access to the U.S. services market. The FTA opened the Jordanian services market to U.S. companies. Specific liberalization was achieved in many key sectors, including business, communications, construction and engineering, distribution, education, energy distribution, environment, finance, health, printing and publishing, recreation, tourism, and transportation.

Intellectual property rights: These provisions incorporated the most up-to-date international standards for copyright protection. Among other things, Jordan agreed to ratify and implement the World Intellectual Property Organization's (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty within two years. These two treaties, sometimes referred to as the "Internet Treaties," establish several critical elements for the protection of copyrighted works in a digital network environment, including creators' exclusive right to make their creative works available online.

Electronic commerce: Jordan and the United States each committed to promoting a liberalized trade environment for electronic commerce that should encourage investment in new technologies and stimulate the innovative uses of networks to deliver products and services. Both countries agreed to seek to avoid imposing customs duties on electronic transmissions, imposing unnecessary barriers to market access for digitized products, and impeding the ability to deliver services through electronic means.

Labor and trade: The FTA includes provisions reaffirming the parties' support for the core labor standards adopted in the 1998 International Labor Organization's Declaration on Fundamental Principles and Rights at Work. The countries also reaffirmed their belief that is inappropriate to lower standards to encourage trade and agreed in principle to strive to improve their labor standards. Each side agreed to enforce its own existing labor laws and to settle disagreements on enforcement of these laws through a dispute settlement process.

Environment and trade: The FTA includes substantive provisions on trade and the environment. Specifically, each country agreed to avoid relaxing environmental laws to encourage trade. The United States and Jordan affirmed their belief in the principle of sustainable development and agreed to strive to maintain high levels of environmental protection and to improve their environmental laws. Each side also agreed to a provision on effective enforcement of its environmental laws and to settle disagreements on enforcement of these laws through a dispute settlement process. Both countries also agreed on an environmental cooperation initiative, which establishes a

U.S.-Jordanian Joint Forum on Environmental Technical Cooperation for ongoing discussion of environmental priorities and identifies environmental quality and enforcement as areas of initial focus. Finally, the FTA includes an initiative to eliminate tariffs on a number of environmental goods and technologies and liberalize Jordanian restrictions on certain environmental services.

Consultation and dispute settlement: The United States envisions most questions on the interpretation of the agreement or compliance with the agreement being settled by either informal or formal government-to-government contacts. The FTA provides for dispute settlement panels to issue legal interpretations of the FTA, but only if the countries have first consulted and failed to resolve the dispute. The process includes strong provisions on transparency. As in the Israel FTA, the report of such dispute settlement panels is non-binding, and the affected country is authorized to take appropriate measures if the parties are still unable to resolve a dispute once a panel has issued its recommendations.

Because the United States already has a Bilateral Investment Treaty with Jordan, the FTA does not include an investment chapter.

UNITED STATES-JORDAN FREE TRADE AREA IMPLEMENTATION ACT

The United States-Jordan Free Trade Area Implementation Act, signed into law on September 28, 2001, approves the Agreement submitted to the Congress on January 6, 2001, and makes changes in U.S. laws necessary or appropriate to implement obligations under the Agreement.

The legislation authorizes the President to proclaim the modifications or continuance of existing duties or duty-free treatment to implement the schedule for U.S. duty elimination under the Agreement. The rule of origin set forth in the Agreement ensures application of preferential tariff treatment only to goods originating in Jordan. There are also certain rules of origin with respect to the reduction or elimination of any duty imposed by the United States on Jordanian textile, fabric, or apparel articles.

The legislation directs the U.S. International Trade Commission (ITC), upon the filing of a petition by an entity (including a trade association, firm, certified or recognized union, or group of workers representative of an industry) requesting trade relief from U.S. obligations under the Agreement (or alleging that critical circumstances exist), to initiate an investigation to determine whether, as a result of the reduction or elimination of a duty provided for under the Agreement, a Jordanian article is being imported into the United States in such increased quantities and under such conditions that such imports alone constitute a substantial cause of serious injury or threat thereof to the domestic industry producing an article that is like, or directly competitive with, the imported article. The legislation requires the President, upon an affirmative determination by the ITC, to provide necessary import relief (including

suspension of any further duty reduction, or an increase in the rate duty, on imported Jordanian articles under the Agreement) and facilitate domestic industry efforts to make a positive adjustment to import competition, unless the provision of such relief is not in the U.S. national economic interest, or in extraordinary circumstances, the provision of relief would cause serious harm to U.S. national security.

The legislation also requires the ITC, if an affirmative determination about import competition has been made under the Trade Act of 1974, to determine whether imports of Jordanian articles are a substantial cause of serious injury or threat. The legislation requires the President to review such a determination and authorizes the exclusion of such Jordanian imports from remedial action if the final determination is negative.

The legislation authorizes a Jordanian national (including any spouse or child, if accompanying or following to join such national) to enter the United States pursuant to the Agreement as a nonimmigrant if such entrance is solely to carry on substantial trade, or solely to develop the operations of an enterprise in which he has invested a substantial amount of capital.

United States-Chile trade relations

UNITED STATES-CHILE FREE TRADE AGREEMENT

In December 1994, the leaders of the United States, Canada, and Mexico announced their intention to negotiate Chile's accession to the North American Free Trade Agreement (NAFTA). Talks on possible accession for Chile to the NAFTA formally began in June 1995. Negotiations for a U.S.-Chile FTA began in December 2000. However, "fast track" authority had lapsed, and the talks stalled. After Trade Promotion Authority was passed in 2002, the negotiations resumed. After two years and fourteen rounds of negotiations, the two countries announced on December 11, 2002, that an agreement had been reached between the United States and Chile. Pursuant to requirements established under TPA, President Bush formally notified the Congress on January 30, 2003, of his intention to sign the agreement. On June 6, 2003, United States Trade Representative Robert Zoellick and Chilean Foreign Minister Soledad Alvear signed the FTA at a ceremony in Miami.

The agreement is comprehensive and includes the following sections:

Tariff Elimination: Under the agreement, all tariffs and quotas on all goods eliminated immediately or after transition period. More than 85% of bilateral trade in consumer and industrial products becomes duty-free immediately upon entry into force of the agreement, with most remaining tariffs eliminated within four years.

Agriculture: More than three-quarters of U.S. farm goods will enter Chile duty-free within 4 years and all duties on U.S. products will be phased out over 12 years. Chilean price bands, under which import duties on the same product

may vary according to price level, will be phased out. The agreement contains an agricultural safeguard provision. Finally, both sides renewed their commitment to continue the work on resolving important sanitary and phytosanitary issues that are inhibiting access to consumers in both markets.

Textiles and Apparel: Textiles and apparel will be duty-free immediately if they meet the agreement's rule of origin. A limited yearly amount of textiles and apparel containing non-US or non-Chilean yarns, fibers or fabrics may also qualify for duty-free treatment.

Trade in Services: The commitments in services cover both cross-border supply of services and the right to invest and establish a local services presence. Traditional market access to services is supplemented by strong and detailed disciplines on regulatory transparency. Chile agreed to accord substantial market access across its entire services regime, subject to very few exceptions, a so-called "negative list" approach.

Investment: All forms of investment are protected under the agreement, such as enterprises, debt, concessions, contracts and intellectual property. U.S. investors enjoy in almost all circumstances the right to establish, acquire and operate investments in Chile on an equal footing with Chilean investors, and with investors of other countries, unless specifically stated otherwise. Pursuant to U.S. Trade Promotion Authority, the agreement draws from U.S. legal principles and practices to provide U.S. investors a basic set of substantive protections that Chilean investors currently enjoy under the U.S. legal system.

Intellectual Property Rights (IPR): Protection of copyrights, patents, trademarks and trade secrets is state-of-the-art, going farther than previous agreements. Enforcement of intellectual property rights is also enhanced under the agreement, and the provisions provide meaningful penalties for piracy and counterfeiting.

Competition Policy: The agreement commits Chile to maintain a competition law that prohibits anti-competitive business conduct and a competition agency to enforce that law. The agreement also requires that Chile control and regulate state enterprises and officially designated monopolies.

Government Procurement: The agreement requires that covered Chilean ministries and regional and municipal governments not discriminate against U.S. firms, or in favor of Chilean firms, when making government purchases in excess of agreed monetary thresholds. The agreement also imposes strong and transparent disciplines on procurement procedures. Finally, the agreement ensures that bribery in government procurement is specified as a criminal offense under Chilean and U.S. laws.

Above certain monetary thresholds, the Agreement applies to procurement by 20 Chilean central government and 13 Chilean regional government entities, and by 79 entities of the United States Government-including the General Services Administration, departments of the Federal Government, and independent agencies, boards, and commissions. The thresholds are:

(1) For national government procurement in the two countries, purchases of goods and services over $58,550 and purchases of construction services over $6,481,000; and

(2) For government-owned enterprises, purchases of goods and services over $280,951 or $518,000 and purchases of construction services over $6,481,000.

The Agreement also covers procurement by 341 Chilean municipalities and 37 U.S. States, above certain monetary thresholds and subject to specified conditions. The equivalent thresholds for purchases for these "sub-central" government entities, i.e., Chilean municipalities and U.S. state government agencies, are set at $460,000 for purchases of goods and services and $6,481,000 for purchases of construction services.

Customs Procedures and Rules of Origin: The agreement requires transparency and efficiency in customs administration, and both parties agree to share information to combat illegal trans-shipment of goods. The agreement also establishes rules of origin, designed to be easier to administer than NAFTA rules of origin.

Temporary Entry of Personnel: The agreement contains provisions that provide for the entry into either party of business visitors, traders and investors, intra-company transferees, and professionals. In the United States, this will take the form of a special FTA professional visa, available to a limited number of individuals holding four-year degrees, capped annually.

Labor and Environmental: Labor and environmental obligations are part of the core text of the trade agreement. The agreement states that both parties shall ensure that their domestic labor laws provide for labor standards consistent with internationally recognized labor principles, and that environmental laws provide for high levels of environmental protection. The agreement also provides that parties shall strive to continue to improve such laws. The agreement makes clear that it is inappropriate to weaken or reduce domestic labor or environmental protections to encourage trade or investment. The core commitment, that a party shall not fail to effectively enforce its labor or environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, is subject to dispute settlement under the agreement. Chile and the United States will pursue a number of cooperative projects to promote environmental protection, and the agreement contains a cooperative mechanism to promote respect for the principles embodied in the ILO Declaration on Fundamental Principles and Rights at Work, and compliance with ILO Convention 182 on the Worst Forms of Child Labor.

Dispute Settlement: The agreement sets out detailed procedures for the resolution of disputes over compliance, with high standards of openness and transparency. Dispute settlement procedures promote compliance through consultation and trade-enhancing remedies, rather than relying solely on trade sanctions. The agreement dispute settlement procedures also provide for "equivalent" remedies for commercial and labor or environmental disputes. In

addition to the use of trade sanctions in commercial disputes, the agreement provides the parties the option of using monetary assessments to enforce commercial, labor, and environmental obligations of the agreement, with the possibility that assessments from labor or environmental cases may be used to fund labor or environmental initiatives. If a party does not pay its annual assessment in a labor or environmental dispute, the complaining party may suspend tariff benefits, while bearing in mind the objective of eliminating barriers to trade and while seeking not to unduly affect parties or interests not party to the dispute.

UNITED STATES-CHILE FREE TRADE AGREEMENT IMPLEMENTATION ACT

The United States-Chile Free Trade Agreement Implementation Act, signed into law on August 3, 2003 (P.L. 108-77), approves the agreement and makes change in U.S. laws necessary or appropriate to implement obligations under the agreement. The agreement was one of the first to be considered by Congress under the procedures outlined in the Bipartisan Trade Promotion Authority Act (TPA), which was approved by the 107th Congress and signed into law in August 2002 as part of the Trade Act of 2002 (P.L. 107-210).

Section 201 of the implementing legislation authorizes the President to proclaim tariff modifications to carry out the agreement. It terminates Chile's status as a beneficiary of the Generalized System of Preferences.

Section 201(c) of the legislation allows, in addition to any duty collected under the agreement, the assessment of a duty on an agricultural safeguard good if the unit import price of the good when it enters the United States is less than the trigger price for that good in the agreement.

Section 202 codifies the rules of origin set out in Chapter 4 of the agreement. Under the general rules, there are three basic ways for a good of Chile to qualify as an "originating good," and therefore be eligible for preferential tariff treatment when it is imported into the United States. A good is an originating good if: (1) it is "wholly obtained or produced entirely in the territory of Chile, the United States or both"; (2) those materials used to produce the good that are not themselves originating goods are transformed in such a way as to cause their tariff classification to change or meet other requirements, as specified in Annex 4.1 of the agreement; or (3) it is produced entirely in the territory of Chile, the United States, or both exclusively from originating materials.

An apparel product must generally meet a tariff shift rule that implicitly imposes a "yarn forward" requirement. Thus, to qualify as an originating good imported into the United States from Chile, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Chile from yarn, or fabric made from yarn, that originates in Chile or the United States.

Section 203 implements Article 3.8 of the agreement, which begins a three-year, phased elimination of duty drawback and duty deferral programs between the United States and Chile within eight years of the entry into force of the

agreement. The legislation provides for no authorization of the refund, waiver, or reduction of countervailing or antidumping duties imposed on a good imported into the United States, as consistent with the agreement and current U.S. law. Section 204 provides for the exemption of the merchandise processing fee on originating goods and prohibits use of funds in the Customs User Fee Account to provide services related to entry of originating goods in accordance with U.S. obligations under the General Agreement on Tariffs and Trade 1994. Section 208 of the legislation implements the verification provisions of the agreement at Article 3.21 and authorizes the President to take appropriate action while the verification is being conducted.

Sections 311-316 authorize the President, after an investigation and affirmative determination by the U.S. International Trade Commission, to impose specified import relief when, as a result of the reduction or elimination of a duty under the agreement, a Chilean product is being imported into the United States in such increased quantities and under such conditions as to be a substantial cause of serious injury or threat of serious injury to the domestic industry. Section 311(d) exempts from investigation under this section Chilean articles that have been the basis previously for relief since entry into force under this safeguard or if, at the time the petition is filed, the article is subject to import relief under the global safeguard provisions in section 201 of the Trade Act of 1974. Under section 312(b), if the ITC makes an affirmative determination, it must find and recommend to the President the amount of import relief that is necessary to remedy or prevent serious injury and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition.

Under section 313(a), the President must provide import relief to the extent that the President determines is necessary to remedy or prevent the injury found by the ITC and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition. Under section 313(b), the President is not required to provide import relief if the President determines that the relief will not provide greater economic or social benefits than costs. Section 313(c) sets forth the nature of the relief that the President may provide as: a suspension of further reductions for the article; or an increase to a level that does not exceed the lesser of the existing most favored nation (MFN)/normal trade relation (NTR) rate or the MFN/NTR rate imposed when the agreement entered into force. Section 313(d) states that the import relief that the President is authorized to provide may not exceed three years. Section 314 provides that no relief may be provided after ten years from the agreement's entry into force, unless the tariff elimination for the article under the agreement is twelve years, in which case relief may not be provided for that article after twelve years from entry into force. Section 315 authorizes the President to provide compensation to Chile consistent with article 7.4 of the agreement.

The bill also contains a textile and apparel safeguard. Section 322(a) provides for the President to determine, pursuant to a request by an interested party,

whether, as a result of the elimination of a duty provided under the agreement, a Chilean textile or apparel article is being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for that article, and under such conditions as to cause serious damage or actual threat thereof, to a domestic industry producing an article that is like, or directly competitive with, the imported article. Section 322(b) identifies the relief that the President may provide, which generally represents the MFN/NTR duty rate for the article at the time relief is granted. Section 323 of the bill provides that the initial period of relief shall be no longer than three years. Section 324 provides that relief may not be granted to an article under this safeguard if relief has previously been granted under this safeguard. Under section 325, after the safeguard expires, the article that had been subject to such action shall be subject to duty-free treatment. Section 326 of the bill states that the authority to provide this safeguard relief expires eight years after the textile and apparel provisions of the agreement take effect. Section 327 of the Act gives authority to the President to provide compensation to Chile if he orders relief.

The legislation also contains provisions concerning the temporary entry of business persons.

United States-Singapore trade relations

UNITED STATES-SINGAPORE FREE TRADE AGREEMENT

Negotiations for a U.S.-Singapore FTA were launched in December 2000. The final round of negotiations was held in November 2002, and the formal agreement was concluded on January 15, 2003. Pursuant to requirements established under TPA, President Bush formally notified the Congress on January 30, 2003, of his intention to sign the agreement. On May 6, 2003, President Bush and Singaporean Prime Minister Goh Chok Tong signed the FTA.

The agreement is comprehensive and contains the following sections:

Trade in Goods: Under the agreement, Singapore guaranteed zero tariffs immediately on all U.S. products. Most U.S. tariffs on Singaporean goods are eliminated upon entry into force of the agreement, with remaining tariffs phased out over 3-10 years.

Textiles and Apparel: Textiles and apparel are duty-free immediately if they meet the agreement's rule of origin. A limited yearly amount of textiles and apparel containing non-US or non-Singaporean yarns, fibers or fabrics may also qualify for duty-free treatment. The agreement contains extensive monitoring and anti-circumvention commitments—such as reporting, licensing, and unannounced factory checks—so that only Singaporean textiles and apparel receive tariff preferences.

Trade in Services: Singapore agreed to accord substantial market access across its entire services regime, subject to very few exceptions, and will treat

U.S. services suppliers as well as its own suppliers or other foreign suppliers. The agreement relies on a so-called "negative list" approach.

Investment: All forms of investment are protected under the agreement unless specifically exempted, a "negative list" approach, and U.S. investors are provided treatment as favorable as local Singaporean investors or any other foreign investor. Pursuant to U.S. Trade Promotion Authority, the agreement draws from U.S. legal principles and practices to provide U.S. investors a basic set of substantive protections that Chilean investors currently enjoy under the U.S. legal system.

Intellectual Property Rights: Protection of copyrights, patents, trademarks and trade secrets is greatly enhanced, as is enforcement of intellectual property rights.

Competition Policy: The agreement commits Singapore to enact a law regulating anti-competitive business conduct and to create a competition commission by January 2005. In addition, specific conduct guarantees are imposed to ensure that commercial enterprises in which the Singapore government has effective influence will operate on the basis of commercial considerations, and that such enterprises will not discriminate in their treatment of U.S. firms.

Government Procurement: Singapore made commitments on non-discrimination in government services procurements, based on a "negative list" approach in which U.S. firms gain nondiscriminatory access unless specifically excluded. The agreement also reinforces WTO commitments to strong and transparent disciplines on procurement procedures. Finally, monetary thresholds for when government procurement disciplines apply is lowered, thus expanding the contracts that are subject to FTA disciplines.

Customs Procedures and Rules of Origin: The agreement requires transparency and efficiency in customs administration, with commitments on publishing laws and regulations on the Internet, and ensuring procedural certainty and fairness. Both parties agree to share information to combat illegal trans-shipment of goods. The agreement also establishes rules of origin, designed to be easier to administer than NAFTA rules of origin.

Temporary Entry of Personnel: The agreement creates separate categories of entry for businesspersons to engage in a wide range of activities on a temporary basis, allowing business visitors to enter Singapore without the need for a labor market test.

Labor and Environmental: Labor and environmental obligations are part of the core text of the trade agreement. The agreement states that both parties shall ensure that their domestic labor laws provide for labor standards consistent with internationally recognized labor principles, and that environmental laws provide for high levels of environmental protection. The agreement also provides that parties shall strive to continue to improve such laws. The agreement makes clear that it is inappropriate to weaken or reduce domestic labor or environmental protections to encourage trade or investment. The core commitment, that a party

shall not fail to effectively enforce its labor or environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, is subject to dispute settlement under the agreement.

Dispute Settlement: The agreement sets out detailed procedures for the resolution of disputes over compliance, with high standards of openness and transparency. Dispute settlement procedures promote compliance through consultation and trade-enhancing remedies, rather than relying solely on trade sanctions. The agreement dispute settlement procedures also provide for "equivalent" remedies for commercial and labor or environmental disputes. In addition to the use of trade sanctions in commercial disputes, the agreement provides the parties the option of using monetary assessments to enforce commercial, labor, and environmental obligations of the agreement, with the possibility that assessments from labor or environmental cases may be used to fund labor or environmental initiatives. If a party does not pay its annual assessment in a labor or environmental dispute, the complaining party may suspend tariff benefits, while bearing in mind the objective of eliminating barriers to trade and while seeking not to unduly affect parties or interests not party to the dispute.

UNITED STATES-SINGAPORE FREE TRADE AREA IMPLEMENTATION ACT

The United States-Singapore Free Trade Agreement Implementation Act, signed into law on August 3, 2003 (P.L. 108-78), approves the agreement and makes change in U.S. laws necessary or appropriate to implement obligations under the agreement. The agreement was one of the first to be considered by Congress under the procedures outlined in the Bipartisan Trade Promotion Authority Act (TPA), which was approved by the 107th Congress and signed into law in August 2002 as part of the Trade Act of 2002 (P.L. 107-210).

Section 201(a) provides the President with the authority to proclaim tariff modifications to carry out the agreement. Section 202 codifies the rules of origin set out in Chapter 3 of the agreement. Under the general rules, there are three basic ways for a good of Singapore to qualify as an "originating good," and therefore be eligible for preferential tariff treatment when it is imported into the United States. A good is an originating good if: (1) it is "wholly obtained or produced entirely in the territory of Singapore, the United States or both"; (2) those materials used to produce the good that are not themselves originating goods are transformed in such a way as to cause their tariff classification to change or meet other requirements, as specified in Annex 3A of the agreement; or (3) it is a good listed in Annex 3B of the agreement and thus considered to be an "originating good" if the good itself, as finished, is imported into the territory of the United States from the territory of Singapore.

Under Annex 3A rules, an apparel product must generally meet a tariff shift rule that implicitly imposes a "yarn forward" requirement. Thus, to qualify as an originating good imported into the United States from Singapore, an apparel

product must have been cut (or knit to shape) and sewn or otherwise assembled in Singapore from yarn, or fabric made from yarn, that originates in Singapore or the United States.

The goods listed in Annex 3B (also called Integrated Sourcing Initiative or ISI products) are predominantly information technology goods for which the current United States Normal Trade Relations or Most Favored Nations duty rate is zero. Imports of these goods into the United States would receive duty-free treatment regardless of origin. The bill makes clear that the Annex 3B good "itself, as imported," is deemed to be an originating good. This means that Annex 3B goods are originating only when transshipped through Singapore, not when the good is incorporated as a component into another product, unless the good is first shipped from the United States to Singapore. Thus, for purposes of determining origin by way of a transformation using the regional value content formula in Section 202(d), an Annex 3B good would not be "originating" for purposes of the regional value content calculation unless it was shipped from the United States to Singapore, where it was then incorporated into the final product.

Section 203 of the bill implements U.S. commitments under Article 2.8 of the agreement, regarding the exemption from the merchandise processing fee for originating goods and prohibits use of funds in the Customs User Fee Account to provide services related to entry of originating goods in accordance with U.S. obligations under the General Agreement on Tariffs and Trade 1994.

Section 205 of the bill implements the textile and apparel good enforcement against circumvention provisions of the agreement. In accordance with Articles 5.4.5, 5.5.5, and 5.8.2 of the agreement, the provision allows the President to exclude from entry textile and apparel goods from any enterprise that does not permit site visits requested by Customs officials or that engages in intentional circumvention. The President may also take further action against circumventing enterprises or related enterprises, such as barring future entries of goods, if consultations with Singapore authorities fail to address problems of circumvention.

Sections 311-316 authorize the President, after an investigation and affirmative determination by the U.S. International Trade Commission, to impose specified import relief when, as a result of the reduction or elimination of a duty under the agreement, a Singaporean product is being imported into the United States in such increased quantities and under such conditions as to be a substantial cause of serious injury or threat of serious injury to the domestic industry. Section 311(a) permits the award of provisional relief and critical circumstances relief under certain circumstances. Section 311(d) exempts from investigation under this section Singaporean articles that have been the basis previously for relief since entry into force under: the bilateral safeguard provision; the textile and apparel safeguard set out in Subtitle B of Title III of the legislation; the global safeguard provisions in section 201 of the Trade Act

of 1974; article 6 of the WTO Agreement on Textiles and Clothing; or article 5 of the WTO Agreement on Agriculture.

Under section 312(c), if the ITC makes an affirmative determination, it must find and recommend to the President the amount of import relief that is necessary to remedy or prevent serious injury and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition.

Under section 313(a), the President must provide import relief to the extent that the President determines is necessary to remedy or prevent the injury found by the ITC and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition. Under section 313(b), the President is not required to provide import relief if the President determines that the relief will not provide greater economic or social benefits than costs. Section 313(c) sets forth the nature of the relief that the President may provide as: a suspension of further reductions for the article; or an increase to a level that does not exceed the lesser of the existing most favored nation (MFN)/normal trade relation (NTR) rate or the MFN/NTR rate imposed when the agreement entered into force.

Section 313(d) provides that the import relief that the President is authorized to provide may not exceed two years. However, the President may extend the relief under certain circumstances, but the aggregate period of relief, including extensions, may not exceed four years. According to section 313(e), the rate of duty at the end of the relief period is to be the rate that would have been in effect on that date but for such action. Section 314 provides that no relief may be provided after ten years from the agreement's entry into force unless Singapore consents. Section 315 authorizes the President to provide compensation to Singapore consistent with article 7.4 of the agreement.

The bill also contains a textile and apparel safeguard. Section 322(a) provides for the President to determine, pursuant to a request by an interested party, whether, as a result of the reduction or elimination of a duty provided under the agreement, a Singaporean textile or apparel article is being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for that article, and under such conditions that imports of the article constitute a substantial cause of serious damage or actual threat thereof, to a domestic industry producing an article that is like, or directly competitive with, the imported article.

Section 322(b) identifies the relief that the President may provide as either a suspension of further duty reductions or the normal trade relations/most-favored-nation duty rate for the article at the time relief is granted. Section 323 of the bill provides that the initial period of relief shall be no longer than two years, although an extension is permitted under certain circumstances as long as total relief, including any extension, does not exceed four years. Section 324 provides that relief may not be granted to an article under this safeguard if relief has previously been granted under this safeguard. Under section 325, the duty

rate applicable to the article after the safeguard expires is the rate that would have been in force on that date, but for application of the safeguard.

Section 326 of the bill provides that the authority to provide this safeguard relief expires ten years after the textile and apparel provisions of the agreement take effect. Section 327 of the Act gives authority to the President to provide compensation to Singapore if he orders relief. Section 328 provides for the treatment of business confidential information.

If, in any investigation initiated under Title II of the Trade Act of 1974 ("section 201" action), the ITC makes an affirmative determination, the ITC shall also find and report to the President whether imports of the article from Singapore are a substantial cause of serious injury or threat thereof. In determining relief to be taken under Section 201, the President shall determine whether imports from Singapore are a substantial cause of the serious injury or threat thereof found by the Commission and, if such determination is negative, may exclude from such actions products from Singapore.

The legislation also contains provisions concerning the temporary entry of business persons.

United States-Australia trade relations

UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT

On November 13, 2002, the President first notified Congress of his intent to negotiate an FTA with Australia. FTA negotiations between the United States and Australia began in March 2003 and concluded in February 2004. On February 13, 2004, the President notified Congress of his intent to enter into the U.S.-Australia FTA. The FTA was signed on May 18 by U.S. Trade Representative Robert B. Zoellick and Australian Minister for Trade Mark Vaile.

The agreement includes the following sections:

Tariff Elimination: Under the agreement, duties on more than 99 percent of tariff lines covering industrial and consumer goods will be eliminated upon entry into force, amounting to over 93 percent of U.S. goods exports to Australia, and duties on other manufactured goods will be phased out over periods of up to ten years. The agreement also requires the elimination of a variety of non-tariff barriers that restrict or distort trade flows.

Agriculture: Duties on all U.S. agricultural exports to Australia will be eliminated immediately upon entry into force of the agreement. Duties on most imports from Australia will be phased out over periods of between four and 18 years. Duties will be maintained on sugar and certain dairy products. In addition, for certain products, including beef, dairy, cotton, peanuts and certain horticultural products, the agreement includes other mechanisms, such as preferential tariff rate quotas and safeguards. The agreement also establishes a new forum for scientific cooperation between U.S. and Australian authorities to

resolve specific bilateral animal and plant health matters based on science and with a view to facilitating trade.

Pharmaceuticals: The United States and Australia affirmed their commitment to several basic principles related to their shared objectives of facilitating high quality health care and improvements in public health. These principles are: (1) the important role played by innovative pharmaceuticals in delivering high quality health care; (2) the importance of research and development in the pharmaceutical industry and of appropriate government support, including through intellectual property protection and other policies; and (3) the need to promote timely and affordable access to innovative pharmaceuticals through adopting or maintaining procedures that appropriately value the objectively demonstrated therapeutic significance of a pharmaceutical. The agreement requires that federal health care programs apply transparent procedures in listing new pharmaceuticals for reimbursement, establishes a Medicines Working Group to promote discussion and understanding of pharmaceutical issues, and requires Australia to establish and maintain procedures enhancing transparency and accountability in the listing and pricing of pharmaceuticals under its Pharmaceutical Benefits Scheme, including establishment of an independent review process for listing decisions.

Services: The agreement requires national treatment and most-favored-nation treatment in all sectors not explicitly excluded and prohibits local presence requirements.

Investment: The agreement establishes a secure, predictable legal framework for U.S. investors operating in Australia covering all forms of investment. All U.S. investment in new businesses is exempted from screening under Australia's Foreign Investment Review Board, and thresholds for acquisitions by U.S. investors in nearly all sectors are raised significantly

In recognition of the unique circumstances of this agreement – such as the longstanding economic ties between the United States and Australia, their shared legal traditions, and the confidence of their investors in operating in each others' markets – the two countries agreed not to adopt procedures in the agreement that would allow investors to arbitrate disputes with governments, but this issue will be revisited if circumstances change. In any event, government-to-government dispute settlement procedures remain available to resolve investment-related disputes.

Intellectual Property Rights: The agreement complements and enhances existing international standards for the protection of intellectual property and the enforcement of intellectual property rights, consistent with U.S. law. The FTA establishes strong penalties for piracy and counterfeiting.

Government Procurement: Under the agreement, U.S. suppliers are granted non-discriminatory rights to bid on contracts to supply Australian government entities, including all major procuring entities and administrative and public bodies. The agreement requires the use of tendering procedures that will ensure that procurements are conducted in a transparent, predictable and fair manner.

The agreement provides integrity in procurement practices, including by requiring laws that make bribery of procurement officials a criminal or administrative offense.

Australia has covered all major procuring entities such as Department of Defense, Department of Transport and Regional Services, Department of Communications, Information Technology and the Arts, and Department of Prime Minister and Cabinet. Australia has also covered 31 administrative and public bodies including important agencies such as the Reserve Bank of Australia, Australian Broadcasting Authority, and Australian Nuclear Science and Technology Organization.

Competition Policy: The agreement proscribes anticompetitive business conduct and requires appropriate action with respect to such conduct. It sets out basic procedural safeguards and rules ensuring against harmful conduct by government-designated monopolies as well as special rules covering state enterprises so that they do not abuse their official status to harm the interests of U.S. companies or discriminate in the sale of goods and services. The agreement also facilitates cooperation between the United States and Australia on cross-border consumer protection and the recognition and enforcement of supporting the mutual recognition and enforcement of certain monetary judgments to provide restitution to consumers, investors or customers who suffered economic harm as a result of being deceived, defrauded or misled.

Labor and environment: Labor and environmental obligations are part of the core text of the trade agreement. The agreement states that both parties shall ensure that their domestic labor laws provide for labor standards consistent with internationally recognized labor principles, and that environmental laws provide for high levels of environmental protection. The agreement also provides that parties shall strive to continue to improve such laws. The agreement makes clear that it is inappropriate to weaken or reduce domestic labor or environmental protections to encourage trade or investment. The core commitment, that a party shall not fail to effectively enforce its labor or environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, is subject to dispute settlement under the agreement.

Dispute Settlement: The agreement sets out detailed procedures for the resolution of disputes over compliance, with high standards of openness and transparency. Dispute settlement procedures promote compliance through consultation and trade-enhancing remedies, rather than relying solely on trade sanctions. The agreement dispute settlement procedures also provide for "equivalent" remedies for commercial and labor or environmental disputes. In addition to the use of trade sanctions in commercial disputes, the agreement provides the parties the option of using monetary assessments to enforce commercial, labor, and environmental obligations of the agreement, with the possibility that assessments from labor or environmental cases may be used to fund labor or environmental initiatives. If a party does not pay its annual assessment in a labor or environmental dispute, the complaining party may

suspend tariff benefits, while bearing in mind the objective of eliminating barriers to trade and while seeking not to unduly affect parties or interests not party to the dispute.

UNITED STATES-AUSTRALIA FREE TRADE AGREEMENT IMPLEMENTATION ACT

The United States-Australia Free Trade Agreement Implementation Act, signed into law on August 3, 2004 (P.L. 108-286), approves the agreement and makes change in U.S. laws necessary or appropriate to implement obligations under the agreement. The agreement was be considered by Congress under the procedures outlined in the Bipartisan Trade Promotion Authority Act (TPA), which was approved by the 107th Congress and signed into law in August 2002 as part of the Trade Act of 2002 (P.L. 107-210).

Section 201(a) provides the President with the authority to proclaim tariff modifications to carry out the agreement. Section 202 of the bill implements the agricultural safeguard provisions of article 3.4 and Annex 3-A of the agreement. Article 3.4 permits the United States to impose an agricultural safeguard measure, in the form of additional duties, on imports from Australia of an agricultural good listed in the U.S. schedule to Annex 3-A of the agreement. The bill provides for three different types of agricultural safeguards. The first applies to certain horticulture goods specified in Annex 3-A of the agreement. The second applies to certain beef goods imported into the United States above specified quantities during the period from January 1, 2013 through December 31, 2022. The third applies to the same categories of beef goods imported into the United States above specified quantities and the monthly average index price in the United States falls below the specified "trigger" price beginning January 1, 2023.

No additional duty may be applied under section 202 if, at the time of entry, the good is subject to import relief under subtitle A of title III of this bill (the general safeguard) or chapter 1 of title II of the Trade Act of 1974 ("section 201" relief). The assessment of an additional duty under either the horticulture safeguard or the quantity-based beef safeguard shall cease to apply to a good on the date on which duty-free treatment must be provided to that good. There is no termination date for the price-based beef safeguard. The sum of the duties assessed under an agricultural safeguard and the applicable rate of duty in the U.S. schedule may not exceed the lesser of the existing normal trade relation (NTR)/most favored nation (MFN) rate or the NTR/MFN rate imposed when the agreement entered into force.

Sections 202(c)(4) and (d)(5) provide that the United States Trade Representative may waive the application of the quantity-based beef safeguard and the price-based beef safeguard if he determines that extraordinary market conditions demonstrate that a waiver would be in the U.S. national interest, after notice and consultation with the Ways & Means and Finance Committees and the appropriate private sector advisory committees.

Section 203 codifies the rules of origin set out in chapter 5 of the agreement. Under the general rules, there are four basic ways for a good of Australia to qualify as an "originating good" and therefore be eligible for preferential tariff treatment when it is imported into the United States. A good is an originating good if: (1) it is "wholly obtained or produced entirely in the territory of Australia, the United States, or both"; (2) those materials used to produce the good that are not themselves originating goods are transformed in such a way as to cause their tariff classification to change or meet other requirements, as specified in Annex 4-A or Annex 5-A of the agreement; (3) it is produced entirely in the territory of Australia, the United States, or both exclusively from originating materials; or (4) it otherwise qualifies as an originating good under chapter 4 or chapter 5 of the agreement.

Under the rules in chapter 5.1 and Annex 4-A of the agreement, an apparel product must generally meet a tariff shift rule that implicitly imposes a "yarn forward" requirement. Thus, to qualify as an originating good imported into the United States from Australia, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Australia from yarn, or fabric made from yarn, that originates in Australia or the United States, or both.

Section 204 implements U.S. commitments under article 3.12(4) of the agreement regarding the exemption of the merchandise processing fee on originating goods. The provision also prohibits use of funds in the Customs User Fee Account to provide services related to entry of originating goods, in accordance with U.S. obligations under the General Agreement on Tariffs and Trade 1994.

Sections 311-316 authorize the President, after an investigation and affirmative determination by the U.S. International Trade Commission, to impose specified import relief when, as a result of the reduction or elimination of a duty under the agreement, an Australian product is being imported into the United States in such increased quantities and under such conditions as to be a substantial cause of serious injury or threat of serious injury to the domestic industry. Section 311(d) exempts from investigation under this section Australian articles for which import relief has been provided under this safeguard since the agreement entered into force. Under sections 312(b) and (c), if the ITC makes an affirmative determination, it must find and recommend to the President the amount of import relief that is necessary to remedy or prevent serious injury and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition.

Under section 313(a), the President may provide import relief to the extent that the President determines is necessary to remedy or prevent the injury found by the ITC and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition. Under section 313(b), the President is not required to provide import relief if the President determines that the relief will not provide greater economic and social benefits than costs. Section 313(c) sets forth the nature of the relief that the President may provide as: a suspension

of further reductions for the article; or an increase to a level that does not exceed the lesser of the existing NTR/MFN rate or the NTR/MFN rate imposed when the agreement entered into force. Section 313(c)(1)(C) specifies that if a duty is applied on a seasonal basis, then the NTR/MFN rate corresponds to the immediately preceding season. Section 313(c)(2) states that if the President provides relief for greater than one year, it must be subject to progressive liberalization at regular intervals over the course of its application.

Section 313(d) states that the import relief that the President is authorized to provide may not exceed two years. If the President determines that import relief continues to be necessary and there is evidence that the industry is making positive adjustment to import competition, then he may extend the relief, but the aggregate period of relief, including extensions, may not exceed four years. Section 314 provides that no relief may be provided after ten years from the date the agreement enters into force, unless the tariff elimination for the article under the agreement is greater than ten years, in which case relief may not be provided for that article after the period for tariff elimination for that article ends. Section 315 authorizes the President to provide compensation to Australia consistent with article 9.4 of the agreement.

The bill also contains a textile and apparel safeguard. Section 322(a) of the Act provides for the President to determine, pursuant to a request by an interested party, whether, as a result of the elimination of a duty provided under the agreement, an Australian textile or apparel article is being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for that article, and under such conditions as to cause serious damage, or actual threat thereof, to a domestic industry producing an article that is like, or directly competitive with, the imported article.

Section 322(b) identifies the relief that the President may provide, which is the lesser of the existing NTR/ MFN rate or the NTR/MFN rate imposed when the agreement entered into force. Section 322(c) provides that when an allegation of critical circumstances is made, the President shall make a determination whether there is clear evidence that critical circumstances exist. If the determination is affirmative, he may provide provisional relief for up to 200 days. Section 323 of the bill provides that the period of relief shall be no longer than two years (including any provisional relief). The President may extend the relief, but the aggregate period of relief, including extensions, may not exceed four years.

Section 324 provides that relief may not be granted to an article under this safeguard if relief has previously been granted under this safeguard, or the article is subject to import relief under subtitle A of title III of this bill or under chapter 1 of title II of the Trade Act of 1974. Under section 325, after a safeguard expires, the rate of duty on the article that had been subject to the safeguard shall be the rate that would have been in effect but for the safeguard action. Section 326 states that the authority to provide safeguard relief expires ten years after the date on which duties on the article are eliminated pursuant to

the agreement. Section 327 of the Act gives authority to the President to provide compensation to Australia if he orders relief.

If, in any investigation initiated under title II of the Trade Act of 1974 ("section 201" action), the ITC makes an affirmative determination, the ITC shall also find and report to the President whether imports of the article from Australia are a substantial cause of serious injury or threat thereof. In determining relief to be taken under section 201, the President shall determine whether imports from Australia are a substantial cause of the serious injury or threat thereof found by the Commission and, if such determination is negative, may exclude from such actions products from Australia.

Section 401 implements chapter 15 of the agreement and amends the definition of "eligible product" in section 308 of the Trade Agreements Act of 1979. As amended, section 308(4)(A) will provide that, for a party to a free trade agreement that entered into force for the United States after December 31, 2003 and prior to January 2, 2005, an "eligible product" means "a product or service of that country or instrumentality which is covered under the free trade agreement for procurement by the United States." This amended definition coupled with the President's exercise of his authority under section 301(a) of the Trade Agreement Act will allow procurement of products and services of Australia and other Parties to FTAs that entered into force during the specified time period.

United States-Morocco trade relations

In 1995, the United States and Morocco signed a Trade and Investment Framework Agreement.

UNITED STATES-MOROCCO FREE TRADE AGREEMENT

Negotiations for a United States-Morocco Free Trade Agreement (FTA) began in January 2003 and were concluded on June 15 2004, when U.S. Trade Representative Robert B. Zoellick and Moroccan Minister-Delegate of Foreign Affairs and Cooperation Taib Fassi-Fihri signed the agreement. President Bush transmitted the agreement to the Congress on July 15, 2004. As of this writing, the agreement has not entered into force because Morocco has not yet implemented it.

The United States-Morocco Free Trade Agreement is comprehensive and includes the following sections:

Tariff Elimination: The FTA will eliminate tariffs on virtually all trade between the two countries within 10 years.

Agriculture: This agreement covers all agricultural products. The FTA provides immediate bilateral tariff elimination on many agricultural products, with most other tariffs phased out within 15 years. The Agreement also includes a price-based safeguard for certain horticultural products.

Services: The FTA opened the Moroccan services market to U.S. companies. The FTA utilizes the "negative list" approach for coverage of services and includes very few exclusions. It also achieves services liberalization far beyond that to which Morocco is committed in the WTO General Agreement on Trade in Services (GATS). Morocco will accord substantial market access across its entire services regime. The Moroccan government was allowed to maintain certain restrictions in the area of financial services.

Intellectual property rights: These provisions incorporated the most up-to-date international standards for copyright protection. Among other things, the FTA incorporates the World Intellectual Property Organization's (WIPO) Copyright Treaty and WIPO Performances and Phonograms Treaty. These two treaties, sometimes referred to as the "Internet Treaties," establish several critical elements for the protection of copyrighted works in a digital network environment, including creators' exclusive right to make their creative works available online.

Investment: The FTA provides important investor protections through the inclusion of an investor-state dispute settlement provision. The FTA's investment provisions establish a secure, predictable legal framework for U.S. investors operating in Morocco with all forms of investment protected under the FTA. The FTA does not provide protection for existing investment agreements (defined as agreements relating to natural resources or other assets controlled by the foreign government).

Textiles and Apparel: The FTA contains a yarn forward rule of origin. Qualifying apparel must contain either U.S. or Moroccan yarn and fabric. The FTA provides a limited exception to the yarn forward rule, allowing access for 30 million square meter equivalents of apparel that does not meet the yarn forward rule of origin in the first year of the FTA, phasing down over a ten-year period. Tariffs on textiles and apparel trade meeting the rule of origin will also be phased out over the course of ten years.

Government Procurement: For covered procurements above certain contract values, the FTA ensures that Moroccan government purchasers cannot discriminate against U.S. firms or in favor of Moroccan firms. Strong and transparent disciplines on procurement procedures, such as requiring advance public notice of purchases, as well as timely and effective bid review procedures provide U.S. suppliers with not only greater market access opportunity but also increased certainty in the bidding and contracting process. The FTA provides access to procurements by thirty Moroccan central government entities and also covers procurement by Morocco's provinces and prefectures.

The agreement prohibits Moroccan government procurers from discriminating against U.S. firms, or favoring Moroccan firms, when purchasing more than $175,000 in goods or services or $6,725,000 million in construction services. Morocco has covered 30 central government entities in its government procurement offer. The list of 30 entities includes Morocco's largest government procurers, such as the Ministries of Defense, Foreign Affairs,

Interior, and the Prime Minister's Office. The agreement covers all of Morocco's provinces and prefectures – the U.S. equivalent of states. The provisions are important because the Moroccan government is heavily involved in the Moroccan economy. The agreement opens up 136 Moroccan administrative and public bodies to U.S. contractors, including the National Office of Electricity, the National Office of Airports, the National Office of Potable Water, the National Railroad Office, and the Office of Ports Utilization.

Consultation and dispute settlement: The United States envisions most questions on the interpretation of the agreement or compliance with the agreement being settled by either informal or formal government-to-government contacts. The FTA provides for dispute settlement panels to issue legal interpretations of the FTA, but only if the countries have first consulted and failed to resolve the dispute. The process includes strong provisions on transparency.

Labor and Environmental: Labor and environmental obligations are part of the core text of the trade agreement. The agreement states that both parties shall ensure that their domestic labor laws provide for labor standards consistent with internationally recognized labor principles, and that environmental laws provide for high levels of environmental protection. The agreement also provides that parties shall strive to continue to improve such laws. The agreement makes clear that it is inappropriate to weaken or reduce domestic labor or environmental protections to encourage trade or investment. The core commitment, that a party shall not fail to effectively enforce its labor or environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties, is subject to dispute settlement under the agreement.

Dispute Settlement: The agreement sets out detailed procedures for the resolution of disputes over compliance, with high standards of openness and transparency. Dispute settlement procedures promote compliance through consultation and trade-enhancing remedies, rather than relying solely on trade sanctions. The agreement dispute settlement procedures also provide for "equivalent" remedies for commercial and labor or environmental disputes. In addition to the use of trade sanctions in commercial disputes, the agreement provides the parties the option of using monetary assessments to enforce commercial, labor, and environmental obligations of the agreement, with the possibility that assessments from labor or environmental cases may be used to fund labor or environmental initiatives. If a party does not pay its annual assessment in a labor or environmental dispute, the complaining party may suspend tariff benefits, while bearing in mind the objective of eliminating barriers to trade and while seeking not to unduly affect parties or interests not party to the dispute.

UNITED STATES-MOROCCO FREE TRADE AGREEMENT IMPLEMENTATION ACT

The United States-Morocco Free Trade Agreement Implementation Act, signed into law on August 17, 2004 (P.L. 108-302), approves the Agreement and makes changes in U.S. laws necessary or appropriate to implement obligations under the Agreement. As noted above, the agreement has not entered into force as of this writing because Morocco has not yet implemented it.

Section 201 provides the President with the authority to proclaim tariff modifications to carry out the agreement and requires the President to terminate Morocco's designation as a beneficiary developing country for the purposes of the Generalized System of Preferences program.

Section 202 of the bill implements the agricultural safeguard provisions of article 3.5 and Annex 3-A of the agreement. Article 3.5 permits the United States to impose an agricultural safeguard measure, in the form of additional duties, on imports from Morocco of certain horticultural goods listed in the U.S. schedule to Annex 3-A of the agreement.

Section 203 codifies the rules of origin set out in chapter 5 of the agreement. Under the general rules, there are four basic ways for a good of Morocco to qualify as an "originating good" and therefore be eligible for preferential tariff treatment when it is imported into the United States. A good is an originating good if it is imported directly from the territory of Morocco into the territory of the United States and: (1) it is "wholly the growth, product, or manufacture of the Morocco, the United States, or both"; (2) it is a new or different good that has been "grown, produced, or manufactured in Morocco, the United States, or both" and the value of the materials produced and the direct cost of processing operations performed in Morocco, the United States, or both is not less than 35% of the appraised value of the good; (3) it satisfies certain rules of origin for textile or apparel goods specified in Annex 4-A of the agreement; or (4) it satisfies certain product-specific rules of origin specified in Annex 5-A of the agreement.

An apparel product must generally meet a tariff shift rule that implicitly imposes a "yarn forward" requirement. Thus, to qualify as an originating good imported into the United States from Morocco, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Morocco from yarn, or fabric made from yarn, that originates in Morocco or the United States, or both. However, Article 4.3.11 provides an exception to this general rule allowing access for 30 million square meter equivalents of apparel that does not meet the yarn forward rule of origin in the first year of the agreement, phasing down over a ten-year period.

Sections 311-316 authorize the President, after an investigation and affirmative determination by the U.S. International Trade Commission (ITC), to impose specified import relief when, as a result of the reduction or elimination of a duty under the agreement, a Moroccan product is being imported into the United States in such increased quantities and under such conditions as to be a

substantial cause of serious injury or threat of serious injury to the domestic industry. Section 311(d) exempts from investigation under this section Moroccan articles for which import relief has been provided under this safeguard since the agreement entered into force. Under sections 312(b) and (c), if the ITC makes an affirmative determination, it must find and recommend to the President the amount of import relief that is necessary to remedy or prevent serious injury and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition.

Under section 313(a), the President shall provide import relief to the extent that the President determines is necessary to remedy or prevent the injury found by the ITC and to facilitate the efforts of the domestic industry to make a positive adjustment to import competition. Under section 313(b), the President is not required to provide import relief if the President determines that the relief will not provide greater economic and social benefits than costs.

Section 313(c) sets forth the nature of the relief that the President may provide as: a suspension of further reductions for the article; or an increase to a level that does not exceed the lesser of the existing NTR/MFN rate or the NTR/MFN rate imposed when the agreement entered into force. Section 313(c)(1)(C) specifies that if a duty is applied on a seasonal basis, then the NTR/MFN rate corresponds to the immediately preceding season. Section 313(c)(2) states that if the President provides relief for greater than one year, it must be subject to progressive liberalization at regular intervals over the course of its application.

Section 313(d) states that the import relief that the President is authorized to provide may not exceed three years. If the President determines that import relief continues to be necessary and there is evidence that the industry is making positive adjustment to import competition, then he may extend the relief, but the aggregate period of relief, including extensions, may not exceed five years. Section 314 provides that no relief may be provided after five years from the date on which the United States must eliminate duties on the good at issue under the agreement. Section 315 authorizes the President to provide compensation to Morocco consistent with article 8.5 of the agreement.

The bill also contains a textile and apparel safeguard. Section 322(a) provides for the President to determine, pursuant to a request by an interested party, whether, as a result of the elimination of a duty provided under the agreement, a Moroccan textile or apparel article is being imported into the United States in such increased quantities, in absolute terms or relative to the domestic market for that article, and under such conditions as to cause serious damage, or actual threat thereof, to a domestic industry producing an article that is like, or directly competitive with, the imported article. Section 322(b) identifies the relief that the President may provide, which is the lesser of the existing NTR/ MFN rate or the NTR/MFN rate imposed when the agreement entered into force. Section 323 of the bill provides that the period of relief shall be no longer than three years. The President may extend the relief, but the aggregate period of relief, including extensions, may not exceed five years. Section 324 provides that

relief may not be granted to an article if relief has previously been granted under this safeguard, or the article is subject to import relief under chapter 1 of title II of the Trade Act of 1974. Under section 325, after a safeguard expires, the rate of duty on the article that had been subject to the safeguard shall be the rate that would have been in effect but for the safeguard action.

Section 326 states that the authority to provide safeguard relief expires ten years after the date on which duties on the article are eliminated pursuant to the agreement. Section 327 gives authority to the President to provide compensation to Morocco if he orders relief.

Because Morocco was expected to complete its actions to bring the agreement into force before 2005, it was further expected that the provisions of the

Section 401 of the U.S.-Australia Free Trade Agreement Implementation Act. which covered all parties to free trade agreement that entered into force for the United States after December 31, 2003 and prior to January 2, 2005, an "eligible product" means "a product or service of that country or instrumentality which is covered under the free trade agreement for procurement by the United States." This amended definition coupled with the President's exercise of his authority under section 301(a) of the Trade Agreement Act will allow procurement of products and services of Australia and other Parties to FTAs that entered into force during the specified time period.

Chapter 7: ORGANIZATION OF TRADE POLICY FUNCTIONS

Congress

The role of the Congress in trade derives from its powers under the Constitution to regulate foreign commerce and to lay and collect duties (see preface). Consequently, the trade agreements program and application of duties or other import restrictions are based upon and limited to specific legislation or authorities delegated by the Congress. In order to ensure proper implementation of these laws and authorities, in accordance with legislative intent, Congress has included various statutory requirements in the trade laws to limit their application, to ensure congressional oversight of their implementation, and to fulfill its responsibility for legislating any necessary or appropriate changes in U.S. laws.

More specifically, for example, periodic delegations of authority by the Congress to the President to proclaim changes in U.S. tariff treatment in the context of trade agreements has been limited in scope and periods of time, and use of the authority subject to certain prenegotiation procedures and negotiating objectives and priorities. On the other hand, Congress has granted Federal agencies permanent authorities to administer certain laws and programs, such as trade remedy laws or trade adjustment assistance, under certain specific guidelines and subject to congressional oversight, including appropriations.

Specific statutory roles of the Congress became formalized under the Trade Act of 1974[1] with the grant of authority to the President under section 102 to enter into reciprocal trade agreements affecting U.S. laws other than traditional changes in tariff treatment. In authorizing implementation through an expedited, no amendment procedure, Congress ensured its role through statutory consultation and notification procedures prior to submission of a draft implementing bill by the executive. This relationship continued under authorities granted by the Omnibus Trade and Competitiveness Act of 1988 and the Trade Act of 2002 (see chapter 6).

Section 2017 of the Bipartisan Trade Promotion Authority Act of 2002 establishes the Congressional Oversight Group, to be co-chaired by the Chairmen of the Ways & Means and Finance Committees and to be comprised of Committees of the House and Senate which would have jurisdiction over provisions of law affected by trade agreement negotiations during this Congress, plus five Members each from the Ways & Means and Finance Committees. The purpose of the COG is to provide the President and the United States Trade Representative with advice regarding the formulation of specific objectives, negotiating strategies and positions, the development of trade agreements, and compliance and enforcement of negotiated commitments under trade agreements. Each Member of the COG is to be accredited as an official adviser to the U.S.

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[1] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2101.

delegation to trade negotiations. The Act directs USTR to develop written guidelines to facilitate the timely and useful exchange of information between USTR and the COG, including: (1) regular, detailed briefings of the COG regarding negotiating objectives and priorities, and positions and the status of the applicable negotiations; (2) access by members of the COG and staff with proper security clearances to pertinent documents relating to the negotiations, including classified materials; (3) the closest practicable coordination between USTR and the COG at all critical periods during the negotiations, including at negotiation sites; (4) after the trade agreement is concluded, consultation regarding ongoing compliance and enforcement of negotiated commitments; and (5) the time frame for submitting the labor rights report required under section 2102(c)(8) of the Trade Act of 2002.

Section 161 of the Trade Act of 1974 provides for appointment at the beginning of each session of Congress of five official congressional advisers by the Speaker of the House from the Committee on Ways and Means and five official advisers by the President of the Senate from the Committee on Finance, and additional advisers where appropriate for specific policy matters or negotiations, to U.S. delegations to international negotiating sessions on trade agreements. The U.S. Trade Representative (USTR) must keep each adviser and designated committee staff members informed of U.S. objectives and the status of negotiations and of any changes which may be recommended in U.S. laws. Section 162 requires transmission of any trade agreements to the Congress.

Section 163 requires annual reports from the President and from the U.S. International Trade Commission (ITC) to keep the Congress informed regarding actions taken under the various trade laws and programs. Additional reports are required on specific aspects of various authorities (e.g., from the ITC on the domestic economic impact of the Caribbean Basin Initiative).

See also the following reporting requirements included in the Bipartisan Trade Promotion Authority Act of 2002, reprinted in Chap. 14:

Sec. 2102(c)(2)	Capacity building on International Labor Organization core labor standards
Sec. 2102(c)(3)	Capacity building on environment
Sec. 2102(c)	Environmental review
Sec. 2102(c)(5)	Impact of future trade agreements on U.S. employment
Sec. 2102(c)(11)	Effectiveness of penalty or remedy imposed by the United States under dispute settlement
Sec. 2103(c)(2)	Extension of Trade Promotion Authority
Sec. 2103(c)(3)	Advisory Committee for Trade Policy Negotiations Report in event of Administration extension request
Sec. 2104(d)(3)	Report on U.S. trade remedy laws
Sec. 2105(a)	Submission of agreement to Congress and supporting information
Sec. 2108	Implementation and enforcement plan

Sec. 2111	Report on economic impact of the five agreements already implemented under trade promotion authorities

See also the following requirements for consultation of Congress by the Administration as part of trade negotiations, as included in the Bipartisan Trade Promotion Authority Act of 2002, reprinted in Chap. 14:

Sec. 2102(d)	Consultations throughout negotiations, including before an agreement is initialed
Sec. 2104	Detailed consultation requirements, both in general and for agriculture and textile negotiations
Sec. 2105	Consultations concerning the submission of a trade agreement
Sec. 2106	Consultations for negotiations that began before the passage of trade promotion authority

Finally, Congress had maintained its institutional role with the executive by requiring the USTR to advise the Congress as well as the President on trade policy developments, through requests to the ITC for studies and analyses under section 332 of the Tariff Act of 1930 of various current trade issues, and through its power to authorize and appropriate funds for the functions of major trade agencies.

Executive Branch

INTERAGENCY TRADE PROCESS

Trade policy is a major element of U.S. economic and foreign policy. A decision to raise or lower tariffs, to impose import quotas, or to take other trade policy actions affects both domestic and foreign interests. In light of the far-reaching effects of trade policy decisions, a large number of U.S. government agencies have a role to play in the development of policy. Various interagency coordinating mechanisms have been used for bringing together conflicting views and interests and resolving them so that there can be a consistent and balanced national trade policy.

Until the late 1950s, the Department of State was the major initiator and coordinator of international trade policy. The Secretary of State chaired the interagency Trade Agreements Committee which originally included eight agencies: the Departments of State, Agriculture, Commerce, and Treasury, the Tariff Commission, the Agricultural Adjustment Administration, the National Recovery Administration, and the Office of the Special Advisor to the President on Foreign Trade.

Congress authorized the President under section 242 of the Trade Expansion Act of 1962[2] to establish a new interagency trade organization to carry out

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[2] 19 U.S.C. 1801.

specified trade policy functions. The Trade Agreements Committee was replaced by the Trade Policy Committee (TPC) in 1975.[3] The TPC performs the same functions authorized by section 242 of the 1962 Trade Act. Two subordinate coordinating groups, the Trade Policy Review Group (TPRG) and the Trade Policy Staff Committee (TPSC), were subsequently created by the authority of the Special Representative.[4]

Section 1621 of the Omnibus Trade and Competitiveness Act of 1988[5] amended section 242 of the 1962 Act to provide that this interagency organization will include the USTR as chair, the Secretaries of Commerce, State, Treasury, Agriculture, and Labor, and authorizes the USTR to invite other agencies to attend meetings as appropriate. The functions of the organization are: to assist and make recommendations to the President in carrying out his functions under the trade laws and to advise the USTR in carrying out its functions; to assist the President and advise the USTR on the development and implementation of U.S. international trade policy objectives; and to advise the President and the USTR on the relationship between U.S. international trade policy objectives and other major policy areas.

The TPSC is the working level interagency group, with members drawn from the office-director level of member agencies. Over 30 subcommittees and task forces support the work of the TPSC. In the absence of consensus at the TPSC level or in the case of particularly significant policy matters, issues are referred to the Assistant Secretary-level TPRG. Disagreements at the Assistant Secretary-level are referred to the TPC for Cabinet-level review. When presidential trade policy decisions are needed, the Chairman (USTR) submits the recommendations and advice of the Committee to the President.

In 1993, President Clinton established the National Economic Council as the final tier of the interagency trade mechanism. Chaired by the President, the NEC is composed of the Vice President, the Secretaries of State, Treasury, Agriculture, Commerce, Labor, Housing and Urban Development, Transportation, and Energy, the Administrator of the Environmental Protection Agency, the Director of the Office of Management and Budget, the USTR, the Chairman of the Council of Economic Advisors, the National Security Advisor, and the Assistants to the President for Economic Policy, Domestic Policy and Science and Technology Policy.

OFFICE OF THE U.S. TRADE REPRESENTATIVE

Section 241 of the Trade Expansion Act of 1962 established the Office of the Special Representative for Trade Negotiations.[6] Congress' stated purpose for

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[3] 40 Fed. Reg. 18419, April 28, 1975.
[4] Exec. Order 11846, March 27, 1975, 40 Fed. Reg. 14291.
[5] Public Law 100-418, section 1621, approved August 23, 1988.
[6] Public Law 87-794, approved October 11, 1962, 19 U.S.C. 1801.

creating the position was to provide better balance between competing domestic and international interests in the formulation of U.S. trade policy and negotiations. The Special Trade Representative (STR), whose rank was ambassador extraordinary and plenipotentiary, was to serve as the chief U.S. representative for negotiations conducted under authority of the Act and for other trade negotiations authorized by the President.

Various executive orders issued by President Kennedy in 1963 established an Office of the Special Trade Representative and provided for the appointment of two Deputy Special Representatives for Trade Negotiations. These deputies, one based in Washington, D.C., and the other in Geneva, Switzerland (headquarters of the GATT Secretariat), were assigned major responsibilities for the conduct of the 1963-67 multilateral trade negotiations under the GATT, commonly known as the Kennedy Round.[7]

Section 141 of the Trade Act of 1974[8] established the office as an agency within the executive office of the President and expanded the STR's duties to include responsibility for the trade agreements program under the Tariff Act of 1930, the Trade Expansion Act of 1962 and the Trade Act of 1974. Other duties and responsibilities also were assigned by the 1974 Trade Act and by Executive Order 11846 of March 27, 1975, as amended. Section 141 indicated Congressional intent to elevate the STR to Cabinet level by adding it to the list of positions at level I of the executive schedule of salaries, with the rank of ambassador. The STR was also made directly responsible to the President and the Congress.

Reorganization Plan No. 3 of 1979, implemented by Executive Order 12188 of January 4, 1980,[9] authorized certain changes in the trade responsibilities of the STR. Plan No. 3 redesignated the Office of the Special Representative for Trade Negotiations as the Office of the United States Trade Representative (USTR). The new name reflected the plan's intent for the Trade Representative to have overall responsibility, on a permanent basis, for developing and coordinating the implementation of U.S. trade policy.

The 1979 Reorganization Plan specified that the USTR is the President's principal adviser and chief spokesman on trade, including advice on the impact of international trade on other U.S. government policies. The USTR also became Vice Chairman of the Overseas Private Investment Corporation (OPIC), a nonvoting member of the Export-Import Bank, and a member of the National Advisory Committee on International Monetary and Financial Policies. In addition to these responsibilities, section 306(c) of the Trade and Tariff Act of 1984 [10] specified that the USTR, through the interagency organization, is responsible for developing and coordinating U.S. policies on trade in services.

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[7] Public Law 97-456, approved January 12, 1983, added a third deputy trade representative.
[8] Public Law 93-618, approved January 3, 1975, 19 U.S.C. 2171.
[9] 44 Fed. Reg. 69273.
[10] Public Law 98-573, approved October 30, 1984.

Section 1601 of the Omnibus Trade and Competitiveness Act of 1988[11] amended section 141 of the 1974 Act to the responsibilities of the USTR first enumerated under Reorganization Plan No. 3 and other statutes, as the following:

(1) to have primary responsibility for developing and coordinating the implementation of U.S. international trade policy;

(2) to serve as the principal adviser to the President on international trade policy and advise the President on the impact of other U.S. government policies on international trade;

(3) to have lead responsibility for the conduct of, and be chief U.S. representative for, international trade negotiations, including commodity and direct investment negotiations;

(4) to coordinate trade policy with other agencies;

(5) to act as the principal international trade spokesman of the President;

(6) to report to the President and the Congress on, and be responsible to the President and the Congress for, the administration of the trade agreements program, including advising on nontariff barriers, international commodity agreements, and other matters relating to the trade agreements program; and

(7) to be chairman of the Trade Policy Committee.

In addition, the Omnibus Trade and Competitiveness Act also included the sense of Congress that the USTR be the senior representative on any body the President establishes to advise him on overall economic policies in which international trade matters predominate and that the USTR be included in all economic summits and other international meetings at which international trade is a major topic. The USTR was made responsible for identifying and coordinating agency resources on unfair trade practices cases that may be actionable under U.S. antidumping and countervailing duty statutes, section 337, or section 301. The Act established an unfair trade practices committee to advise the USTR.

Under the Omnibus Trade and Competitiveness Act of 1988, the Congress further sought to elevate the importance of the USTR in trade matters by shifting to the USTR from the President responsibility for implementing actions under section 301 of that Act, subject to the specific direction, if any, of the President.

The Uruguay Round Agreements Act specifies that the USTR is to have lead responsibility for all negotiations on any matter considered under the auspices of the World Trade Organization.

The Lobbying Disclosure Act of 1995 amended section 141 to prohibit the appointment of a person who has directly represented, aided, or advised a foreign entity (as defined by section 207(f)(3) of title 18, U.S. Code) in any trade negotiations, or trade dispute, with the United States as United States Trade Representative or Deputy United States Trade Representative.[12] In 1997,

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[11] Public Law 100-418, section 1601, approved August 23, 1988.

[12] Public Law 104-65, approved December 19, 1995.

Congress passed legislation to waive this restriction so that Deputy USTR Charlene Barshefsky could become USTR.[13]

Section 406 of the Trade and Development Act of 2000 (Public Law 106-200) amended the Trade Act of 1974 to establish the position of Chief Agriculture Negotiator within USTR, with the rank of Ambassador, to conduct trade negotiations and enforce trade agreements relating to U.S. agriculture products and services. Section 117 of that Act also established the position of Assistant USTR for African Affairs to direct and coordinate interagency activities on U.S.-Africa trade policy and investment matters.

Section 141(g) of the Trade Act of 1974 provides for a 2-year authorization of appropriations for USTR.

U.S. DEPARTMENT OF COMMERCE

The Department of Commerce was established in 1903 as the Department of Commerce and Labor.[14] A 1913 act of Congress split the Department of Commerce and Labor into two separate departments.[15] The mandate of the Commerce Department originally was to promote the foreign and domestic commerce of the United States. In subsequent years, its authority was extended to other areas bearing on the economic and technological development of the country. The titles of the component units of the Department indicate the diversity of the agency's current programs and services: Bureau of the Census; Bureau of Economic Analysis; Economic Development Administration; Bureau of Industry and Security; International Trade Administration; Minority Business Development Agency; National Institute of Standards and Technology; National Oceanic and Atmospheric Administration; National Technical Information Service; National Telecommunications and Information Administration; and United States Patent and Trademark Office.

While most of these agencies have some responsibilities that affect U.S. trade, the U.S. Department of Commerce's major trade responsibilities are centered in the International Trade Administration and the Bureau of Industry and Security.

The International Trade Administration (ITA), which was established by the Secretary of Commerce on January 2, 1980,[16] administers many of the Department's international trade responsibilities and activities as prescribed by Reorganization Plan No. 3 of 1979. The plan provides that the Commerce Department has "general operational responsibility for major nonagricultural international trade functions," as well as for any other functions assigned by law. Those include export development, commercial representation abroad, the administration of the antidumping and countervailing duty laws, export controls,

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[13] Public Law 105-5.
[14] 32 Stat. 827, 5 U.S.C. 591.
[15] 37 Stat. 736, 15 U.S.C. 1501.
[16] 45 Fed. Reg. 11862, as amended by 46 Fed. Reg. 13537.

trade adjustment assistance to firms, research and analysis, and compliance with international trade agreements to which the United States is a party.

The Bureau of Industry and Security (BIS), formerly the Bureau of Export Administration controls exports of commodities and technology for reasons of national security, foreign policy, and short supply. BIS issues export licenses in accordance with the export control regulations. Export control regulations are developed in consultation with other agencies, and some export license applications require interagency review.

U.S. CUSTOMS AND BORDER PROTECTION

The second act of Congress, dated July 4, 1789, authorized the collection of duties on imported goods, wares and merchandise. The fifth act of Congress, passed in July 31, 1789, established customs districts and authorized customs officers to collect import duties. On March 3, 1927, the Bureau of Customs was established as a separate agency under the Treasury Department.[17] The Bureau was redesignated the U.S. Customs Service on August 1, 1973.[18]

On November 25, 2002 President Bush signed the Homeland Security Act of 2002 (Public Law 107-296), which established the new Department of Homeland Security as a Department level agency. Under Section 402, the Secretary of Homeland Security became vested with the functions, personnel, assets, and liabilities of the United States Customs Service of the Department of the Treasury. The entire agency was moved into the new Department's Border and Transportation Security directorate. Notwithstanding this section, authority related to Customs revenue functions that were vested in the Secretary of the Treasury by law before the effective date of the Act under those provisions of law set forth in paragraph (2) are not to be transferred to the Secretary by reason of the Act, and on and after the effective date of this Act, the Secretary of the Treasury may delegate any such authority to the Secretary at the discretion of the Secretary of the Treasury. The Secretary of the Treasury is to consult with the Secretary of Homeland Security regarding the exercise of any such authority not delegated to the Secretary.

The provisions of law that remain vested with the Secretary of the Treasury under the Act are the following: the Tariff Act of 1930; section 249 of the Revised Statutes of the United States (19 U.S.C. 3); section 2 of the Act of March 4, 1923 (19 U.S.C. 6); section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (19 U.S.C. 58c); section 251 of the Revised Statutes of the United States (19 U.S.C. 66); section 1 of the Act of June 26, 1930 (19 U.S.C. 68); the Foreign Trade Zones Act (19 U.S.C. 81a et seq.); section 1 of the Act of March 2, 1911 (19 U.S.C. 198); the Trade Act of 1974; the Trade Agreements Act of 1979; the North American Free Trade Area Implementation Act; the Uruguay Round

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[17] 44 Stat. 1381.

[18] Treasury Department Order 165-23, of April 4, 1973.

Agreements Act; the Caribbean Basin Economic Recovery Act; the Andean Trade Preference Act; the African Growth and Opportunity Act; and any other provision of law vesting customs revenue functions in the Secretary of the Treasury.

The Act defines the term "customs revenue function" as the following: (1) assessing and collecting customs duties (including antidumping and countervailing duties and duties imposed under safeguard provisions), excise taxes, fees, and penalties due on imported merchandise, including classifying and valuing merchandise for purposes of such assessment; (2) processing and denial of entry of persons, baggage, cargo, and mail, with respect to the assessment and collection of import duties; (3) detecting and apprehending persons engaged in fraudulent practices designed to circumvent the customs laws of the United States; (4) enforcing section 337 of the Tariff Act of 1930 and provisions relating to import quotas and the marking of imported merchandise, and providing Customs Recordations for copyrights, patents, and trademarks; (5) collecting accurate import data for compilation of international trade statistics; (6) enforcing reciprocal trade agreements; (7) functions performed by the following personnel, and associated support staff, of the United States Customs Service on the day before the effective date of this Act: Import Specialists, Entry Specialists, Drawback Specialists, National Import Specialist, Fines and Penalties Specialists, attorneys of the Office of Regulations and Rulings, Customs Auditors, International Trade Specialists, Financial Systems Specialists; (8) functions performed by the following offices, with respect to any function described in any of paragraphs (1) through (7), and associated support staff, of the United States Customs Service on the day before the effective date of this Act: the Office of Information and Technology, the Office of Laboratory Services, the Office of the Chief Counsel, the Office of Congressional Affairs, the Office of International Affairs, and the Office of Training and Development.

Customs collects import duties and enforces more than 400 laws or regulations relating to international trade. Among the many responsibilities falling to Customs are assessing and collecting duties, excise taxes, penalties and other fees due on imported goods; interdicting and seizing illegally entered merchandise; processing persons, carriers, cargo and mail into and out of the United States; helping enforce U.S. laws against the transfer of certain technologies to certain countries under export control authorities, laws on copyright, patent and trademark rights; and administering quotas and other import restrictions. Customs maintains close ties with private business associations, international organizations, and foreign customs services.

The Commissioner of Customs is appointed by the President and subject to confirmation by the Senate.

U.S. International Trade Commission

The U.S. International Trade Commission (ITC) is an independent and quasi-judicial agency that conducts studies, reports, and investigations, and makes recommendations to the President and the Congress on a wide range of international trade issues. The agency was established on September 8, 1916[19] as the U.S. Tariff Commission. In 1974 the name was changed to the U.S. International Trade Commission by section 171 of the Trade Act of 1974.[20]

Commissioners are appointed by the President for 9-year terms, unless they are appointed to fill an unexpired term. Any Commissioner who has served for more than 5 years may not be reappointed. Of the six commissioners, not more than three may be of the same political party. The Chairman and Vice Chairman are designated by the President for 2-year terms, and successive Chairmen may not be of the same political party. After June 17, 1996, a Commissioner with less than 1 year of continuous service as a Commissioner may not be designated as Chairman.

The Commission has numerous responsibilities for advice, investigations, studies, and data collection and analysis which may be grouped into the following general areas: advice on trade negotiations; Generalized System of Preferences; import relief for domestic industries; East-West trade; investigations of injury caused by subsidized or dumped goods; import interference with agricultural programs; unfair practices in import trade; development of uniform statistical data; matters related to the U.S. tariff schedules; international trade studies; trade and tariff summaries.

Statutory authority for the Commission's responsibilities is provided primarily by the Tariff Act of 1930, the Agricultural Adjustment Act, the Trade Expansion Act of 1962, the Trade Act of 1974, the Trade Agreements Act of 1979, the Trade and Tariff Act of 1984, the Omnibus Trade and Competitiveness Act of 1988, and the Uruguay Round Agreements Act.

The Tariff Act of 1930 gives the Commission broad authority to conduct studies and investigations relating to the impact of international trade on U.S. industries. Various sections under title VII of the Tariff Act authorize the Commission to determine whether U.S. industries are materially injured by imports which benefit from subsidies or are priced below fair value.[21] If the Secretary of Commerce decides to suspend an antidumping or countervailing duty investigation upon reaching an agreement to eliminate the injury caused by the subsidized or dumped imports, the Commission is authorized to study whether or not the injury in fact is being eliminated. Section 337 of the Tariff Act authorizes the ITC to investigate whether unfair methods of competition or unfair acts are being committed in the

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[19] 39 Stat. 795.
[20] 19 U.S.C. 2231.
[21] Sections 704, 734, and 751; 19 U.S.C. 1671c, 1673c, and 1675c.

importation of goods into the United States.[22] The Commission is authorized to order actions to remedy any such violations, subject to presidential disapproval.

Upon the request of the President, the House Committee on Ways and Means, the Senate Committee on Finance, or on its own motion, the ITC conducts studies and investigations under section 332 of the Tariff Act of 1930 on a wide range of trade-related issues.[23] Public reports generally are issued following such studies and investigations. The ITC also publishes summaries outlining the types of products entering the United States, their importance in U.S. consumption, production, and trade, and other relevant information. The ITC also is required to establish and maintain statistics on U.S. trade and to review the international commodity code for classifying products and reporting trade statistics among countries.[24]

The Trade Expansion Act of 1962 and the Trade Act of 1974 expanded the duties of the ITC. Both laws require the Commission to review developments within an industry receiving import protection and to advise the President on the probable impact of reducing or eliminating the protection.[25]

The Trade Act of 1974 gives the Commission a presidential advisory role on the probable domestic economic effects of trade concessions proposed during trade negotiations.[26] The ITC performs a similar advisory role in relation to duty-free treatment under the Generalized System of Preferences.[27] Under section 201 of the 1974 Trade Act,[28] the Commission conducts investigations to determine whether increased imports are causing or threatening serious injury to the competing domestic industry and reports its findings and recommendations for relief to the President.

Sections 406 and 410[29] of the 1974 Trade Act provide for ITC monitoring and investigation of various aspects of trade with nonmarket economics.

Section 221 of the Trade and Tariff Act of 1984, amended by section 1614 of the Omnibus Trade and Competitiveness Act of 1988, established a separate Trade Remedy Assistance Office within the ITC to provide information to the public on remedies and benefits available under U.S. trade laws and on the procedures and filing dates for relief petitions.

Private or Public Sector Advisory Committees

The first formal mechanism providing for ongoing advice from the private sector on international trade matters was authorized by section 135 of the Trade

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[22] 19 U.S.C. 1337.
[23] 19 U.S.C. 1332.
[24] 19 U.S.C. 1484(e).
[25] 19 U.S.C. 1981, 2253.
[26] 19 U.S.C. 2151.
[27] 19 U.S.C. 2151, 2163.
[28] 19 U.S.C. 2251.
[29] 19 U.S.C. 2240, 2436.

Act of 1974.[30] In view of the positive contribution of the advisory committees to the Tokyo Round of multilateral trade negotiations and to passage of the implementing legislation—the Trade Agreements Act of 1979—Congress provided for continuation of the advisory committee structure in section 1631 of the Omnibus Trade and Competitiveness Act of 1988. Congress also expanded the committees' responsibilities by authorizing them to provide advice on the priorities and direction of U.S. trade policy, in addition to their previous responsibilities.

The U.S. Trade Representative manages the advisory committees in cooperation with the Departments of Agriculture, Commerce, Labor, and other departments. The committee structure is three-tiered, with the most senior level represented by the Advisory Committee for Trade Policy and Negotiations (ACTPN). The ACTPN is a 45-member body composed of presidential-appointed representatives of non-Federal governments, labor, industry, agriculture, small business, service industries, retailers, nongovernmental environmental and conservation organizations, consumer interests, and the general public. The group provides overall guidance on trade policy matters, including trade agreements and negotiations, and is chaired by a chairman elected by the committee. The group convenes at the call of the U.S. Trade Representative.

The second tier is made up of policy advisory committees representing overall sectors of the economy (e.g., industry, agriculture, labor, services) whose role is to advise the government of the impact of various trade measures on their respective sectors.

The third tier is composed of sector advisory committees consisting of experts from various fields. Their role is to provide specific, technical information and advice on trade issues involving their particular sector. Members of the second and third tier are appointed by the U.S. Trade Representative and the Secretary of the relevant department or agency.

Although Section 14 of the Federal Advisory Committee Act generally limits the term of this and other committees to two years, Congress extended the term for trade advisory committees to four years in Section 2004 of the Miscellaneous Trade and Technical Corrections Act of 2004 (Public Law 108-429).

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[30] 19 U.S.C. 2155.

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