CHAPTER 20

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LIST OF ACRONYMS & ABBREVIATIONS

AD	ANTIDUMPING
DOC	DEPARTMENT OF COMMERCE
DSB	DISPUTE SETTLEMENT BOARD
DSU	DISPUTE SETTLEMENT UNDERSTANDING
GATT	GENERAL AGREEMENT ON TARIFFS AND TRADE
IA	IMPORT ADMINISTRATION
ITC	INTERNATIONAL TRADE COMMISSION
NAFTA	NORTH AMERICAN FREE TRADE AGREEMENT
SAA	STATEMENT OF ADMINISTRATIVE ACTION REGARDING THE URUGUAY ROUND AGREEMENTS ACT
THE ACT	THE TARIFF ACT OF 1930, AS AMENDED
U.S.- CANADA FTA	UNITED STATES - CANADA FREE TRADE AGREEMENT
WTO	WORLD TRADE ORGANIZATION
WTO AGREEMENT	THE AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION

Chapter 20

INTERNATIONAL AGREEMENTS

References:

The Tariff Act of 1930, as amended

Section 516A - binational panel reviews under U.S. - Canada Agreement and the North American Free Trade Agreement (NAFTA)

Sections 751(c)(6)(C) and (D) - transition orders and the World Trade Organization (WTO)

Section 771(7)(F)(iii) - effect of dumping in third country markets

Sections 771(21)(22)(29)(30) and (31) - definitions of U.S.- Canada Agreement, NAFTA, WTO Agreement, WTO member, and General Agreement on Tariffs and Trade (GATT)

Section 777(f) - disclosure of proprietary information under U.S.- Canada Agreement and NAFTA

Section 783 - the WTO and antidumping (AD) petitions by third countries

Department of Commerce (DOC) Regulations

None

SAA

Section A - summary of provisions of Article VI of the GATT 1994

Sections B. and C. - various references to agreements throughout the text

Agreement Establishing the World Trade Organization

Annex 1A: Multilateral Agreements on Trade in Goods

Antidumping Agreement

All Articles and Annexes

I. OVERVIEW OF THE WTO AGREEMENT AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE

When we impose AD duties, we are taking a measure against an internationally recognized unfair trade practice on the basis of internationally agreed upon principles, rules and procedures. Since the entry into force of the General Agreement on Tariffs and Trade (GATT) in 1948, these rules and procedures have been embodied in Article VI of the GATT. The provisions of Article VI continue to form the basis of the international

rules on antidumping, but Article VI is now modified and interpreted by the WTO Agreement on Implementation of Article VI of GATT 1994, known as the AD Agreement. The AD Agreement, as well as the current version of the GATT (known as

“GATT 1994") are two of the multilateral agreements on trade in goods which are incorporated into the Agreement Establishing the World Trade Organization, known as the WTO Agreement. The relationship between these agreements is discussed in further detail below.

As is the case throughout the WTO Agreement, Article VI and the AD Agreement each involve a balance of rights and obligations for every contracting party or signatory. Neither the AD Agreement nor Article VI prohibit dumping. However, Article VI of GATT 1994 recognizes that injurious dumping is to be "condemned," and may be countered, if dumped imports cause or threaten material injury or materially retard the establishment of an industry within the importing country. Article VI as interpreted by the AD Agreement therefore allows for the imposition of AD duties in such cases where injury as described above is determined.

Article VI of the GATT and the AD Agreement address the principle of trade on the basis of fair competition, laying down conditions under which AD duties may be imposed to reestablish a reasonable competitive balance in the face of dumped or subsidized imports which injure a domestic industry. The rules are designed to allow WTO members to offset the effects of unfair trade in their domestic markets while guarding against the use of AD measures as substitutes for tariff protection.

A. GATT and WTO as Institutions

The WTO is an inter-governmental organization with headquarters in Geneva, Switzerland which administers the WTO Agreement. The WTO is the successor organization to the GATT, which was an ad hoc organization formed to administer the General Agreement on Tariffs and Trade. Established in 1995, the WTO now has over 120 members with a number of countries in the accession process.

The WTO Agreement establishes five functions for the WTO:

1. To facilitate the implementation, administration and operation of the WTO Agreement.

2. To provide a forum for multilateral trade negotiations.

3. To administer the WTO Dispute Settlement Understanding which governs disputes arising out of the WTO Agreement.

To administer the Trade Policy Review Mechanism which reviews and publishes summaries of the trade policies of member states.

To cooperate with the International Monetary Fund and other agencies to achieve greater coherence in global economic policy making.

B. The GATT and WTO Agreements

The preamble to the WTO Agreement lists the goals of the parties to the agreement. These goals included the continuation and improvement of the GATT Agreement:

Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.

The WTO Agreement is the successor to the GATT Agreement, which is now known as "GATT 1947." U.S. acceptance of the WTO Agreement was approved by Congress in the Uruguay Round Agreements Act. Unlike the GATT system which it replaced, the WTO Agreement is a set of multilateral agreements which are a "single undertaking." In other words, in order to receive the benefits under one of the agreements, a country must agree to be bound by the rights and obligations of all of the agreements. Countries are not obligated to have or enforce antidumping laws, but must follow the Antidumping Agreement rules if they do. The individual agreements are included in annexes of the WTO Agreement. Thirteen multilateral agreements on trade in goods are included in

Annex 1A, including the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Agriculture. The "GATT 1994" is also incorporated by reference into Annex 1A. "GATT 1994" consists of the text of "GATT 1947" as "rectified, amended or modified by the terms of legal instruments which entered into force before the date of entry into force of the WTO Agreement." See GATT 1994 in Annex 1A of the WTO Agreement.

In addition to the multilateral agreements which relate to trade in goods included in Annex 1A, the WTO administers the General Agreement on Trade in Services (GATS) contained in Annex 1B and the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) in Annex 1C of the WTO Agreement. There are also four "plurilateral" agreements (the Agreements on government procurement, civil aircraft, dairy, and bovine meat) which countries can choose whether or not to sign.

C. The relationship between GATT 1994 and the WTO Antidumping Agreement

The antidumping provisions of Article VI of the GATT 1994 are not replaced by the WTO AD Agreement. Rather, Article VI is implemented and interpreted by the WTO AD Agreement. Article 18.1 of the AD Agreement provides that "no specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." The relationship between the GATT 1994 and the AD Agreement or other agreements included in Annex 1A of the WTO Agreement was clarified in the "General interpretative note to Annex 1A." Under these rules, in the event of a conflict between a provision of the GATT 1994 and the AD Agreement, the terms of the AD Agreement "shall prevail to the extent of the conflict."

D. The WTO Dispute Settlement Understanding

One of the most significant innovations of the WTO Agreement over the GATT 1947 is the creation of a binding dispute settlement mechanism. Under the prior system, there was no binding method of enforcing the decisions of the GATT panels which heard disputes between trading partners. Article 2 of the WTO Dispute Settlement Understanding (DSU) establishes a Dispute Settlement Body (DSB) which is comprised of representatives from all the member states and has the "authority to establish panels,

adopt panel and Appellate Body Reports, maintain surveillance and implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements."
The first stage of the dispute settlement process calls for consultations between the governments involved. If the consultation process does not lead to a mutually acceptable solution, the complaining party may request that a panel be formed to resolve the dispute. Generally a party must wait 60 days after the request for consultations is made before requesting the formation of a panel. Generally, the panel will complete its work within six months. The panel decision can then be appealed to the Appellate Body. The Appellate Body will generally reach a decision in 60 days.

If a party does not comply with the recommendations of the DSB, (i.e., by modifying its practices or amending its laws) the country that filed the complaint with the DSB may retaliate by suspending trade concessions equivalent to the trade benefit it has lost. Since the inception of the DSU process, the United States has been a complaining party, a defending party, and an interested third-party participant in an number of panel proceedings.

The WTO dispute settlement procedure applies, with certain modifications, to the AD Agreement. Specifically, the AD Agreement contains a special standard of review to be applied by WTO panels in resolving AD and CVD disputes.

The standard of review of Article 17.6 of the Agreement requires panels to uphold authorities determinations if:

(i) establishment of the facts was proper and if the evaluation of those facts was unbiased and objective, and

(ii) If the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, and the authorities interpretation rests upon one of those permissible interpretations.

In addition, panels are instructed to examine a case based on the facts made available to the authorities (DOC and ITC) in the proceeding at issue. Thus a panel proceeding is not the place to introduce new facts.

Dispute settlement procedures are designed to resolve procedural disputes among governments concerning the operation of domestic laws and their consistency with the Agreement. In other words, a WTO panel can only determine whether a country's laws and the manner in which those laws are implemented are consistent with the Agreement. The WTO dispute settlement process does not decide whether dumping or injury is occurring.

E. The relationship between the WTO Agreement and U.S. Law.

At the conclusion of various rounds of GATT trade agreement negotiations, the U.S. has agreed to make changes in its laws as needed to conform with the agreements that were concluded. These changes were implemented through legislation, such as the URAA, and through subsequent amendments to administrative regulations. The URAA establishes the relationship between the WTO Agreement and U.S. law. Section 102(a)(1) of the URAA provides: "No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the united States shall have effect." In other words, U.S. laws prevail even if they are inconsistent with a provision of the Agreement. In DOC proceedings, parties may make legal arguments premised upon alleged inconsistencies between U.S. law and the WTO Agreement. While arguments regarding the WTO Agreement may provide insight into the intent of U.S. law, such arguments must be considered in light of the clear language of Section 102 of the URAA.

II. THE ANTIDUMPING AGREEMENT

The AD Agreement was developed during the Uruguay Round of multilateral trade negotiations (1986-1993) under the GATT. Together with the rest of the WTO Agreement, it entered into force on January 1, 1995, replacing a similar agreement negotiated in 1979 as part of the Tokyo Round of multilateral trade negotiations.

The AD Agreement picks up where Article VI leaves off, specifying the basis for the imposition, collection and duration of AD duties and allowing for negotiated agreements, called price undertakings, between relevant parties. (These undertakings are known under U.S. law as suspension agreements.) The AD Agreement defines such terms as dumping and injury, and outlines the procedures to be followed during an AD investigation. Most

notably, the Agreement requires that both dumping and injury investigations be conducted simultaneously and, except in special circumstances, be completed within one year. It also details petition requirements, describes rules of evidence, provides for public notice of the determinations of the investigating parties and requires that evidence of a nonconfidential nature be made public, and specifies the conditions under which investigations may be suspended or terminated.

The Agreement permits "provisional measures" (i.e., suspension of liquidation and provisional imposition of duties) to be imposed to offset the injurious effect of dumping during the investigation period. These measures may be taken no sooner than 60 days after initiation of the case and only after affirmative preliminary determinations of dumping and injury and, in most cases, may be imposed for no longer than four months. The Agreement also permits under certain circumstances the imposition of provisional duties on imports entered not more than 90 days prior to application of provisional measures. The U.S. analogue for this measure is the critical circumstances provision under our AD law.

Following final determinations of dumping and injury, the Agreement permits the retroactive collection of AD duties from the date provisional measures became effective but only for certain conditions of injury. Here the AD Agreement distinguishes between actual injury, threat of injury and material retardation of the establishment of an industry, and caps assessment at the rate found in the preliminary determination for entries made before the final determination.

E. Changed Circumstances Reviews and Sunset Reviews

The AD Agreement also stipulates that AD duties shall remain in force only as long as and to the extent necessary to counteract dumping that is causing injury. The investigating authorities shall review the need for continuing duties, where warranted, upon their initiative or if an interested party submits positive evidence substantiating the need for review. In U.S. law, these reviews are known as “changed circumstances reviews.” Finally, orders are also reviewed, both by DOC and the International Trade Commission (ITC), no later than five years after the order is put in place to determine whether revocation of the order, or termination of the suspended investigation, would be likely to lead to continuation or recurrence of dumping and injury. These so-called “sunset” reviews are a new provision of the law required by the AD Agreement. Old law orders,

those orders in effect before January 1, 1995, are deemed for purposes of these reviews to enter into effect as of that date. The sunset reviews for these orders are scheduled to begin in July of 1998.

III. IMPORT ADMINISTRATION'S ROLE IN TRADE NEGOTIATIONS

The Assistant Secretary for Import Administration (IA) and representatives from the Office of Policy and the Office of the Chief Counsel for IA comprise part of the U.S. delegation to meetings of the Committee on AD Practices. The Committee's job is to ensure the transparency and consistency of signatory countries' practices by requiring full notification of AD actions and regularly reviewing each signatory's AD laws and regulations.

IA is therefore integrally involved in the provision of information and explanations in fulfillment of these notification and surveillance requirements.

IV. THE NORTH AMERICAN FREE TRADE AGREEMENT

NAFTA largely concerns judicial type of review of administrative determinations. Under Chapter 19 of the NAFTA, an interested party may request that a binational panel review a NAFTA country's final determination in an AD or CVD administrative proceeding that involves imports from another NAFTA country if an interested party requests it. In the United States this can replace review by the Court of International Trade.

The binational panels consist of five individuals drawn from a roster, established by the three countries and comprised of judges or former judges, "to the extent practicable," and trade experts. Each panel must include at least one lawyer because the chair must be a lawyer. Each government involved in a dispute can select two panelists and together select the fifth panelist. The agreement also provides for selection of the fifth panelist by lot if the two governments can not reach a consensus on the fifth panelist.

The panels are supposed to determine whether a determination by an administering authority was in accordance with the AD or CVD law of the importing country. In other words, a panel reviewing a U.S. action against imports from Mexico or Canada will determine whether the actions taken by the DOC or the ITC, as appropriate, were

consistent with U.S. law. The panel review process is designed to take no more than 315 days.

The NAFTA does not provide private parties with the right to appeal the decision of a panel. However, a government, which is a party to a dispute, can request that a panel decision be reviewed by an extraordinary challenge committee. The agreement provides three grounds upon which the request for an extraordinary challenge can be based. The three grounds are (1) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct, (2) the panel seriously departed from the fundamental rule of procedure, or (3) the panel manifestly exceeded its powers, authority or jurisdiction set out in Chapter 19 of the NAFTA, for example by failing to apply the appropriate standard of review. Finally, the action which serves as the basis of the request must materially affect the panel's decision and threaten the integrity of the bi-national review process.

V. THE UNITED STATES-CANADA FREE TRADE AGREEMENT

The United States-Canada Free Trade Agreement (U.S.-Canada FTA) was entered into in 1988, and created what at the time was the most comprehensive bilateral agreement ever negotiated. The U.S.-Canada FTA created the world's largest internal market for goods and services.

The NAFTA incorporates or otherwise carries forward most provisions of the U.S.-Canada FTA, or supersedes the bilateral agreement in certain areas such as rules of origin to receive NAFTA treatment benefits. 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.