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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

2010 EDITION



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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 ELEVENTH CONGRESS

SANDER M. LEVIN, MICHIGAN, *Chairman*

JANICE MAYS, *Chief of Staff*

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LETTER OF TRANSMITTAL

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON WAYS AND MEANS,
Washington, DC, December 2010

Hon. Sander M. Levin, 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 regularly. This addition incorporates all statutory provisions enacted through the 111th 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 considerable work by Annie Minguez. Significant assistance was provided by the Office of the Legislative Counsel, the Congressional Research Service and various government agencies, to which the staff extends its most sincere thanks.

Sincerely,
VIJI RANGASWAMI
Staff Director and Counsel, Subcommittee on Trade

P R E F A C E

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 which 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.

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 111th 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.

CONTENTS

Letter of transmittal	III
Preface	IV

PART I - OVERVIEW

Chapter 1: Tariff and customs laws	1
Harmonized Tariff Schedule of the United States	1
Generalized System of Preferences (GSP)	16
Title V of the Trade Act of 1974, as amended	16
Caribbean Basin Initiative (CBI)	25
Additional Temporary Benefits under the U.S. - Caribbean Basin Trade Partnership Act	35
Andean Trade Preference Act, as amended	41
Andean Trade Promotion and Drug Eradication Act	44
African Growth and Opportunity Act	49
Customs valuation	60
The GATT/WTO Customs Valuation Agreement	61
Current law	63
Limitations on the applicability of transaction value	65
Legislation involving Customs Valuation	70
Customs user fees	71
Other customs laws	81
Country-of-origin marking	81
Drawback	84
The Softwood Lumber Act of 2008	88
The Customs Modernization Act	88
Protests and administrative review	89
Copyrights and trademark enforcement	91
Penalties	93
Miscellaneous Customs Authority	95
Commercial operations	95
Foreign trade zones	98
Chapter 2: Trade remedy laws	102
The antidumping and countervailing duty laws	102
CVD law: subsidy determination	102
AD law: less-than-fair-value (LTFV) determination	108
AD and CVD laws: material injury determination	112
Issues common to AD and CVD investigations	114
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	125
International consultations and dispute settlement	125
Enforcement authority and procedures (section 301)	126
Identification of intellectual property rights priority countries (Special 301)	132
Identification of trade liberalization priorities (Super 301)	133
Foreign direct investment	134
Foreign anticompetitive practices	135
Unfair practices in import trade (Section 337 of the Tariff Act of 1930, as amended)	135
Import relief (safeguard) authorities	138
Sections 201-204 of the Trade Act of 1974, as amended	138

Section 406 of the Trade Act of 1974: market disruption by imports from Communist countries.....	144
Sections 421-423 of the Trade Act of 1974, as amended: market disruption by imports from the People's Republic of China.....	146
Section 1102 of the Trade Agreements Act of 1979: public auction of import licenses	148
Trade adjustment assistance.....	149
Chapters 2, 3, and 5 of title II of the Trade Act of 1974, as amended.....	149
Trade adjustment assistance program for Workers.....	153
Reemployment trade adjustment assistance	166
Trade adjustment assistance program for Firms	167
Trade adjustment assistance for Communities	171
Trade adjustment assistance for Farmers	178
Chapter 3: Other laws regulating imports	181
Authorities to restrict imports of agricultural and textile products	181
Section 204 of the Agricultural Act of 1956, as amended	181
Multifiber Arrangement (MFA)	181
Uruguay Round Agreement on Textiles and Clothing.....	184
China Textile Safeguard Provision	186
Textiles and apparel trade under Free Trade Agreements.....	186
Section 22 of the Agricultural Adjustment Act of 1933	190
Agriculture trade under the Uruguay Round Agreements Act	191
Agriculture trade under the North American Free Trade Agreement Implementation Act	193
Agriculture trade under other Free Trade Agreements	195
Meat Import Act of 1979	200
Reciprocal meat inspection requirement	201
Sugar tariff-rate quotas under Harmonized Tariff Schedule authorities	201
Import prohibitions on certain agricultural commodities under marketing orders (Section 8e of the Agricultural Adjustments Act, as amended)	203
Requirements applicable to cigarette imports.....	205
Authorities to restrict imports under certain laws	205
Marine Mammal Protection Act of 1972, as amended	205
International Dolphin Conservation Program Act.....	206
Endangered Species Act of 1973, as amended	207
Tariff Act of 1930, as amended: wild mammals or birds	207
Tariff Act of 1930: Dog and Cat Fur Products	208
African Elephant Conservation Act.....	208
Rhinoceros and Tiger Conservation Act of 1994, as amended	209
Section 8 of the Fishermen's Protective Act of 1967, as amended ("Pelly Amendment")	209
High Seas Driftnet Fisheries Enforcement Act.....	209
Wild Bird Conservation Act of 1992.....	210
Atlantic Tunas Convention Act of 1995.....	210
Section 609 of Public Law 101-162: Conservation of Sea Turtles	211
Prohibition on imports of illegal timber and products made from illegal timber	213
National security import restrictions.....	214
Section 232 of the Trade Expansion Act of 1962.....	214
Section 233 of the Trade Expansion Act of 1962.....	215
Balance of payments authority (section 122 of the Trade Act of 1974).....	216
Product standards.....	218
Agreement on Technical Barriers to Trade.....	219
Uruguay Round Agreement on Technical Barriers to Trade.....	221
The North American Free Trade Agreement.....	222
Title IV of the Trade Agreements Act of 1979, as amended.....	223
Government procurement.....	224
Buy American Act.....	224

1979 GATT Agreement on Government Procurement	225
1994 WTO Agreement on Government Procurement	227
Government Procurement under Free Trade Agreements.....	228
Title III of the Trade Agreements Act of 1979, as amended	230
Title VII of the Omnibus Trade and Competitiveness Act of 1988, as amended.....	231
Chapter 4: Laws regulating export activities	235
Export controls.....	235
Export Administration Act of 1979.....	237
Export Administration Amendments Act of 1985	238
Omnibus Trade and Competitiveness Act of 1988.....	239
Expiration of the Export Administration Act of 1979.....	240
The National Defense Authorization Act for FY 1998	241
Strom Thurmond National Defense Authorization of 1999.....	242
Arms Export Control Act of 1976.....	243
Section 3017 of the Solid Waste Disposal Act	246
Mercury Export Ban of 2008	246
Export promotion of goods and services.....	246
Export Enhancement Act of 1988	246
Agricultural export sales and promotion	248
Public Law 480.....	248
Export credit guarantee and export promotion programs.....	248
Chapter 5: Authorities relating to political or economic security	251
A. Economic authorities in national emergencies.....	251
International Emergency Economic Powers Act.....	251
Trading With the Enemy Act	263
B. Embargo on transactions with Cuba	266
The Cuban Liberty and Democratic Solidarity Act	268
C. Economic sanctions against Libya, Iran, and Iraq (Including Broader Provisions Against International Terrorism).....	270
The International Security and Development Cooperation Act of 1985	270
Iraq Sanctions Act of 1990.....	270
Iran-Iraq Arms Non-Proliferation Act of 1992.....	271
The Iran and Libya Sanctions Act of 1996	272
Emergency Protection for Iraqi Cultural Antiquities Act of 2004	276
D. Sanctions against countries related to counternarcotics efforts.....	276
Narcotics Control Trade Act	276
E. Sanctions related to missile proliferation and the use of chemical or biological weapons	279
Section 73 of the Arms Export Control Act.....	279
Chemical and Biological Weapons and Warfare Elimination Act of 1991	280
Section 81 of the Arms Export Control Act.....	281
F. Sanctions Exemptions for Food and Medicine	282
Trade Sanctions Reform and Export Enhancement Act of 2000	282
G. Sanctions against Sudan	283
The Sudan Peace Act.....	283
The Comprehensive Peace in Sudan Act of 2004	283
Darfur Peace and Accountability Act of 2006	284
Sudan Accountability and Divestment Act of 2007	284
H. Sanctions to address the illicit diamond trade	285
Clean Diamond Trade Act of 2003.....	285
I. Sanctions against Burma.....	286
Burmese Freedom and Democracy Act of 2003	286
Tom Lantos Block Burmese Junta's Anti-Democratic efforts (JADE) Act of 2008	287
J. Sanctions against Syria	288
Syrian Accountability and Lebanese Sovereignty Restoration Act of 2003	288
K. Sanctions against Belarus.....	288

The Belarus Democracy Act of 2004	288
L. The Hong Kong Policy Act and Taiwan's Accession to the WTO	289
M. Section 27 of the Merchant Marine Act, 1920 (Jones Act).....	290
N. Section 721 of the Defense Production Act of 1950, as amended ("Exon/Florio").....	290
Chapter 6: Reciprocal trade agreements.....	293
Reciprocal trade agreement objectives and authorities.....	293
Trade negotiating objectives	294
General tariff authority	295
Trade agreement authority	297
Other trade agreement authorities	297
Trade Promotion Authority implementing procedures	299
Trade Promotion Authority Procedures.....	299
Trade Promotion Authority consultations and assessment.....	302
Uruguay Round Agreements	304
Uruguay Round Agreements Act.....	306
Post Uruguay Round Negotiations and Agreements.....	307
U.S. WTO Dispute Settlement Fund.....	310
Specific foreign trade barriers	310
Sections 181 and 182 of the Trade Act of 1974, as amended	310
Telecommunications Trade Act of 1988	311
Most-Favored-Nation (Nondiscriminatory) or Normal Trade Relations treatment	312
North American trade relations	320
North American Free Trade Agreement.....	321
North American Free Trade Agreement Implementation Act of 1993	321
NAFTA Rules of Origin	323
United States-Israel trade relations	324
Title IV of the Trade and Tariff Act of 1984.....	325
United States-Israel Free Trade Area Agreement	326
United States-Israel Free Trade Area Implementation Act of 1985.....	327
West Bank and Gaza Strip Free Trade Benefits	328
United States-Canada trade relations	328
United States-Canada Free-Trade Agreement	329
United States-Canada Free-Trade Agreement Implementation Act of 1988	330
United States-Jordan trade relations	331
United States-Jordan Free Trade Agreement.....	332
United States-Jordan Free Trade Area Implementation Act.....	334
United States-Chile trade relations.....	335
United States-Chile Free Trade Agreement.....	335
United States-Chile Free Trade Agreement Implementation Act.....	337
United States-Singapore trade relations	340
United States-Singapore Free Trade Agreement	340
United States-Singapore Free Trade Agreement Implementation Act	342
United States-Australia trade relations	345
United States-Australia Free Trade Agreement.....	345
United States-Australia Free Trade Agreement Implementation Act	348
United States-Morocco trade relations	351
United States-Morocco Free Trade Agreement	351
United States-Morocco Free Trade Agreement Implementation Act	354
United States-Central America-Dominican Republic trade relations	356
United States- Central America-Dominican Republic Free Trade Agreement	356
United States- Central America-Dominican Republic Free Trade Agreement Implementation Act.....	360
United States-Bahrain trade relations.....	363
United States- Bahrain Free Trade Agreement.....	363
United States- Bahrain Free Trade Agreement Implementation Act.....	367

United States-Oman trade relations	369
United States- Oman Free Trade Agreement	369
United States- Oman Free Trade Agreement Implementation Act.....	373
United States-Peru trade relations.....	374
United States- Peru Promotion Agreement	374
United States- Peru Promotion Agreement Implementation Act.....	379
Chapter 7: Organization of trade policy functions.....	383
Congress	383
Executive branch.....	386
Interagency trade process.....	386
Office of the U.S. Trade Representative	387
U.S. Department of Commerce.....	390
U.S. Customs and Border Protection	391
U.S. International Trade Commission	394
Private or public sector advisory committees.....	396

PART II - COMPILATION OF U.S. TRADE STATUTES

Chapter 8: Tariff and customs laws	398
A. Implementation of the Harmonized Tariff Schedule of the United States.....	398
Sections 1201-1217 of the Omnibus Trade and Competitiveness Act of 1988	398
Section 484(e) of the Tariff Act of 1930, as amended.....	407
B. Excerpts from the Harmonized Tariff Schedule of the United States (HTS) relating to special duty treatment	408
1. American goods returned (HTS item 9801.00.10)	408
2. American goods repaired or altered abroad (HTS items 9802.00.40, .50)	410
American metal articles processed abroad (HTS item 9802.00.60).....	410
American components assembled abroad (HTS item 9802.00.80).....	410
3. Personal (Tourist) exemptions (HTS Items 9804.00.65, .70, .72).....	416
4. Noncommercial importations of limited value	419
5. Classification of personal effect of participants in international athletic events	421
6. Products of U.S. insular possessions (General Note 3(a)(iv)).....	423
7. Rates of duty on certain motor vehicles (General Note 3(d)	425
C. Generalized System of Preferences.....	426
Title V of the Trade Act of 1974, as amended	426
General Note 4 of the Harmonized Tariff Schedule	439
D. Caribbean Basin Initiative (CBI)	445
Caribbean Basin Economic Recovery Act, as amended (including certain provisions from the U.S. provisions from the U.S. - Caribbean Trade Partnership Act)	445
Caribbean Basin Economic Recovery Expansion Act of 1990 (CBI II)	474
Section 423 of the Tax Reform Act of 1986, as amended (treatment of imports of ethyl alcohol).....	476
General Note 7(a) of the Harmonized Tariff Schedule	480
General Note 17(a) of the Harmonized Tariff Schedule	481
Haiti Initiatives	481
E. Andean Initiative (Andean Trade Preference Act, as amended)	518
F. African Growth and Opportunity Act.....	537
Trade Act of 1974 Generalized System of Preferences.....	538
African Growth and Opportunity Act, as amended.....	539
AGOA Acceleration Act	555
G. Customs valuation (Section 402 of the Tariff Act of 1930, as amended)	562
H. Customs user fees	571
Section 13031 of the Consolidated Budget Reconciliation Act of 1985, as amended.....	572

Sections 111(f), 112, and 113 of the Customs and Trade Act of 1990, as amended	589
Section 1893(f) of the Tax Reform Act of 1986, as amended	589
Section 892(c) of the American Jobs Creation Act of 2004.....	590
I. Other customs laws.....	590
1. Country of origin marking	590
Section 304 of the Tariff Act of 1930, as amended.....	590
Rule of origin for textile and apparel products.....	596
2. Drawback (section 313 of the Tariff Act of 1930, as amended)	598
3. Entry of merchandise (section 484 of the Tariff Act of 1930, as amended).....	610
Statutory Note to Section 484 on Requirements Relating to Transaction Value of Imported Merchandise (“First Sale”)	614
Softwood Lumber Declaration	617
4. Protests and Further Administrative Reviews (section 514-516 of the Tariff Act of 1930, as amended)	626
5. Copyrights and trademark enforcement.....	632
Section 101 of the Copyright Revision Act of 1976.....	632
Section 526 of the Tariff Act of 1930, as amended.....	633
Section 431 of the Tariff Act of 1930, as amended.....	635
6. Penalties, prohibitions and export restrictions (sections 592 and 592A of the Tariff Act of 1930, as amended)	637
7. Convict and forced labor made goods	645
8. Prohibition on importation of dog and cat fur products	645
9. Cigarette Imports	648
10. National Customs Automation Program (sections 411-414 of the Tariff Act of 1930, as amended)	651
11. Commercial operations	656
Section 9503(c) of the Omnibus Budget Reconciliation Act of 1987	656
Section 301 of the Customs Procedural Reform and Simplification Act of 1978, as amended	657
J. Foreign Trade Zones (Act of June 18, 1934, as amended)	659
K. Implementation of the GATT Agreement on Trade in Civil Aircraft and the Harmonized Tariff Schedule of the United States General Note 6 on Aircraft	668
Chapter 9: Trade remedy laws	670
A. Authorities to respond to foreign subsidy and dumping practices	670
1. Countervailing duties.....	670
Section 753 of the Tariff Act of 1930, as amended	670
Section 261 (a)–(c) of the Uruguay Round Agreements Act.....	674
Subtitle A of Title VII (sections 701-709) of the Tariff Act of 1930, as amended	675
2. Antidumping duties (subtitle B of title VII (sections 731-739) of the Tariff Act of 1930, as amended)	699
3. Administrative review of antidumping and countervailing duties (subtitle C of title VII (sections 751, 752, 761, and 762) of the Tariff Act of 1930, as amended).....	726
4. General provisions relating to antidumping and countervailing duties (subtitle D of the VII (sections 771-782) of the Tariff Act of 1930, as amended).....	740
5. Continued dumping and subsidies offset (Section 754 of the Tariff Act of 1930, as amended)	798
6. Judicial and panel review of antidumping and countervailing duty actions.....	801
Section 516A of the Tariff Act of 1930, as amended	801
Section 129 of the Uruguay Round Agreements Act	815
7. Third-country dumping (section 1317 of the Omnibus Trade and Competitiveness Act of 1988)	817
8. Antidumping petitions by third countries (section 783 of the Tariff Act of 1930, as amended)	818
9. Antidumping Act of 1916	819
B. Enforcement of United States rights under trade agreements and response to certain	

foreign trade practices	822
Sections 301-310 of the Trade Act of 1974, as amended	822
Sections 281 and 282 of the Uruguay Round Agreements Act, as amended.....	839
Section 307(b) of the Trade and Tariff Act of 1984	848
Foreign air transportation: section 2 of the International Air Transportation Fair Competitiveness Act of 1974, as amended, and the Federal Aviation Act of 1958, as amended)	849
Section 19 of the Merchant Marine Act of 1920, as amended	851
Section 10002 of the Foreign Shipping Practices Act of 1988.....	854
C. Unfair practices in import trade (section 337 of the Tariff Act of 1930, as amended)	857
D. Safeguard actions (sections 201-204 of the Trade Act of 1974, as amended).....	866
E. Relief from market disruption by imports from Communist countries (section 406 of the Trade Act of 1974, as amended)	885
F. Relief from market disruption by imports from the People's Republic of China (Section 421-423 of the Trade Agreements Act of 1974, as amended)	887
G. Authority to auction import licenses (section 1102 of the Trade Agreement Act of 1979)	897
H. Trade adjustment assistance (chapters 2, 3, 4, 5, and 6 title II of the Trade Act of 1974, as amended)	898
I. Sections 401 and 408 of the Trade and Development Act of 2000	976
Chapter 10: Other laws regulating imports.....	978
A. Authorities to restrict imports of agricultural and textile products.....	978
Section 204 of the Agricultural Act of 1956, as amended	978
Section 22 of the Agricultural Adjustment Act of 1933, as amended	978
Tariff-rate quotas and safeguards (sections 404 and 405 of the Uruguay Round Agreements Act)	980
Reciprocal meat inspection requirement (section 20(h) of the Federal Meat Inspection Act).....	983
Sugar tariff-rate quotas under headnote authority.....	984
Sugar quota reallocation.....	988
Import prohibitions on certain agricultural commodities under marketing orders (section 8e of the Agricultural Adjustment Act, as amended)	989
Import prohibitions for animal health protection: Animal Health Protection Act.....	992
B. Authorities to restrict imports under certain environmental laws.....	995
Marine Mammal Protection Act of 1972, as amended (excerpts).....	995
Section 9 of the Endangered Species Act of 1973, as amended.....	1013
Section 527 of the Tariff Act of 1930, as amended	1016
African Elephant Conservation Act.....	1017
Section 7 of the Rhinoceros and Tiger Conservation Act of 1994, as amended	1020
Section 8 of the Fishermen's Protective Act of 1967, as amended	1021
High Seas Driftnet Fisheries Enforcement Act (excerpts)	1024
Sections 105 and 108 of the Wild Bird Conservation Act of 1992	1029
Atlantic Tunas Convention Act of 1975, as amended (excerpts)	1031
Conservation of Sea Turtles.....	1033
Lace Act Provisions Relating to the Prevention of Illegal Logging	1035
C. National security import restrictions (sections 232 and 233 of the Trade Expansion Act of 1962, as amended)	1040
D. Balance of payments authority (section 122 of the Trade Act of 1974).....	1044
E. Implementation of the GATT Agreement of Technical Barriers to Trade (product standards) (title IV of the Trade Agreements Act of 1979).....	1047
F. Government procurement.....	1057
1. Buy American requirements	1057
Buy American Act (title III of the Act of March 3, 1933, as amended).....	1057
Section 833 of the Defense Production Act of 1950, as amended	1059
Act of October 29, 1949	1060

2. Implementation of the GATT Agreement on Government Procurement (Title III of the Trade Agreements Act 1979, as amended)	1060
Import Restrictions on Low Enriched Uranium	1068
Chapter 11: Laws regulating export activities	1072
A. Export controls	1073
Export Administration Act of 1979, as amended	1076
B. Export financing and promotion	1088
1. Agriculture export sales and promotion.....	1088
Agricultural Trade Act of 1978, as amended (excerpts).....	1088
Section 1123 of the Food Security Act of 1985	1091
2. Export promotion of goods and services	1092
Sections 2303, 2306, and 2312 of the Export Enhancement Act of 1988, as amended.....	1092
Chapter 12: Authorities relating to political or economic security	1097
A. Economic authorities in national emergencies	1097
National Emergencies Act	1097
International Emergency Economic Powers Act, as amended	1099
Section 5(b) of the Trading With the Enemy Act, as amended	1105
B. Embargo on trade with Cuba	1107
Section 620(a) of the Foreign Assistance Act of 1961, as amended	1107
Cuban Democracy Act of 1992 (title XVII of the National Defense Authorization Act for Fiscal Year 1993)	1107
Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 (excerpts).....	1115
C. Economic sanctions against Libya, Iran, and Iraq	1123
Sections 504 and 505 of the International Security and Development Cooperation Act of 1985	1123
Iraq Sanctions Act of 1990 (sections 586-586J of the Foreign Assistance and Related Programs Appropriation Act, 1991) (excerpts)	1124
Iran-Iraq Arms Non-Proliferation Act of 1992 (title XVI of the National Defense Authorization Act for Fiscal Year 1993).....	1129
Iran Sanctions Act of 1996	1133
Emergency Protection for Iraqi Cultural Antiquities Act of 2004	1150
D. Trade sanctions against uncooperative major drug producing or drug-transit countries.....	1150
Narcotics Control Trade Act	1150
Section 591 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 2002	1157
Section 706 of the Foreign Relations Authorization Act of 2003.....	1158
E. Sanctions related to missile proliferation and chemical and biological warfare.....	1160
Section 73 of the Arms Export Control Act	1160
Chemical and Biological Weapons Control and Warfare Elimination Act of 1991	1164
Section 81 of the Arms Export Control Act	1171
F. Trade Sanctions Reform and Export Enhancement Act of 2000	1174
G. Economic sanctions against Sudan	1181
Tariff Suspension and Trade Act of 2000	1181
Sudan Peace Act.....	1182
Comprehensive Peace in Sudan Act of 2004.....	1191
Darfur Peace and Accountability Act of 2006	1197
H. Clean Diamonds Trade Act	1207
I. Trade sanctions against Burma	1214
Burmese Freedom and Democracy Act of 2003.....	1214
Renewal of Import Restrictions—Burmese Freedom and Democracy Act	1225
Tom Lantos Block Burmese Junta's Anti-Democratic Efforts (JADE) Act	1225
J. Syria Accountability and Lebanese Sovereignty Restoration Act of 2003.....	1237
K. Belarus Democracy Act of 2004.....	1245
L. United States-Hong Kong Policy Act of 1992	1252
M. Restrictions on transport of merchandise by foreign vessels (section 27 of the Merchant	

Marine Act, 1920, as amended)	1259
N. Authority to review certain mergers, acquisitions, and takeovers (section 721 of the Defense Production Act of 1950, as amended)	1263
Chapter 13: Reciprocal trade agreements	1267
A. U.S. negotiating objectives	1267
Sections 2101 and 2102 of the Trade Act of 2002	1267
Section 1124 and 3004 of the Omnibus Trade and Competitiveness Act of 1988	1278
Sections 131, 132, 135, and 315 of the Uruguay Round Agreements Act, as amended	1279
Section 409 of the Trade and Development Act of 2000	1282
Section 108 of the North American Free Trade Agreement Implementation Act	1284
B. General trade agreement and implementation authorities	1286
1. Trade Promotion Authority	1287
2. Congressional Trade Promotion Authority and other procedures with respect to Presidential Actions	1304
3. Trade agreement implementation authority and amendment procedures	1313
Sections 111(b) and 115 of the Uruguay Round Agreements Act	1313
Sections 103 and 104 of the North American Free Trade Agreement Implementation Act	1314
Sections 2(a) and 3(c) of the Trade Agreements Act of 1979	1315
4. Uruguay Round/WTO implementation, tariff modifications, and dispute settlement	1316
Section 101 (a and b), 102, 111 (a, b, c, and e), and 121-129 of Uruguay Round Agreements Act	1317
Section 5201 of the Trade Act of 2002	1333
C. Specific trade agreement authorities	1334
1. Compensation authority (section 123 of the Trade Act of 1974, as amended)	1334
2. Termination and withdrawal authority	1335
Section 125 of the Trade Act of 1974	1335
Section 2110(b) of the Trade Act of 2002	1337
3. Accession of State trading regimes to the GATT or the WTO (section 1106 of the Omnibus Trade and Competitiveness Act of 1988, as amended)	1337
4. GATT and WTO authorizations	1339
Section 5201 of the Trade Act of 2002	1339
Section 121 of the Trade Act of 1974, as amended	1340
Section 101(c) of the Uruguay Round Agreements Act	1340
D. Trade negotiation procedural requirements	1340
Sections 131-134 of the Trade Act of 1974, as amended	1340
Sections 127(a) and (b) of the Trade Act of 1974	1343
E. Identification of, and action on, specific foreign trade barriers	1344
1. National trade estimates report (section 181 of the Trade Act of 1974, as amended)	1344
2. Intellectual property rights (section 182 of the Trade Act of 1974, as amended)	1346
3. Telecommunications trade (Telecommunications Trade Act of 1988)	1349
F. Normal Trade Relations (nondiscriminatory) treatment	1359
1. NTR principle	1359
Section 5003 of P.L. 105-206: Clarification of Designation of Normal Trade Relations	1359
Section 251 of the Trade Expansion Act of 1962	1360
Section 126(a) of the Trade Act of 1974	1360
Section 1103(a)(3) of the Omnibus Trade and Competitiveness Act of 1988	1361
2. Trade relations with nonmarket economy countries	1361
General note 3(b) of the Harmonized Tariff Schedule	1361
Title IV of the Trade Act of 1974, as amended	1362
NTR treatment for Hungary and Czech and Slovak Republics	1369
NTR treatment for Estonia, Latvia, and Lithuania	1370
NTR withdrawal from Serbia and Montenegro	1371

NTR treatment for Bulgaria.....	1372
NTR treatment for Romania.....	1373
NTR treatment for Armenia.....	1374
NTR treatment for Cambodia.....	1375
NTR treatment for Laos.....	1375
NTR treatment for Mongolia.....	1376
NTR treatment for Albania and Kyrgyzstan.....	1377
NTR treatment for the People's Republic of China.....	1379
NTR treatment for Georgia.....	1395
NTR treatment for Ukraine.....	1396
NTR treatment for Vietnam.....	1398
G. Trade relations with North America (North American Free Trade Agreement Implementation Act, as amended).....	1402
H. Bilateral trade relations with Israel.....	1475
Section 102(b)(1) of the Trade Act of 1974, as amended.....	1475
Title IV of the Trade and Tariff Act of 1984, as amended.....	1475
United States-Israel Free Trade Area Implementation Act of 1985, as amended.....	1479
Report on Free Trade Agreement with Israel.....	1485
I. Bilateral trade relations with Canada.....	1486
United States-Canada Free-Trade Agreement Implementation act of 1988, as amended.....	1486
Automotive Products Trade Act of 1965, as amended.....	1513
J. Bilateral Trade Relations with Jordan.....	1517
K. Bilateral Trade Relations with Chile.....	1527
L. Bilateral Trade Relations with Singapore.....	1551
M. Bilateral Trade Relations with Australia.....	1574
N. Bilateral Trade Relations with Morocco.....	1606
O. Bilateral Trade Relations with Central America and Dominican Republic.....	1627
P. Bilateral Trade Relations with Bahrain.....	1666
Q. Bilateral Trade Relations with Oman.....	1685
R. Bilateral Trade Relations with Peru.....	1704
Chapter 14: Organization of trade policy functions.....	1740
A. Congress.....	1740
1. Congressional advisers (section 161 of the Trade Act of 1974, as amended).....	1740
2. Congressional Oversight Group (section 2107 of the Trade Act of 2002).....	1742
3. Reports and consultation to Congress.....	1744
Sections 162 and 163 of the Trade Act of 1974, as amended.....	1744
Section 2202 of the Omnibus trade and Competitiveness Act of 1988.....	1747
B. Executive Branch.....	1748
1. Interagency trade organization.....	1748
Section 242 of the Trade Expansion Act of 1962, as amended.....	1748
Reorganization Plan No. 3 of 1979.....	1749
Section 306 of the Trade and Tariff Act of 1984.....	1754
2. Office of the United States Trade Representative.....	
Section 141 of the Trade Act of 1974, as amended.....	1755
Section 117 of the Trade and Development Act of 2000.....	1760
3. U.S. Customs and Border Protection.....	1761
C. United States International Trade Commission.....	1768
1. Organization, general powers, procedures.....	1768
Sections 330, 331, 333-335 and 339 of the Tariff Act of 1930, as amended.....	1768
Section 603 of the Trade Act of 1974.....	1776
Section 175(a)(1) of the Trade Act of 1974.....	1776
2. Investigations (section 332 of the Tariff Act of 1930, as amended).....	1776
D. Private or Public sector advisory committees (section 135 of the Trade Act of 1974, as amended).....	1778

APPENDIX

Descriptions of major regional and multilateral trade organizations	1785
World Trade Organization (WTO)	1785
Organization for Economic Cooperation and Development (OECD)	1788
United Nations Conference on Trade and Development (UNCTAD)	1788
World Customs Organization	1789
European Union (EU)	1789
Asia-Pacific Economic Cooperation (APEC)	1790
MERCOSUR	1790
Association of Southeast Asian nations (ASEAN)	1791
Cairns Group	1791

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 1988¹ 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 a detailed nomenclature structure 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 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 1974⁴ 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, Congress introduced legislation to repeal the TSUS and replace it with the HTS. Upon the enactment of the Omnibus Trade and Competitiveness Act on August 23, 1988, the United States joined over 75 other trading partners as a party to the

¹ Public Law 100-418, enacted August 23, 1988.

² Presidential Proclamation No. 5911, November 19, 1988.

³ Public Law 87-456, enacted May 24, 1962.

⁴ Public Law 93-618, enacted January 3, 1975.

HS Convention. As of June 2010, the HS Convention had 137 countries and the European Union as Contracting Parties in addition to other non-parties applying the HS nomenclature.

Structure of the HTS

Under the HS Convention, the contracting parties are obliged to base their import and export schedules on the HS nomenclature, and 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 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. The general notes to the HTS, which are provided before chapter 1, contain definitions and rules on the scope of the pertinent provisions, additional requirements for classification purposes, and non-legal statistical notes. The general notes also set out the conditions for special tariff treatment under the various trade programs and free trade agreements. 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.

Although cited under title 19, U.S. Code section 1202, 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.” This arrangement is reflective of the diverse textual sources of the HTS, as well as to the need to amend it frequently. As discussed above, key elements of the HTS text are taken directly from the international nomenclature of the HS. Other substantive HTS provisions are legislated directly by Congress. The third source of HTS text is the President, whom Congress authorizes in its trade enactments to implement many HTS elements by proclamation and other appropriate means, subject to Congressional oversight. Such Congressional grant of authority to the President permits timely adjustment of the HTS in response to developments related to the trade measures and commitments of the United States.

The ITC has an important editorial, advisory and custodial role in the preparation of the HTS. Section 1207 of the 1988 Omnibus Trade and Competitiveness Act (19 U.S.C. 3007) charges the Commission with the responsibility of compiling, publishing “at appropriate intervals,” and keeping up to date the HTS and any related materials. The document and subsequent updates include 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 issued in supplements that 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. The current HTS and archive editions are made available online by the Commission at its website <www.usitc.gov>.

Sections 1205 and 1206 of the 1988 Omnibus Trade and Competitiveness Act authorize the President to proclaim technical modifications to the HTS, including changes needed to bring the HTS into conformity with proposed amendments to the HS. Section 1205 directs the Commission to keep the HTS under continuous review and to recommend appropriate modifications to the President as warranted to keep the HTS updated with technological changes and whenever amendments to the HS nomenclature are adopted by the Customs Cooperation Council (WCO).⁵ All recommended modifications must be consistent with the HS and with sound nomenclature principles, and must “ensure substantial rate neutrality.” Under section 1206, the President may proclaim the recommended modifications if he determines that they are in conformity with U.S. obligations under the HS Convention and are not counter to the national economic interest of the U.S. The modifications can be proclaimed only after the expiration of a 60-day period beginning when the President submits a report to the Committee on Ways and Means of the House and the Committee on Finance of the Senate enumerating the proposed modifications and the reasons for making them.

Unlike the TSUS, which applied exclusively to imported goods, the HTS can,

⁵ In 1994 the CCC adopted the informal working name “World Customs Organization (WCO)” in order to indicate more clearly its nature and world-wide status.

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 for 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 (2010) (Rev. 2) Annotated for Statistical Reporting Purposes

XV
72-8

Heading/ Subheading	Stat. Suf- fix	Article Description	Unit of Quantity	Rates of Duty	
				1 General	2 Special
		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:			
7202.11		Ferromanganese:			
7202.11.10	00	Containing by weight more than 2 percent of carbon:			
		Containing by weight more than 2 percent but not more than 4 percent of carbon	kg Mn kg	1.4%	Free (A,AU,BH,CA,CL,E,IL,J,JO,MA,MX,OM,P,PE,SG)
7202.11.50	00	Containing by weight more than 4 percent of carbon	kg Mn kg	1.5%	Free (A+,AU,BH,CA,CL,D,E,IL,J,JO,MX,OM,P,PE,SG) 0.6% (MA)
7202.19		Other:			
7202.19.10	00	Containing by weight not more than 1 percent of carbon	kg Mn kg	2.3%	Free (A,AU,BH,CA,CL,E,IL,J,JO,MA,MX,OM,P,PE,SG)
7202.19.50	00	Containing by weight more than 1 percent but not more than 2 percent of carbon	kg Mn kg	1.4%	Free (A,AU,BH,CA,CL,E,IL,J,JO,MA,MX,OM,P,PE,SG)

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.

The fourth column, "Unit of Quantity," sets forth the unit of measure in which the goods in question are to be reported for statistical purposes. 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 takes 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 or partial duty-free entry of goods that 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 that have 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:

- (i) Programs under which special tariff treatment may be provided, and the corresponding symbols for such programs as they are indicated in the "Special" subcolumn, are as follows:

Generalized System of Preferences	A, A* or A+
United States-Australia Free Trade Agreement	AU
Automotive Products Trade Act	B
United States-Bahrain Free Trade Agreement Implementation Act	BH
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
United States-Chile Free Trade Agreement	CL
African Growth and Opportunity Act	D
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
Dominican Republic-Central America-United States	
Free Trade Agreement Implementation Act	P or P+
Uruguay Round Concessions on Intermediate	
Chemicals for Dyes	L
United States-Caribbean Basin Trade Partnership Act	R
United States-Morocco Free Trade Agreement Implementation Act	MA
United States-Singapore Free Trade Agreement	SG
United States-Oman Free Trade Agreement Implementation Act	OM
"United States-Peru Trade Promotion Agreement Implementation Act	PE

The presence of one or more of these symbols – Special Program Indicators (SPIs) – indicates the potential eligibility of the described articles under the respective program. In the case of the GSP, 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.)

HTS General Notes and Duty Preferences

The HTS General Notes implement, among other things, the conditions of eligibility for preferential duty treatment for articles identified by one or more Special Program Indicators in Column 1 – Special. For tariff treatment under a Free Trade Agreement, the article generally must qualify as an “originating good” under the rules of origin that appear under the applicable HTS General Note. For tariff treatment pursuant to one of the U.S. unilateral preference programs, an article identified by a Special Program Indicator must meet eligibility requirements set forth in the applicable General Note. These requirements may include, among others: production or manufacture such that the article is a “product of” the relevant country or countries; additional value

based on costs or values of eligible materials and direct costs of processing; direct shipment of the article to the U.S. and other conditions. (See the separate discussions of Free Trade Agreements and U.S. preference programs elsewhere in this volume.) Several of the General Notes special duty provisions not separately discussed in this volume include:

- *Products of Insular Possessions.* As provided in General Note 3(a)(iv) of the HTS, an article imported directly from an insular 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 and Border Protection 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 1999⁶ (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.

⁶ Public Law 106-36.

insular possessions under the Production Incentive Certificate (PIC) program. U.S. Note 5 to Chapter 91 allows watch producers 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 2004⁷ 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 identified by the Special Program Indicator “B” that 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 1965,⁸ 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

⁷ Public Law 108-429.

⁸ Public Law 89-283, 19 U.S.C. 2001, et seq.

Agreements Act of 1979 gave the President the authority to proclaim new TSUS provisions 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 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, as identified by the Special Program Indicator “C,” 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 1996⁹ 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,

⁹ Public Law 104-295.

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.

HTS Chapter 98 Special Classification Duty Exemptions and Reductions

In principle, special classification and tariff treatment is available for any good, wherever classified in HTS Chapters 1-97, that also meets the terms of a Chapter 98 provision. An importer claims Chapter 98 tariff treatment by declaring classification of the imported merchandise in both a regular HTS provision and in Chapter 98. The various Chapter 98 provisions implement U.S. international obligations or legislative mandates by providing duty-free or reduced-duty treatment. Among the notable Chapter 98 items are:

American goods returned (HTS subheading 9801.00.10).—Products of the United States 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.

Goods previously imported, duty-paid (HTS subheading 9801.00.20)—Articles previously imported may be returned for the account of the same person free of duty when exported under a lease or similar use agreement and returned to the U.S. without advancement in value or improvement in condition.

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.¹⁰

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, 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

¹⁰ 19 U.S.C. 1401a.

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 that results in a “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 made in the Trade Act of 2002¹¹. 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.

The Miscellaneous Trade and Technical Corrections Act of 2004¹² provided increased duty-free allowances for U.S. residents returning from U.S. insular possessions or from beneficiary countries under the Caribbean Basin Economic

¹¹ Public Law 107-210.

¹² Public Law 108-429.

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 exemption 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 1996¹³ 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 1999¹⁴ 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 2000¹⁵ made this exemption permanent under new HTS subheading 9817.60.00.

Articles specially designed or adapted for the blind or handicapped (HTS subheadings 9817.00.92, 9817.00.94, and 9817.00.96). These HTS subheadings implement into U.S. law provisions of the Nairobi Protocol, whereby signatories agreed to allow the duty-free treatment of imports of articles for the use or benefit of physically or mentally handicapped persons, as well as the blind. The Nairobi Protocol is a supplementary agreement to the Florence Agreement, which entered into force at the United Nations in 1952, and calls for the duty-free treatment of goods determined to facilitate the free exchange of knowledge

¹³ Public Law 104-295.

¹⁴ Public Law 106-36.

¹⁵ Public Law 106-476.

and ideas. The United States initially enacted both the Florence Agreement and the Nairobi Protocol in 1982 through the Educational, Scientific, and Cultural Materials Act of 1982¹⁶. In 1988, Congress re-enacted provisions implementing the Nairobi Protocol in the Omnibus Trade and Competitiveness Act of 1988 (“the Omnibus Act”)¹⁷, as amended by the Technical and Miscellaneous Revenue Act of 1988¹⁸. Section 1121 of the Omnibus Act implemented the Nairobi Protocol under HTS subheadings 9817.00.92, 9817.00.94 and 9817.00.96, and became effective on January 1, 1989. The articles entitled to duty free treatment under these subheadings include printed materials in Braille, specially adapted machinery and prostheses.

Prototypes (HTS subheading 9817.85.01.) Pursuant to the Product Development and Testing Act of 2000, enacted as a subchapter of the Tariff Suspension and Trade Act of 2000 (see above), articles imported for use in product development, testing, evaluation or quality control may receive duty-free treatment. Eligibility is conditioned on terms set forth in U.S. Note 7 to subchapter 17 of HTS Chapter 98. Among other things, articles imported for prototype use may be imported only in noncommercial quantities and may not be sold after use.

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 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 asserted that 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

¹⁶ Public Law 97-446.

¹⁷ Public Law 100-418.

¹⁸ Public Law 100-647.

instituted, and may 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 “differential and more favourable treatment” for developing countries. The enabling clause also requires that developing countries accept the principle that “their capacity to make contributions or negotiated concessions or take other mutually agreed action under the provisions and procedures of the [GATT] would improve with the progressive development of their economies and improvement in their trade situation”

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.¹⁹ 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 4 of the Andean Trade Preference Extension approved on December 28, 2009 (P.L. 111-124). Section 4 extended duty-free treatment under GSP until December 31, 2010. The U.S. Trade Representative (USTR) administers the GSP program and makes recommendations to the President in consultation with the Trade Policy Staff Committee (TPSC) as to (1) which countries should be designated beneficiary developing countries and (2) which articles should be designated as eligible under the program.²⁰ The TPSC also conducts annual reviews, examines petitions for eligibility, and may also act on its own initiative to recommend addition or removal of 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

¹⁹ Public Law 93-618, enacted on January 3, 1975.

²⁰ Executive Order 11846 of March 27, 1975, as amended; Executive Order 12188 of January 2, 1980, as amended.

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 2007, the program provided duty-free treatment on imports valued at approximately \$30.8 billion from more than 130 BDCs, including 44 least-developed BDCs.

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) based on certain considerations set out in the statute. 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 that:

(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 pursuant to which it 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 that adequate and effective compensation has been provided, negotiations are underway to provide compensation, or a dispute over compensation is in arbitration;

(5) fails to recognize or 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;²¹ 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 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 2 years for country graduation from the GSP program. In 2009 the World Bank designated countries with a per capita gross national income of \$12,196 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 designating a least-developed BDC, the President must provide Congress at least 60 days notification. 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 August 26, 2010, designated GSP beneficiaries are:

Independent Countries

²¹ Defined by amendment under section 503 of the Generalized System of Preferences Renewal Act of 1984 for purposes of GSP to include: "(A) the right of 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."

Afghanistan	Gabon	Papua New Guinea
Albania	Gambia, The	Paraguay
Algeria	Georgia	Philippines
Angola	Ghana	Russia
Argentina	Grenada	Rwanda
Armenia	Guinea	St. Kitts and Nevis
Azerbaijan*	Guinea-Bissau	Saint Lucia
Bangladesh	Guyana	Saint Vincent and the Grenadines
Belize	Haiti	Samoa
Benin	India	Sao Tomé and Príncipe
Bhutan	Indonesia	Senegal
Bolivia	Iraq	Serbia
Bosnia and Herzegovina	Jamaica	Seychelles
Botswana	Jordan	Sierra Leone
Brazil	Kazakhstan	Solomon Islands
Burkina Faso	Kenya	Somalia
Burundi	Kiribati	South Africa
Cambodia	Kosovo*	Sri Lanka
Cameroon	Kyrgyzstan	Suriname
Cape Verde	Lebanon	Swaziland
Central African Republic	Lesotho	Tanzania
Chad	Liberia	Thailand
Colombia	Macedonia, Former Yugoslav Republic of	Togo
Comoros	Madagascar	Tonga
Congo (Brazzaville)	Malawi	Tunisia
Congo (Kinshasa)	Maldives	Turkey
Côte d'Ivoire	Mali	Tuvalu
Croatia	Mauritania	Uganda
Djibouti	Mauritius	Ukraine
Dominica	Moldova	Uruguay
East Timor	Mongolia	Uzbekistan
Ecuador	Montenegro	Vanuatu
Egypt	Mozambique	Venezuela
Equatorial Guinea	Namibia	Republic of Yemen
Eritrea	Nepal	Zambia
Ethiopia	Niger	Zimbabwe
Fiji	Nigeria	
	Pakistan	
	Panama	

* Added by Proclamation 8830, on December 19, 2008, effective February 1, 2009.

Non-Independent Countries and Territories

Anguilla	Gibraltar	Turks and Caicos Islands
British Indian Ocean Territory	Heard Island and McDonald Islands	
Christmas Island (Australia)	Montserrat	Virgin Islands, British
Cocos (Keeling) Islands	Niue	Wallis and Futuna
	Norfolk Island	West Bank and
	Pitcairn Islands	

Cook Islands	Saint Helena	Gaza Strip
Falkland Islands	Tokelau	Western Sahara
(Islas Malvinas)		

Associations of Countries (treated as one country)

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

Bolivia	Ecuador	Venezuela
Colombia	Peru	

Member Countries of the Association of South East Asian Nations (ASEAN), consisting of:

Cambodia	Philippines
Indonesia	Thailand

Certain Member Countries of the Caribbean Common Market (CARICOM), consisting of:

Belize	Jamaica	Saint Vincent and
Dominica	Montserrat	the Grenadines
Grenada	St. Kitts and Nevis	
Guyana	Saint Lucia	

Certain 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	

Certain Member Countries of the Southern Africa Development Community (SADC), consisting of:

Botswana	Mauritius	Tanzania
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Member Countries of the South Asian Association for Regional Cooperation (SAARC), consisting of:

Bangladesh	India	Pakistan
Bhutan	Nepal	Sri Lanka
	Maldives	

Countries designated as least developed BDCs are listed under General Note 4(b)(i) of the HTS. As of June 30, 2008, designated GSP least developed BDCs are:

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

Eligible articles

The President designates articles under section 503 eligible for GSP duty-free treatment after considering advice from the U.S. International Trade Commission (ITC) on the probable domestic economic impact.

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, 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 section 203 of the Trade Act of 1974 or to national security actions under sections 232 or 351 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. Notwithstanding the provisions regarding textile and apparel eligibility, section 1555 of the Miscellaneous Trade and Technical Corrections Act of 2004²² modified GSP to allow the President to designate certain hand-made rugs as eligible for duty-free treatment.

²² Public Law 108-429

The President may designate any article as being an eligible article only for least developed BDCs if, after receiving advice from the ITC, he determines such an article is not import-sensitive in the context of imports from least developed BDCs. However, he may not designate as least developed BDC eligible the statutorily exempt articles—textiles and apparel, footwear and related articles, and watches.

GSP duty-free treatment applies only to an eligible article which is the growth, product, or manufacture of a 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 BDC or in two or more BDCs in an association of countries treated as one country for GSP purposes, plus (b) the direct cost of processing performed in such country or countries is not less than 35 percent of the appraised value of the article at the time of entry .

Materials imported into a BDC may not be counted toward the 35 percent minimum valued-added requirement unless 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

Raw cane sugar, refined sugar, sugar syrups and specialty sugars enter the United States under a tariff-rate quota system (TRQ). The Secretary of Agriculture establishes the amount of the TRQ and the U.S. Trade Representative (USTR) allocates the quantity among sugar supplying countries.²³ 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 dutiable at a 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 in-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). 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

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

have demonstrated their competitiveness and to promote a shifting of benefits to less advanced developing countries.

In addition, section 503(c) establishes statutory “competitive need” limitations on GSP duty-free treatment for particular articles, 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 2010, \$145 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 terminated and the NTR 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 fall below the competitive need ceilings in effect during the preceding calendar year.

The Tax Relief and Health Care Act of 2006²⁴, amended the competitive need limit provisions by requiring revocation of any waiver that has been in effect for more than five years if imports beneficiary country exceed 1.5 times the annual dollar limit (or 1.5 times the \$145 million limit in 2010) or exceed 75 percent of total U.S. imports of that article in a particular calendar year.

There are four specifically-defined statutory circumstances in which competitive need limits do 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 \$19 million in calendar year 2008, 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 least developed BDC or a beneficiary sub-Saharan African country.

(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;

²⁴ Public Law No. 109-432.

(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 was designed for possible exemption of the Philippines.

In addition to these four circumstances, the President may waive competitive need limits on any article as a general matter 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 the Federal Register. In making the national interest determination, the President must give great weight to the extent to which the BDC (1) has provided assurances of equitable and reasonable market access; and (2) 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. Further, the President may not waive competitive need limits with respect to any quality of an article, entered after 1995 from particular countries, the value of which is greater than 15 % of the total value of all GSP duty free imports imported from those countries during the preceding calendar year. The particular countries at issue are those that: (i) have a per capita GNP of \$5000 or more in the year or (ii) account for at least a 10% share of total GSP duty free imports.

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),²⁵ the centerpiece of the Caribbean Basin Initiative or CBI, was enacted on August 5, 1983, authorizing the President to grant certain U.S. unilateral preferential trade and tax benefits for Caribbean Basin countries and territories.

Duty-free treatment under CBERA became effective as of January 1, 1984,

²⁵ Public Law 98-67, title II, enacted on August 5, 1983, 19 U.S.C. 2701 et seq.

and currently applies to imports from 24 designated beneficiary countries or territories.

The United States developed the CBI program to respond to an economic crisis in the Caribbean in close consultation with the governments and private sectors of beneficiary countries 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. CBI II 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 countries and territories that are 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 June 30, 2008, designated CBERA beneficiary countries are:²⁶

Antigua and Barbuda	Grenada	Saint Lucia
Aruba	Guyana	Saint Vincent and the Grenadines
Bahamas	Haiti	Trinidad and Tobago
Barbados	Jamaica	Virgin Islands,
Belize	Montserrat	
	Netherlands Antilles	
Dominica	Panama	British
	St. Kitts and Nevis	

General CBERA Designation Criteria

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

²⁶ Anguilla, Cayman Islands, Suriname, and the Turks and Caicos Islands are not currently designated; Aruba, originally part of the Netherlands Antilles, is designated separately. Guatemala, Honduras, the Dominican Republic, El Salvador, Costa Rica, and Nicaragua have been removed as designated countries because of CAFTA-DR.

- (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 providing compensation or submission to arbitration;
- (3) fails to recognize or enforce arbitral awards 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.

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 and other appropriate economic factors; (3) the extent the country has assured the United States it will provide equitable and reasonable access to the country's markets and basic commodity resources; (4) the degree to which the country follows accepted rules of international trade under the World Trade Organization and applicable trade agreements; (5) the degree to which the country uses distortive export subsidies or imposes export performance or local content requirements; (6) the degree to which the country's trade policies contribute to regional revitalization; (7) the degree to which the country is undertaking self-help measures; (8) whether or not the country has taken or is taking steps to afford its workers internationally-recognized worker rights; (9) the extent to which 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 to which 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 program.

The President must notify the Congress of his intention to designate a country as a CBI beneficiary, 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 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.

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

(3) At least 35% of the entered value of the article must be attributable to materials from and/or processing performed in one or more beneficiary countries (with U.S. materials able to account for up to 15% of the total 35% required).

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 articles that were not CBERA-eligible on January 1, 1994 (i.e., articles subject to textile agreements); certain footwear; canned tuna; petroleum and petroleum products; watches and watch parts containing components from non-most-favored-nation (column 2) sources; and certain leather-related products to which the President can grant reduced duties under section 213(h).

Pursuant to section 213(h), the President may apply a reduced duty to handbags, luggage, flat goods, work gloves, and leather wearing apparel that is the greater of 20% of the duty applicable on December 31, 1991 or the current duty minus 2.5 percent *ad valorem*. This reduction was to be phased in equally over five years beginning January 1, 1992.

Section 222 of CBI II extended duty-free treatment to articles, other than textiles and apparel and petroleum and petroleum products, that are (1) 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 (2) for which 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.

Special Rules for Haiti

In order to promote Haiti's economic development and encourage investment in its primary export sector, CBERA was amended by adding special rules governing U.S. imports of Haitian apparel. The Haitian Hemispheric Opportunity through Partnership Encouragement Act of 2006 (HOPE I) was

passed as Title V of the Tax Relief and Health Care Act of 2006.²⁷ Following review from government and private sector actors, Congress amended the rules, making them more flexible, in the Hemispheric Opportunity through Partnership Encouragement Act of 2008 (HOPE II), Title XV of the Food, Conservation, and Energy Act of 2008.²⁸ The Act also requires that the Haitian government establish a new labor ombudsman office to monitor working conditions of Haitian firms that use the special import rules.

Benefits under the HOPE Act, as amended, are in effect for a 10-year period, ending September 30, 2018, and apply in addition to any other preferential trade benefits already in effect. It is the sense of Congress that the executive branch should interpret, implement, and enforce the provisions broadly in order to expand trade by maximizing opportunities for imports from Haiti.

To be eligible for HOPE Act preferences, the President must certify that Haiti has established or is making continual progress toward establishing a market-based economy, the rule of law, the elimination of barriers to U.S. trade, economic policies that reduce poverty, a system to combat corruption, protection of internationally recognized worker rights, and does not engage in activities that undermine U.S. national security or that are gross violations of internationally recognized human rights.

The HOPE Act, as amended, provides special rules of origin governing duty-free treatment of U.S. apparel imports from Haiti. The rules of origin differ from those defined in the CBTPA, which require articles to be cut and assembled in the United States or a CBTPA beneficiary country, from fabric made from U.S. yarn. Haiti may use third-country (non-beneficiary country) yarn and fabric that may also be cut in non-beneficiary countries (with a few exceptions), as long as the final apparel good is the product of Haiti. These rules allow Haiti to use less expensive inputs and still have the final apparel article enter the United States duty-free, providing Haitian producers with a competitive advantage.

HOPE Act Temporary Trade Benefits for Apparel Imports

The HOPE Act provides duty-free treatment for apparel goods that are wholly assembled or knit-to-shape in Haiti and imported directly from either Haiti or the Dominican Republic, with no restrictions on source of inputs, subject to the following limitations:

(1) Knit and woven apparel products must be wholly assembled or knit-to-shape from any combination of fabric, fabric components, components knit-to-shape, and yarns, provided a minimum of 50% (rising to 60% over time) of the value added of the materials plus direct cost of processing operations is

²⁷ Public Law 109-432, enacted on December 20, 2006.

²⁸ Public Law 110-246, enacted on June 18, 2008.

undertaken in Haiti, or a country that is either a party to a U.S. reciprocal free trade agreement or a beneficiary country under a unilateral trade preference arrangement. There are no restrictions on the source of the remaining inputs.

(2) Total qualified imports from Haiti are capped at an annual level of 1.25% of total annual U.S. apparel imports until December 31, 2011.

(3) Woven apparel that cannot meet the value-added rule may enter duty free, subject to an annual volume cap of 70,000,000 square meter equivalents.

(4) Knit apparel that cannot meet the value-added rule may enter duty free, subject to an annual volume cap of 70,000,000 square meter equivalents, with exclusions for certain T-shirts, sweatshirts, and pullovers.

(5) Certain brassieres, women and girls sleep wear, luggage, and handbags subject to a single transformation rule with no quantitative limitations.

(6) Any apparel articles if made from fabrics or yarns that would qualify as not being widely available in commercial quantities as listed in CBERA, AGOA, ATPA, NAFTA, and any other reciprocal free trade agreement in effect with the United States, with no quantitative restrictions.

(7) An uncapped "3 for 1" earned import allowance (EIA) that allows producers to claim a credit for the export of apparel articles made from qualifying inputs that can be used in exchange for exporting articles duty-free made from non-qualifying inputs in a 3 for 1 ratio.

(8) Articles subject to specific caps are not subject to the overall cap and articles subject to one specific cap may not be used in the calculation of other caps.

Labor provisions require Haiti to create a new independent Labor Ombudsman's Office and establish the Technical Assistance Improvement and Compliance Needs Assessment and Remediation (TAICNAR) Program within 16 months of the enactment of HOPE II. The labor ombudsman is to be appointed by the President of Haiti and report directly to him. That official's major functions include: (1) maintaining a registry of apparel and textile producers that seek to use the trade preferences; (2) overseeing the implementation of the TAICNAR program; (3) receiving, investigating and directing appropriate comments, as appropriate, to the Haitian Department of Labor and the United Nations International Labor Organization (ILO) regarding labor conditions and complaints; and (4) overseeing compliance with ILO core labor standards. Those firms that do not comply with the TAICNAR program requirements are subject to loss of trade preferences provided under the HOPE Act.

The ILO is to issue a report every six months evaluating the progress of each producer in meeting the goals of the TAICNAR program. The first report was issued on October 19, 2010. The U.S. President is also to produce an annual report on the progress of implementing the labor provisions. There is authorized to be appropriated to carry out this program a sum of \$10 million for the period beginning on October 1, 2008 and ending on September 30, 2013.

Haiti Economic Lift Program (HELP) Act of 2010

As part of U.S. support for Haiti's post-earthquake economic recovery, Congress passed the Haiti Economic Lift Program (HELP) Act of 2010 (P.L. 111-171)²⁹ in May 2010. In the HELP Act, Congress crafted amendments to the HOPE Act, targeting those tariff preferences that had so far appeared to demonstrate the greatest promise of promoting Haitian apparel exports to the United States. The HELP Act extends both the Caribbean Basin Trade Partnership Act (CBTPA) and the HOPE Act through September 30, 2020. The bill provides duty-free treatment for additional textile and apparel products that are wholly assembled or knit-to-shape in Haiti regardless of the origin of the inputs. The bill also substantially increases tariff preference levels (TPLs) under which certain Haitian knit and woven apparel products may receive duty-free treatment regardless of the origin of the inputs. The bill extends until December 20, 2015, the rule that provides duty-free treatment for apparel wholly assembled or knit-to-shape in Haiti with at least 50 percent value from Haiti, the United States, a U.S. free trade agreement partner or preference program beneficiary, or a combination thereof. The bill similarly extends until December 20, 2017, duty-free treatment for Haitian apparel with at least 55 percent of value from qualifying countries, and until December 20, 2018, duty-free treatment for Haitian apparel with at least 60 percent of value from qualifying countries. The bill extends until December 20, 2016, the rule that provides duty-free treatment for wire harness automotive components imported from Haiti. Together, the relevant trade preference rules give current producers and would-be investors assurance that enhanced U.S. market access for Haitian apparel will be available for the next decade. The HELP Act also requires U.S. Customs and Border Protection (CBP) to verify that apparel articles imported under the tariff preferences are not transshipped illegally.

CBERA Special Provisions for Dehydrated Ethanol

Special criteria have been established for the duty-free entry of ethanol under the CBI program. The Tax Reform Act of 1986³⁰ required increasing amounts of CBI feedstock in order for ethanol to qualify for duty-free treatment pursuant to CBERA -- 30 percent in 1987; 60 percent in 1988; and 75 percent in 1989 and thereafter.

The Steel Trade Liberalization Program Implementation Act of 1989³¹ amended the Tax Reform Act of 1986 to provide 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

²⁹ Public Law 108-429

³⁰ Public Law 99-514, section 423, enacted on October 22, 1986.

³¹ Public Law 101-221, section 7, enacted on December 12, 1989.

only if it meets the applicable local feedstock requirement: (1) no feedstock requirement is imposed on imports up to a maximum base 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;³² (2) a local feedstock requirement of 30 percent by volume applies to the next 35 million gallons of imports above the base level; 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 is eligible for duty-free treatment in unlimited quantities without regard to feedstock requirements.

These provisions have been continuously renewed, most recently in section 15333 of the Food Conservation and Energy Act of 2008³³, which extended them through January 1, 2011.

Treatment of Sugar Imports under CBERA

Raw cane sugar, refined sugar, sugar syrups and specialty sugars enter the United States under a tariff-rate quota system. The Secretary of Agriculture establishes the amount of the TRQ and the U.S. Trade Representative (USTR) allocates the quantity among sugar supplying countries.³⁴ The quantities allocated to beneficiary countries under the CBI receive duty-free treatment. Imports above the in-quota amount from beneficiary countries are dutiable at a 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 in-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 satisfactory stable food production plan within 90 days after its designation, if the country is not making a good faith effort to implement the plan or if 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

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) if such action is provided under Chapter

³² For the 12-month period ending on September 30, 2008, the ITC determined the domestic ethanol market to be 8.88 billion gallons. Accordingly, the ITC determined the base quantity for 2009 should be 621.5 million gallons.

³³ Public Law 110-234

³⁴ Presidential Proclamation No. 6763, December 23, 1994, 60 Fed. Reg. 1007.

1 of title II of the Trade Act of 1974 or under section 232 of the Trade Expansion Act of 1962. In such a case, the President is authorized to proclaim the duty rate or other relief measure for CBI imports that applies to imports from non-CBI countries. In its report to the President on import relief investigations covering CBI eligible articles pursuant to section 202(f) of the Trade Act of 1974, 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. Moreover, there shall be no suspension of duty-free treatment unless the ITC determines, in making an affirmative determination under section 202(b) of the Trade Act of 1974, that the serious injury (or threat thereof) results from the duty-free treatment provided under CBERA.

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, or threat thereof, 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 (or "cumulated") 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. When determining whether the imports from the non-CBI country are causing, or threatening to cause, material injury to a U.S. industry, imports from CBI countries may continue to be cumulated with imports from the 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. In addition, section 221(a)(5) of the Customs and Trade Act of 1990 (P.L. 101-382), provided that tourists returning from a CBERA beneficiary country are 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, and Guam):

(1) Pursuant to section 213(a)(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 or improved in condition in a CBERA beneficiary country; and (c) to the extent 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).³⁵

(3) Section 214(b) of CBERA provides that the duty-free entry of alcoholic beverages by returning U.S. residents arriving directly from insular possessions is 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.

³⁵ See section 214(a)(1) of CBERA and General Note 3(a)(iv) of the U.S. Harmonized Tariff Schedule (HTS) for more information.

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 shall include producers in the insular possessions, thereby allowing them 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 of CBERA and to provide an 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 early 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 in the House on March 4, 1999. It was reported out of the Ways and Means Committee on June 10, 1999. No further action on H.R. 984 was taken in the House.

On June 22, 1999, the Senate Committee on Finance considered S. 1389, draft legislation entitled “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. This draft legislation was subject to no further action in the Senate.

In November 1999, 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. Title II of the conference report for H.R. 434 (H. Rpt. 106-606) 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.

Under the original legislation, CBTPA benefits were to be in effect during a “transition period” that began on October 1, 2000 and ended 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 entered into force between the United States and the CBTPA beneficiary country. The end date of the program was extended to September 30, 2010 as part of the 2008 Farm Bill signed into law on June 18, 2008 (P.L. 110-246). The HELP Act extends both the Caribbean Basin Trade Partnership Act (CBTPA) and the HOPE Act through September 30, 2020.

Designation Criteria and Eligibility for CBTPA Benefits

In designating a country as eligible for CBTPA benefits, section 213(b)(5)(B) of CBERA, as amended, 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 on or ahead of schedule 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 forms 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.”³⁶ Six of these countries later graduated when they became parties to the CAFTA-DR Free Trade Agreement.

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 June 30, 2008, CBTPA beneficiary countries eligible for enhanced CBTPA benefits are:

Barbados	Haiti	Saint Lucia
Belize	Jamaica	Trinidad and
Costa Rica	Panama	Tobago
Guyana		

³⁶ 65 FR 60236.

Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua have been removed from this list because they are parties to CAFTA-DR; however, pursuant to general note 17(e) to the HTS, CBTPA beneficiary countries includes these former CBTPA beneficiary countries for certain purposes.

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 NAFTA parties” and are therefore eligible for preferential treatment accorded to originating goods under NAFTA. The CBTPA provides that NAFTA tariff treatment applies to certain articles otherwise 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 qualify 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.

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. Qualifying apparel has been limited in each year of the CBTPA. Pursuant to Public Law 110-246, the limit for each one-year period from October 1, 2008 through September 30, 2010, is 970 million square meter equivalents (SMEs).

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 2002³⁷ 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, Public Law 107-210 set the cap for t-shirts at 12 million dozen per year. Public Law 110-246 continued this same annual cap through September 30, 2010.

(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. 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.

³⁷ Public Law 107-210

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 is 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 than 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 than elastomeric 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.

CBTPA Transshipment Provisions

In accordance with section 213(b)(2)(D) of CBERA, if an exporter is determined to have engaged in illegal transshipment of textile or apparel products from a CBTPA beneficiary country, then the President shall deny all benefits under the bill to such exporter, and to any successor 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 beneficiary countries in order to establish a schedule of regular meetings of the trade ministers and USTR. The purpose of the meetings is to reach agreement between the United States and CBTPA beneficiary countries concerning the likely timing and procedures for initiating negotiations for CBTPA beneficiary countries to enter into 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 (CAFTA-DR). Congress approved implementing legislation for CAFTA-DR in July 2005 and the President signed the legislation on August 2, 2005³⁸. On November 18, 2003, the President notified the Administration's intent to negotiate an FTA with Panama, and an FTA with Panama was subsequently signed on June 28, 2007. That agreement is awaiting Congressional approval.

Andean Trade Preference Act, as amended

On July 23, 1990, the President 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, the President 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),

³⁸ Public Law 109-53

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 CBI beneficiary countries.

ATPA went into effect on December 4, 1991. The designations of Colombia and Bolivia as ATPA beneficiary countries became effective July 22, 1992.³⁹ Designations of Ecuador⁴⁰ and Peru⁴¹ became effective, respectively, on April 30, 1993 and August 31, 1993. Each of these designations has been reviewed annually and renewed.

In Public Law 110-436, the Andean Trade Preference Extension, Congress extended the ATPA duty-free and other preferential treatment for (a) one year for Colombia and Peru (until December 31, 2009), (b) six months for Ecuador plus an additional six months unless the Administration determines that Ecuador does not satisfy the ATPA criteria and (c) six months for Bolivia plus an additional six months only if the Administration determines that Bolivia satisfies the ATPA criteria. Effective December 15, 2008, the President suspended the designation of Bolivia as a beneficiary country for purposes of the ATPA.⁴² In 2009, Congress extended the program through December 31, 2010 for Colombia, Ecuador, and Peru. Preferences for Bolivia were not extended because the Administration determined that the criteria established in the statute were not satisfied.⁴³

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 the inputs produced in the beneficiary country and the direct costs of processing operations performed in the beneficiary country is not less than 35 percent of the value of the article. Inputs from other ATPA beneficiary countries, Puerto Rico, the U.S. Virgin Islands, and CBERA beneficiary countries may be counted toward the 35 percent requirement. The ATPA includes rules and requirements to preclude transshipment or pass-through operations which are identical to CBI provisions.

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 countries. Designated beneficiary countries are listed in General Note 11(a) of the Harmonized Tariff Schedule of the United States. As of

³⁹ Presidential Proclamations 6455 and 6456; 57 Fed. Reg. 30069 and 30097, respectively.

⁴⁰ Presidential Proclamation 6544; 58 Fed. Reg. 19547.

⁴¹ Presidential Proclamation 6585; 58 Fed. Reg. 43239.

⁴² Presidential Proclamation 8323; 73 Fed. Reg. 72677.

⁴³ The 111th Congress passed legislation extending Andean preferences for Colombia and Ecuador until February 12, 2011. The legislation, H.R. 6517, as amended, was expected to be signed into law. Preferences were not extended to Peru, because it has a an FTA in force with the United States.

January 1, 2008, designated ATPA beneficiary countries are:

Bolivia⁴⁴

Colombia⁴⁵

Ecuador⁴⁶

Peru⁴⁷

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 the President 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 protection of 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

⁴⁴ As discussed above, effective December 15, 2008, the President suspended the designation of Bolivia as a beneficiary country under the APTA. Presidential Proclamation 8323; 73 Fed. Reg. 72677.

⁴⁵ The United States and Colombia concluded negotiations on the United States – Colombia Trade Promotion Agreement (CTPA) on February 27, 2006 and signed the agreement on November 22, 2006. As of December 1, 2008, Congress has not implemented this agreement.

⁴⁶ The United States and Ecuador conducted negotiations towards a free trade agreement through March 2006; however, an agreement has not been concluded.

⁴⁷ The United States and Peru concluded negotiations on the United States – Peru Trade Promotion Agreement (PTPA) on December 7, 2005 and signed the agreement on April 12, 2006. The agreement entered into force on February 1, 2009.

recognized worker rights to workers in the country.

Criteria (1), (2), (3), (5), and (7) do not prevent a country's designation as a beneficiary country 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 shall 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 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 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 the country's status as a beneficiary country or the duty-free treatment on any article if the President determines, as a result of changed circumstances, a country's performance under the eligibility criteria is no longer satisfactory.

Andean Trade Promotion and Drug Eradication Act

The original ATPA contained a list of products that were ineligible for duty-

free treatment. More specifically, ATPA duty-free treatment did not apply to certain textile and apparel articles; petroleum and petroleum products; footwear not eligible for duty-free treatment under the Generalized System of Preferences; certain watches and watch parts; and certain leather products.

The Andean Trade Promotion and Drug Eradication Act (ATPDEA) amended ATPA and extended and enhanced its trade benefits as a way to create additional alternatives to illicit drug production, thereby seeking to enhance political security in the Andean region and the hemisphere. In general, the ATPDEA expanded trade benefits to include the products identified above as excluded from ATPA.

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:

- (1) 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;
- (2) 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;
- (3) the extent to which the country provides internationally recognized worker rights;
- (4) whether the country has implemented its commitments to eliminate the worst forms of child labor;
- (5) the extent to which the country has met the counternarcotics certification criteria in section 490 of the Foreign Assistance Act of 1961;
- (6) the extent to which a country has taken steps to become a party to and implement the Inter-American Convention Against Corruption;
- (7) 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 to develop and implement international rules in transparency in government procurement; and
- (8) 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 ATPDEA beneficiary countries:

- (1) Footwear not eligible for GSP treatment;
- (2) Petroleum, or certain products derived from petroleum;
- (3) Watches and watch parts;
- (4) Handbags, luggage, flat goods, work gloves, and leather wearing apparel that were not eligible for GSP treatment.

The ATPDEA also authorizes the President to proclaim duty-free treatment for tuna from ATPDEA beneficiary countries if it is packed in flexible (e.g. foil), airtight containers weighing with their content not more than 6.8 kg each if the tuna was harvested by United States or ATPDEA beneficiary country vessels.

Pursuant to ATPDEA, 1) certain textile and apparel articles other than those described below; 2) sugar, syrups and molasses subject to over-quota duty rates; 3) rum and tafia; and 4) tuna other than that described above continue to be ineligible for duty-free treatment.

Eligible Apparel Articles

Pursuant to sections 202 and 204(b)(3) of ATPA, as amended by ATPDEA, the President may proclaim duty-free and quota-free 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 only if the U.S. knit or woven fabric is dyed and finished 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 are in chief value of llama, alpaca, and vicuna.

(3) Fabrics or yarn 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. Any interested party may request the President to consider such preferential 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, subject to certain procedures.

(4) Apparel articles sewn or otherwise assembled in one or more beneficiary countries from fabrics or fabric components formed or from components knit-to-shape, in one or more ATPDEA beneficiary countries, from yarns formed in the United States or in one or more ATPDEA 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 ATPDEA beneficiary country from fabric and yarns formed in the United States and cut either in the United States or an ATPDEA beneficiary country.

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.

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 to have engaged in transshipment of apparel products from an ATPDEA beneficiary country, then the President shall deny all benefits under the bill to such exporter, and to any successor 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 shall reduce the quantity of 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 U.S. obligations under the World Trade Organization.

Import Safeguard Provisions

The import relief procedures and authorities under sections 201-204 of the Trade Act of 1974 apply to imports from ATPDEA beneficiary countries, as they do to imports from other countries. If such 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.

Import Safeguard Provisions for Perishable Products

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 the Secretary has reason to believe that a perishable product from an ATPA 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.

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 the results of a general review of beneficiary countries of the criteria listed in sections 203(c) and 203(d) and the performance of each beneficiary country under the 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.

The most recent report was submitted on June 30, 2010.

Petitions for Review

Section 3103(d) of ATPDEA 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. These regulations are to be similar to regulations governing the Generalized System of Preferences petition process.

Tourist Duty-Free Allowance for ATPA countries

Section 2004(d)(8)(B) of Public Law 108-429 increased the duty-free tourist allowance for U.S. residents returning 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. In addition, 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 2000,⁴⁸ 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 2002⁴⁹ 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 2004⁵⁰ made further significant enhancements and extended the preferential program.

Background

Section 134 of the Uruguay Round Agreements Act (URAA)⁵¹ 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.

On January 21, 2000, the President submitted his fifth and final report required by section 134 of the URAA. 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 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, 2000⁵². 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

⁴⁸ Public Law 106-200, enacted on May 18, 2000.

⁴⁹ Public Law 107-210, enacted on August 6, 2002.

⁵⁰ Public Law 108-274, enacted on July 13, 2004.

⁵¹ Public Law 103-465, enacted on December 8, 1994, 19 U.S.C. 3554.

⁵² Public Law 106-200

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. In the Trade Act of 2002, Congress clarified its intent to cover such products.

After reviewing the trade and development results of AGOA, the House introduced H.R. 4103, the AGOA Acceleration Act of 2004, on April 1, 2004. 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, 2004⁵³.

In Public Law 109-432, Congress further amended AGOA adding provisions for the preferential treatment of certain products from lesser developed beneficiary sub-Saharan African countries through September 30, 2012. This legislation also contained special rules regarding fabric or yarn produced in beneficiary sub-Saharan African countries and available in commercial quantities allowing some of that fabric or yarn to be used by lesser developed beneficiary sub-Saharan African countries. These special rules were subsequently repealed in Public Law 110-436, a law which also provided for Mauritius’ eligibility as a lesser developed beneficiary sub-Saharan African country.

Beneficiary Countries

Section 107 of the African Growth and Opportunity Act (AGOA) lists 48 countries, or their successor political entities, as potentially eligible for designation by the President as beneficiary countries. As of June 30, 2008, the following countries have been designated as beneficiary countries:

Angola	Gambia	Nigeria
Benin	Ghana	Republic of Congo
Bostswana	Guinea	Rwanda
Burkina Faso	Guinea-Bissau	Sao Tomé and
Burundi	Kenya	Principe
Cameroon	Lesotho	Senegal
Cape Verde	Liberia	Seychelles

⁵³ Public Law 108-274

Chad	Madagascar	Sierra Leone
Comoros	Malawi	South Africa
Democratic Republic of Congo	Mali	Swaziland
Djibouti	Mauritania*	Tanzania
Ethiopia	Mauritius	Togo
Gabon	Mozambique	Uganda
	Namibia	Zambia
	Niger	

*Mauritania's status as a beneficiary sub-Saharan African country is being terminated effective January 1, 2009.⁵⁴

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.

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, among other things, 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;
- (2) the rule of law, political pluralism, and the right to due process;
- (3) the elimination of barriers to U.S. trade and investment, including by:
 - (A) the provision of national treatment and measures to create an environment conducive to domestic and foreign investment;
 - (B) the protection of intellectual property; and
 - (C) the resolution of bilateral trade and investment disputes;
- (4) economic policies to reduce poverty, increase the availability of health care and educational opportunities, expand physical infrastructure, and promote the development of private enterprise;
- (5) a system to combat corruption and bribery; 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

⁵⁴ Presidential Proclamation 8330 of December 19, 2008.

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 that the country: (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.

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.

The President is required pursuant to 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.

Pursuant to Public Law 110-436, the ITC was required to review and report to Congress on yarns, fabrics, and other textile and apparel inputs that through new or increased investment can be produced competitively in beneficiary sub-Saharan African countries. Subsequently, GAO was to provide recommendations for changes to U.S. trade preference programs to provide incentives to increase investment in and improve the competitiveness of beneficiary sub-Saharan African countries with respect to these products.

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.⁵⁵ 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

⁵⁵ 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.

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, as amended, 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, 2015.

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). Pursuant to 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 or 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) subject to certain additional requirements; and

(5) certified handloomed, handmade, folklore articles, and ethnic printed fabrics.⁵⁶

With regard to findings and trimmings, section 112(e)(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,

⁵⁶ 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.

elastic strips, and zippers, including zipper tapes and labels.

On certain interlinings of foreign origin, section 112(e)(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.⁵⁷

The AGOA Acceleration Act allows beneficiary countries to use additional minor apparel components without losing AGOA benefits. Under new section 112(e)(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 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 112(b)(3) of the original AGOA legislation, as amended, provides 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. 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 are eligible for preferential treatment subject to a cap.

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). Section 7 of the AGOA Acceleration Act provides a 7% cap for each year beyond 2007 until September 30, 2005.

⁵⁷ 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(e)(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.

Section 112(c)(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.⁵⁸ This benefit is provided through September 30, 2012, subject to a “sub-cap” of 3.5 percent for each 1-year period after October 2006.

Botswana, Namibia, and Mauritius exceed the income eligibility for the lesser developed countries, set at \$1500, and therefore would not be eligible to use third country fabric pursuant to the special rule. Amended section 112(c)(3) specifically allows these three countries to use third country fabric.

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 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 a 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 as a result of monitoring 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. Section 112(b)(3)(C)(v) defines the term “interested party” as: (1) any producer of a like or directly competitive article or of essential inputs for like or directly competitive articles; (2) a union or group or workers representative of an industry engaged in the manufacture, production or sale in the United States of a like or directly competitive article or of essential inputs for like or directly competitive articles; and (3) a trade or business association representing producers or sellers of like or directly competitive articles or of essential inputs for like or directly competitive articles.

⁵⁸ As of July 1, 2008, 27 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, Burkina Faso, Cameroon, Cape Verde, Chad, Ethiopia, Gambia, Ghana, Kenya, Lesotho, Madagascar, Malawi, Mali, Mauritius, Mozambique, Namibia, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, South Africa, Swaziland, Tanzania, Uganda, and Zambia. See discussion below describing eligibility for Botswana, Namibia, and Mauritius.

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:

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

(2) permits U.S. Customs Service verification teams to have the access necessary to investigate allegations of transshipment;

(3) agrees to report export and import information requested by the U.S. Customs Service;

(4) will cooperate fully to prevent circumvention and transshipment as provided in Article 5 of the WTO Agreement on Textiles and Clothing;

(5) agrees to require all producers and exporters of covered articles to maintain complete records of the production and the export of covered articles for at least two years; and

(6) agrees to report documentation establishing the country of origin of covered articles as used by that country in implementing an effective visa system.

Section 113(a)(2) defines country of origin documentation to include production records, information relating to the place of production, the number and identification of the types of machinery used in 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.⁵⁹ Furthermore, 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. The Certificate of Origin is not required if it would not be required under Article 503 of the NAFTA (as implemented

⁵⁹ 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.

into U.S. Law) if the article were imported from Mexico.⁶⁰ Under section 113(b)(3), if the President determines that an exporter has engaged in transshipment, then the President is 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.⁶¹

Transshipment is defined to have occurred when preferential treatment for a textile or apparel article has been claimed 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 to report to Congress on an annual basis on the effectiveness of the visa systems, the implementation of legislation and regulations by sub-Saharan African countries to permit access by U.S. Customs teams investigating transshipment, and the measures taken to deter circumvention.

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 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

⁶⁰ 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.

⁶¹ 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.

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. In particular, within a year, the President, after consulting with Congress and the governments concerned, was 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 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 was 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)(A) 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)(2)(B) requires the President, in consultation with Congress, to encourage similar meetings between representatives of the U.S. and sub-Saharan African private sector.

Pursuant to 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 trade expansion and investment relations between the United States and sub-Saharan African countries and the implementation of AGOA, including encouraging joint ventures between small and large businesses. The most recent Trade and Economic Cooperation Forum was held in Washington, D.C. on July 14-16, 2008.

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 the 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. The Act further directs the President to develop infrastructure projects that increase trade capacity particularly with regard to the ecotourism industry, transportation, energy, agriculture, and telecommunications infrastructure. The Act also directs the President to foster improved coordination between customs services at ports and airports in the United States and eligible sub-Saharan African 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 at least 10 eligible sub-Saharan African countries based on their potential to increase marketable export 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 to maintain ongoing discussions with African trade and agriculture ministries and private sector organizations to facilitate the goals of the 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 declared 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 enactment⁶² 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, the U.S. Trade Representative 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. In 2006, the countries announced that they would establish a framework to remain engaged and deepen their relationship in light of differences that existed in the

⁶² Public Law 106-200, enacted on May 18, 2000.

FTA talks.

Customs Valuation

To assess applicable duty rates under the Harmonized Tariff Schedule of the 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, 1980.⁶³

Title II revised section 402 of the Tariff Act of 1930⁶⁴ 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 402(a) of the Tariff Act of 1930.⁶⁵

Historical background

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 was more readily available and the elimination of foreign value would streamline the appraisement process by obviating the need to make simultaneous

⁶³ 45 Fed. Reg. 45135 (1980).

⁶⁴ 19 U.S.C. 1401a.

⁶⁵ 19 U.S.C. 1402.

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 1930⁶⁶ and referred to as the “new law.” The “new law” eliminated the foreign value standard and made export value the primary basis for appraisal. With certain modifications, both U.S. value and cost of production (renamed the constructed value) were retained as the first and second alternative 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 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 1956,⁶⁷ there were nine separate bases of appraisal (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 appraisal 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

⁶⁶ 19 U.S.C. 1401a.

⁶⁷ Act of August 2, 1956, ch. 887.

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 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 toward 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 reach 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 LAW⁶⁸

Section 402 of the Tariff Act of 1930,⁶⁹ 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

⁶⁸ A description of current U.S. law can also be found in Department of Homeland Security, U.S. Customs and Border Protection, *Customs Valuation Encyclopedia (1980-2003)*, June 2004. See also Department of Homeland Security, U.S. Customs and Border Protection, Office of Regulations and Rulings, “What Every Member of the Trade Community Should Know About Customs Value,” CBP Informed Compliance Publication, July 2006.

⁶⁹ 19 U.S.C. 1401a.

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:

- (1) the packing costs incurred by the buyer;
- (2) any selling commission incurred by the buyers;
- (3) the value of any assist;⁷⁰
- (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

⁷⁰ 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. 19 U.S.C. 1401a(B)(1)(A).

goods into the United States.

And, 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

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 that 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 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 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 related⁷¹ does not automatically negate the use of their transaction value; however, the transaction value must be acceptable under prescribed procedures. To be acceptable for transaction value, the 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.

⁷¹ 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;

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. 19 U.S.C. 1401a(g)(1).

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 specifically apply to the transaction value of identical merchandise or similar merchandise. These factors include 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 is 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.

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.

LEGISLATION INVOLVING CUSTOMS VALUATION

Section 15422 of the Food, Conservation and Energy Act of 2008 created an importer declaration requirement for one year to assist in the gathering of

information on the valuation of goods imported into the United States. The provision provided for the collection of additional information about the extent to which importers are declaring, for purposes of customs valuation, a transaction value in a multiple sale scenario that is based on the price paid in the first or earlier sale occurring prior to the introduction of the merchandise into the United States – i.e., a “first sale” as opposed to a “last sale.” The provision was added to assist Members of Congress to understand better the impact of a January 24, 2008 Customs and Border Protection (CBP) Federal Register notice of proposed interpretation that would have reversed a long-standing judicial and administrative interpretation of the expression “sold for exportation to the United States.” This notice was withdrawn by CBP on September 29, 2010.

Specifically, the 2008 provision: (1) required importers to declare whether the value of the imported merchandise is determined on the basis of the price paid on the first or earlier sale occurring prior to the introduction of the merchandise into the United States; (2) required CBP to collect and provide this information to the International Trade Commission (ITC) on a monthly basis; (3) required the ITC to submit a report to the Ways and Means Committee and Senate Finance Committee within ninety days of receipt of CBP’s last monthly report; and (4) expressed a sense of Congress that CBP should not before January 1, 2011, implement a change of interpretation of the expression “sold for exportation to the United States” for purposes of applying the transaction value in a series of sales.

The sense of Congress also expressed that CBP may propose to change or change its interpretation only if CBP: (1) consults with and provides notice to the appropriate committees not less than 180 days prior to proposing a change and not less than 90 days prior to publishing a change; (2) consults with, provides notice to, and takes into consideration views expressed by the Commercial Operations Advisory Committee not less than 120 days prior to proposing a change and not less than 60 days prior to publishing a change; and (3) receives the explicit approval of the Secretary of Treasury prior to publishing the change. The sense of Congress also expresses that CBP should take into consideration the ITC report before publishing any change to the expression “sold for exportation to the United States.”

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)⁷² established a schedule of flat-rate fees for inspection-related services, including processing conveyances and passengers entering the United States. The Act imposed fees⁷³ 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 1986,⁷⁴ 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)⁷⁵ 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 1987⁷⁶ and the Technical and Miscellaneous Revenue Act of 1988,⁷⁷ 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 1988,⁷⁸ 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.

The off-setting receipt revenue generated from user fees is an important source of funding for customs inspections. Receipts from user fees are deposited in a dedicated “Customs User Fee Account” within the general fund of

⁷² Public Law 99-272, enacted April 7, 1986.

⁷³ See, generally 19 U.S.C. 58c.

⁷⁴ Public Law 99-514, enacted October 22, 1986.

⁷⁵ Public Law 99-509, enacted October 21, 1986.

⁷⁶ Public Law 100-203, section 9501, December 22, 1987.

⁷⁷ Public Law 100-647, section 9001, November 10, 1988.

⁷⁸ Public Law 100-449, enacted September 28, 1988.

the Treasury, with one subaccount of the receipts from the merchandise processing fee and a second subaccount of the receipts from the inspection-related 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 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 1990,⁷⁹ as amended by the Omnibus Budget Reconciliation Act of 1990,⁸⁰ 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

⁷⁹ Public Law 101-382, title I, subtitle C, enacted August 20, 1990.

⁸⁰ Public Law 101-508, section 10001, enacted November 5, 1990.

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 on 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 the 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 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 1996⁸¹ 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"

⁸¹ Public Law 104-295.

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 1999⁸² (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

⁸² Public Law 106-36.

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, 109th, and 110th Congresses and entry into force of those agreements resulted in the elimination of the merchandise processing fee for goods originating in Chile, Singapore, Australia, the Dominican Republic, Honduras, El Salvador, Guatemala, Nicaragua, Costa Rica, and Bahrain, Oman, and Peru. Commitments made by the United States to eliminate the merchandise processing fee were explicitly contained in the text of free trade agreements with these countries and implemented into U.S. law respectively under the U.S.-Chile Free Trade Agreement Implementation Act⁸³, the U.S.-Singapore Free Trade Agreement Implementation Act⁸⁴, the U.S.-Australia Free Trade Agreement Implementation Act⁸⁵, the U.S.-Dominican Republic-Central American Free Trade Agreement (DR-CAFTA) Implementation Act⁸⁶, the U.S.-Bahrain Free Trade Agreement Implementation Act⁸⁷, the U.S.-Oman Free Trade Agreement Implementation Act⁸⁸, and the U.S.-Peru Trade Promotion Agreement Implementation Act.⁸⁹ The merchandise processing fee was not eliminated in the U.S.-Morocco Free Trade Agreement.

Extension of the authority to charge customs fees

The Omnibus Budget Reconciliation Act of 1986⁹⁰ established a date upon which the authority to charge customs user fees would expire by amending the Consolidated Omnibus Budget Reconciliation Act of 1985⁹¹ to state that the fees were not to be charged after September 30, 1989. This date applied to the authority to charge both Consolidated Omnibus Reconciliation Act of 1985 (COBRA) fees and the Merchandise Processing Fee (MPF). Early extensions of the authority to charge customs user fees simply amended current law with a later year. However, beginning in 2003 with the enactment of the Act to Extend the Temporary Assistance for Needy Families Block Grant Program, extensions of the authority to charge customs user fees were made for less than full year increments. The American Jobs Creation Act of 2004⁹² amended section

⁸³ Public Law 108-77.

⁸⁴ Public Law 108-78.

⁸⁵ Public Law 108-286.

⁸⁶ Public Law 109-53.

⁸⁷ Public Law 109-169.

⁸⁸ Public Law 109-283.

⁸⁹ Public Law 110-138.

⁹⁰ Public Law 99-509, section 8101(e), enacted October 21, 1986.

⁹¹ Public Law 99-272, section 13031(j), enacted April 7, 1986.

⁹² Public Law 108-357, section 891, enacted October 22, 2004.

13031(j)(3) of the Consolidated Omnibus Budget Reconciliation Act of 1985 to establish separate expiration dates for the authority to charge MPF and COBRA fees. Since the enactment of the Omnibus Budget Reconciliation Act of 1986, the authority to charge customs user fees has been extended 16 times as follows:

- The Omnibus Reconciliation Act of 1987⁹³ substituted 1990 for 1989;
- The Customs Trade Act of 1990⁹⁴ substituted 1991 for 1990;
- The Omnibus Reconciliation Act of 1990⁹⁵ substituted 1995 for 1991;
- The Omnibus Reconciliation Act of 1993⁹⁶ substituted 1998 for 1995;
- The North American Free Trade Implementation Act⁹⁷ substituted 2003 for 1998;
- An Act to Extend the Temporary Assistance for Needy Families Block Grant Program, and Certain Tax and Trade programs, and for other purposes⁹⁸ substituted March 31, 2004 for September 30, 2003;
- The Military Family Tax Relief Act of 2003⁹⁹ substituted March 1, 2005 for March 31, 2004;
- The American Jobs Creation Act of 2004¹⁰⁰ amended section 13031(j)(3) of the Consolidated Omnibus Budget Reconciliation Act of 1985 by inserting a new subsection (j)(3), which had two parts: part (A), which established a termination date for the authority to charge MPFs and part (B), which established a separate termination date for the authority to charge COBRA fees. Thus, the American Jobs Creation Act of 2004 effectively moved the termination date for the authority to charge both MPFs and COBRA fees from March 31, 2004, to September 30, 2014;
- An Act to extend the authorities of the Andean Trade Preferences Act until February 29, 2008¹⁰¹ extended the authority to charge MPFs from September 30, 2014 to October 14, 2014;
- The Joint Resolution approving the renewal of import restrictions contained in the Burmese Freedom and Democracy Act of 2003, and for other purposes¹⁰² extended the authority to charge MPFs from October 14, 2014, to October 21, 2014;
- The Act to extend the trade adjustment assistance program under the Trade Act of 1974 for 3 months¹⁰³ extended the authority to charge

⁹³ Public Law 100-203, section 9501(a)(5), enacted December 22, 1987.

⁹⁴ Public Law 101-382, section 111(e), enacted August 20, 1990.

⁹⁵ Public Law 101-508, section 10001(a), enacted November 5, 1990.

⁹⁶ Public Law 103-66, section 7701, enacted August 10, 1993.

⁹⁷ Public Law 103-182, section 521(e)(4), enacted December 8, 1993.

⁹⁸ Public Law 108-89, section 301, enacted October 1, 2003.

⁹⁹ Public Law 108-121, section 201, enacted November 3, 2003.

¹⁰⁰ Public Law 108-357, section 891, enacted October 22, 2004.

¹⁰¹ Public Law 110-42, section 3, enacted June 30, 2007.

¹⁰² Public Law 110-52, section 2, enacted August 1, 2007.

¹⁰³ Public Law 110-89, section 2(b), enacted September 28, 2007.

- COBRA fees from September 30, 2014, to October 7, 2014;
- The United States-Peru Trade Agreement Implementation Act¹⁰⁴ extended the authority to charge MPFs from October 21, 2014, to December 13, 2014 and the authority to charge COBRA fees from October 7, 2014 to December 13, 2014;
 - The Andean Trade Preference Extension Act of 2008¹⁰⁵ extended the authority to charge customs user fees (both MPFs and COBRA) from December 13, 2014 to December 27, 2014;
 - The Food, Conservation, and Energy Act of 2008¹⁰⁶ extended the authority to charge MPFs from December 27, 2014 to November 14, 2017 and the authority to charge COBRA fees from December 27, 2014, to September 30, 2017;¹⁰⁷
 - The Joint Resolution approving the renewal of import restrictions contained in the Burmese Freedom and Democracy Act of 2003¹⁰⁸ extended the authority to charge COBRA fees from September 30, 2017, to October 7, 2017;
 - The Act to extend the Andean Trade Preference Act and for other purposes¹⁰⁹ extended the authority to charge MPFs from November 14, 2017 to February 14, 2018, and the authority to charge COBRA fees from October 7, 2017 to January 31, 2018.
 - The Joint Resolution approving the renewal of import restrictions contained in the Burmese Freedom and Democracy Act of 2003 and for other purposes¹¹⁰ extended the authority to charge COBRA fees from January 31, 2018, to February 7, 2018;
 - An Act to extend the generalized system of preferences and the Andean Trade Preference Act and for other purposes¹¹¹ extended the authority to charge MPF from February 14, 2018 to May 14, 2018, and the authority to charge COBRA fees from February 7, 2018 to June 7, 2018;
 - The Haiti Economic Lift Program Act of 2010¹¹² extended the authority to charge MPF from May 14, 2018 to November 10,

¹⁰⁴ Public Law 110-138, section 601, enacted December 14, 2007.

¹⁰⁵ Public Law 110-191, section 3, enacted February 29, 2008.

¹⁰⁶ Public Law 110-246, section 15201, enacted June 18, 2008.

¹⁰⁷ The Food, Conservation and Energy Act of 2008, P.L. 110-234 (enacted May 22, 2008), which extended the authority to charge customs user fees from December 27, 2014, to September 30, 2017, was subsequently repealed by P.L. 110-246.

¹⁰⁸ Public Law 110-287, section 2, enacted July 29, 2008.

¹⁰⁹ Public Law 110-436, section 5, enacted October 16, 2008.

¹¹⁰ Public Law 111-42, Sec. 103, enacted July 28, 2009.

¹¹¹ Public Law 111-124, Sec. 3, enacted May 24, 2010.

¹¹² Public Law 111-171, Sec. 11, enacted May 24, 2010

2018, and the authority to charge COBRA fees from June 7, 2018 to August 17, 2018;

- The Joint Resolution approving the renewal of import restrictions contained in the Burmese Freedom and Democracy Act of 2003 and for other purposes¹¹³ extended the authority to charge COBRA fees from August 17, 2018 to August 24, 2018;
- The United States Manufacturing Enhancement Act of 2010¹¹⁴ extended the authority to charge MPF from November 10, 2018 to December 10, 2018, and the authority to charge COBRA fees from August 24, 2018 to November 30, 2018.
- The Claims Resolution Act of 2010¹¹⁵ extended the authority to charge MPF from November 10, 2018 to September 30, 2019 and the authority to charge COBRA fees from November 30, 2018 to September 30, 2019.

Customs fees and the Homeland Security Department

The above history and explanation shows a focused interest by Congress to ensure 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 million 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.

¹¹³ Public Law 111-210, Sec. 2, enacted July 27, 2010.

¹¹⁴ Public Law 111-227, Sec. 4001, enacted August 11, 2010.

¹¹⁵ Public Law 111-291, enacted December 8, 2010.

Other Customs Laws

COUNTRY-OF-ORIGIN MARKING

Section 304 of the Tariff Act of 1930, as amended,¹¹⁶ 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.

Pursuant to longstanding judicial authority, goods are considered to be products of the country in which they are grown, produced or manufactured. The principle of substantial transformation is applied if necessary to identify the last country in which a good was produced or manufactured. Substantial transformation is said to take place when an article having a new name, character or use is produced.¹¹⁷

The country of origin requirements apply not only to determine the country of origin for marking, but also for identification of the country of origin for duty, statistical and other trade purposes.¹¹⁸

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 that arrive at the U.S. border unmarked, provided: the expense of marking under Customs supervision 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

¹¹⁶ 19 U.S.C. 1304.

¹¹⁷ See Anheuser-Busch Brewing Ass’n v. United States, 207 U.S. 556 (1908); United States v. Gibson-Thomsen Co. Inc., 27 C.C.P.A. 267 (1940); 19 CFR 134.35.

¹¹⁸ See NAFTA Rules of Origin section of Chapter 6 for discussion on preferential rules of origin in the NAFTA and other Free Trade Agreements.

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 that 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 valued at \$1 or less, or as bona fide gifts less than \$10 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 that had been imported in substantial quantities during the 5-year period ending December 31, 1936, and 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.”¹¹⁹

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 contains special provisions for the marking of certain pipe and fittings. In particular, the amendment provides 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.

The Miscellaneous Trade and Technical Corrections Act of 1996¹²⁰ 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 1994 Uruguay Round Agreements Act (URAA)¹²¹ established specific country of origin rules based on prescribed changes in tariff classification for all textiles and apparel (generally, HTS Section XI). Under these rules, known as “Breaux-Cardin,” and also termed the “yarn-forward approach,” the origin of textile and apparel articles is generally the country where the fabric was formed from yarn. For example, under Breaux-Cardin certain fabrics, silk handkerchiefs and scarves are treated as being products of the country where the fabrics are made, even if they subsequently undergo dyeing, printing, cutting, sewing, and other finishing operations in another

¹¹⁹ 19 CFR 134.33.

¹²⁰ Public Law 104-295.

¹²¹ Public Law 103-165.

country. 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 origin of silk products under the Breaux-Cardin rule. As part of the U.S. settlement of 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 1999¹²². 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 2000¹²³ 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 apparel of silk, except for goods made from cotton, wool, or fiber blends containing 16 percent or more of cotton.¹²⁴

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.¹²⁵

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

¹²² Public Law 106-36.

¹²³ Public Law 106-200.

¹²⁴ The restored origin rules appear in the Customs Regulations at 19 CFR 102.21(e)(2).

¹²⁵ *Globemaster, Inc. v. United States*, 68 Cust. Ct. C.D. 4340, 340 F. Supp. 974 (1972).

person 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,¹²⁶ 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.

NAFTA Marking Rules.—Sections 207 and 208 of the North American Free Trade Agreement Implementation Act implemented U.S. obligations under NAFTA article 311, annex 311, and article 510 regarding country-of-origin marking for goods of a NAFTA country, and the review and appeal of customs marking decisions. The Customs Service used the regulatory authority granted in these provisions to elaborate a detailed set of product-specific rules of origin for goods of NAFTA countries that are based on the tariff-shift requirements and other criteria. See 19 CFR 102.1-102.20. Section 207 amended 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 a NAFTA country. It exempted goods where the importer “reasonably knows” that they are goods of a NAFTA country, 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 protest adverse NAFTA marking decisions by the Customs Service.

DRAWBACK

Under section 313(a) of the Tariff Act of 1930 (19 U.S.C. 1313(a)),

¹²⁶ As added by Public Law 102-388, section 355 approved October 6, 1992.

“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 duty drawback 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.

Legislation modifying duty drawback law.

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 1999¹²⁷ 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 2000¹²⁸ 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 2004¹²⁹ 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

¹²⁷ Public Law 106-36.

¹²⁸ Public Law 106-476.

¹²⁹ Public Law 108-429.

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.

The Food, Conservation and Energy Act of 2008¹³⁰ made two changes to the duty drawback program. Section 15334 of the Act amends subsection 313(p) of the Tariff Act of 1930 (19.U.S.C. 1313(p)) to prohibit a refund of the duty imposed by subheading 9901.00.50 of the Harmonized Tariff Schedule of the United States (HTS), which covers imports of ethyl alcohol or a mixture of ethyl alcohol used as a fuel, if the exported article upon which a drawback claim is based does not contain ethyl alcohol or a mixture of ethyl alcohol. In particular, the provision eliminates the ability to export jet fuel as a substitute for motor fuel made with imports of ethyl alcohol or a mixture of ethyl alcohol and then receive duty drawback based on the import duty paid on the ethyl alcohol or the mixture of ethyl alcohol under HTS subheading 9901.00.50. Section 15421 of the Act amends section 313(j)(2) of the Tariff Act of 1930 (19 U.S.C. 1313(j)(2)) to provide a standard for what is considered to be "commercially interchangeable" for purposes of unused merchandise drawback for wine. This provision carries forward the standard used by Customs and Border Protection for commercial interchangeability from 2001 to May 2007. Specifically, the provision provides that "wine of the same color having a price variation not to exceed 50 percent between the imported wine and the exported wine shall be deemed to be commercially interchangeable."

Treatment of duty drawback in free trade agreements.

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

¹³⁰ Public Law 110-246.

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 Act¹³¹ 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.— Since the implementation of the U.S.-Chile FTA, no other free trade agreement has included a provision affecting the drawback or duty deferral program. Specifically, there are no such provisions in the implementation acts for the U.S.-Australia FTA, U.S.-Singapore FTA, U.S.-Morocco FTA, U.S.-DR-CAFTA FTA, the U.S.-Bahrain FTA, the U.S.-Oman FTA, and the U.S.-Peru FTA.

THE SOFTWOOD LUMBER ACT OF 2008

The “Food, Conservation and Energy Act of 2008” amended the Tariff Act of 1930 to include a new Title VIII, the “Softwood Lumber Act of 2008.” The Act directs the President to establish a softwood lumber importer declaration program. The program requires U.S. importers of specified softwood lumber and softwood lumber products to provide additional information to help the United States and its trading partners ensure that trade in these products is consistent with the terms of any relevant international agreements. Specifically, importers of covered products must provide the export price, the estimated export charge, if any, and an importer declaration on the entry summary for each shipment of softwood lumber and softwood lumber products subject to the Act.

THE CUSTOMS MODERNIZATION ACT

The Customs Modernization Act or “Mod” (Title VI of the North American

¹³¹ Public Law 108-77.

Free Trade Agreement Implementation Act¹³²) of 1993 amended the Tariff Act of 1930 and related laws. The Act shifted much of the responsibility for correctly classifying and determining the value of imported merchandise on the importer of record (see section 484 of the Tariff Act of 1930, as amended). The importer is required to use “reasonable care” to provide classification and valuation information, as well as other information necessary to enable U.S. Customs and Border Protection (CBP) to assess properly duties, collect accurate statistics, and determine whether other applicable legal requirements, if any, have been met. CBP remains responsible for fixing the final classification and value of the merchandise. If an importer does not exercise reasonable care, release of merchandise could be delayed and, in some cases, could result in penalties being imposed.

Importers and exporters are required to keep records of all imports for a period of five years from the date of entry or exportation. CBP has authority to examine and/or audit any transaction records.

The Mod Act also established a National Customs Automation Program to enable processing of commercial imports and enable electronic payment of duties, fees, and taxes related to importation.

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 1930,¹³³ 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;

¹³² Public Law 103-182.

¹³³ 19 U.S.C. 1514, 1515, and 1516.

(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 2004¹³⁴ 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 1999¹³⁵ 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 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 parties 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 30 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 30 days that he will contest the negative decision in court.

¹³⁴ Public Law 108-429.

¹³⁵ Public Law 106-36.

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 1976¹³⁶ 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.¹³⁷

Section 105 of the Prioritizing Resources and Organization for Intellectual Property Act of 2008 amends section 602(a) of the Copyright Revision Act of 1976 (19 U.S.C. 602(a)), to specify that exportation of infringing copies is also prohibited and considered an infringement of the exclusive right to distribute copies or phonorecords to the public. This section also makes importation and exportation of infringing copies a criminal copyright violation, prosecutable under 17 U.S.C. 506, and makes conforming changes to section 602(b).

Trademarks and trade names.—Articles bearing counterfeit trademarks, or marks that 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.¹³⁸ The U.S. Customs Service also affords similar protection against unauthorized shipments bearing trade names which are recorded with Customs pursuant to regulations.¹³⁹ 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 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 1996¹⁴⁰ strengthened the protection afforded trademark owners against the importation of articles bearing a counterfeit trademark. A “counterfeit trademark” is defined as a spurious

¹³⁶ Public Law 94-553, section 101, enacted October 19, 1976, 17 U.S.C. 602(a).

¹³⁷ 19 CFR 133, subpart D.

¹³⁸ 19 CFR 133.1-133.7.

¹³⁹ 19 CFR part 133, subpart B.

¹⁴⁰ Public Law 104-153.

trademark that 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 that 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)¹⁴¹ is a complex piece of legislation that 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

¹⁴¹ Public Law 105-304.

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,¹⁴² 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 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.

¹⁴² 19 U.S.C. 1592.

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 reasonable 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. 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 appraisal, established a “shared responsibility” between Customs and importers; and allowed 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 that 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 1996¹⁴³ 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

¹⁴³ Public Law 104-153.

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.

MISCELLANEOUS CUSTOMS AUTHORITY

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 1987¹⁴⁴ established in the Department of Treasury the “Advisory Committee on Commercial Operations of the U.S. Customs Service,” which is referred to as COAC. The Assistant Secretary of Treasury for Enforcement is the Committee Chairman, which is composed of 20 members. The COAC’s structure was slightly modified after the creation of the Department of Homeland Security pursuant to the Homeland Security Act of 2002¹⁴⁵ and the ensuing transfer of functions, personnel, assets and liabilities of the United States Customs Service of the Department of Treasury to the newly created Department. Specifically, the Committee’s official designation was changed to the “Advisory Committee on Commercial Operations of Customs and Border

¹⁴⁴ Public Law 100-203.

¹⁴⁵ Public Law 107-296.

Protection” and a government co-Chair position was created, with one chair to be filled by a representative from the Department of Treasury and the other from the Department of Homeland Security.

In making member appointments, the Secretary of Treasury and Secretary of Homeland Security are to select individuals or firms “affected by the commercial operations and related functions” of Customs and Border Protection (CBP). A majority of the members may not belong to the same political party. The Advisory Committee is required to provide advice to the Secretary of Treasury and the Secretary of Homeland Security on all CBP 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.¹⁴⁶ 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 1993¹⁴⁷ 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

¹⁴⁶ “Report on Abuses and Mismanagement in the U.S. Customs Service Commercial Operations”; February 8, 1990; WMCP: 101-22.

¹⁴⁷ Public Law 102-393.

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 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 ongoing effort to fully implement the Mod Act, the Miscellaneous Trade and Technical Corrections Act of 1999¹⁴⁸ (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 2002¹⁴⁹ gave discretion to Customs to require the filing of electronic submission of information.

¹⁴⁸ Public Law 106-36, enacted June 25, 1999.

¹⁴⁹ Public Law 107-210.

Periodic Payment.—Section 383 of the Trade Act of 2002¹⁵⁰ 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 (ACE) 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, whichever comes first. Ongoing development and implementation of Customs' ACE computer system is proceeding in step with efforts to streamline the entry process.

Foreign Trade Zones

The Foreign Trade Zones Act of 1934,¹⁵¹ 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 CBP, 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.¹⁵² Second, regulations, promulgated by both the Customs Service (now CBP)¹⁵³ and the Department of Commerce,¹⁵⁴ 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.¹⁵⁵

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

¹⁵⁰ Public Law 107-210.

¹⁵¹ Act of June 18, 1934, ch. 590, 48 Stat. 998, 19 U.S.C. 81a -81u.

¹⁵² Boggs amendment of 1959, ch. 296, 64 Stat. 246, 19 U.S.C. 81c.

¹⁵³ 19 CFR 146.0-48 (1980).

¹⁵⁴ 15 CFR 400.100-1406 (1980).

¹⁵⁵ 431 F.2d 779 (2d Cir. 1970), aff'g 303 F. Supp. 262 (S.D.N.Y. 1969).

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 that were unable to relocate to or take advantage of an existing general-purpose zone.¹⁵⁶ Under the regulations, only a grantee of a previously approved general zone may apply to establish a subzone.

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.¹⁵⁷ 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

¹⁵⁶ 15 CFR 400.304 (1983).

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

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 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 paying an MPF for each entry removed from the zone.

Section 410 of the Trade and Development Act of 2000¹⁵⁸ 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 MPF 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

¹⁵⁸ Public Law 106-200.

and Technical Corrections Act of 1996¹⁵⁹ 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 Act¹⁶⁰ 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 Act¹⁶¹ further amended section 3(a) to 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 of any other existing United States FTA, with the exception of the United States-Chile FTA. After a transition period, the United States - Chile FTA eliminated duty deferral programs for Chilean goods except for products that are merely warehoused and reexported without change in condition. For additional information, see the discussion in Chapter 6 on the impact of Section 203 of the United States-Chile Free Trade Agreement Implementation Act¹⁶² on duty deferral programs.

¹⁵⁹ Public Law 104-295.

¹⁶⁰ Public Law 100-449, enacted September 28, 1988.

¹⁶¹ Public Law 100-182, enacted December 8, 1993.

¹⁶² Public Law 108-77.

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,¹⁶³ 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 that have assumed obligations equivalent to those of the WTO 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 that 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

¹⁶³ 19 U.S.C. 1671.

agreement 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, the Trade Act of 1974 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.¹⁶⁴

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”). 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;

¹⁶⁴ Exec. Order No. 12188, January 4, 1980, 44 Fed. Reg. 69273.

(2) description of export subsidies that superseded the GATT Article XVI requirement that an export 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) dispute settlement procedures; (8) greater transparency regarding subsidy practices (such as international notification procedures); (9) a test designed to afford relief only where subsidized imports (whether an export or domestic subsidy is involved) cause or threaten injury to 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 that 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 contingent upon the use of domestic goods over imported goods; (3) creating a special presumption of serious prejudice for egregious subsidies (that presumption lapsed on January 1, 2000); (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 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).¹⁶⁵ The URAA amended section 701 of the Tariff Act of 1930 to require the application of an injury test to: (1) members of the WTO, (2) countries that have assumed obligations substantially equivalent to the obligations under the Subsidies Agreement, and (3) certain other countries that have the right under an agreement with the United States to unconditional most-favored-nation treatment. The URAA also amended section 771 of the Tariff Act of 1930 to provide for a uniform definition of a subsidy, applicable to both WTO members and non-members. Based on these changes, the URAA also included a provision repealing any countervailing duty determination under section 303 (discussed above).

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. Direct transfers of funds (e.g., grants, loans, equity infusions), potential direct transfers (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), and the purchase of goods are forms of “financial contributions.” A financial contribution also occurs 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.—The Subsidies Agreement provides that only those subsidies that are “specific” may be subject to countervailing import duties, and may be actionable under WTO dispute settlement procedures. The URAA (and the Subsidies Agreement) provide that a subsidy is specific if it is: (1) an export subsidy (i.e., contingent upon export performance); (2) an import substitution subsidy (i.e., contingent upon the use of domestic over imported goods); (3) specific, in law or in fact, to an enterprise or industry, or group of enterprises or

¹⁶⁵ Public Law 103-465, 19 U.S.C. 3572.

industries.

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. Annex I of the Agreement provides an illustrative list of export subsidies. The list includes: more favorable transport and freight terms for exports, special tax deductions based on export, and export 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” subsidies 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) by December 31, 2002. An exception to this transition period 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. In 2006, these developing countries were granted a final further extension for certain export subsidies through 2015. 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 import substitution subsidies. The transition period for import substitution subsidies for all developing and least developed countries has ended.

Upstream Subsidies

The Trade and Tariff Act of 1984 modified the application of the CVD law to address “upstream subsidies”—subsidies bestowed on inputs which are then incorporated into the manufacture of a final product that is exported to the United States. Section 268 of URAA further modified the law by establishing criteria for determining the existence of an upstream subsidy.

Accordingly, section 771A of the Tariff Act of 1930, as amended, defines an “upstream subsidy” as a countervailable subsidy that: (1) is paid or bestowed on an input product by the same country that is the subject of the countervailing duty proceeding on the final product; (2) bestows a “competitive benefit” on the final product (i.e., the merchandise that is the subject of the proceeding); and (3) has a “significant effect” on the cost of manufacturing or producing the subject merchandise. The DOC shall include in the amount of any countervailing duty imposed on the subject merchandise an amount equal to the “competitive benefit” that results from the upstream subsidy, not to exceed the amount of the upstream subsidy.

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 other export markets. 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 (or threatening to materially injure, or materially retarding the establishment of) the U.S. industry.

Historical Background

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.¹⁶⁶ 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, when it was transferred to the Department of Commerce (DOC).

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. More specifically, the 1967 Code required that dumping be the “principal” cause of the material injury to the domestic industry. It also provided for the establishment of a GATT Committee on Antidumping Practices whose function it was to review annually the operation of national antidumping laws. The 1967 Code entered into force on July 1, 1968. The U.S. President, however, had received no explicit authorization from Congress to negotiate and enter into such an agreement, and Congress enacted a law directing that the 1967 Code not be followed by U.S.

¹⁶⁶ Act of May 27, 1921, ch. 14, 42 Stat. 11, 19 U.S.C. 160 (now repealed).

authorities where it conflicted with domestic law.¹⁶⁷

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. The GATT Agreement on Implementation of article VI of the GATT, Relating to Antidumping Measures, came into force on January 1, 1980.¹⁶⁸

The Congress approved the revised GATT Antidumping Code under section 2(a) of the Trade Agreements Act of 1979.¹⁶⁹ Title I of the 1979 Act repealed the 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 1979.¹⁷⁰

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” (LTFV). 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 (e.g., the price in the foreign market)

¹⁶⁷ Renegotiations Amendments Act of 1968, Public Law 90-634 (1968).

¹⁶⁸ 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.

¹⁶⁹ Public Law 96-39, approved July 26, 1979.

¹⁷⁰ 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.

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 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 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 14 of the

Antidumping Agreement (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 14 of the Antidumping Agreement 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.” 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 provides 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 USTR initiates an investigation, 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 material injury standard is 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. 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.¹⁷¹

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 that were self-initiated). However, the ITC is to terminate immediately 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 1990¹⁷² 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.

¹⁷¹ The URAA Statement of Administrative Action at 853.

¹⁷² Public Law 101-382

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) 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.¹⁷³ 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” that an

¹⁷³ URAA Statement of Administrative Action at 862.

industry in the United States is materially injured or is threatened with material injury (or that the establishment of an industry in the United States is materially retarded) by reason of imports of the subject merchandise, based on the information available to it at the time. If the ITC preliminary determination is negative, the investigation is terminated. If it is affirmative, 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 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 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. 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 an outstanding AD or CVD order, or suspension agreement. 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.¹⁷⁴

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

¹⁷⁴ URAA Statement of Administrative Action at 885.

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. To date, the Committee has not developed such a text.

Facts Available/Best Information Available

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 Dispute Settlement 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 Antidumping Agreement provides for deference to the administering authority of the WTO Member whose antidumping measure is the subject of the dispute. For example, “[w]here the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.” The URAA contains provisions relating to the adoption of panel and Appellate Body reports in AD and CVD cases.

Section 129(a) of the URAA provides that if a dispute settlement panel or the 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 the 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 (CDSOA),¹⁷⁵ commonly referred to as the Byrd Amendment, which provides for the annual distribution of AD and countervailing duties to the affected domestic producers for certain 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 with respect to orders in effect from January 1, 1999.

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 CDSOA. 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 CDSOA 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 CDSOA disbursements related to that country's products. The United States reached separate agreements with Australia,

¹⁷⁵ Public Law 106-387, approved October 28, 2000, 19 U.S.C. 754.

Indonesia, and Thailand to postpone their requests for authorization to retaliate. The European Union and Japan continue to impose retaliatory duties on U.S. goods.

A provision repealing the CDSOA, but providing for the distribution of “duties on entries of goods made and filed before October 1, 2007,” was enacted in the Deficit Reduction Act of 2005, signed by the President on February 8, 2006.¹⁷⁶ Accordingly, although collection of antidumping and countervailing duties for purposes of CDSOA disbursement ceased as of October 1, 2007, duties will continue to be available for disbursement until all entries before this date are liquidated, i.e. the final assessment of duties on these entries is made.

**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

Articles 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),¹⁷⁷ provided the general consultation and dispute settlement procedures 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

¹⁷⁶ Public Law 109-171.

¹⁷⁷ MTN/FR/W/20/Rev. 2, reprinted in House Doc. No. 96-153, pt. I at 619.

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 2000¹⁷⁸ 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,¹⁷⁹ (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”¹⁸⁰ to

¹⁷⁸ Public Law 106-200

¹⁷⁹ 19 U.S.C. 2411--2420.

¹⁸⁰ 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,

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 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

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.

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 are 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 that 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 that 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 that (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 that 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 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 that 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 statutory requirement, 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 1930¹⁸¹ 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 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 subject to the

¹⁸¹ Public Law 71-361, section 337, approved June 17, 1930, 19 U.S.C. 1337.

provisions of the Administrative Procedure Act (APA).¹⁸² 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.¹⁸³

The language of section 337 closely parallels that of section 5 of the Federal Trade Commission Act,¹⁸⁴ 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 DOC of those laws for appropriate action.¹⁸⁵ 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 to avoid duplication and conflicts in the administration of the trade remedy laws.

The Audio Home Recording Act of 1992¹⁸⁶ 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.

¹⁸² Act of June 11, 1946, ch. 324, sections 1-12, 5 U.S.C. 551 et seq.

¹⁸³ 19 U.S.C. 1337(c).

¹⁸⁴ Public Law 63-203, approved September 26, 1914, 38 Stat. 717, 15 U.S.C. 45.

¹⁸⁵ 19 U.S.C. 1337(b)(3).

¹⁸⁶ Public Law 102-563, approved October 28, 1992, 17 U.S.C. 1008 .

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 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 1974,¹⁸⁷ 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

¹⁸⁷ 19 U.S.C. 2251-2254.

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.

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 1994.¹⁸⁸ 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

¹⁸⁸ 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."

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.

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, 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,¹⁸⁹ 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

¹⁸⁹ 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.

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 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,¹⁹⁰ 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 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.¹⁹¹

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.

¹⁹⁰ Public Law 103-182, approved December 8, 1993, 19 U.S.C. 3371.

¹⁹¹ These provisions are reprinted in Chapter 13, which contains the complete legislation implementing these agreements.

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 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 1974¹⁹² 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 and causation and a faster relief procedure, and that 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 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

¹⁹² 19 U.S.C. 2436.

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. This 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

Federal assistance is offered to workers, firms, farmers and communities that are directly affected adversely by foreign trade. This assistance is provided through 4 programs that are discussed below. The Trade Adjustment Assistance (TAA) for Workers aids workers displaced by trade and is administered by the U.S. Department of Labor (DOL). TAA originated in 1962 under the Trade Expansion Act of 1962, Public Law 87-794, approved October 11, 1962, and was revamped by the Trade Act of 1974, Public Law 93-618, approved January 3, 1975, and many times before a major expansion under the Trade Act of 2002, Public Law 107-210, approved August 6, 2002. The Trade and Globalization Adjustment Assistance Act of 2009 (“the 2009 Act”), passed as part of the American Recovery and Reinvestment Act of 2009, Public Law 111-5, approved February 17, 2009, extended authorization of, and expanded eligibility for, the TAA for Workers program as well as the other TAA programs. The second program, Trade Adjustment Assistance for Firms, offers technical assistance to firms designed to improve their capability to compete with imported goods and is administered by the U.S. Department of Commerce. The third program, Trade Adjustment Assistance for Farmers, aids farmers, ranchers and fisherman harmed by low prices caused at least partly by imports and is administered by the U.S. Department of Agriculture (USDA). A fourth program, Trade Adjustment Assistance for Communities, provides grants to communities that have been affected by trade, and to eligible higher education institutions to offer, develop or improve training opportunities for workers covered under TAA Program for Workers.

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 1962¹⁹³ 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 liberalized under title II of the Trade Act of 1974.¹⁹⁴ The Omnibus Budget Reconciliation Act (OBRA) of 1981¹⁹⁵ amended the program for workers. To sharply restrict access to the program and to cut program benefits, OBRA included the following changes to the TAA for Workers program: (1) to be certified, workers now had to show that imports were a “substantial cause” of layoffs (which was defined as not only important, but “not less than any other cause”); previously, a “contributed importantly” standard applied; (2) it prohibited the concurrent receipt of

¹⁹³ Public Law 87-794, enacted October 11, 1962.

¹⁹⁴ Public Law 93-618, enacted January 3, 1975.

¹⁹⁵ Public Law 97-35, enacted August 13, 1981.

employment and TRA benefits; and (3) required increased efforts to look for work. OBRA, Public Law 97-35, approved August 13, 1981, also made relatively minor modifications in the TAA for Firms program. Most amendments became effective on October 1, 1981. Both programs were extended at that time for 1 year, to terminate on September 30, 1983. TAA enrollment declined dramatically after the OBRA amendments went into effect.¹⁹⁶ Public Law 98-120, approved October 12, 1983, extended the TAA for Workers and TAA for Firms programs for 2 years, until September 30, 1985. Public Law 98-120, approved October 12, 1983, also changed the criteria for certification of workers back to “contributed importantly” from the requirement that imports be a “substantial cause” of layoffs. Sections 2671-2673 of the Deficit Reduction Act of 1984¹⁹⁷ included three provisions that amended the TAA for Workers program to increase the availability of worker training allowances and the level of job search and relocation benefits, and amended the TAA for Firms program to increase the availability of industry-wide technical assistance.

The termination date of the Worker and Firm TAA programs was further extended under temporary legislation in the first session of the 99th Congress from September 30, 1985 to December 19, 1985 (Public Law 99-107, approved September 30, 1985; Public Law 99-155, approved November 14, 1985; Public Law 99-181, approved December 13, 1985; and Public Law 99-189, December 18, 1985). The Consolidated Omnibus Budget Reconciliation Act of 1985, Public Law 99-272, approved April 7, 1986, reauthorized the TAA Programs for Workers and Firms for 6 years retroactively from December 19, 1985, until September 30, 1991, with amendments. Sections 1421-1430 of the Omnibus Trade and Competitiveness Act of 1988 (OTCA)¹⁹⁸ made significant amendments in the Worker TAA program, particularly concerning the eligibility criteria for cash benefits, funding, and administration. In addition, OCTA instituted a training requirement as a condition for income support to encourage and enable workers to obtain early reemployment; this provision became effective as of November 21, 1988. The requirement replaced a 1986 amendment that instituted a job-search requirement as a condition for receiving cash benefits. Among the other changes to the TAA for Workers program included in OTCA were: (1) an extension of TAA eligibility to some adversely affected secondary workers, (2) an extension of TRA benefits from 52 week to 78 weeks and (3) the creation of a wage insurance program. Public Law 100-418, approved August 23, 1988, extended TAA program authorization for an additional 2 years until September 30, 1993.

Section 136 of the Customs and Trade Act of 1990, Public Law 101-382,

¹⁹⁶ In 1980, an estimated 598,000 workers were certified under the TAA program. In 1981, an estimated 35,000 workers were certified and in 1982, an estimated 23,000 workers were certified. Department of Labor, Employment and Training Administration.

¹⁹⁷ Public Law 98-369, enacted July 18, 1984.

¹⁹⁸ Public Law 100-418, enacted August 23, 1988.

approved August 20, 1990, extended the completion and reporting period for the supplemental wage allowance demonstration projects for workers required by the 1988 amendments. Section 106 of Public Law 102-318, approved July 3, 1992, to extend the Emergency Unemployment Compensation Program, provided for weeks of active military duty in a reserve status (including service during Operation Desert Storm) to qualify toward the minimum number of weeks of prior employment required for TAA eligibility.

Section 13803 of the Omnibus Budget Reconciliation Act, Public Law 103-66, approved August 10, 1993, reauthorized the TAA Programs for Workers and Firms for an additional 5 years through fiscal year 1998, with assistance to terminate on September 30, 1998. Section 13803 also reduced the level of the “cap” on training entitlement funding from \$80 million to \$70 million for fiscal year 1997 only.

Sections 501-506 of the North American Free Trade Agreement (NAFTA) Implementation Act¹⁹⁹ set forth the “NAFTA Worker Security Act,” establishing the NAFTA Transitional Adjustment Assistance Program for Workers as a new subchapter D (section 250) under chapter 2 of title II of the Trade Act of 1974.

²⁰⁰ That special program went into effect on January 1, 1994, with a termination date of the earlier of September 30, 1998, or the date that a comparable comprehensive dislocated worker program became effective. Import-impacted workers also were able to petition for assistance under TAA but could not obtain benefits under both programs. The NAFTA-TAA program was repealed by the TAA Reform Act of 2002.²⁰¹ Petitions for NAFTA-TAA were accepted until November 3, 2002. Workers certified under any petitions received before November 4, 2002, even if the certifications were made after that date, were eligible for services under the NAFTA-TAA program. Funds were made available to cover NAFTA-TAA-certified workers until their eligibility period ran out. No funds have been appropriated for NAFTA-TAA since fiscal year 2004.

Following the expiration of the TAA Programs’ authorizations on September 30, 1998, they were extended through June 30, 1999, by section 1012 of the Omnibus Consolidated and Emergency Supplemental Appropriations Act for fiscal year 1999, Public Law 105-277, approved October 21, 1998. After this 9-month extension expired, the programs were continued through September 30, 2001, by section 702 of the Consolidated Appropriations Act for fiscal year 2000²⁰², approved November 29, 1999. At the beginning of fiscal year 2002, eight continuing resolutions kept the programs funded through January 10, 2002. Debate on TAA reform continued after this expiration until the passage of the Trade Act of 2002, Public Law 107-210, approved August 6, 2002, which became law on August 6, 2002, and authorized the TAA programs through fiscal

¹⁹⁹ Public Law 103-182, enacted December 8, 1993.

²⁰⁰ Public Law 93-618, enacted January 3, 1975.

²⁰¹ Public Law 107-210, enacted August 6, 2002.

²⁰² Public Law 106-113.

year 2007. The Trade Act of 2002 also created the Health Coverage Tax Credit. The Trade Act of 2002 also created the Alternative Trade Adjustment Assistance for Older Workers program, which was effective for petitions filed on or after August 6, 2003. Finally, the Trade Act of 2002 added sections 291-298 of the Trade Act of 1974 to create the TAA for Farmers program.

The Consolidated Appropriations Act, 2008²⁰³ fully funded the TAA for Workers and ATAA programs for fiscal year 2008. DOL considered the appropriations language sufficient to continue the operation of the TAA for Workers and ATAA programs throughout fiscal year 2008, including issuing new certifications for eligibility, although their authorization had expired on December 31, 2007.²⁰⁴ The Consolidated Appropriations Act, 2008 also prohibited any of the funds made available from being used to finalize or implement any proposed regulation related to TAA for Workers until the program was reauthorized. The Consolidated Security, Disaster Assistance and Continuing Appropriations Act, 2009²⁰⁵ approved Sept. 30, 2008, fully funded the TAA for Workers and ATAA programs until enactment of the applicable regular appropriations bill or until March 6, 2009, whichever occurred first. The prohibition on the finalization or implementation of TAA for Workers regulations until the program is reauthorized remained in place through fiscal year 2009. The authorization for the TAA for Firms and TAA for Farmers Programs expired on December 31, 2007. EDA continued to certify firms under the TAA for Firms program based on the enactment of appropriations. USDA did not issue further certifications under the TAA for Farmers program.

The Trade and Globalization Adjustment Assistance Act of 2009, passed as part of the American Recovery and Reinvestment Act of 2009²⁰⁶ extended authorization of and significantly amended the TAA for Workers, TAA for Firms and TAA for Farmers programs. It also created the TAA for Communities program. The Trade and Globalization Adjustment Assistance Act of 2009, inter alia, made service sector workers eligible for the TAA for Workers program, expanded access to the program for manufacturing workers, significantly increased training funding, created more flexible training options, promoted longer-term training and simplified enrollment deadlines and made them subject to state law good cause waiver provisions. It improved and simplified access to the TAA wage insurance program for older workers and renamed it the Reemployment Trade Adjustment Assistance Program. Additionally, the 2009 Act increased the HCTC to 80 percent and made several important changes to the existing tax credit designed to minimize gaps in health insurance coverage and assure access to insurance policies that meet the health and medical needs of eligible individuals and their families. The Trade and

²⁰³ Public Law 110-161

²⁰⁴ See Training and Guidance Letter No. 15-07, December 27, 2007 (Department of Labor, Employment and Training Administration).

²⁰⁵ Public Law 110-329

²⁰⁶ Public Law 111-5

Globalization Adjustment Assistance Act of 2009 authorization for the TAA programs expires on December 31, 2010. The provisions that expanded benefit eligibility under the TAA program (and the Internal Revenue Code changes expanding HCTC) are scheduled to sunset on December 31, 2010. In addition, the 2009 Act provides that on January 1, 2011, the TAA program will be administered as if the provisions of the Trade and Globalization Adjustment Assistance Act of 2009 had not been enacted, although workers covered by petitions certified before January 1, 2011, would receive benefits under the expanded TAA program.²⁰⁷

TAA PROGRAM FOR WORKERS

Sections 221-249 of the Trade Act of 1974²⁰⁸ approved January 3, 1975, as amended, contain the procedures, eligibility requirements, benefit terms and conditions and administrative provisions of the TAA Program for Workers. The program is administered by the Employment and Training Administration (ETA) within the Department of Labor and under the most recent amendments in 2009 consists of the following benefits for certified and otherwise qualified workers: basic, additional trade readjustment allowances (TRA) (income support while workers are enrolled in approved training, including remedial and prerequisite coursework), employment and case management services, training, job search and relocation allowances, wage supplements for workers 50 years and older, and eligibility for assistance in paying health insurance premiums through tax credits (HCTC). 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 employment and case management services and training opportunities.

Certification requirements

A two-step process is involved to determine whether an individual worker will receive TAA: (1) The Secretary of Labor must certify that a petitioning group of workers in a particular firm as eligible to apply; and (2) The State agency administering the program must approve the application for benefits of an individual worker covered by a certification. To obtain a group eligibility certification, a group of workers, their union or authorized representative, their employer, a one-stop operator or partner, or the State Dislocated Worker Unit may file a petition for certification with the DOL Office of Trade Adjustment

²⁰⁷ On December 22, 2010, the 111th Congress passed legislation extending all the provisions of the Trade and Globalization Adjustment Assistance Act of 2009 until February 12, 2011. That extension is expected to become law.

²⁰⁸ Public Law 93-618

Assistance (DTAA OTAA) in ETA and the State TAA Coordinator or Dislocated Worker Unit in the State in which the worker group's firm is located. 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 (3 or more workers in a firm of fewer than 50 workers or 5% of the workforce in a firm of 50 or more) has been totally or partially separated or is threatened with total or partial separation; and
2. One of the following:
 - a. The firm's sales or production have decreased absolutely, and there has been an increase in imports like or directly competitive with (I) articles produced or services supplied by the firm; (II) articles into which one of more component parts produced by the firm are incorporated; (III) articles which are produced using services supplied by the firm; or (IV) articles incorporating component parts produced outside the United States that are like or directly competitive with imports of articles that incorporate component parts produced by the firm. The increase in imports described in (I) through (IV) must contribute importantly to the workers' separation or threat of separation and to the decline in sales and production of the firm; or
 - b. One of the following: (I) there has been a shift by the workers' firm to a foreign country in the production of articles or the supply of services like or directly competitive with goods produced or services supplied by workers in the firm; or (II) the workers' firm has acquired from a foreign country articles or services that are like or directly competitive with goods produced or services supplied by workers in the firm. The shift in production or the acquisition of goods or services described in (I) or (II) must have contributed importantly to the workers' separation or threat of separation.
 - c. A group of workers in a public agency are eligible for TAA benefits if (1) a significant number or proportion of workers in a public agency has been totally or partially separated or is threatened with total or partial separation; (2) the public agency has acquired from a foreign country services like or directly competitive with services which are supplied by the agency; and (3) the acquisition of these services contributed importantly to the workers' separation or threat of separation.
 - d. Workers in firms that are identified in an International Trade Commission investigation that results in a finding of injury or market disruption under section 202(b)(1), 421(b)(1), 705(b)(1)(A), or 735(b)(1)(A) of the Tariff Act of 1930 are eligible for TAA certification if (1) the petition is filed within

one year after the date the International Trade Commission publishes the affirmative determination in the *Federal Register* and (2) the workers were totally or partially separated no more than one year prior to the date of publication of the ITC's determination and no than later than one year after that date.

- e. A group of secondary workers is eligible for TAA benefits if (1) a significant number or proportion of the workers in the firm (or appropriate subdivision) have been totally or partially separated or are threatened with total or partial separation; the workers' firm is a supplier or downstream producer to a firm that employed workers certified as eligible for TAA and such supply or production is related to the article or service that was the basis for the certification; and (1) the worker's firm is a supplier and the component parts it supplied accounted for at least 20 percent of the firms production or sales, or (2) the loss of business by the workers' firm with the certified firm contributed importantly to the workers' separation or threat of separation.

Table 6-1 contains the number of petitions from 1975-2010 for which DOL initiated an investigation as the first part of the certification process and the number of petitions that DOL certified as meeting the eligibility requirements.

TABLE 6-1--NUMBER OF PETITIONS INSTITUTED AND CERTIFIED
AND ESTIMATED NUMBER OF WORKERS PETITIONING
AND CERTIFIED FOR TAA, FISCAL YEARS 1975-2010

Fiscal Year	Cases Instituted		Cases Certified		
	Petitions	Estimated Workers	Petitions	Percent ¹	Estimated Workers
1975	559	216,173	141	25	59,330
1976	1,053	226,523	454	43	147,943
1977	1,317	229,842	437	33	145,285
1978	1,876	177,072	933	50	168,226
1979	2,307	346,714	1,006	44	238,220
1980	5,570	1,051,350	1,060	19	598,970
1981	1,159	133,924	377	33	35,545
1982	1,064	176,320	280	26	22,988
1983	976	166,604	517	53	60,986
1984	511	44,247	356	70	17,011
1985	1,439	131,102	510	35	34,538
1986	1,887	168,625	920	49	80,610
1987	1,650	194,654	824	50	93,572
1988	2,761	230,541	1,195	43	106,363
1989	1,856	151,744	1,430	77	85,500
1990	1,621	160,793	706	44	75,638
1991	1,784	152,942	793	44	64,040
1992	2,002	128,867	1,321	66	60,190

1993	1,375	168,442	740	54	78,496
1994	1,629	137,242	1,047	64	81,974
1995	1,506	136,029	1,122	75	89,398
1996	1,658	175,965	1,116	67	111,836
1997	1,335	151,000	842	63	109,904
1998	1,730	181,310	1,000	58	108,981
1999	2,321	220,483	1,587	69	156,998
2000	1,440	151,693	821	57	97,939
2001	2,406	304,596	1,164	48	144,293
2002	2,565	338,701	1,674	65	245,003
2003	3,567	304,367	1,894	53	197,748
2004	2,992	210,567	1,812	61	149,705
2005	2,644	156,022	1,561	59	118,022
2006	2,465	169,017	1,444	59	119,602
2007	2,272	190,494	1,444	65	146,838
2008	2,224	171,326	1,437	65	125,845
2009	4,549	422,248	1,845	59	201,312
2010	2,222	156,785	2,718	76 ²	280,873

¹ Cases certified as a percent of petitions instituted (entered into management information system after filing and investigation initiated).

² In FY 2010 3,556 investigations were completed; 1,172 of these were instituted during FY 2009

Note: The lag between the time that a petition is instituted and when the petition is certified is the reason that annual comparisons of petitions instituted and certified may be inexact.

Source: U.S. Department of Labor, Employment and Training Administration.

Table 6-2 summarizes the number of workers certified by major industries from 1975 to 2010.

TABLE 6-2--ESTIMATED NUMBER OF WORKERS CERTIFIED BY MAJOR INDUSTRIES, FISCAL YEARS 1975-2007

Industry	Fiscal Years 1975-2007 Workers (In Thousands)	Fiscal Years 2002-2007 Workers (In Thousands)
Total for all industries	4,048	732
Motor Vehicles (SIC 37xx)	1,025	87
Apparel (SIC 23xx)	685	68
Steel (SIC 331x)	241	20
Footwear (SICs 302x, 313x, 314x)	148	2
Electrical and Electronic Equip. (Incl. computers) (SICs 357x, 36xx)	470	125
Oil and Gas (SIC 13xx)	190	1
Fabricated metal products (SIC 34xx)	141	47
Textiles (SIC 22xx)	195	77
All others	953	305

Note: SIC refers to an industry's Standard Industrial Classification number.

Source: U.S. Department of Labor, Employment and Training Administration.

Upon notification of petition filing, the State must ensure that rapid response

assistance and appropriate core and intensive employment services are made available to the workers to the extent authorized under the Workforce Investment Act of 1998²⁰⁹ approved August 7, 1998. The State also is required to assist the ETA in the review of the petition. 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, the *impact date*, and the expiration date of the certification (generally 2 years following the date of certification) or the certification termination date (if the Secretary issues one), whichever is sooner.

Cooperating State agencies, which operate the TAA programs in their States, 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. Cooperating State agencies also must: (1) facilitate the early filing of petitions for any workers who reasonably may be or become eligible for benefits under the Act, including helping petitioners file petitions and filing petitions on behalf of groups of workers; (2) identify the adversely affected workers and adversely affected incumbent workers covered by a certification and inform them of suitable training opportunities, review such opportunities with them and provide additional information including time limits for applying for benefits and services, and advice and assistance to workers to obtain training and other benefits; (3) advise adversely affected incumbent workers covered by a certification of the availability of the pre-layoff training benefit; and (4) encourage each adversely affected worker covered by a certification to apply for training under the Act before (if possible) the worker becomes entitled to receive TRA, but in no event later than the enrollment deadline.

Qualifying requirements for trade readjustment allowances

A worker may receive TRA for any week of unemployment, if an individual is an adversely affected worker covered by a certification, files an application with the State agency, and meet all of 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 (but never more than 1 year prior to the date of the petition), and before the expiration date of the certification (generally 2 years following the date of certification) or the termination date (if any) of the certification.
2. The worker was employed for at least 26 weeks during the 52-week

²⁰⁹ Public Law 105-220

period preceding the week of the first qualifying separation 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. It also includes up to 7 weeks of employer-authorized leave for the purpose of vacation, sickness, injury, maternity, or military leave for training, or service as a full-time union representative. Additionally, all weeks of disability covered by works compensation and all weeks on call-up for active duty in a military reserve also may count toward the 26-week minimum.

3. The worker was entitled to unemployment insurance (UI), has exhausted all rights to any UI entitlement, including any extended benefits or Federal supplemental compensation (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 extended benefits by reason of the work acceptance and job search requirements under section 202(a)(3) of the Federal-State Extended Unemployment Compensation Act of 1970.²¹⁰ All TRA claimants in all States are subject to the provisions of the extended benefits “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 extended benefits suitable work test does not apply to workers enrolled or participating in a TAA-approved training program. However, the test does apply to workers for whom TAA-approved training is certified as not feasible or appropriate.

5. To receive basic TRA payments, the worker must be enrolled in, or have completed a training program approved by the Secretary of Labor. Enrollment must occur within 26 weeks of the date worker’s separation from adversely affected employment or 26 weeks from the date the Secretary issues a certification covering the worker, whichever is later. In the case of extenuating circumstances, enrollment must occur within 45 days after the end of the applicable 26 week period. In the case of a worker who fails to enroll within the applicable period due to the failure to provide the worker with timely information regarding that deadline, enrollment must occur within a period set at the discretion of the Secretary. Basic TRA will also be available to a worker if the Secretary has determined and submitted a written statement to the individual worker certifying that approval of training is not “feasible or appropriate”. There are 6 possible reasons for granting a waiver from training: (1) notification of recall received, (2) possession of marketable skills, (3) proximity to retirement age, (4) poor health, (5) unavailability of timely enrollment or (6) unavailability of suitable training. Waivers are limited to 6 months in

²¹⁰Public Law 91-373, enacted August 10, 1970.

duration. With the exception of waivers based on proximity to retirement, waivers must be reviewed after three months and every month thereafter. If the Secretary determines that the basis for the waiver is no longer applicable, the waiver shall be revoked. No cash benefits may be paid to a worker who, without justifiable cause, has failed to begin participation or has ceased participation in an approved training program until the worker begins or resumes participation, or to a worker whose waiver of participation in training is revoked in writing by the Secretary.

This training requirement to encourage and enable workers to obtain early reemployment became effective under the Omnibus Trade and Competitiveness Act (OTCA)²¹¹ amendments. This requirement replaced a 1986 amendment that instituted a job search requirement as a condition for receiving cash benefits. Waivers from the training requirement were granted at the discretion of the Secretary of Labor until the Trade Act of 2002²¹² approved August 6, 2002, specified criteria for the waivers and set the duration at 6 months unless the Secretary determines otherwise. The 2009 Act clarified that the “marketable skills” training waiver may apply to workers who have post-graduate degrees from accredited institutions of higher education and revised the waiver review rules, which were considered to be unduly burdensome.

Cash benefit levels and duration

A worker may receive TRA benefits for any week of unemployment on or after the date of certification, provided that the worker has exhausted entitlement to UC. The Trade and Globalization Adjustment Assistance Act of 2009 eliminated the requirement that 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, or (b) the first week after the employee is totally separated from work. Under the 2009 Act, the worker is entitled to TRA payment for weeks of unemployment beginning on or after the date of certification.

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. This amount is 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

²¹¹Public Law 100-418, enacted August 23, 1988.

²¹²Public Law 107-210

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. For example, 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. Thus, 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. As an exception to the 104-week eligibility period for basic TRA, the eligibility period for basic TRA for workers requiring a program of either prerequisite education or remedial education is 130 weeks. 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 (or 130 weeks) after the week in which the subsequent total qualifying separation occurs.

A worker may receive up to 78 additional weeks of TRA benefits after collecting basic benefits (up to a total maximum of 156 weeks) if the worker participates in remedial or prerequisite education.

Additional benefits may be paid only during the 78-week or, if remedial education or prerequisite is needed, 104-week period that follows either the last week of entitlement to basic TRA or the last week before training begins, if training begins after exhaustion of basic TRA. A worker is not eligible for additional TRA unless the worker is enrolled and participating in training; waivers do not apply.

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 and 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 designated in the training schedule. However, the Trade and Globalization Adjustment Assistance Act of 2009 expanded the eligibility period to allow a worker 91 weeks during which to collect 78 weeks of benefits. Prior to this amendment, the worker had a 52-consecutive week period during which to collect 52 weeks of benefits. Any weeks not claimed were lost. This change allows the worker to not claim benefits during up to 13 weeks without losing any weeks of benefits.

If there is justifiable cause, the Secretary may extend the period for which a worker is eligible for TRA, but not the maximum amounts of such allowances that are payable.

In the event that a worker receives an overpayment, the worker is required to repay it. However, the 2009 Act clarifies that this requirement can be waived if an overpaid worker is without fault and repayment of the amount would cause financial hardship for the individual (or the individual's household, if applicable).

Training and other employment and case management services, job research and relocation allowances

Training and other employment and case management services and job search and relocation allowances are available through cooperating State agencies to adversely affected workers and adversely affected incumbent workers whether or not they have exhausted UI benefits and become eligible for TRA payments.

States must make available to adversely affected workers and adversely affected incumbent workers an array of employment and case management services: comprehensive and specialized assessments of skill levels and service needs, including through diagnostic testing and use of other assessment tools and in-depth interviewing and evaluation to identify employment barriers and appropriate employment goals; the development of an individual employment plans to identify employment goals and objectives, and appropriate training to achieve those goals and objectives; the provision of information on training available in local and regional areas, on how to determine which training is suitable training for the worker, and how to apply for such training; the provision of information on how to apply for financial aid; short-term prevocational services; individual career counseling, including job search and placement counseling (during the period in which the individual is receiving a trade adjustment allowance or training under this chapter and after receiving such training for purposes of job placement); the provision of information relating to the labor market; and information relating to the availability of supportive services necessary to enable an individual to participate in training.

The following 6 conditions must be met in order for a worker to receive training:

1. No suitable employment available;
2. The worker would benefit from appropriate training;
3. A reasonable expectation of employment following training completion exists;
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.

Programs that may be approved for training include employer-based training (e.g. on-the-job training, customized training and apprenticeships), WIA-approved training, remedial and prerequisite education, training or coursework at an accredited institution of higher education, training paid for by another federal or State program or other source or any other training approved by the Secretary. If training is approved, the workers are entitled to payment of the costs by the Secretary either 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 (e.g., the non-overtime work hours, wages or employment benefits of current employees are not reduced). Workers are entitled to have the costs of approved training paid for under the TAA program subject to an aggregate \$575 million statutory ceiling. Up to this limit, workers are entitled to have the costs of approved training paid on their behalf. Training funds are allocated to the States in accordance with a statutory formula and implementing regulations.

In addition to increasing the funds available for training to \$575 million, the Trade and Globalization Adjustment Assistance Act of 2009 provided that each State shall receive a payment for employment services and case management services equal to 15 percent of the amount of the training funds it received. While appropriators customarily provided the Department of Labor with administrative funds equal to 15 percent of the total training funds for disbursement to the States, the 2009 Act codified the practice. Of this amount, the 2009 Act requires that not more than 2/3 can be used for the administration of the TAA for Workers program and not less than 1/3 can be used for employment and case management services. Additionally, each State is provided an additional \$350,000 exclusively for employment and case management services. Finally, the 2009 Act modified the method of allocating training funds, which had, in the past, resulted in insufficient funds for some States.

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, unless the worker who receives training under a nongovernmental program would be required to reimburse any portion of the costs from TAA funds. In determining whether the costs of training are reasonable, the Secretary may consider whether such other public or private funds are available to the worker, but may not require the worker to obtain such funds as a condition for approval of training. Where the worker demonstrates the ability to pay living expenses while in TAA funded training after TRA is exhausted, such training can also be approved if the other training approval criteria are met. 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 from or shared by other sources.

The 2009 Act made adversely affected incumbent workers eligible for case employment and case management services and training. However, such workers are not eligible for on-the-job training or for customized training, unless that customized training is for a position other than the worker's adversely affected employment. Moreover, if the Secretary determines that an incumbent worker for whom training was approved is no longer threatened with separation, approval of that training shall be terminated.

Supplemental assistance is available to defray reasonable transportation and subsistence expenses for separate maintenance when training is not within the

worker's commuting distance. This assistance equal to the lesser of actual expenses or 50 percent of the prevailing Federal per diem rate for subsistence and 100 percent of the 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, who are totally laid off, and who apply within 365 days after certification or last total layoff, whichever is later, or within 182 days after concluding training. The allowance for reimbursement is equal to 100 percent of necessary job search expenses, based on the same increased supplemental assistance rates described above, up to a maximum amount of \$1,500. 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 separated from employment at the time of relocation who have been able to obtain an offer of suitable employment only outside their commuting area, who apply within 425 days after certification or last total layoff, whichever is later, or within 182 days after concluding training, and whose relocation occurs within 182 days after filing the application for the relocation allowance or the conclusion of training. The allowance is equal 100 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 3 times the worker's average weekly wage, up to a maximum amount of \$1,500. In fiscal year 2010, \$6 million was appropriated for job search and relocation expenses. Annual outlays, the number of new recipients, and average weekly benefits for TRAs are presented in Table 6-3.

TABLE 6-3--TOTAL OUTLAYS FOR TRADE READJUSTMENT ALLOWANCES, NUMBER OF RECIPIENTS, AND AVERAGE WEEKLY PAYMENTS, FISCAL YEARS 1975-2010

Fiscal Year	Total Outlays (Millions)	New Recipients (Thousands)	Average Weekly Payment Per Recipient
1975 (4th Quarter)	\$71	47	\$58
1976 ¹	79	62	47
1977	148	111	57
1978	257	155	68
1979	256	132	70
1980	1,622	532	126
1981	1,440	281	140
1982	103	30	119
1983	37	30	120
1984	35	16	139
1985	40	20	133
1986	118	40	144
1987	208	55	155
1988	186	47	165

1989	125	24	175
1990	93	19	164
1991	116	25	169
1992 ²	43	9	163
1993	51	10	157
1994	120	31	181
1995	145	28	193
1996	160	31	200
1997	188	32	193
1998	151	24	191
1999	199	36	202
2000	239	33	218
2001	226	33	222
2002	254	37	234
2003	352	44	238
2004	530	81	262
2005	598	55	267
2006	529	53	289
2007	562	47	329
2007	540	47	320
2008	523	42	312
2009	122	11	314
2010	93	8	320

¹ Fiscal year 1976 is the first full year of experience under the program as amended by the Trade Act of 1974, Public Law 93-618, approved January 3, 1975.

² The 1992, 2009 and 2010 figures for TRA recipients and outlays are abnormally low because of emergency unemployment compensation (EUC) payments that were made to eligible workers in lieu of TRA payments.

Note: Center column is number of *new* recipients, not the total number of recipients. Data are not available on the total number of recipients.

Source: U.S. Department of Labor, Employment and Training Administration.

Table 6-4 provides a summary of training, job search, and relocation allowances from 1975 to 2010.

TABLE 6-4--TRAINING, JOB SEARCH, AND RELOCATION
ALLOWANCES: TOTAL NUMBER OF WORKERS AND OUTLAYS,
FISCAL YEARS 1975-2010

Fiscal Year	Total Number			Total Outlays Including Administration (Millions)
	Entered Training	Job Search	Relocation	
1975 (4th Quarter)	463	158	44	-----
1976	823	23	26	\$2.7
1977	4,213	277	191	4.0
1978	8,337	1,072	631	12.8
1979	4,456	1,181	855	13.5
1980	9,475	931	629	6.0
1981	20,366	1,491	2,011	2.4
1982	5,844	697	662	19.4

1983	11,299	696	3,269	36.0
1984	6,821	799	2,220	17.0
1985	7,424	916	1,692	30.2
1986	12,229	1,276	2,292	28.6
1987	22,888	1,709	1,537	49.9
1988	9,538	1,156	1,347	54.4
1989	17,042	863	989	62.6
1990	18,057	565	1,245	57.6
1991	20,093	525	759	64.9
1992	18,582	594	751	70.2
1993	19,467	802	2,063	80.0
1994	26,484	671	2,306	98.9
1995	26,514	869	1,572	97.8
1996	30,280	737	858	96.6
1997	22,840	481	706	85.1
1998	21,333	243	330	96.7
1999	28,113	255	398	94.3
2000	22,657	351	641	92.7
2001	24,106	242	369	94.3
2002	37,163	271	388	94.5
2003	43,672	430	736	220.1
2004	50,929	467	817	258.2
2005	38,207	288	446	259.3
2006	37,426	454	531	259.4
2007	49,339	405	757	259.4
2008	38,189	526	461	259.6
2009	47,231	617	682	598.0
2010	43,633	319	404	685.6

Source: U.S. Department of Labor, Employment and Training Administration.

Health coverage tax credit

The Trade Act of 2002²¹³ authorized the Health Coverage Tax Credit (HCTC): a federal income tax credit to cover 65 percent of cost of “qualified health insurance” for eligible taxpayers and their family members. The 2009 Act increased the credit to 80 percent. The credit is refundable, so taxpayers may claim the full credit amount even if they have little or no federal income tax liability. The credit can also be advanced, so taxpayers need not wait until they file their tax returns in order to benefit from it.

Eligibility for the HCTC is limited to 3 groups of taxpayers. Two groups consist of individuals who are eligible for allowances (financial assistance) through the TAA program, because such individuals have lost manufacturing jobs due to increased foreign imports or shifts in production outside the United States. The third eligibility group consists of individuals whose defined benefit pension plans were taken over by the Pension Benefit Guaranty Corporation because of financial difficulties. To be eligible for the HCTC individuals cannot

²¹³Public Law 107-210, enacted August 6, 2002.

be enrolled in the following types of coverage: an employer-sponsored plan for which the employer pays at least half of the total premium, Medicare Part B, the Federal Employees Health Benefits Program, Medicaid, or the State Children's Health Insurance Program; nor entitled to Medicare Part A or a U.S. military health program.

The HCTC can be claimed for only 11 types of qualified health insurance specified in the statute, 7 of which require state action to become effective. For tax year 2008, 44 states and the District of Columbia made at least one of these seven types of state-qualified health plans available. In the remaining 6 states and Puerto Rico, only the 4 types of qualified health insurance not dependent on state action (automatically qualified health plans) were available, though not necessarily all who were eligible for the credit could avail themselves of these options.

Funding

Federal funds, as an appropriated entitlement from general revenues under the Federal Unemployment Benefit and Allowances Account, are used for payments for TRA, training, employment and case management services, job search and relocation allowances, wage supplements for older workers, as well as State-related administrative expenses. Funds made available under grants to States defray expenses of any employment services and other administrative expenses. To induce States to participate, a penalty first introduced by section 239 of the Trade Act of 1974²¹⁴ provided for a 15 percent reduction of the credits for State unemployment taxes that 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. The Tax Equity & Fiscal Responsibility Act of 1982²¹⁵, approved September 3, 1982, reduced this penalty against employers to 7.5 percent.

REEMPLOYMENT TRADE ADJUSTMENT ASSISTANCE

The Trade Act of 2002²¹⁶ also established a 5-year demonstration project for Alternative Trade Adjustment Assistance (ATAA) for older workers. This program is effective for petitions filed on or after August 6, 2003. The Trade and Globalization Adjustment Assistance Act of 2009 renamed the program Reemployment Trade Adjustment Assistance (RTAA), improved the program and made it more accessible, and set the same expiration date as the other TAA programs. Petitioners who request that workers be certified for the ATAA program must request both certifications (TAA and RTAA) at the same time.

²¹⁴Public Law 93-618, enacted January 3, 1975.

²¹⁵Public Law 97-248

²¹⁶Public Law 107-210, enacted August 6, 2002.

RTAA is designed to allow TAA-eligible workers for whom retraining may not be appropriate and who find reemployment at a lower wage to receive a temporary wage subsidy to help bridge the salary gap between their old and new employment.

In order to establish that petitioning workers are eligible to apply for the RTAA program, the Secretary of Labor first must determine that all of the criteria listed above for a regular TAA certification are met. The following 3 additional criteria must be met for RTAA certification:

1. A significant number of workers in the petitioning workers' firm are 50 years of age or older;
2. The workers in the petitioning workers' firm possess job skills that are not easily transferable to other employment; and
3. The competitive conditions within the affected workers' industry are adverse.

The Trade and Globalization Adjustment Assistance Act of 2009 eliminated the requirement for a group of workers to file a separate petition for RTAA certification. Workers who are certified for TAA may receive RTAA, provided they meet individual RTAA eligibility requirements. The individual must be at least 50 years of age at the time of reemployment, and obtain full-time employment making less than \$55,000 a year within 26 weeks of the date of separation from the adversely affected employment., and be employed either (1) full-time or (2) part-time (but at least 20 hours per week) and enrolled full-time in a TAA-approved training program. The worker may not return to that affected employment.

An eligible worker is entitled to receive half the difference between the wages received from reemployment and the wages received at the time of the qualifying separation for a period up to 2 years, but the payments may not exceed \$12,000 over the 2-year eligibility period. The participant may receive the relocation allowance and the HCTC, but is not eligible to receive retraining, job search allowances, and TRA. A worker who wants to receive the HCTC and intends to choose the RTAA must apply for a waiver from the required training in order to maintain eligibility for TAA and the HCTC. A worker who receives RTAA may not also receive TRA benefits in the same week, but otherwise is eligible for TAA benefits.

TAA PROGRAM FOR FIRMS

Sections 251 through 264 of the Trade Act of 1974,²¹⁷ as amended, contain the procedures, eligibility requirements, benefits terms and conditions, and administrative provisions of the TAA program for Firms. The program is administered by the Economic Development Administration within the Department of Commerce. Program benefits consist exclusively of technical

²¹⁷Public Law 93-618, enacted January 3, 1975.

assistance for petitioning firms that demonstrate they have been adversely impacted by increased import competition. Amendments in 1986 under Public Law 99-272, approved April 7, 1986, eliminated financial assistance benefits (direct loan or loan guarantee), increased government participation in technical assistance and expanded the criteria for firm certification. The program was reauthorized most recently through December 31, 2010 by the Trade and Globalization Adjustment Assistance Act of 2009, which was enacted as part of the American Recovery and Reinvestment Act of 2009²¹⁸, approved February 17, 2009. Key changes made include extending eligibility to services firms, increasing program funding, and introducing greater flexibility to demonstrate eligibility for assistance.

Certification requirements

To qualify for assistance, firms complete 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 separated;
2. Sales, production, or both of the firm have decreased absolutely; that sales, production, or both of an article or service of the firm 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; that sales, production, or both of the firm during the most recent 12-month period for which data are available have decreased relative to (a) the average annual sales or production for the firm during the 24-month period preceding that 12-month period, or (b) the average annual sales or production for the firm during the 36-month period preceding that 12-month period; and that sales production, or both of an article or service that accounts for at least 25 percent of the total sales or production of the firm during the most recent 12-month period for which data are available have decreased compared to (a) the average annual sales or production for the article or service during the 24-month period preceding that 12-month period, or (b) the average annual sales or production for the article or service during the 36-month period preceding that 12-month period, and
3. Increased imports of articles like or directly competitive with articles or services produced by the firm have “contributed importantly” to both the

²¹⁸ Public Law 111-05

layoffs and the decline in sales and/or production.

The Secretary may determine that imports of articles or services like or directly competitive with articles or services produced by the firm have contributed importantly to layoffs or declines in sales and/or production if customers accounting for a significant percentage of the decrease in sales or production of the firm certify to the Secretary that such customers have increased their imports of such articles or services from a foreign country, either absolutely or relative to their acquisition of such articles or services from suppliers located in the United States.

The 1988 OTCA, amendments,²¹⁹ expanded potential eligibility coverage of the program to include firms that engage in exploration or drilling for oil or natural gas. A certified firm may file an application with the Secretary of Commerce for TAA 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 or in developing a viable economic adjustment proposal.

The Secretary approves the firm's application for assistance only if it is determined that the firm's adjustment proposal: (1) is reasonably calculated to contribute materially to the economic adjustment of the firm; (2) gives adequate consideration to the interests of firm's workers; and (3) demonstrates that the firm will make all reasonable efforts to use its own resources for economic development (adjustment). The Secretary must make a determination within 60 days after the application has been filed.

Firm trade adjustment assistance data for fiscal years 2002 through 2009 are presented in Table 6-5. In fiscal year 2009, the program assisted 172 firms through one of the 11 regional Trade Adjustment Assistance Centers (TAACs). The federal government share averaged 55 percent of adjustment costs. Most assisted firms were small- to medium-sized manufacturing enterprises with an average of \$11.2 million in sales and 68 employees.

TABLE 6-5--TRADE ADJUSTMENT ASSISTANCE FOR FIRMS
PROPOSALS, FISCAL YEARS 2002-2007

	2002	2003	2004	2005	2006	2007	2008	2009
Number of Firms Assisted	141	162	177	132	137	126	139	172
Avg. Firm Sales (\$ millions)	\$11.7	\$7.2	\$11.6	\$8.4	\$10.6	\$11.2	\$13.1	\$10.7
Avg. Firm Employees	102	68	88	64	91	68	82	77
Govt Share (\$ millions)	\$7.6	\$8.1	\$8.5	\$5.9	\$6.7	\$7.1	\$7.9	\$10.3
Firm Share (\$ millions)	\$7.1	\$7.4	\$8.1	\$5.4	\$6.0	\$5.9	\$7.5	\$9.8

²¹⁹Public Law 100-418, enacted August 23, 1988.

Total TAA (\$ millions)	\$14.7	\$15.5	\$16.6	\$11.3	\$12.7	\$13.0	\$15.4	\$20.2
Avg TAA Per Firm	\$53,90	\$50,00	\$48,02	\$44,69	\$48,90	\$56,44	\$56,44	\$60,12
(Govt)	0	0	3	7	5	9	9	3

Source: Economic Development Administration, Department of Commerce.

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 TAACs. In practice, the TAACs have provided most of the technical assistance to certified firms. As amended by the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA),²²⁰ 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 for developing or implementing an economic adjustment proposal. Since 1996, assistance has been administratively capped. The firms must pay at least 25 percent of the cost to prepare the adjustment proposal and at least 25% of project adjustment assistance. For project assistance exceeding \$30,000, a firm must cover at least 50 percent of the total cost. Grants may also be made to intermediate organizations to defray up to 100 percent of their expenses in providing technical assistance.

Subject to appropriations, the Secretary of Commerce is also authorized to provide technical assistance of up to \$10 million annually per industry to establish industry-wide programs for new product or process development, export development, or other uses consistent with adjustment assistance objectives. This program was authorized during much of this time; the Commerce Department, however, has not awarded funding since 1995.

Two new reporting requirements were added under the Trade and Globalization Adjustment Assistance Act of 2009. The first requires the United States International Trade Commission (USITC) to notify the Secretary of Commerce when an investigation has been initiated with respect to possible relief from injury from imports. The Secretary is required to initiate a study of the number of firms in the competing domestic industry that have been or are likely to be certified as eligible to receive adjustment assistance, and to evaluate the extent to which the orderly adjustment of such firms to import competition may be facilitated through existing programs. If the USITC makes a positive

²²⁰Public Law 99-272, enacted April 7, 1986.

determination, those firms likely to be affected are to be notified of possible eligibility for firm TAA assistance.

The Secretary is also required, upon receiving notice from the Secretary of Labor of the identify of a firm that is covered by a certification issued under the Trade Adjustment Assistance for Workers program, to notify the firm that it may be eligible for firm TAA assistance.

The Secretary is also required to prepare an annual report containing data on the Trade Adjustment Assistance for Firms program, including specific program performance and economic data outlined in statute. The report shall be submitted to the House Committee on Ways and Means and Senate Committee on Finance, and published in the Federal Register.

Funding

Funds to cover all costs of the program are subject to annual appropriations from general revenues to the Economic Development Administration of the Department of Commerce. The American Recovery and Reinvestment Act of 2009, Public Law 111-05 approved February 17, 2009 authorized \$50 million annually for the TAA for Firms program through December 31, 2010. Table 6-6 provides the authorized and appropriated funding levels for fiscal years 1999 – 2010.

TABLE 6-6—TAA FOR FIRMS AUTHORIZATIONS AND
APPROPRIATIONS
FISCAL YEARS 1999-2010

Year	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Authorizations (millions)	\$10.0	10.0	10.0	10.0	16.0	16.0	16.0	16.0	16.0	16.0	50.0	50.0
Appropriations (millions)	\$9.5	10.5	10.5	10.5	10.0	11.9	11.0	12.8	12.8	14.1	15.8	15.8

Source: Economic Development Administration, Department of Commerce.

TRADE ADJUSTMENT ASSISTANCE FOR COMMUNITIES

The Trade Adjustment Assistance Program for Communities grant program was created by the Trade and Globalization Adjustment Assistance Act of 2009 (TGAAA) which was enacted as part of the American Recovery and Reinvestment Act (ARRA) of 2009.²²¹

²²¹ Public Law 111-5, Division B, Title I, Subtitle I, Part III; 123 U.S.C. 401. The Trade Act of 1974, Public Law 93-618 (19 U.S.C. 2371, 88 Stat. 2035) as originally enacted included provisions

The TAAC program comprises four subchapters:

- Subchapter A—Trade Adjustment Assistance to Communities (TAAC) directs the Department of Commerce’s Economic Development Administration (EDA) to provide technical assistance and to award strategic planning and implementation grants to eligible trade-impacted communities.
- Subchapter B—Community Colleges and Career Training (CC&CT) creates a competitive grant program administered by the Department of Labor which is intended to strengthen the role of community colleges in filling the education and skills gap of workers in trade impacted communities.
- Subchapter C—Industry or Sector Partnership Grants Program for Communities Impacted by Trade (ISG) creates a grant program intended to encourage the creation of public-private partnerships that develop a skilled workforce.

Subchapter A — The TAA for Communities Program

Subchapter A charges EDA with the responsibility for determining if a community is eligible for trade adjustment assistance; providing technical assistance to eligible communities to assist them in the application process; awarding strategic planning and project implementation grants to eligible communities; and establishing an Interagency Community Assistance Working Group responsible for directing additional, non-EDA, federal assistance to trade-impacted communities.

A community is eligible to apply for trade adjustment assistance if on or after August 1, 2009 it met one or more of the following certifications:

1. a Department of Labor certification that a group of workers in the community is eligible to apply for Trade Adjustment Assistance for Workers (TAAW);
2. a Department of Commerce certification that a firm or firms located within the community are eligible for Trade Adjustment Assistance for Firms (TAAF); or
3. a Department of Agriculture certification that a group of agricultural producers in the community is eligible for Trade Adjustment Assistance to Farmers.

In addition, EDA must determine that the community is or will be significantly affected by a threatened or actual loss of jobs related to one of the

authorizing trade adjustment assistance for communities and established a sunset date terminating the program on September 30, 1982 (Sec. 284 of P.L. 93-618), (88 Stat. 2041).

certifications identified above.

Upon making an affirmative determination that a community has been impacted by trade and qualifies for TAAC assistance, EDA is responsible for:

- promptly notifying the state's governor and officials of the trade-impacted community of the availability of TAAC funds and other appropriated economic development assistance;
- providing comprehensive technical assistance to aid the community in developing or updating a strategic plan aimed at diversifying and strengthening the community's economy; and
- assisting a trade-impacted community gain access to other federal programs. To facilitate this EDA was charged with establishing the Interagency Community Assistance Working Group (ICAWG), which comprised of representatives from at least eight federal agencies.

Before a trade-impacted community can receive trade adjustment assistance implementation grant funds, it must have an EDA-approved strategic plan. To the extent practicable, the plan must have been developed with the involvement of both public and private sector entities (e.g., government, business, workforce investment boards, labor unions and educational institutions) and include elements that assess the community's needs and assets, identify long-term economic adjustment prospects and private sector commitments, and estimates of projected costs of implementing elements of the plan. If an entity in an eligible community is seeking or intends to seek a CCCT grant or an ISP grant, the community must include in the grant application a description of how it intends to integrate projects and programs funded by the different grants. A community can apply for a grant to offset up to 75 percent of the cost developing the strategic plan.

Implementation grants are used to finance activities and programs included in a community's approved strategic plan. A grant may not exceed \$5 million and may not cover more than 95% of the cost of a project or program. (The community must contribute not less than 5 percent of the amount of the grant.)

There are six specific categories of eligible activities that may be funded with implementation grants, including: (1) infrastructure improvements; (2) market and industry research and analysis; (3) technical assistance including feasibility studies; (4) public services; (5) training; and (6) other activities included in the strategic plan that satisfy statutory and regulatory requirements.

EDA uses six weighted criteria in evaluating grant applications, including the extent to which proposed:

- Activities support small and medium sized communities (communities with populations less than 100,000 persons) (20%);

- Investment is targeted to the most severely trade impacted communities as measured by the number of persons receiving Trade Adjustment Assistance for workers (20%);
- Activities will result in a high return on investment as measured by jobs created or retained, private and public sector funds leveraged and the use of best practices in the management of the project (20%);
- Activities will support regionalism, innovation and entrepreneurship through the implementation of regional cluster strategies and the adaptation of technology for commercial usage (20%);
- Project supports global trade and competitiveness by supporting companies that have significant export potential (15%); and
- Activities will promote the green economy through the use of renewable energy, energy efficiency and green building technology (5%).

The TGAAA authorized funding of \$337.5 million for implementation and strategic planning grants for the period that includes FY2009, FY2010 and a 90 day period from October 1, 2010, to December 31, 2010. For FY2009, as part of the 2009 Supplemental Appropriation for Iraq, Afghanistan, Pakistan and Pandemic Flu²²², Congress appropriated \$40 million and directed that it be split between TAAC activities and Trade Adjustment Assistance for Firms (TAAF). TAAC received \$38.3 million of this amount. TAAC has received no other appropriations.

Table 1. TAA for Communities Authorizations and Appropriations: FY2009 to FY2011

	2009	2010	2011
Authorization (in millions of dollars)	150.0	150.0	37.5 ^a
Strategic planning grants	25.0	25.0	6.2
Implementation grants	125.0	125.0	31.2
Appropriations (in millions of dollars)	38.3	0	0

Source: Authorization amounts from P.L. 111-5. Appropriation amounts from P.L. 111-32.

²²² Public Law 111-32

Subchapter B — Community College and Career Training Grant Program

The Community College and Career Training Grant Program (CCCT; 19 U.S.C. § 2372), subchapter B of Trade Adjustment Assistance for Communities (TAAC) program, supports efforts to strengthen the role of community colleges in addressing the education and skills deficiencies of workers in trade impacted communities. The CCCT program authorizes the U.S. Department of Labor (DOL) to award grants for the purpose of developing, offering, or improving educational or career training options for workers eligible for training under Trade Adjustment Assistance for Workers (TAA; 19 U.S.C. § 2296). Eligible grant recipients are institutions of higher education. Eligible programs are two-year and less-than-two-year educational and training programs.

Grant applications must contain descriptions of the following:

- The specific project for which the grant proposal is submitted.
- The educational or career training program to be developed, offered, or improved, and its suitability for workers eligible for training under TAA.
- The extent to which the educational or career training program will meet the needs of workers who are eligible for training under TAA and who are served by the eligible institution.
- The extent to which the educational or career training program fits within a TAA for Communities program strategic plan.
- The extent to which the educational or career training program fits within the strategic plan developed under the Industry or Sector Partnership Grants Program.
- Previous experience providing educational or career training programs for workers eligible for training under TAA. The absence of experience can not automatically disqualify an applicant.
- The extent to which the applicant has incorporated feedback into the planned educational or career training program as received from employers and other stakeholders, including the partners that have sought or received a grant under the ISG.
- The extent to which employers have indicated a commitment to employ workers who will have completed the educational or career training program.

DOL uses three criteria in awarding grant applications: the merits of the grant proposal; the likelihood that workers who will have completed the educational or career training program will be employed; and the prior and future demand for and the availability and capacity of existing training programs in the

community. Finally, DOL must give priority to applicants in a community recently identified by the Secretary of Commerce to be eligible for TAAC.

Although the CCCT program was authorized by the TGAAA in 2009, FY2011 will be the first year of funding. The Health Care and Education Reconciliation Act of 2010 (Title I, Part F of P.L. 111-152) provided \$500 million in mandatory funding per year for FY2011 through FY2014 for the CCCT program, with the provision that each state receive no less than 0.5% of the funds appropriated for each year.

Subchapter C — Industry or Sector Partnership Grants

The Trade Adjustment Assistance for Communities provisions of the TGAAA includes Subchapter C, which authorizes the creation of Industry or Sector Partnership Grants (ISPG,) and directs the Department of Labor (DOL) to award such grants to eligible public/private partnerships located in communities eligible for trade adjustment assistance for workers, firms or farmers. Such partnerships must be comprised of representatives from industry associations; local, county or state governments; businesses in the designated industry or sector, workforce investment boards; labor unions; and education institutions.

In order to strengthen and revitalize industries and sectors and create employment opportunities, the legislation allows ISPGs to be used to fund skill need assessments and to identify training and employment gaps in a targeted sector or industry, and to develop systems to fill such gaps, including by:

- developing systems to better link skilled workers with firms in the targeted industry;
- assisting firms in obtaining access to qualified job applicants; and
- training new workers and retraining existing workers (including remedial skills training).

Funds may also be used to analyze the skills of unemployed and incumbent workers and develop training to address skill gaps that prevent such workers for obtaining jobs in the targeted industry; help firms in the targeted industry increase productivity; assist such firms retain incumbent workers; develop learning consortia comprised of small and medium size firms in an effort to lower the cost of training; making firms in the targeted sector aware of the partnership and its activities; seek, apply and disseminate information on best practices; and identify and seek other resources to support the partnership's activities, including Community College and Career Training Grants.

The authorizing statute outlines several specific elements that must be included in an application for assistance. When submitting a proposal for grant assistance applicants will be required to:

- identify the industry or sector that will be the focus of the partnership;
- identify member organizations or entities involved in the partnership, including the lead agency;
- describe the goals and specific projects to be undertaken with grant funds; and
- demonstrate that the partnership has the organizational capacity to carry out proposed projects;

In addition, a grant proposal should state whether the community has or will seek funding under the Trade Adjustment for Communities (Subchapter A) or Community College and Career Training (Subchapter B) grant programs, or other federal programs, and how such assistance will be coordinated with ISPG. The proposal must also include performance measures, developed using the measures issued by the Secretary of Labor and provide a timeline for meeting the goals included in the proposal.

DOL is directed to provide technical assistance to sector partnership entities to assist them in developing and administering sector partnership grants. In order to carry out this responsibility, the act allows DOL to award technical assistance grants or contracts to national and state organizations. DOL is also responsible for developing performance measures to be used to assess progress in meeting goals outlined in a partnership's grant application.

The Act limits the number of grants an eligible industry partnership may be awarded to no more than one grant, or not more than \$2.5 million, except in the case where the partnership is located in a community that does not receive Community College and Career Training grants (see description under Subchapter B). In such cases the amount may not exceed \$3 million. In addition, approved Industry and Sector Partnership Grant activities must be completed within three years. As of November 2010, DOL has not issued regulations nor published a Solicitation of Grant Applications for the program.

The TGAAA authorized funding of \$40.0 million for ISP grants for the period that includes FY2009, FY2010 and a 90 day period from October 1, 2010, to December 31, 2010. Congress has not appropriated any funds for the ISPG program.

Table 1. ISP Grants Authorizations and Appropriations: FY2009 to FY2011

	2009	2010	2011
Authorization (in millions of dollars)	40.0	40.0	10.0 ^a
Appropriations (in millions of dollars)	0.0	0.0	0.0

Source: Authorization amounts from P.L. 111-5. Appropriation amounts from P.L. 111-32 and P.L. 111-117.

- a. The FY2011 authorization amount covers the first 90 days of the fiscal year, October 1 to December 31, 2010.

TRADE ADJUSTMENT ASSISTANCE FOR FARMERS

The Trade Act of 2002, as amended by the Trade and Globalization Adjustment Assistance Act of 2009 (TGAAA), established a Trade Adjustment Assistance for Farmers (TAAF) program administered by the U.S. Department of Agriculture (USDA).¹ The program's objective is to provide assistance to producers of an agricultural commodity adversely affected by increased imports. Program benefits are available in the form of technical and financial assistance.

Eligible producers of raw and natural agricultural commodities (crops, livestock, farm-raised aquatic products and wild-caught aquatic species) must follow a two-part process to qualify for program benefits. First, a group of producers of a commodity can petition the Secretary of Agriculture to be certified as eligible for TAAF. The petition must show that imports “contributed importantly” to at least a 15 percent decline in: (1) the national average price, (2) the quantity of production and (3) the value of production or (4) cash receipts, of the affected commodity during the most recent marketing year compared to the average of each factor in the three preceding marketing years. The petition must show that the volume of imports of “articles like or directly competitive” with the affected commodity increased from the average volume of such imports in the 3 preceding marketing years. The Secretary has 40 days to make a determination on the petition.

Second, if the Secretary certifies that a group is eligible for assistance, each producer in the group has 90 days to apply for program benefits. A producer who meets three requirements becomes eligible for financial assistance, but only upon the completion of training intended to help the producer become more competitive in producing the same or another commodity. A producer must show that (1) the commodity was produced in the year covered by the application and also in one of the three preceding marketing years, (2) the quantity of the commodity produced that year decreased compared to the most recent marketing year, or the price received for the commodity that year decreased compared to the preceding three-year average price, and (3) no TAA benefits are already being received.

If determined to be eligible, a producer is entitled to receive initial technical assistance to improve the yield and marketing of the commodity, and to explore

¹ Public Law 107-210, sections 141-142, approved August 6, 2002, 116 Stat. 946 [19 USC 2401 et seq.]; Public Law 111-5, sections 1856, 1881-1887, and 1891-1894, approved February 17, 2009, 123 Stat. 115.

the feasibility and desirability of substituting one or more alternative commodities for the one being produced. A producer who completes this initial phase is eligible for intensive technical assistance. This includes training courses to assist the producer in improving the competitiveness of the same commodity or an alternative commodity, and financial assistance to develop an initial business plan based on the courses completed. USDA is required to approve a producer's initial business plan if it reflects the skills gained by the producer through the courses taken. If approved, the producer is entitled to not more than \$4,000 to implement this plan or to develop a long-term business adjustment plan. A producer is entitled to up to an additional \$8,000 to implement this long-term plan if USDA determines it includes steps calculated to materially contribute to the producer's economic adjustment to changing market conditions, takes into account the interests of the workers employed by the producer, and demonstrates that the producer will have sufficient resources to implement the business plan. For all phases, an eligible producer is limited to receiving not more than \$12,000 in a three-year period to develop and implement a business adjustment plan designed to address the impact of import competition.

A producer is ineligible for assistance in any year in which average adjusted gross income exceeds the level specified in section 1001D of the Food Security Act of 1985. Through the 2008 crop year, a producer with income over \$2.5 million was ineligible unless more than 75 percent of that income came from farming, ranching, or fishing. Beginning with the 2009 crop year, the level was lowered. Now, TAAF benefits are not available to a producer whose non-farm income is higher than \$500,000, or whose farm income is more than \$750,000, depending on the details of the producer's involvement in a farm operation. Eligible producers cannot receive cash benefits under any other TAA program.

The Secretary of Agriculture is required to provide written notice to each agricultural producer that potentially is covered by a certification. A notice must also be published stating the benefits available to certified agricultural commodity producers in newspapers of general circulation in the areas in which such producers reside.

The International Trade Commission (ITC) must notify the Secretary of Agriculture when the ITC begins a safeguard investigation of a particular agricultural commodity. USDA is then required to immediately conduct a study of the producers who have been or are likely to be certified as eligible for TAAF benefits, and the extent to which this program may facilitate the adjustment of such producers to import competition. This report must be sent to the President when the ITC submits its report on the investigation to the President. Additionally, if the ITC makes an affirmative determination of injury, or threat thereof, involving an agricultural commodity in a section 421 safeguard case; an affirmative safeguard determination involving an agricultural commodity under a U.S. trade agreement; or an affirmative determination involving an agricultural commodity in an anti-dumping or countervailing duty case under section 705 or

735 of the Tariff Act of 1930, the ITC must notify the Secretary of Agriculture.

The Trade Act of 2002 authorized and appropriated to USDA funds not to exceed \$90 million for each of fiscal years 2003 through 2007. Section 1(c) of P.L. 110-89 authorized \$9 million in appropriations for the first quarter of fiscal year 2008 (through December 31, 2007). The TGAAA authorized and appropriated \$90 million for each of FY2009 and FY2010, and \$22.5 million for the first quarter of FY2011.

Though funding is authorized only through year end 2010, producers will be able to access technical and financial assistance if their eligibility had already been established and USDA had approved their applications before December 31, 2010. In both cases, benefits will be available to the extent that funds are available and only to those eligible to receive technical and financial assistance.

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,²²³ 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,²²⁴ as well as to implement an agreement with the European Communities (EC) restricting U.S. importation of certain cheeses from the EC.²²⁵ Section 204 also provided the legal basis for the GATT Arrangement Regarding International Trade in Textiles, commonly referred to as the Multifiber Arrangement (MFA),²²⁶ for U.S. bilateral agreements with 47 textile-exporting nations²²⁷, and provided 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 terminated, thereby removing many of the specific restrictions for textiles and clothing. Section 204 also provided the basis for the President's authority to negotiate a 2005 textile agreement with the People's Republic of China (China).

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

²²³ 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.

²²⁴ 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.

²²⁵ Exec. Order No. 11851, April 10, 1975, 40 Fed. Reg. 16645.

²²⁶ Arrangement Regarding International Trade in Textiles, T.I.A.S. 7840 (1973) (expired 1994).

²²⁷ There are no bilateral textiles agreements in June.

unilateral action by an importing country if an agreement cannot be reached. The MFA, which went into effect in 1974, was established to deal with problems of market disruption in textile trade, while permitting developing countries to share in expanded export opportunities. It was superseded 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 which, among other things, provided negotiating authority for agreements restricting imports of textile products (see discussion of section 204, above). 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, 1961.²²⁸ 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, 1962.²²⁹ 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.²³⁰

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

²²⁸ T.I.A.S. 4884 (1961) (expired 1962).

²²⁹ T.I.A.S. 5240 (1962) (expired 1973).

²³⁰ Public Law 87-488, enacted June 19, 1962, 76 Stat. 104.

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 agreement, incorporating the provisions of the bilaterals with Hong Kong, South Korea, and Taiwan, was also signed. The multilateral agreement also allowed importing countries 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 importing countries negotiated quotas on imports of textiles and clothing primarily from exporting countries (article 4), and for unilateral actions following a finding of market disruption (article 3).²³¹ 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.²³² 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

²³¹ 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.

²³² 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.

Committee, which was made up of representatives of countries participating in the MFA and was 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 provision allowing jointly agreed “reasonable departures” from the MFA requirements in negotiating bilateral agreements. The MFA was then renewed for 4 more years.²³³

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.²³⁴ 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. This objective was met through the Agreement on Textiles and Clothing (ATC), which liberalized trade in textiles and apparel products among WTO Members in two ways: (1) by increasing quotas established pursuant to bilateral agreements under the MFA; and (2) by removing quotas negotiated under the MFA in three phases over a 10-year transition period. That transition period ended on January 1, 2005.

Specifically, under the ATC, bilateral agreements negotiated between WTO Members restricting trade in textiles and apparel products were terminated. However, existing quotas, as well as various “administrative arrangements” included in such bilateral agreements remained in force until January 1, 2005, but subject to modification under ATC rules. Under those rules, WTO Members were required to increase existing quotas on a yearly basis, subject to growth levels specified in the ATC. In addition, WTO Members were required “integrate” textiles and apparel products into GATT rules in 3 stages. 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. The first stage began on January 1, 1995,

²³³ T.I.A.S. 8939 (1977).

²³⁴ T.I.A.S. 10323 (1981).

required each WTO Member maintaining quota restrictions to integrate into normal GATT rules textile and apparel products accounting for at least 16 percent of the trade covered by the ATC, using 1990 as the base year. On January 1, 1998, WTO Members were required to integrate another 17 percent of trade, and on January 1, 2002, an additional 18 percent. Beginning in 2005, all textile and apparel trade was covered under normal GATT/WTO rules.²³⁵

The ATC also included a specific transitional safeguard mechanism that could be applied to products not yet integrated into the GATT at any stage. Action under the safeguard mechanism could be taken against individual countries if it were demonstrated by the importing country that overall imports of a product were entering the country in such increased quantities as to cause serious damage — or threat thereof — to the relevant domestic industry, and that there was a sharp and substantial increase of imports from the individual country concerned. Action under the safeguard mechanism could be taken either by mutual agreement, following consultations, or unilaterally but subject to review by the WTO's Textiles Monitoring Body.

The U.S. Committee for the Implementation of Textile Agreements (CITA), an inter-agency group, was 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. The Office of Textiles and Apparel (OTEXA) in the Department of Commerce implemented the terms of the agreements and decisions made by CITA. CITA continues to operate, with its primary responsibility being to administer textiles and apparel provisions of U.S. free trade agreements and preference programs, including "short supply" petitions.

Rules of origin

Related to implementation of the ATC and administration of quotas under that agreement, the Uruguay Round Agreements Act 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, cutting operations or assembly could determine

²³⁵ Textiles and apparel trade with China was subject to a special safeguard provision under paragraph 242 of the *Report of the Working Party for the Accession of China to the World Trade Organization* until December 31, 2008.

the origin of apparel. 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 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.

CHINA TEXTILE SAFEGUARD PROVISION

A China-specific safeguard provision in China’s WTO accession agreement permitted the United States and other WTO members to impose temporary quotas on textile and apparel products from China if authorities determined that the Chinese-origin imports were causing “market disruption.” Under the safeguard quotas, China was required to hold its shipments of the targeted product to a level no greater than 7.5% (6% for wool categories) more than the quantity entered during the previous year. The quotas were permitted to continue for a maximum of a year unless reapplied for, or unless a longer-term agreement was reached between the parties. While the quotas were in force, the importing country and China were expected to continue in consultations in order to negotiate a mutually satisfactory solution. This safeguard provision expired on December 31, 2008.

From 2003 to 2005, the United States implemented the textile-specific safeguard on several categories of textile and apparel imports from China, including brassieres, dressing gowns, and socks. In early November 2005, after months of negotiations, the United States and China agreed to a bilateral Memorandum of Understanding limiting the import of 34 categories of textiles and apparel for three years, which expired on December 31, 2008.

TEXTILES AND APPAREL TRADE UNDER FREE TRADE AGREEMENTS

NAFTA.—NAFTA created the first of a number of special rules affecting trade in textiles and those rules subsequently were used 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. The *de minimis* exception provides that a textile or apparel article may be considered originating if the total weight of all nonoriginating fibers or yarns is not more than seven percent of the total weight of the good.

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. 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 “yarn forward” origin rules, and therefore are not “originating” goods. These are essentially annual tariff rate quotas. Once imports reach the TPL limit, normal 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 rules of origin as other goods: i.e. the good must be either 1) wholly the growth, product, or manufacture of a party to the agreement; or 2) the good must be produced in a party to the agreement and 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 rules 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. There is a limited amount of apparel that may enter the United States duty free, subject to tariff preference levels, even if the apparel does not meet the rule of origin. The TPL benefit phases out over a 10 year period. 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.

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.

Bahrain.—Under the rules in Chapter 3 and Annex 3-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 Bahrain, an apparel product must have been cut (or knit-to-shape) and sewn or otherwise assembled in Bahrain from yarn, or fabric made from yarn, that originated in Bahrain, the United States, or both. Article 3.2.8 and 9 provide a limited exception to this general rule, allowing access for non-originating cotton or man-made textile or apparel goods to enter under a preferential tariff rate. The TPL is set at 65 million square meter equivalent units for each of the first ten years of the agreement. Article 3.2.6 includes a *de minimis* exception 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.

Oman.—Under the rules in Chapter 3 and Annex 3-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 Oman, an apparel product must have been cut (or knit-to-shape) and sewn or otherwise assembled in Oman from yarn, or fabric made from yarn, that originated in the United States, Oman, or both. Article 3.2.8 and 9 provide a limited exception to this general rule, allowing access for non-originating cotton or man-made textile or apparel goods under a preferential tariff rate. The TPL is set at 50 million square meter equivalent units for each of first ten years of the agreement. Article 3.2.6 includes a *de minimis* exception 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.

Peru.—Under Chapter 3 and Annex 3-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 Oman, an apparel product must have been cut (or knit-to-shape) and sewn or otherwise assembled from yarn, or fabric made from yarn, that originated in Peru, the United States, or both. No TPL is specified in the FTA. Article 3.3.8 provides a *de minimis* exception 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 10 percent of the total weight of the good.

Dominican Republic – Central America.—Under the rules in chapters 3 (Section G) and 4 and Annex 4.1 of the FTA, an apparel product must generally meet a tariff shift rule, which implicitly means that a yarn-forward applies to most products, although there are a number of exceptions. This means, generally, that to qualify as an originating good imported into the United States from Central America or the Dominican Republic (CAFTA-DR), an apparel product must have been cut (or knit-to-shape) in the region and sewn or otherwise assembled from yarn, or fabric made from yarn, that originated in the region.

Exceptions to the yarn-forward rule found in Annex 4.1, “Specific Rules of Origin” include a “cut-and-assemble” rule of origin for certain apparel products, including womens’ and girls’ man-made fiber suits and mens’ cotton yarn-died shirts. The “cut-and-assemble” rule means that yarns and fabrics for these apparel goods may come from countries outside of the CAFTA-DR region, but that the fabric must be cut and the good must be assembled in one or more of the CAFTA-DR countries. A “fabric-forward” rule applies for wool fabric and apparel, meaning that the wool fabric must be formed in one or more of the CAFTA-DR countries, but that the wool yarn used in qualifying textile and apparel goods can be sourced from outside the region.

Article 3.27 provides a TPL for certain tailored wool apparel assembled in

Costa Rica, subject to a preferential tariff rate. The TPL is set at 500,000 square meter equivalent units for the first two years of the agreement. Article 3.28 provides that certain cotton and man-made fiber apparel assembled in Nicaragua may enter the United States at a preferential tariff rate, subject to a TPL set at 100 million square meter equivalent units per year for the first five years of the FTA, then decreasing by 20 million square meter equivalent units each year thereafter until it expires in the tenth year of the agreement. Article 4, Appendix 4.1-B provides that certain woven apparel (subject to an annual quantitative limit) cut and assembled in the CAFTA-DR region may use Mexican yarns and fabric. Article 3.25.7 provides a *de minimis* exception 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 10 percent.

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 provided for the initiation of a second round of negotiations concerning agriculture trade beginning in the year 2000 (those negotiations were not initiated until November, 2001, as part of the WTO's Doha Round of Trade Negotiations).

Under the Agreement on Agricultural 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. 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. Under the agreement, all U.S. agriculture tariffs were bound and subject to specific reduction commitments.

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 of the United States (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. Other Uruguay Round agreements, including the Agreements on Subsidies and Countervailing Measures and Application of Sanitary and Phytosanitary Measures, also affect trade in agricultural products.

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 that 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. 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. Under 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 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 agricultural agreement, 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, 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 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. The Agreement on Trade in Agricultural Products has been extended through December 31, 2010. 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. *Chile.*—On January 1, 2004, the U.S.-Chile FTA took effect. By year 4 (2007), Chile had granted duty-free status to more than 75% of U.S. agricultural products. Such treatment applied to U.S. pork and products, beef and products, soybeans and soybean meal, durum wheat, feed grains, potatoes, and processed food products (i.e., french fries, pasta, distilled spirits and breakfast cereals). Chile’s tariffs and quotas on remaining U.S. agricultural products will be phased out over 8, 10, or 12 years. The 12-year transition period applies to the most import-sensitive products designated by each country. TRQs and agricultural safeguards will be used to provide interim protection for such products. The special safeguards are price-based, and will be implemented automatically using trigger prices spelled out in the agreement. U.S. products subject to Chile’s safeguards include certain meat products; broken, brown, and partially-milled rice; rice flour; and certain wheat products. Chile also agreed to

eliminate its price bands on a non-linear basis in three stages on imports of non-durum wheat, wheat flour, and vegetable oils from the United States by year 12 (2015).

The United States similarly agreed to eliminate tariffs and offer preferential quota access to all agricultural imports from Chile. By 2007, the FTA granted duty-free access for 95% of Chile's agricultural exports to the U.S. market. Preferential TRQs will govern the amount of beef, dairy products (including fluid milk products, cheese, milk powder, and butter), sugar and sugar-containing products, peanuts, tobacco, cotton, avocados, processed artichokes, and poultry allowed to enter during their respective transition periods to free trade. The amount of sugar allowed to enter under quota will depend on whether Chile shows a net surplus of sugar available to export. Chilean products subject to U.S. price-based safeguards include numerous fresh and processed fruits and vegetables.

Morocco.—On January 1, 2006, the U.S.-Morocco FTA took effect. Morocco agreed to reduce tariffs and expand preferential quotas on all agricultural imports from the United States immediately or under one of 9 phase-out periods ranging up to year 25 (2030). The longest transition will apply to imports of U.S. chicken leg quarters and wings. Morocco will offer access under expanding TRQs for U.S. high quality beef for its restaurant/hotel sector, standard quality beef, whole birds—chickens and turkeys, chicken leg quarters and wings, other frozen chicken products, durum wheat, common bread wheat, wheat products, sugar and sugar-containing products, almonds, and apples. A "preference clause" provides U.S. exporters with "better market access" for U.S. wheat, beef, poultry, corn, soybeans, and corn/soybean products in case Morocco negotiates more favorable terms in the future with other countries.

Complex provisions detail the terms of U.S. wheat access to the Moroccan market, which differentiate between durum wheat and common bread wheat. The in-quota tariff on durum imports will fall from 75% to zero by year 10 (2015), while the in-quota tariff on common wheat imports will decline using a formula triggered if certain conditions apply. These preferential tariffs will not be available to U.S. exporters during June and July (and possibly August for common wheat) of any year, unless Morocco imports either type of wheat from another country, in which case U.S. wheat will then receive the preferential rate. Over-quota tariffs for both wheat types will remain at current high levels indefinitely, unless Morocco negotiates a reduction with another supplier. If this occurs, U.S. exporters will automatically benefit from this wheat tariff reduction. The preferential quota for common wheat will be based on the level of Moroccan wheat output—a smaller quota if production is 3 million metric tons (MT) or more; a larger quota if output is less than 2.1 million MT; and a quota derived by formula if production falls between these two thresholds. While the durum wheat quota will expand slowly and indefinitely, the common wheat quota will increase through 2015 and then be capped indefinitely.

The United States similarly agreed to eliminate tariffs and offer preferential

quota access to all agricultural imports from Morocco under seven phase-out periods: immediately, and by years 5, 8, 10, 12, 15, and 18. The longest transition (year 18, or 2023) is reserved for six processed fruit products. The United States established preferential TRQs for beef, dairy products (including fluid milk products, cheese, milk powder, butter), sugar and sugar-containing products that are subject to a "trade surplus" calculation, peanuts, tobacco, cotton, tomato products (including tomato paste and puree), tomato sauces, dried onions, and dried garlic.

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.

Jordan.—The U.S.-Jordan FTA took effect in December 2001, and eliminated tariffs on almost all bilateral trade by 2010. One exception is that trade in cigarettes and unmanufactured tobacco is exempt from tariff elimination. Pertinent to the more significant agricultural products traded, Jordan phased out its 5% tariff on imports of U.S. rice, corn, and unrefined vegetable oils at year-end 2004, and its 30% tariff on imports of U.S. refined corn and soybean oil in 2010. Wheat continues to enter duty-free. In return, Jordan secured 10-year preferential TRQs to export several agricultural commodities that meet the FTA's rules of origin: dairy products, sugar and sugar-containing products, peanuts/peanut butter, and cotton.

CAFTA-DR.—Under the Central American-Dominican Republic Free Trade Agreement, the United States and six countries (Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua) agreed to phase out tariffs and quotas on all but four agricultural commodities and food products immediately or under one of six phase-out periods ranging up to 20 years. Trade

in four very sensitive commodities—fresh potatoes and fresh onions imported by Costa Rica, white corn imported by the other four Central American countries, and sugar entering the U.S. market—are treated uniquely in the agreement. The quota amount set for these four commodities will continue to increase by about 1% to 2% each year in perpetuity. The CAFTA-DR also commits all parties to consult and review the implementation and operation of the provisions on trade in chicken about midway in the long transition period to free trade.

The United States moved on a rolling basis during 2006 to implement the CAFTA-DR with four countries (El Salvador, Honduras, Nicaragua, and Guatemala) once the USTR determined that each had made "sufficient progress" in completing its commitments under the agreement. Provisions took effect with the Dominican Republic on March 1, 2007, and with Costa Rica on January 1, 2009.

The CAFTA-DR granted immediate duty-free status to more than one-half of the U.S. farm products exported to the six countries. Such treatment now applies to high-quality U.S. beef cuts, cotton, wheat, soybeans, certain fruits and vegetables, processed food products, and wine destined for the five Central American countries. Central American tariffs and quotas on pork, beef, poultry, rice, other fruits and vegetables, yellow corn, and other processed products will be phased out over a 15-year period. Longer transition periods apply to imports from the United States of rough/milled rice and chicken leg quarters (18 years) and dairy products (20 years). U.S. agricultural exports to the Dominican Republic will be accorded increased access under similar provisions.

The CAFTA-DR makes permanent duty-free access for almost all U.S. agricultural imports from the six countries that had previously entered under the Caribbean Basin Initiative. The most significant change is the granting of additional market access in the form of country-specific preferential quotas to imports from the region of U.S. import-sensitive agricultural products (sugar, sugar-containing products, beef, peanuts, dairy products, tobacco, and cotton). These quotas are in addition to (i.e., not carved out of) the existing agricultural TRQs established by the United States under its WTO commitments, which the six countries in varying degrees historically have used to export these commodities to the U.S. market. The agreement includes a "sugar compensation mechanism" that allows the United States to compensate the six countries for sugar they would not be able to ship under its preferential sugar quotas if the entry of such additional sugar is expected to undermine the U.S. Department of Agriculture's (USDA) ability to administer the U.S. sugar price support program.

Bahrain.—Bahrain, a small island state with limited land suitable for agriculture, is a significant net agricultural importer. The U.S.-Bahrain FTA took effect on August 1, 2006, when Bahrain provided immediate duty-free access for U.S. agricultural exports on 98% of its agricultural tariff lines. It agreed to phase out its 5% tariff on all other agricultural products by year 10

(2015). In return, all of Bahrain's exports of farm products to the United States received immediate duty-free access, subject to pertinent rules of origin.

Oman.—The U.S.-Oman FTA entered into force on January 1, 2009. Under its terms, Oman allowed immediate duty-free entry for U.S. products entering under 87% of its agricultural tariff lines. Its duties on most other agricultural products will be phased out over five years, and by year 10 (2018) for those subject to the highest tariff. The United States provided immediate duty-free access for all of Oman's limited agricultural exports. Preferential TRQs phased out over 10 years will allow duty free access to the U.S. market for beef and specified dairy products, among other sensitive commodities, but only if produced in Oman.

Peru.—The U.S.- Peru FTA, which took effect on February 1, 2009, will eliminate tariffs and quotas on all agricultural products traded bilaterally (except for sugar) and establishes long transition periods for both countries' more sensitive commodities. The United States secured immediate duty-free access for almost 90% of its farm exports to Peru (e.g., high quality beef, cotton, wheat, soybeans, soybean meal, and crude soybean oil; fruits and vegetables such as apples, pears, peaches, and cherries; almonds; and processed foods such as frozen french fries, cookies, and snack foods). Peru agreed to immediately eliminate price bands on about 40 products, such as corn, rice and dairy products, to be replaced in part by TRQs with long transition periods. Peru's tariffs on other agricultural products will be phased out under seven transition periods ranging from 2 to 17 years.

This FTA makes permanent duty-free access for almost all of Peru's agricultural exports to the United States that had previously entered duty-free under the Andean Trade Preference Program. Peru now has additional access to the U.S. market for four commodities under preferential TRQs. These will allow expanding access for imports from Peru of processed dairy products over a 15-year period (2023), and of cheese and condensed/evaporated milk over a 17-year period (2025). At the end of these transition periods, quotas will no longer apply on U.S. imports of these products. Sugar will be treated uniquely, with TRQ access to the United States dependent on whether Peru shows a net trade surplus available for export. The agreement includes a "sugar compensation mechanism" that allows the United States to compensate Peru for sugar that would not be shipped under its preferential sugar TRQ if the entry of such additional sugar is expected to undermine the USDA's ability to administer the U.S. sugar price support program.

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 1988²³⁶ 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. 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. In addition, 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 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 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

²³⁶ Public Law 100-418, enacted August 23, 1988, 102 Stat. 1107, 1408, amending section 20 of Public Law 90-201, 21 U.S.C. 620.

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.²³⁷

Background

The United States has always been a net importer of sugar. However, sugar imports have been restricted almost continuously since 1934. From the enactment of the Jones Costigan Sugar Act of 1934²³⁸ through the expiration of the Sugar Act of 1948 on December 31, 1974,²³⁹ 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.²⁴⁰ 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 periods.²⁴¹

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. 6179²⁴² 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

237 Pres. Proc. No. 6763, Dec. 23, 1994, 60 Fed. Reg. 1007.

238 Public Law 73-213, ch. 263, enacted May 9, 1934, 48 Stat. 670.

239 Public Law 80-388, ch. 519, enacted August 8, 1947, 61 Stat. 922. See also the Sugar Act of 1937, Public Law 75-414, ch. 898, enacted September 1, 1937, 50 Stat. 903.

240 Pres. Proc. No. 4334, November 16, 1974, 39 Fed. Reg. 40739.

241 Pres. Proc. No. 4941, May 5, 1982, 47 Fed. Reg. 19661.

242 Pres. Proc. No. 6179, September 13, 1990, 55 Fed. Reg. 38293.

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.²⁴³

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.²⁴⁴ 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.²⁴⁵

The operation of the TRQ was modified in the Food, Conservation, and Energy Act of 2008²⁴⁶ by limiting the ability of the Secretary of Agriculture to modify the TRQs until after certain dates in each calendar year.

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). These provisions, supplemented by a sugar side letter, governed the amount of sugar and the tariff that applied in each year of the 15-year transition to free trade. Effective January 1, 2008, all sugar imports from Mexico enter the United States on a duty-free basis. 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 monitor continuously certain imports of sugar and sugar-containing products for circumvention of the sugar tariff-rate quota.²⁴⁷

IMPORT PROHIBITIONS ON CERTAIN AGRICULTURAL COMMODITIES UNDER
MARKETING ORDERS
SECTION 8e OF THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

²⁴³ See Pres. Proc. No. 6763, December 23, 1994.

²⁴⁴ See 15 CFR part 2011.

²⁴⁵ See additional U.S. note 6 to chapter 17 of the HTS and 7 CFR part 1530

²⁴⁶ Public Law 110-234

²⁴⁷ Section 5203 of the Trade Act of 2002, Public Law 107-210.

Section 8e of the Agricultural Adjustment Act, as amended,²⁴⁸ 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, apples, clementines, caneberries (including raspberries, blackberries, and loganberries).

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, the Secretary must establish with respect to the imported commodity such grade, size, quality, and maturity restrictions by varieties, types, or other classification as the Secretary 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.

²⁴⁸ 7 U.S.C. 608e-1.

REQUIREMENTS APPLICABLE TO CIGARETTE IMPORTS

Title V of the Tariff Suspension and Trade Act of 2000²⁴⁹ 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 a 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.

The Family Smoking Prevention Act²⁵⁰ imposed new restrictions on the sale and importation of certain types of cigarettes containing certain flavor components.

Authorities to Restrict Imports Under Certain Laws

MARINE MAMMAL PROTECTION ACT OF 1972, AS AMENDED

The Marine Mammal Protection Act (MMPA), enacted in 1972,²⁵¹ 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

²⁴⁹ Public Law 106-476, enacted November 9, 2000.

²⁵⁰ Public Law 111-31

²⁵¹ Public Law 92-522, enacted October 21, 1972, 16 U.S.C. 1361 et seq.

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 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 Act²⁵², 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 United States, Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, and Venezuela. The Panama Declaration

²⁵² Public Law 105-52

endorses the success of the La Jolla Agreement and adjusts the marketing policy of dolphin safe tuna 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 tuna 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 or 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 Act²⁵³ 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,²⁵⁴ 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 bird lives restrict its “taking, 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

²⁵³ Public Law 93-205, enacted December 28, 1973, 16 U.S.C. 1531 et seq.

²⁵⁴ 19 U.S.C. 1527.

forfeiture under the customs laws. The import prohibition in Section 527 the does not apply in the case of: (1) articles the importation of which is prohibited by any other law; (2) articles imported for scientific or educational purposes; or (3) certain migratory game birds.

TARRIFF ACT OF 1930: DOG AND CAT FUR PRODUCTS

The Tariff Suspension and Trade Act of 2000²⁵⁵ 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 dog 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 minimis* amount of dog or cat fur.

AFRICAN ELEPHANT CONSERVATION ACT

Title II of the Endangered Species Act Amendments of 1988²⁵⁶ contained the African Elephant Conservation Act,²⁵⁷ 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).

²⁵⁵ Public Law 106-476

²⁵⁶ Public Law 100-478, enacted October 7, 1988.

²⁵⁷ 16 U.S.C. 4201-4245.

RHINOCEROS AND TIGER CONSERVATION ACT OF 1994, AS AMENDED

Section 7 of the Rhinoceros and Tiger Conservation Act of 1994²⁵⁸, as amended by the Rhino and Tiger Product Labeling Act²⁵⁹ 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 ("PELLEY AMENDMENT")

Under section 8 of the Fishermen's Protective Act of 1967²⁶⁰ as amended (the so-called "Pelly Amendment")²⁶¹, 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 that conducts fishery practices or engages in trade that 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 1992²⁶² 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, 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 whose nationals or vessels conduct large-scale driftnet fishing beyond the exclusive economic zone of any country and to notify the President and each identified country. The President must enter into consultations within 30 days with any country so identified to obtain its agreement to terminate 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

²⁵⁸ Public Law 103-391, enacted October 22, 1994.

²⁵⁹ Public Law 105-312, enacted October 30, 1998.

²⁶⁰ Public Law 90-482, enacted August 12, 1968.

²⁶¹ Public Law 93-205, enacted December 28, 1973.

²⁶² Public Law 102-582, enacted November 2, 1992.

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 1992²⁶³ bans the importation of exotic birds listed in any appendix to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), unless the bird is on an approved list of species to be maintained by the Secretary. To be included on such an approved list, the species must be (1) regularly bred in captivity and no wild-caught birds of the species are in trade; (2) the species is bred in a qualifying facility; or (3) the species is protected under a conservation program 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 that such action is necessary for the conservation of the species and (1) an adequate scientifically-based management plan for the species has not been developed; (2) that the management plan is not being enforced; or (3) methods of capture, transport and maintenance do not minimize the species' risk of injury. Moreover, the Secretary can issue a moratorium or quota on all species from a country if that country has not developed and implemented a management program for exotic birds in trade generally and 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 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)²⁶⁴, 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

²⁶³ Public Law 102-440, approved October 23, 1992.

²⁶⁴ Public Law 94-70, approved August 5, 1975

taken in a manner that would diminish the effectiveness of ICCAT's conservation efforts.

Congress reauthorized and amended the Atlantic Tunas Convention Act with the passage of the Atlantic Tunas Convention Authorization Act of 1995²⁶⁵. The Atlantic Tunas Convention Authorization Act of 1995 was intended to foster the development of an international consensus concerning multilateral management of Atlantic tunas, and made certain changes to the ATCA concerning the identification and notification of countries violating the terms of ICCAT recommendations. Specifically, the act added provisions requiring the Department of 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 authorized the President to enter into consultations with identified nations. The legislation did not modify United States' authority under ATCA to restrict imports of fish taken in a manner that tends to diminish the effectiveness of ICCAT's conservation recommendations.

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 1990²⁶⁶ 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 that 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 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 (56 Fed. Reg. 1051 (January 10, 1991)). 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 of 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

²⁶⁵ Public Law 104-43, approved November 3, 1995

²⁶⁶ Public Law 101-162, approved November 21, 1989

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 by May 1, 1996 the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology that may affect adversely sea turtles.²⁶⁷

In April 1996, the State Department published revised guidelines (61 Fed. Reg. 17342) (April 19, 1996) 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 been certified."²⁶⁸ 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 609.²⁶⁹

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. On April 6, 1998, a dispute settlement panel ruled in favor of the complainants, 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, the Appellate

²⁶⁷ *Earth Island Institute v. Warren Christopher*, 913 F. Supp. 559 (CIT 1995).

²⁶⁸ *Earth Island Institute v. Warren Christopher*, 942 Fed. Supp. 597 (CIT 1996).

²⁶⁹ *Earth Island Institute v. Warren Christopher*, 948 Fed. Supp. 1062 (CIT 1996).

Body 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 and Appellate Body 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 to 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" 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.

PROHIBITION ON IMPORTS OF ILLEGAL TIMBER AND PRODUCTS MADE FROM ILLEGAL TIMBER

The Lacey Act²⁷⁰ makes it illegal to engage in the trade of fish, wildlife, or plants taken in violation of any U.S. or Indian tribal law, treaty, or regulation, as well as in the trade of any wildlife or plants acquired through violations of foreign law or treaties (including CITES). The 2008 Farm Bill²⁷¹ expanded the authority of the Lacey Act to include foreign plants and plant products,

²⁷⁰ 16 U.S.C. 3371-3378

²⁷¹ Public Law 110-246, approved on June 18, 2008

including timber species. The changes are expected to curb illegal logging. Illegal logging costs nations approximately \$15 billion annually in lost tax revenues, and contributes to loss of biodiversity, watershed damage and increased sedimentation, and climate change. In the communities in which illegal logging takes place, the forest is often the only local economic resource. Illegal logging decimates, often irrevocably, that resource. In the same way, the illegal taking of other plant species has serious environmental and economic consequences.

Under the amended Lacey Act, plants are defined as any wild member of the plant kingdom, including roots, seeds, parts or products thereof, and including trees from either natural or planted forest stands. Exclusions to this definition are common cultivars (except trees), common food crops and plants used as scientific specimens, among others. The amended law makes it illegal to take (e.g., capture, kill, collect, harvest or remove), possess, transport or sell plants in violation of any law or regulation of any State, or foreign law, which protects plants or regulates the theft or taking of plants.

The law also enacts a declaration requirement for imported plants and plant products. For plants, the importer must file a declaration that contains the scientific name of the plant (including genus and species), a description of the value of the importation and the quantity being imported, and the name of the country from which the plant was taken. In the case of plant products, if the plant species used in the product is unknown, all of the species that might have been used are to be declared. Further, if the country of origin of a plant species in a plant product is unknown, all of the countries in which the plant might have been taken are to be declared. Rules to clarify exclusions from the definition of a “plant” and potentially to limit the application of the declaration requirement have been promulgated by the Secretaries of Agriculture and the Interior.

National Security Import Restrictions

SECTION 232 OF THE TRADE EXPANSION ACT OF 1962

Section 232 of the Trade Expansion Act of 1962, as amended,²⁷² authorizes the President to impose restrictions on imports that 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

²⁷² Public Law 87-794, enacted October 11, 1962, 19 U.S.C. 1862, amended by section 127 of the Trade Act of 1974, Public Law 93-618, enacted January 3, 1975, by section 402 of the Crude Oil Windfall Profit Tax Act of 1980, Public Law 96-223, enacted April 2, 1980, and further amended by section 1501 of the Omnibus Trade and Competitiveness Act of 1988, Public Law 100-418, enacted August 23, 1988.

of the President to adjust oil imports.

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 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 1962²⁷³ was added by section 121 of the Export Administration Amendments of 1985²⁷⁴ as a means of enforcing

²⁷³ 19 U.S.C. 1864.

²⁷⁴ Public Law 99-64

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.

Balance of Payments Authority

SECTION 122 OF THE TRADE ACT OF 1974

Section 122 of the Trade Act of 1974²⁷⁵ 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.

²⁷⁵ Public Law 93-618, enacted January 3, 1975; 19 U.S.C. 2132.

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 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.²⁷⁶ 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

²⁷⁶ Senate Report 93-1298 at 87-88.

(and in preference to) quotas for balance-of-payments adjustment purposes and providing rules for their use.²⁷⁷ 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,²⁷⁸ 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 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.”²⁷⁹

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 that have the least disruptive effect on trade, and that restrictive import measures taken for balance-of-payments purposes may be applied only 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.²⁸⁰

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,²⁸¹ chapter 9 of the North American Free Trade Agreement and its U.S. implementing legislation as part of the North American

²⁷⁷ Senate Report 93-1298 at 88.

²⁷⁸ MTN/FR/W/20/Rev. 2, reprinted in House Doc. 96-153, pt. I, at 626.

²⁷⁹ Public Law 100-418, section 122(d)(4), section 1101(b)(5); 19 U.S.C. 2901(b)(5).

²⁸⁰ The United States prevailed in a WTO challenge 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.

²⁸¹ Public Law 103-465, enacted December 8, 1994.

Free Trade Agreement Implementation Act,²⁸² 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 1979.²⁸³

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 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 discriminatory practices.

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

The Agreement on Technical Barriers to Trade,²⁸⁴ 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 protect reasonably 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 to comply with Code principles.

The Code's provisions are applicable to all products, both agricultural and industrial. The Code's provisions are not applicable to standards involving services, technical specifications included in government procurement contracts,

²⁸² Public Law 103-182, enacted December 8, 1993.

²⁸³ Public Law 96-39, enacted July 26, 1979, 19 U.S.C. 2531-2573.

²⁸⁴ MTN/NTM/W/192 Rev. 5, reprinted in House Doc. No. 96-153, pt. I, at 211.

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 basic tenets of the Code, then that signatory may use the Code's dispute settlement mechanism to facilitate a "mutually satisfactory solution."

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 provides that 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. The Code 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 that 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 TBT Agreement as one of the "multilateral" 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 Standards Code, which contained a separate procedure limiting any response to Code violations to withdrawing concessions under the Code.

The TBT Agreement seeks to eliminate barriers in the form of discriminatory or otherwise 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 TBT Agreement updates and expands disciplines in the 1979 Standards Code regarding conformity assessment procedures. Whereas the 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 (SPS 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 SPS 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. 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.²⁸⁵ Since U.S. practices were already in conformity with the Code, title IV did not amend, repeal, or replace any existing law. Title IV 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

²⁸⁵ 19 U.S.C. 2531-2573.

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 and described in the Buy American Act of 1933,²⁸⁶ the plurilateral WTO Agreement on Government Procurement and the procurement chapters of U.S. free trade agreements, and title III of the Trade Agreements Act of 1979,²⁸⁷ as amended, including amendments made in the Uruguay Round Agreements Act. In addition, the “Buy American Act of 1988” (title VII of the Omnibus Trade and Competitiveness Act of 1988)²⁸⁸ established standards and procedures to prohibit procurement from foreign countries whose governments discriminate against U.S. products or services in awarding contracts. Finally, separate provisions in appropriation acts and other legislation apply additional restrictive Buy American-type provisions on particular types of purchases.

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 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 certain “qualifying countries.” Executive Order 10582 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 that 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 U.S. trade agreement obligations, such as those found in the WTO Agreement on

²⁸⁶ Act of March 3, 1933, ch. 212, title III, 47 Stat. 1520, 41 U.S.C. 10a-10d.

²⁸⁷ Public Law 96-39, title III, enacted July 26, 1979, 19 U.S.C. 2511-2518.

²⁸⁸ Public Law 100-418, title VII, enacted August 23, 1988, 41 U.S.C. 10a note.

Government Procurement with respect to signatory countries and U.S. free trade agreements.

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.

1979 GATT AGREEMENT ON GOVERNMENT PROCUREMENT

The first Agreement on Government Procurement, also known as the Government Procurement Code,²⁸⁹ 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 until the completion of the WTO Agreement on Government Procurement, as part 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 also 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 allowed the maximum degree of competition possible.

²⁸⁹ MTN/NTM/W/211/Rev. 2, reprinted in House Doc. No. 96-153, pt. I, at 69.

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 on an annual basis data to the Committee on Government Procurement on their procurements.

The adoption or use of technical specifications which act to create unnecessary obstacles to international trade was prohibited. The Code mandated the use, where appropriate, of technical specifications based on performance rather than design, and of specifications based on recognized national or international standards. The Code did not prohibit the granting of an offset or the requirement that technology be licensed as a condition of award. However, the Code provided that the Parties shall "limit" the offset to a "reasonable proportion within the contract value" and "shall not favor suppliers from one Party over suppliers from any other Party." The Code also provided that requirements for licensing of technology "should be as infrequent as possible" and suppliers from one Party shall not be favored over suppliers from any other Party.

Enforcement of the Code depended more on diplomacy than on adjudication or the threat of retaliation. 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. If those consultations failed to resolve the matter, the Code provided that the Committee on Government Procurement (composed of representatives from each of the Parties to the Code) would seek to "facilitate a mutually satisfactory solution." If that process failed, the Committee would establish a fact-finding panel. As a last resort, and only when the Committee considered the circumstances "serious enough," the Committee could authorize countermeasures.

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 – a unit of account established by the International Monetary Fund). 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 Code applied to purchases of goods originating in the territory of signatory countries. As a result of the 1988 amendments to the Code, leasing contracts were also subject to the Code. The Code did not apply to government procurement of services except to 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 using Federal funds such as under the Surface Transportation Act, were not subject to the Code.

For the United States, the Code did not apply to the Department of Transportation, the Department of Energy, the Tennessee Valley Authority, the Army 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 that are not bound by the Buy American Act, such as the U.S. Postal Service, COMSAT, AMTRAK, and CONRAIL, were not covered.

The Code also did not apply to U.S. 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 (e.g., textiles, clothing, shoes, food, stainless steel flatware, certain specialty metals, buses, hand tools, ships, and major ship components) be purchased only from domestic sources.

1994 WTO AGREEMENT ON GOVERNMENT PROCUREMENT

The 1994 Agreement on Government Procurement (the “Agreement” or “GPA”), negotiated in the Uruguay Round, makes important improvements to the Tokyo Round Government Procurement Code, described above. The GPA 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 (e.g., electronic tendering).

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 applies the 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 (U.S. dollar equivalents are applicable

for the calendar years 2008-2009)²⁹⁰:

Central government purchases

Goods and services: 130,000 SDRs (\$194,000)

Construction services: 5 million SDRs (\$7,443,000)

Subcentral government purchases

Goods and services: 355,000 SDRs (\$528,000)

Construction services: 5 million SDRs (\$7,443,000)

Government-owned enterprise purchases

Goods and services: 400,000 SDRs (\$595,000)

Construction services: 5 million SDRs (\$7,443,000)

During the negotiations, each signatory negotiated the exclusion of certain procurements from the obligations imposed by the new Agreement. The United States carried forward the exclusions that it applied under the 1979 Code. In addition, certain states excluded specified procurement; and set-asides on behalf of small and minority businesses are also excluded for all the entities that the United States covers under the Agreement. The 1994 Agreement applies to most U.S. executive branch agencies with certain exceptions, including the Federal Aviation Administration.

The following WTO Members are covered by the Agreement: Canada; Chinese Taipei;²⁹¹ the European Communities and its 27 member States; 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 Agreement also provides that the parties “shall undertake further negotiations, with a view to improving this Agreement and achieving the greatest possible extension of its coverage”. On December 8, 2006, the WTO Members to the 1994 Agreement on Government Procurement provisionally agreed on a substantial revision of the text of the Agreement. Final agreement on the revision of the Agreement requires a mutually satisfactory outcome in the market access negotiations to extend the coverage of the Agreement. As of this writing, the signatories to the Agreement have not concluded their market access negotiations.

GOVERNMENT PROCUREMENT UNDER FREE TRADE AGREEMENTS

U.S. bilateral and regional free trade agreements (“FTAs”) typically include

²⁹⁰ 72 Fed. Reg. 73904 (December 28, 2007). 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). All of the Parties to the Agreement apply the same thresholds to purchases by central government entities (under Annex I). However, the thresholds for subcentral government purchases (under Annex II) and for government-owned enterprises (under Annex III) vary among the Parties. For example, the European Communities applies a 200,000 SDR threshold to its Annex II entities.

²⁹¹ Chinese Taipei’s accession was completed on July 15, 2009.

government procurement obligations that are similar to those found in the WTO Agreement on Government Procurement.²⁹² Thus, for each procurement covered by the FTA, each party agrees to accord national treatment to the goods, services, and suppliers of the other party. In addition, U.S. FTAs generally require the parties to follow certain procurement procedures that are similar to those established in the WTO Agreement on Government Procurement. Like the Agreement on Government Procurement, these FTAs prohibit the parties from imposing “offsets” (requirements such as local content that encourage local development or improve a party’s balance of payments accounts) and require the parties to provide an impartial administrative or judicial review procedure to address supplier challenges.

Coverage. The coverage of the procurement obligations of most U.S. FTAs is similar in some respects and different in others to the coverage under the WTO Agreement on Government Procurement. For example, the procurement chapters of these FTAs generally cover both goods and services (including construction services) with some exceptions, and the United States generally agrees to cover the same central government procuring entities (i.e., federal agencies and departments) and the same “government enterprises” (e.g., Tennessee Valley Authority) that are covered in the WTO Agreement on Government Procurement. The United States excludes from its coverage set-aside programs for small and minority businesses, as well as the procurement of certain goods (e.g., textiles and clothing, hand tools, and certain specialty metals) by the Department of Defense, among other exclusions.

At the same time, the coverage of U.S. FTAs *differs* from the coverage of the WTO Agreement on Government Procurement in two important respects. First, the monetary thresholds in some FTAs are lower than they are in the WTO Agreement on Government Procurement (i.e., the coverage of those FTAs is more extensive). For example, under the Australia FTA, the DR-CAFTA, Chile FTA, the NAFTA with respect to Mexico, and the Singapore FTA, the thresholds for central government entities procuring goods and services (other than construction services) is \$67,826 for the calendar years 2008-2009. By

²⁹² The following U.S. FTAs include government procurement obligations similar to those in the WTO Agreement on Government Procurement (listed in order of date of entry into force): the North American Free Trade Agreement, the U.S.-Chile FTA, the U.S.-Singapore FTA, the U.S.-Australia FTA, the U.S.-Morocco FTA, the Dominican Republic – Central America – United States FTA, the U.S.-Bahrain FTA, the U.S.-Oman FTA, and the U.S.-Peru FTA. The U.S.-Israel FTA does not provide comprehensive procurement obligations. The United States and Israel are both parties to the Agreement on Government Procurement. Israel and the United States agree under the FTA to waive all “Buy National restrictions” with respect to government agency purchases of good with a contract value of \$50,000 or more that would be subject to the Agreement on Government Procurement, but for the higher monetary thresholds that apply to that Agreement. Thus, the U.S.-Israel FTA effectively lowers the monetary thresholds on certain procurements covered by the Agreement on Government Procurement with respect to the two countries. The U.S.-Jordan FTA contains no substantive procurement obligations. Instead, the FTA recognizes that Jordan has applied to accede to the WTO Agreement on Government Procurement; the United States and Jordan are currently engaged in negotiations on Jordan’s accession to that Agreement.”

contrast, under the Bahrain FTA, Morocco FTA , Oman FTA, and Peru FTA, the thresholds for central government entities procuring such goods and services is the same as it is under the WTO Agreement on Government Procurement (130,000 SDRs, or \$194,000 for the calendar years 2008-2009).

Second, the coverage of “sub-central level government entities” (in the case of the United States, state governments) varies from agreement to agreement. For example, whereas the WTO Agreement on Government Procurement and the Chile FTA cover 37 states, the procurement chapters of other FTAs cover fewer states (e.g., 31 states are covered in Australia; nine states and Puerto Rico are covered in Peru; and the North American Free Trade Agreement, Bahrain FTA, and Oman FTA do not cover any sub-central government entities).

TITLE III OF THE TRADE AGREEMENTS ACT OF 1979, AS AMENDED

Title III of the Trade Agreements Act of 1979, as amended, grants the President the authority to waive discriminatory federal procurement laws, to comply with the WTO Agreement on Government Procurement (the “Agreement”) and with the U.S. bilateral and regional trade agreements described above. The President exercised that authority through Executive Order 12260, issued on December 31, 1980. Section 301 of the 1979 Act authorizes the President to waive the application of discriminatory aspects of federal 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 Agreement or FTAs and only to foreign countries designated by the President. In essence, the President may designate a country either because it provides appropriate reciprocal, competitive government procurement opportunities to U.S. products and suppliers (e.g., through its participation in the WTO Agreement on Government Procurement), or because it 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 (e.g., those that are not parties to a U.S. procurement agreement and are not least-developed countries). 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 Agreement and to provide appropriate reciprocal competitive opportunities. For this purpose, the President is required to prohibit the procurement of products or services otherwise covered by the Agreement 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 that enters into a reciprocal procurement agreement with the Department of Defense.

Section 303 authorizes the President to waive 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 WTO Agreement on Trade in Civil Aircraft.

Section 304 sets forth negotiating objectives in conjunction with the renegotiation of the Agreement 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 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 Agreement from such countries.

Title III of the 1979 Act, as amended, also contains a number of reporting requirements to Congress on various aspects of the WTO Agreement on Government Procurement 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”)²⁹³ 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. Thus, the following overview of Title VII is provided for historical perspective only.

Title VII prohibited U.S. government procurement of products and services

²⁹³ 41 U.S.C. 10a note.

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 were to be imposed when a foreign government maintained a significant and persistent pattern or practice of discrimination against procurement of U.S. products or services that resulted in identifiable harm to U.S. business. In the case of a country that is a signatory to the Agreement, Federal agencies were prohibited from procuring only those products not covered by the Agreement, unless that country has also been designated as a country “not in good standing.”

Least developed countries were exempt from the procurement prohibition, as were products and services procured and used by the Federal Government outside the United States and its territories. A prohibition also could 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 also could authorize the award of a contract or class of contracts, notwithstanding a prohibition, if insufficient competition existed 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 was required to 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 identified: (1) signatories to the Agreement that were not in compliance with its requirements; (2) signatories to the Agreement whose products and services were acquired in significant amounts by the U.S. government, who were in compliance with the Agreement, but maintained a significant and persistent pattern or practice of discrimination in the government procurement of products and services not covered by the Agreement which resulted in identifiable harm to U.S. businesses; (3) non-signatories to the Agreement whose products or services were acquired in significant amounts by the U.S. government and who maintained in their government procurement a significant and persistent pattern or practice of discrimination which resulted in identifiable harm to U.S. businesses; (4) non-signatories to the Agreement, which failed to apply transparent and competitive procedures equivalent to those in the Agreement, and whose products and services were required in significant amounts by the U.S. government; and (5) non-signatories to the Agreement, which failed to maintain and enforce effective prohibitions on bribery and other corrupt practices in connection with government procurement, and whose products and services were required in significant amounts by the U.S. government. The law required 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 was submitted, the U.S. Trade Representative (USTR) was required to request consultations with any identified country, unless that country was also identified in the preceding annual report. If the country was a signatory identified as not in compliance with the Agreement and did not comply within 60 days after the annual report was issued, the USTR was required to request formal dispute settlement proceedings under the Agreement, unless they were already underway pursuant to a previous identification. If dispute settlement was not concluded within 18 months or was concluded and the country did not take action required as a result of the procedures to the satisfaction of the President, the country was considered "not in good standing" and the President was required to revoke the waiver of Buy American restrictions granted under the Trade Agreements Act of 1979, as amended. The President would not limit procurement from the foreign country if, before the end of 18 months following initiation of dispute settlement, the country complied with the Agreement, took action recommended as a result of the procedures to the satisfaction of the President, or the procedures resulted in a determination requiring no action by the country. The President also could terminate the sanctions and reinstate a waiver at any time under such circumstances.

Within 60 days after the annual report was issued, the President was required to impose the procurement prohibition on any country identified as discriminating on procurements not covered by the Agreement and which did not eliminate its discriminatory procurement practices. The President could terminate the sanctions at such time as he determined the country has eliminated the discrimination.

With respect to either category of countries, if the President determined that imposing or continuing the sanctions would harm the U.S. public interest, the President could modify or restrict the application of the sanctions to the extent necessary to impose appropriate limitations that were equivalent in their effect to the discrimination against U.S. products or services in government procurement by that country.

The President also could not impose sanctions if they 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 were 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 was required to 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 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 four countries (Iran, Syria, 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 1989²⁹⁴ and the National Defense Authorization Act for Fiscal Year 1991.²⁹⁵

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. Exports of crude oil, certain refined petroleum product, and unprocessed western red cedar harvested from Federal or state lands, and horses transported by sea are subject to licensing requirements under short supply controls.

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 1949,²⁹⁶ 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 1969,²⁹⁷ which was in turn replaced by the Export Administration Act of 1979.²⁹⁸

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 1977.²⁹⁹

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 1977.³⁰⁰

²⁹⁴ Public Law 101-222, section 4, enacted December 12, 1989.

²⁹⁵ Public Law 101-510, section 1702, enacted November 5, 1990.

²⁹⁶ Public Law 81-11, enacted February 26, 1949.

²⁹⁷ Public Law 91-184, enacted December 30, 1969.

²⁹⁸ Public Law 96-72, enacted July 7, 1977.

²⁹⁹ Public Law 93-500, enacted December 5, 1980. Public Law 95-52, enacted June 22, 1977.

Public Law 92-412, enacted August 29, 1972.

³⁰⁰ Public Law 95-52, enacted June 22, 1977.

EXPORT ADMINISTRATION ACT OF 1979

The Export Administration Act of 1979³⁰¹ 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 that 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. 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, COCOM³⁰² 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 agreement on reducing the

³⁰¹ 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.

³⁰² 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.

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, 1984,³⁰³ 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 1985³⁰⁴ which reauthorized the 1979 Act for four 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.

³⁰³ Public Law 98-108, enacted October 1, 1983; Public Law 98-207, enacted December 5, 1983; Public Law 98-222, enacted February 29, 1984.

³⁰⁴ Public Law 99-64.

The Act also restrained the President's authority to impose new foreign policy 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 U.S. 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 U.S. Department of Commerce³⁰⁵ and a new National Security Council Office in the U.S. Department of Defense. Congress also directed that an Office of Foreign Availability be established in the U.S. 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 1988³⁰⁶ 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 one 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

³⁰⁵ 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."

³⁰⁶ Public Law 100-418, title II, subtitle D, enacted August 23, 1988.

provided for the use of distribution licenses for multiple exports to the People's Republic of China.

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,³⁰⁷ the U.S. 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.³⁰⁸ Section 2443 of that Act required the President to impose, for a period of three 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 three years. The sanctions required by section 2443 were imposed by President Reagan on December 27, 1988³⁰⁹ 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 102nd 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 102nd 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 103rd Congress, the Export Administration Act was extended twice. On March 27, 1994³¹⁰, the Export Administration Fiscal Year 1994 Authorization bill, extended the Act through June 30, 1994.³¹¹ 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

³⁰⁷ Public Law 95-223, enacted December 28, 1977.

³⁰⁸ Public Law 100-418, sections 2441-2447, enacted August 23, 1988.

³⁰⁹ Executive Order 12661, dated December 27, 1988; "Implementing the Omnibus Trade and Competitiveness Act of 1988 and Related International Trade Matters."

³¹⁰ Public Law 103-10, enacted March 27, 1993.

³¹¹ Public Law 103-10, enacted March 27, 1994.

Act.³¹² On August 19, 1994, President Clinton used the International Emergency Economic Powers Act authorities to continue the export control system and he renewed that authority annually for the next six years. The last attempt at a comprehensive rewrite of the Export Administration Act occurred in the 107th Congress. The Senate Banking Housing and Urban Affairs Committee reported S. 149, the Export Administration Act of 2001 on March 22, 2001 (S.Rept 107-10). The Senate passed the bill in September 2001.

The House version of the Export Administration Act (H.R. 2581) was introduced on July 20, 2001, but never reached the House floor. In conjunction with this renewal attempt, President Clinton signed into law an extension of the Export Administration Act of 1979 until August 20, 2001³¹³. Upon the expiration of this extension, President Bush issued Executive Order 13222 to continue the export control system under IEEPA authority, and renewed that authority yearly.³¹⁴ President Obama also has renewed that authority yearly.³¹⁵

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 1998³¹⁶ (NDAA98), passed by the 105th Congress, imposed special conditions on the export of HPCs. From the late 1990's until 2006, 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 required exporters to provide prior notification to the Secretary of Commerce before exporting HPCs above the MTOPS threshold to Tier III³¹⁷ 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.

Members of the Wassenaar Arrangement approved a new standard for calculating computing power in December 2005. It was incorporated into the Export Administration Regulations on April 24, 2006.³¹⁸ The new standard,

³¹² Public Law 103-277, enacted July 5, 1994.

³¹³ Public Law 106-508, November 13, 2000.

³¹⁴ 66 Fed. Reg. 44025, August 22, 2001.

³¹⁵ 75 Fed. Reg. 50681, August 16, 2010.

³¹⁶ Public law 105-85, section 1211, enacted November 18, 1997.

³¹⁷ 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.

³¹⁸ 71 Fed. Reg. 20876, April 24, 2006.

known as adjusted peak performance (APP), is measured by a metric known as “weighted teraflops”(WT). Despite the conversion to the WT metric, changes in the control level are still subject to the notification requirements of Title XII (B) of Division A of the National Defense Authorization Act of 1998 (NDAA98), which allows implementation of a new performance level 60 days after a report has been submitted to Congress.³¹⁹

STROM THURMOND NATIONAL DEFENSE AUTHORIZATION ACT OF 1999

Traditionally, commercial communications satellites (CCS) were controlled under Section 38 of the Arms Export Control Act³²⁰ as administered by the Department of State. Despite having both military and civilian uses, CCS have been considered munitions, as many satellites and associated technologies were originally designed “specifically” for military purpose and continue to have “significant military or intelligence applications” as defined by regulation. In 1990, President George H.W. Bush ordered a review of dual-use items including CCS. This led to satellites without militarily sensitive characteristics being transferred to Commerce jurisdiction. On March 14, 1996, the Clinton administration announced the transfer of all commercial communications satellites to Commerce jurisdiction. CCS was categorized as a “significant item,” a new category of foreign policy control created for CCS and “hot section” jet technology items, as well as being subject to national security controls for all destinations. Further, the items would not be subject to decontrol based on foreign availability. CCS license applications would also be subject to enhanced interagency review procedures. Regulations implementing the executive order were published in October 1996 by the Commerce Department and November 1996 by the State Department.³²¹

Congress returned export licensing authority for CCS to State Department jurisdiction by the Strom Thurmond National Defense Authorization Act of 1999 (NDAA)³²², effective March 15, 1999. This was done in the wake of allegations that certain U.S. satellite firms had engaged in improper technology transfer to China during investigations of launch failures in the 1990s. The 1999 NDAA placed all satellite exports under the authority of the Arms Export Control Act and under the jurisdiction of the State Department. It provided that all licenses for export of CCS to non- NATO members or major non-NATO allies would require a technology transfer control plan approved by the Department of Defense and an encryption plan approved by the National

³¹⁹ The National Defense Authorization Act of 2001 lowered the notification requirement from 180 to 60 days, H.Rept. 106-945, Sec. 1234, October 6, 2000. The WT metric conversion notification was sent to Congress on February 3, 2006.

³²⁰ Public Law 90-629

³²¹ 61 Fed.Reg. 54540, October 21, 1996 (Commerce); 61 Fed.Reg 56894 . November 5, 1996 (State).

³²² Public Law 105-261, October 17, 1998.

Security Agency. U.S. persons or entities involved in launch failure or crash investigations were already subject to licensing requirements; this legislation mandated that the Defense Department monitor foreign launches to prevent the unauthorized transfer of technology in investigations of launch failures or crashes. The measure also placed additional reporting requirements on waiver requests to launch satellites in China. These reporting requirements contained several national security and economic criteria, including some that addressed the overall U.S.-China trade relationship outside the trade in CCS.

The 2000 NDAA ³²³ provided that the technology control plan mandated by the 1999 NDAA be prepared by the Department of Defense (DOD) and the licensee. The Act mandated that the plan contain enhanced security arrangements for the satellite before and during the launch operation and directed licensees to reimburse the costs of security to DOD. The legislation also prescribed certain activities by the launch monitoring agency, the Defense Threat Reduction Agency at DOD, including training and record-keeping requirements. Additionally, it required the President to notify Congress of investigations of alleged export control violations and to notify and provide justification for granting a waiver to export CCS to China to a person subject to an investigation.

The Foreign Relations Authorization Act of 2000-2001³²⁴ directed the Secretary of State to establish a regulatory system for commercial satellites, satellite technologies, components, and systems to NATO allies and major non-NATO allies. The legislation provided for expedited processing (a) in cases of time-critical situations, such as launch failure or flight anomalies; (b) to submit bids to procurements offered by foreign persons; (c) to re-export unimproved materials, products, or data; or (d) to obtain launch or on-orbit insurance. However, the Act mandated that the State Department give U.S. national security considerations and obligations under the MTCR priority in evaluation of any license and that interagency license review by the Departments of Defense and State, and the U.S. intelligence community be afforded “such time...as is necessary.” (Section 1309) The regulations implementing this legislation excluded major defense equipment, i.e. equipment reaching the threshold requiring Congressional notification, from the expedited procedures.³²⁵

ARMS EXPORT CONTROL ACT OF 1976 (AECA)

The Arms Export Control Act (AECA)³²⁶ provides the statutory authority for the control of defense articles and services. It sets out foreign and national

³²³ Public Law 106-65, enacted October 5, 1999.

³²⁴ Public Law 106-113, enacted November 29, 1999.

³²⁵ 65 Fed. Reg. 103, May 26, 2000.

³²⁶ Public Law 94-329, enacted June 30, 1976.

policy objectives for international defense cooperation and military export controls. Section 3(a) of the AECA sets forth the general criteria for countries or international organizations to be eligible to receive United States defense articles and defense services provided under the act. It also sets express conditions on the uses to which these defense items may be put. Section 4 of the Arms Export Control Act states that U.S. defense articles and defense services shall be sold: to friendly countries “solely” for use in “internal security;” for use in “legitimate self-defense;” to enable the recipient to participate in “regional or collective arrangements or measures consistent with the Charter of the United Nations;” to enable the recipient to participate in “collective measures requested by the United Nations for the purpose of maintaining or restoring international peace and security;” and to enable the foreign military forces “in less developed countries to construct public works and to engage in other activities helpful to the economic and social development of such friendly countries.” The AECA also contains the statutory authority for the Foreign Military Sales program, under which the U.S. government sells U.S. defense equipment, services, and training on a government-to-government basis.

Congressional consideration of foreign arms sales proposed by the President is required by the AECA. This procedure includes consideration of proposals to sell major defense equipment, defense articles and services, or the re-transfer to other nations of such military items. The procedure is triggered by a formal report to Congress under Sections 36 of the AECA. In general, the executive branch, after complying with the terms of applicable section of U.S. law, is free to proceed with an arms sales proposal unless Congress passes legislation prohibiting or modifying the proposed sale.

The traditional sequence of events for the congressional review of an arms sale proposal has been the submission by the Defense Department (on behalf of the President) of a preliminary or “informal” classified notification of a prospective major arms sale 20 calendar-days before the executive branch takes further formal action. This “informal” notification is submitted to the Speaker of the House (who traditionally has referred it to the House Foreign Affairs Committee), and to the Chairman of the Senate Foreign Relations Committee. This practice stems from a February 18, 1976, letter of the Defense Department making a non-statutory commitment to give Congress these preliminary classified notifications. It has been the practice for such “informal” notifications to be made for arms sales cases that would have to be presented in formal notifications to Congress under the provisions of Section 36(b) of the AECA. These “informal” notifications always precede the submission of the required statutory notifications, but the time period between the submission of the “informal” notification and the statutory notification is not fixed.

Under Section 36(b) of AECA, Congress must be formally notified 30 calendar-days before the Administration can take the final steps to conclude a government-to-government foreign military sale of: major defense equipment valued at \$14 million or more; defense articles or services valued at \$50 million

or more; or design and construction services valued at \$200 million or more. In the case of such sales to NATO member states, NATO, Japan, Australia, or New Zealand, Congress must be formally notified 15 calendar-days before the Administration can proceed with the sale. However, the prior notice thresholds are higher for NATO members, Australia, Japan or New Zealand. These higher thresholds are: \$25 million for the sale, enhancement or upgrading of major defense equipment; \$100 million for the sale, enhancement or upgrading of defense articles and defense services; and \$300 million for the sale, enhancement or upgrading of design and construction services, so long as such sales to these countries do not include or involve sales to a country outside of this group of nations.

In cases of commercially licensed arms sales, Congress must be formally notified 30 calendar-days before the export license is issued if the sale involves major defense equipment valued at \$14 million or more, or defense articles or services valued at \$50 million or more (Section 36(c) of the AECA). In the case of such sales to NATO member states, NATO, Japan, Australia, or New Zealand, Congress must be formally notified 15 calendar-days before the Administration can proceed with such a sale. However, the prior notice thresholds are higher for sales to NATO members, Australia, Japan or New Zealand specifically: \$25 million for the sale, enhancement or upgrading of major defense equipment; \$100 million for the sale, enhancement or upgrading of defense articles and defense services, and \$300 million for the sale, enhancement or upgrading of design and construction services, so long as such sales to these countries do not include or involve sales to a country outside of this group of nations. It has not been the general practice for the Administration to provide a 20-day “informal” notification to Congress of arms sales proposals that would be made through the granting of commercial licenses.

The AECA provides for criminal penalties of \$1 million or ten years of imprisonment for each violation, or both. AECA also authorizes civil penalties of up to \$500,000 and debarment from future exports. (Sec 38(c)-(f), of AECA) The AECA provides the statutory authority for the International Traffic in Arms Regulations (ITAR)(22 C.F.R. 120 *et seq*), which sets out licensing policy for exports (and some temporary imports) of U.S. Munitions List (USML) items. A license is required for the export of nearly all items on the USML. Canada has a limited exemption as it is considered part of the U.S. defense industrial base. In addition, the United States has signed treaties with the United Kingdom and Australia to exempt certain defense articles from licensing obligations to approved end-users in those countries, although they have yet to receive Senate ratification. The United States prohibits munitions exports to countries either unilaterally or based on adherence to United Nations arms embargoes.³²⁷ In

³²⁷ Proscribed countries include Belarus, Burma, China, Cuba, Haiti, Iran, Liberia, Libya, North Korea, Somalia, Sudan, Syria, and Vietnam. In addition, exports to Iraq, Afghanistan, Rwanda, and D.R. Congo are reviewed on a case-by-case basis.

addition, any firm engaged in manufacturing, exporting, or brokering any item on the USML must register with DDTC and pay a registration fee. Exports of defense goods and services are administered by the Directorate of Defense Trade Controls (DDTC) at the Department of State.

SECTION 3017 OF THE SOLID WASTE DISPOSAL ACT (42 USC 6938)

Section 3017 of the Solid Waste Disposal Act prohibits the export of hazardous waste (as defined by the act) unless: 1) the exporter has provided notification to the government of the receiving country and that government has consented to accept the waste, the shipment conforms to the terms of the consent, and the consent notice is attached, or 2) the United States and the government of the receiving country have entered into an agreement that establishes notification, export, and enforcement procedures.

MERCURY EXPORT BAN OF 2008

The Environmental Protection Agency (EPA) is responsible for identifying and regulating dangerous chemicals in U.S. commerce under the authority of the Toxic Substances Control Act (TSCA). TSCA requires EPA regulation of importation, manufacture, sale, use, or disposal of any chemical that is found to pose an unreasonable risk of injury to human health or the environment, but TSCA generally exempts from EPA regulation chemicals manufactured solely for export. However, concern about global mercury pollution prompted Congress in 2008 to amend TSCA to ban most exports of elemental mercury.

The Mercury Export Ban Act amends TSCA Section 12 to prohibit export of elemental mercury from the United States effective January 1, 2013 subject to certain exemptions. The Act directs EPA to report to Congress in October 2009 information relevant to consideration of a possible extension of this prohibition to other chemical forms of mercury. Exports of coal containing mercury are explicitly not prohibited.

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 1988³²⁸, includes provisions that establish in statute the United States and Foreign Commercial Service in the International

³²⁸ Public Law 100-418, enacted August 23, 1988, 15 U.S.C. 4721 et seq.

Trade Administration of the U.S. 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.

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 one to two 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.

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 in Title II of the Export Enhancement Act of 1992³²⁹ 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.³³⁰

³²⁹ Public Law 102-429, enacted October 21, 1992.

³³⁰ Public Law 103-392, enacted October 22, 1994, 15 U.S.C. 4701 note.

Agricultural Export Sales, Commodity Donations and Promotion

The U.S. Department of Agriculture (USDA) administers several sales and credit programs. These include the concessional sales program under authority of the Agricultural Trade Development and Assistance Act of 1954, as amended, commonly known as Public Law 480,³³¹ and the commercial export programs of the U.S. Department of Agriculture's Commodity Credit Corporation (CCC) authorized in the Agricultural Trade Act of 1978, as amended.³³² The U.S. Agency for International Development administers commodity donation programs under Title II of Public Law 480; however USDA does all the commodity procurement. The Food, Conservation and Energy Act of 2008, also known as the 2008 Farm Bill, renamed Public Law 480 the Food for Peace Act.³³³

PUBLIC LAW 480, THE FOOD FOR PEACE ACT

Public Law 480 was reauthorized through the end of FY 2012 by the Food, Conservation and Energy Act of 2008³³⁴. Public Law 480 Title I is administered by the U.S. Department of Agriculture (USDA). Public Law 480 Titles II and III are administered by the U.S. Agency for International Development (USAID).

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 five years before repayment must begin. The 2008 Farm Bill deleted as a policy objective of Public Law 480, the development and expansion of export markets for U.S. agricultural commodities. Title I has not been used in several years. 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, co-operatives and the United Nations World Food Program. Title III authorizes donations of U.S. agricultural commodities to governments of least developed countries for direct feeding programs, emergency food reserves, and recipient government sales which are sold to finance economic development activities.

EXPORT CREDIT GUARANTEE AND EXPORT PROMOTION PROGRAMS

USDA's Commodity Credit Corporation (CCC) offers both commercial credit guarantees and export promotion programs.

³³¹ Public Law 83-480, enacted July 10, 1954.

³³² Public Law 95-501, enacted October 21, 1978.

³³³ Public Law 110-246, enacted June 18, 2008.

³³⁴ Public Law 110-246, enacted June 18, 2008.

Export Credit Guarantees

Under the Agricultural Trade Act of 1978, as amended, the CCC provides guarantees against defaults on payments due from foreign banks on the agricultural export sales they finance. The GSM-102 program encourages financing of commercial exports of U.S. agricultural products from privately owned stocks by underwriting credit extended by the private banking sector for up to three years. Guarantees are extended to U.S. exporters, who then assign the guarantees to a U.S. bank. The U.S. banks deal directly with foreign purchases to set loan repayment terms and interest rates, but must meet certain requirements to qualify for CCC guarantees.

The 2008 Farm Bill repealed authority for an intermediate credit guarantee program which provided guarantees for periods of three to ten years. The 2008 Farm Bill also repealed authority for the Supplier Credit Guarantee Program, a short-term credit guarantee program which provided credit terms of up to 180 days. In addition, the 2008 Farm Bill eliminated the 1% cap on origination fees for export credit guarantees. These changes in the GSM guarantee programs were made as a result of findings of the World Trade Organization's (WTO) Dispute Settlement Body (DSB) in the United States-Brazil *cotton dispute* which found that export credit guarantees under the GSM 102 on certain products were, in effect, export subsidies, which are prohibited under the Uruguay Round Agreement on Agriculture.

The 2008 Farm Bill also authorizes \$5.5 billion in export credit guarantees for each fiscal year 2008 through 2012, provided the required budget authority does not exceed \$40 million per year, plus any unobligated budget authority from prior fiscal years. In addition, as part of this \$5.5 billion authority, the 2008 Farm Bill authorizes not less than \$1 billion of export credit guarantees or direct credits for fiscal years 2008 through 2012 for countries that are classified as "emerging markets." A portion of these guarantees are authorized to be made available under a Facility Credit Guarantee Program for the establishment or improvement of facilities or goods and services to improve handling, marketing, processing, storage, or distribution of imported U.S. agricultural commodities and products to these 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.

Export Market Development Programs

USDA also administers two export market development programs. The market access program (MAP) aims 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, reauthorized in

the 2008 farm bill, was established under the 1996 farm bill³³⁵ as the successor to the market promotion program (MPP) authorized in the 1990 Farm Bill.³³⁶ MPP had replaced the targeted export assistance program (TEA) of the Food Security Act of 1985.³³⁷ The 2008 Farm Bill authorizes CCC funding for MAP from fiscal years 2008 through 2012. The 2008 Farm Bill also authorizes CCC funding for a second export market development program, the foreign market development program (FMDP) otherwise known as the "Cooperator Program." Prior to 1996, FMDP was funded through appropriations for USDA's Foreign Agricultural Service. While MAP primarily focuses on exports of high value agricultural products, including branded products, FMDP mainly focuses on exports of bulk agricultural commodities.

The 2008 Farm Bill extends through December 31, 2012 the authorization for the dairy export incentive program (DEIP) which provides export subsidies on a bid basis to entities that sell for export U.S. dairy products. The CCC can use money or commodities to finance the DEIP program "in the maximum amount consistent with the obligations of the United States under the Uruguay Round Agreements Act of 1994."³³⁸ The 2008 Farm Bill repealed authority for a export subsidy program for other commodities, the export enhancement program (EEP). Authorized funding for EEP had been set at \$478 million in the 2002 Farm Bill.

The 2008 Farm Bill also authorizes assistance, through the CCC, to address "unique barriers that prohibit or threaten the export of United States specialty crops." Specialty crops generally refer to fruits, vegetables, and tree nuts. The main focus of the authorized program, the technical assistance for specialty crops (TASC) program, is to remove, resolve, or mitigate sanitary and phytosanitary and related barriers to trade.

³³⁵ Public Law 104-127, enacted April 4, 1996.

³³⁶ Public Law 101-624, enacted November 28, 1990.

³³⁷ Public Law 99-198 enacted December 23, 1985.

³³⁸ Public Law 103-465, enacted December 8, 1994, 19 U.S.C. 3501 note.

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).³³⁹ 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 emergencies³⁴⁰ 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.³⁴¹ 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.³⁴² 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

³³⁹ Public Law 95-223, title II, enacted December 28, 1977, 91 Stat. 1626, 50 U.S.C. 1701-1706.

³⁴⁰ 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.

³⁴¹ Public Law 94-412, enacted September 14, 1976.

³⁴² Public Law 109-56, enacted October 26, 2001.

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 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 Act³⁴³ 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 penalties were raised by the International Emergency Economic Powers Enhancement Act,³⁴⁴ which increased criminal penalties for IEEPA violations to \$1 million – up from \$50,000 previously – or up to 20 years' imprisonment for natural persons, or both. The act also raised civil penalties to the greater of \$250,000 or twice the amount of the transaction for which the penalty is imposed, up from \$50,000 previously.

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.³⁴⁵ They can be terminated by the President and expire annually on the anniversary of their promulgation unless the President continues them for another year.

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

³⁴³ Public Law 107-56, enacted Oct. 26, 2001.

³⁴⁴ Public Law 110-96, October 16, 2007.

³⁴⁵ Public Law 94-412, 50 U.S.C. 1701.

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 extended periods when statutory authority has lapsed. Below are some examples of the application of the IEEPA authorities.

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.³⁴⁶ The measure and its later amendments were implemented through the Iranian Assets Control Regulations (31 CFR 535). Sanctions against Iran were broadened on April 7, 1980,³⁴⁷ and April 17, 1980,³⁴⁸ 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.³⁴⁹

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.³⁵⁰ The President imposed additional sanctions on May 8, 1995.³⁵¹ The sanctions were then amended in 1997.³⁵² As discussed below, additional sanctions on Iran were imposed by the Iran and Libya Sanctions Act.³⁵³

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

³⁴⁶ Executive Order 12170, 44 Fed. Reg. 65729.

³⁴⁷ Executive Order 12205, 45 Fed. Reg. 24099.

³⁴⁸ Executive Order 12211, 45 Fed. Reg. 26685.

³⁴⁹ 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).

³⁵⁰ Executive Order 12957, 60 Fed. Reg. 14615.

³⁵¹ Executive Order 12959, 60 Fed. Reg. 24757. See also discussion on the Iran and Libya Sanctions Act of 1996.

³⁵² Executive Order 13059, 62 Fed. Reg. 44531; 34 Weekly Comp. Pres. Doc. 2324 (Nov. 16, 1998); 31 CFR Part 560.

³⁵³ Public Law 99-83, 22 U.S.C. 2349.

continue in force the existing regulations for the administration of export controls.³⁵⁴ After the EAA was temporarily extended by law,³⁵⁵ 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.³⁵⁶ On February 29, 1984, the EAA was again extended by law³⁵⁷ 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.³⁵⁸ The extension and the declared emergency remained in force during the protracted, and 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,³⁵⁹ the executive extension of export controls was revoked and the emergency rescinded.³⁶⁰ 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.

Upon the expiration of the EAA on September 30, 1990, President George H.W. Bush invoked a national emergency under IEEPA to maintain the export control regulations under the Act.³⁶¹ This emergency was continued annually until 1993, when Congress reauthorized the 1979 Act for two limited periods of time while negotiating a new EAA.³⁶² On August 19, 1994, President Clinton again invoked a national emergency under IEEPA to continue the regulations in effect and renewed that emergency annually until 2000.³⁶³ On November 20, 2000, President Clinton signed legislation reauthorizing the 1979 Act until August 20, 2001, during another attempt to rewrite the legislation in the 106th Congress.³⁶⁴

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

³⁵⁴ Executive Order 12444, 48 Fed. Reg. 48215.

³⁵⁵ Public Law 98-207, 97 Stat. 1391.

³⁵⁶ Executive Order 12451, 48 Fed. Reg. 56563.

³⁵⁷ Public Law 98-222, 98 Stat. 36.

³⁵⁸ Executive Order 12470, 49 Fed. Reg. 13099.

³⁵⁹ Export Administration Act of 1979, Reauthorization; Public Law 99-64, 1985, 99 Stat. 120.

³⁶⁰ Executive Order 12525, 50 Fed. Reg. 28757.

³⁶¹ Executive Order 12730, 55 Fed. Reg. 40373.

³⁶² Public Law 103-10, March 27, 1993 extended the EAA until June 30, 1994; P.L. 103-277, July 5, 1994 extended the Act until August 20, 1994.

³⁶³ Executive Order, 12924, 59 Fed. Reg. 43437; terminated by E.O. 13206 of April 4, 2001, 66 Fed. Reg. 18397.

³⁶⁴ Public Law 106-508, enacted November 13, 2000.

organized democratic resistance) and transactions related thereto, and all activities of Nicaraguan ships and aircraft at U.S. sea- and airports.³⁶⁵ The declaration of emergency and the imposed sanctions were terminated on March 13, 1990.³⁶⁶

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.³⁶⁷ The embargo, implemented through the South African Transactions Regulations (31 CFR 545), was later greatly expanded, and additional economic sanctions were imposed by the Comprehensive Anti-Apartheid Act of 1986,³⁶⁸ upon the enactment of which the President allowed the declaration of the South African emergency to expire.³⁶⁹

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.³⁷⁰ President Clinton sent such certification to Congress on June 8, 1994.³⁷¹

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.³⁷² On the following day, he ordered the blocking of all property and interests of the Libyan government and its instrumentalities in the United States.³⁷³ These measures are implemented by

³⁶⁵ Executive Order 12513, 50 Fed. Reg. 18629. The embargo is implemented by Nicaraguan Trade Control Regulations (31 CFR part 540).

³⁶⁶ Executive Order 12707, 55 Fed. Reg. 9707.

³⁶⁷ Executive Order 12532, 50 Fed. Reg. 36861; Executive Order 12535, 50 Fed. Reg. 40325.

³⁶⁸ Public Law 99-440, 100 Stat. 1086, 22 U.S.C. 5001 et seq.

³⁶⁹ Weekly Compilation of Presidential Documents, v. 23, no. 36, September 14, 1987, p. 997.

³⁷⁰ Public Law 103-149, 22 U.S.C. 5001 note.

³⁷¹ Message to the Congress on Elections in South Africa, 30 Weekly Compilation of Documents 1258 (June 8, 1994).

³⁷² Executive Order 12543, 51 Fed. Reg. 875.

³⁷³ Executive Order 12544, 51 Fed. Reg. 1235.

the Libyan Sanctions Regulations (31 CFR 550). Also in 1992 the President used IEEPA authority to place restrictions on air travel to and from Libya.³⁷⁴ As discussed below additional sanctions were imposed on Libya by the Iran and Libya Sanctions Act of 1996.³⁷⁵ In response to Libya's commitments and actions to abandon its weapons of mass destruction programs and cooperate in efforts against international terrorism, , On April 23, 2004, President George W. Bush determined and certified that Libya had fulfilled its requirements under United Nations Security Council Resolutions 731, 748, and 883 as required by Sec. 8b of the Iran-Libya Sanctions Act of 1996.³⁷⁶ On September 20, 2004, President George W. Bush terminated the national emergency declared in respect to Libya and ended most sanctions.³⁷⁷

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 country³⁷⁸ 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 applied 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, 1990.³⁷⁹

Iraq and Kuwait

On August 2, 1990, in response to the Iraqi invasion of Kuwait, President George H.W. 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.³⁸⁰ 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, 1991.³⁸¹

³⁷⁴ Executive Order 12308, 57 Fed. Reg. 14319.

³⁷⁵ Public Law 99-83, 22 U.S.C. 2349.

³⁷⁶ Presidential Determination 2004-30 of April 23, 2004, 69 Fed. Reg. 24907.

³⁷⁷ Executive Order 13357, 69 Fed. Reg. 56665.

³⁷⁸ Executive Order 12635, 53 Fed. Reg. 12134.

³⁷⁹ Executive Order 12710, 55 Fed. Reg. 13099.

³⁸⁰ Executive Order 12722, 55 Fed. Reg. 31803 and Executive Order 12723, 55 Fed. Reg. 31805.

³⁸¹ Kuwaiti Assets Control Regulations, 55 Fed. Reg. 49856, 31 CFR 570; Iraqi Sanctions

The Kuwaiti sanctions were revoked on July 25, 1991, after the liberation of Kuwait.³⁸² 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.³⁸³ On July 29, 2004, President George W. Bush terminated the national emergency and lifted most of the related economic sanctions by Executive Order 13350.³⁸⁴

Threats Related to Chemical, Biological and Nuclear Weapons

President George H.W. 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.³⁸⁵ 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 national emergency was expanded by President Clinton to include the proliferation of nuclear weapons on November 14, 1994.³⁸⁶ 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.³⁸⁷ Later, on June 26, 2000, President Clinton used IEEPA to address specifically the accumulation of weapons-usable fissile material by the Russian Federation, by issuing an Executive Order.³⁸⁸ 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.³⁸⁹

Haiti

Regulations, 56 Fed. Reg. 2112, 31 CFR 575.

³⁸² Executive Order 12771, 56 Fed. Reg. 35993.

³⁸³ Executive Order 13290, 68 Fed. Reg. 14307.

³⁸⁴ Executive Order 13350, 69 Fed. Reg. 46055.

³⁸⁵ Executive Order 12735, 55 Fed. Reg. 48587.

³⁸⁶ Executive Order 12938, 59 Fed. Reg. 59099. This Executive Order superseded and revoked Executive Order 12735.

³⁸⁷ Executive Order 13094, 63 Fed. Reg. 40803; 31 CFR Part 539.

³⁸⁸ Executive Order 13159, 65 Fed. Reg. 39279.

³⁸⁹ Executive Order 13159, 65 Fed. Reg. 39279.

President George H.W. 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.³⁹⁰ 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.³⁹¹ These measures were subsequently implemented by the Haitian Transactions Regulations.³⁹² After the signing of the Governors Island Agreement on July 3, 1993, the U.S. trade restrictions against Haiti were suspended, and new financial and other transactions with the government of Haiti were authorized consistent with the 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, 1993.³⁹³ In response to the restoration of the democratically elected government of Haiti, President Clinton terminated the national emergency on October 14, 1994.³⁹⁴

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 George H. W. 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.³⁹⁵ Additional orders were later issued by the President to prohibit trade and other transactions with Serbia and Montenegro.³⁹⁶ 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.³⁹⁷ In conjunction with the acceptance by the various relevant parties of the Dayton peace accords, on December 27, 1995, President

³⁹⁰ Executive Order 12775, 56 Fed. Reg. 50641.

³⁹¹ Executive Order 12779, 56 Fed. Reg. 55975.

³⁹² 31 CFR part 580.

³⁹³ Presidential Notice of September 30, 1993 (58 Fed. Reg. 51563); Haitian Transactions Regulations, 31 CFR part 580.

³⁹⁴ Executive Order 12932, 59 Fed. Reg. 52403.

³⁹⁵ Executive Order 12808, 57 Fed. Reg. 23299.

³⁹⁶ Executive Order 12810, 57 Fed. Reg. 2,347; Executive Order 12831, 58 Fed. Reg. 5253; Executive Order 13121, 64 Fed. Reg. 24021.

³⁹⁷ Presidential Notice of May 25, 1994 (59 Fed. Reg. 27,429); Executive Order 12934, 59 Fed. Reg. 54119.

Clinton directed the suspension of sanctions against the FRY (S&M) while keeping previously blocked property blocked.³⁹⁸

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.³⁹⁹ Subsequently, President Clinton also imposed a broad trade embargo on the FRY (S&M).⁴⁰⁰ 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 open indictment for war crimes by the International Criminal Tribunal for the Former Yugoslavia (ICTY).⁴⁰¹ 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.⁴⁰² 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.⁴⁰³

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).⁴⁰⁴ 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, 2003.⁴⁰⁵

Persons Disrupting the Middle East Peace Process

³⁹⁸ Presidential Determination 96-7 of December 27, 1995 (61 Fed. Reg. 2887).

³⁹⁹ Executive Order 13088, 63 Fed. Reg. 32109.

⁴⁰⁰ Executive Order 13121, 64 Fed. Reg. 24021.

⁴⁰¹ Executive Order 13192, 66 Fed. Reg. 7379.

⁴⁰² See 66 Fed. Reg. 50506; 67 Fed. Reg. 78973.

⁴⁰³ Executive Order 13219, 66 Fed. Reg. 34777.

⁴⁰⁴ Executive Order 12865, 58 Fed. Reg. 51,005.

⁴⁰⁵ UNITA (Angola) Sanctions Regulations, 58 Fed. Reg. 64,904, 31 CFR part 590; Executive Order 13098, 63 Fed. Reg. 44771-; revoked by Executive Order 13298, 68 Fed. Reg. 24885.

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.⁴⁰⁶ 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

On May 22, 1997, President Clinton issued IEEPA declarations with respect to Burma's repression of democratic oppression (Executive Order 13047 (62 FR 28301)). This Executive Order sought to prohibit new investments in Burma, and additional sanctions against Burma were established by the Burmese Freedom and Democracy Act of 2003, and by the Tom Lantos Block Burmese Junta's Anti-Democratic Efforts (JADE) Act of 2008, discussed below.

Sudan

On November 3, 1997, President Clinton used IEEPA authority to block Sudan's 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.⁴⁰⁷ 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.⁴⁰⁸ 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.

On April 26, 2006, President George W. Bush used IEEPA authority to expand the scope of the national emergency declared by Executive Order 13067 to block the property or transactions of certain persons listed or designated as representing a threat to the peace in Darfur.⁴⁰⁹ (See Section G below for additional legislation enacted on Sudan.)

Afghanistan, the Taliban, and International Terrorism

On July 4, 1999, President Clinton declared a national emergency with

⁴⁰⁶ Executive Order 12947, 60 Fed. Reg. 5,079.

⁴⁰⁷ Executive Order 13067, 62 Fed. Reg. 59989.

⁴⁰⁸ Public Law 106-476, enacted November 9, 2000.

⁴⁰⁹ Executive Order 13400, 71 Fed Reg 25483.

respect to the Taliban and Mohammed Omar blocking all property and interests of, or transactions with, the Taliban or those supporting it.⁴¹⁰ Following the 2001 terrorist attacks, on September 23, 2001, President George W. Bush declared a national emergency blocking property and prohibiting transactions with persons who commit, threaten to commit, or support terrorism.⁴¹¹ The Order contained an initial list of 27 persons, and also provided authority to the Secretary of State to name additional persons to the list determined to have committed or determined to pose a significant risk of committing acts of terrorism; and provided authority to the Secretary of the Treasury to name persons (entities) determined to be owned or controlled by those listed or subject to the Order; or persons providing financial, material, or technological support or services to acts of terrorism to those listed or subject to the Order.

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.⁴¹² President George W. 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.⁴¹³ Congress passed legislation, The Clean Diamond Trade Act of 2003, on this issue as discussed below.⁴¹⁴ As a result, President George W. Bush terminated the emergencies declared and expanded in scope by the two prior orders on January 15, 2004.⁴¹⁵

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.⁴¹⁶ 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.⁴¹⁷

⁴¹⁰ Executive Order 13129, 64 Fed. Reg. 36750. Terminated by Executive Order 13268, July 2, 2002.

⁴¹¹ Executive Order 13224, 66 Fed. Reg. 49079.

⁴¹² Executive Order 13194, 66 Fed. Reg. 7389.

⁴¹³ Executive Order 13213, 66 Fed. Reg. 28829.

⁴¹⁴ Public Law 108-19, 19 U.S.C. 3901-13.

⁴¹⁵ Executive Order 13324, 69 Fed. Reg. 2823.

⁴¹⁶ Section 111 of Public Law 106-386.

⁴¹⁷ Section 111 of Public Law 106-386.

Blocking Assets and Transactions with Specially Designated Personnel

As noted above, national emergencies have been declared to invoke IEEPA to block the property or interests of, and prohibit transactions with, specially designated persons who have engaged in activities or behaviors counter to U.S. foreign policy or national security interests. The following is a (partial) list of these emergencies (not otherwise addressed in this chapter) currently in effect against:

- the assets and transactions of significant narcotics traffickers in Colombia (E.O. 12978, October 21, 1995, 60 Fed. Reg. 54579).
- the property of persons undermining democratic processes or institutions in Zimbabwe (E.O. 13288, March 6, 2003, 68 Fed. Reg. 11457).
- the property of certain persons and blocking importation of certain goods from Syria (E.O. 13338, May 13, 2004, 69 Fed. Reg. 26751).
- the property of certain persons and imports of certain goods from Liberia (E.O. 13348, July 22, 2004, 69 Fed. Reg. 44885).
- the property of additional persons undermining democratic processes or institutions in Zimbabwe (E.O. 13391, November 25, 2005, 70 Fed. Reg. 71201) [partially supersedes E.O. 13288, above].
- the property of additional persons in connection with the national emergency with respect to Syria (E.O. 13399, April 25, 2006, 71 Fed. Reg. 25059).
- the property of persons in connection with the conflict in Sudan's Darfur region (E.O. 13400, April 26, 2006, 71 Fed. Reg. 25483).
- the property of persons contributing to the conflict in Cote d'Ivoire (E.O. 13396, 71 Fed. Reg. 7389, February 6, 2006).
- the property of persons undermining democratic processes and institutions in Belarus (E.O. 13405, June 16, 2006, 71 Fed. Reg. 35485).
- the property of persons contributing to the conflict in the Democratic Republic of the Congo (E.O. 13413, October 27, 2006, 71 Fed. Reg. 64105).
- the property of persons undermining the sovereignty of Lebanon or its democratic processes or institutions (E.O. 13441, August 1, 2007, 72 Fed. Reg. 43499).
- the property of additional persons in connection with the national emergency with respect to Syria (E.O. 13460, 73 Fed. Reg. 8991, February 13, 2008).

TRADING WITH THE ENEMY ACT

The Trading With the Enemy Act⁴¹⁸ (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.⁴¹⁹ Similar authorities, though more limited in scope and subject to the accountability and reporting requirements of the National Emergencies Act,⁴²⁰ were conferred upon the President by the International Emergency Economic Powers Act, enacted in 1977 as title II of Public Law 95-223.⁴²¹ 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 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

⁴¹⁸ Public Law 65-91, ch. 106, 40 Stat. 411, 50 App. U.S.C. 1-44.

⁴¹⁹ Public Law 95-223, title I.

⁴²⁰ 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.

⁴²¹ See discussion of International Emergency Economic Powers Act, *supra*.

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.⁴²²

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.⁴²³

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

⁴²² Public Law 95-223, enacted December 28, 1977.

⁴²³ 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.

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 1975.⁴²⁴ 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 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 one-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.⁴²⁵ 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 were lifted.⁴²⁶ 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.⁴²⁷

Second, the Cuban Assets Control Regulations,⁴²⁸ based on section 5(b) as well as on foreign assistance legislation, (see also section on the embargo on transactions with Cuba) imposed a ban on virtually all transactions in which Cuba or Cuban nationals have an interest.

⁴²⁴ 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).

⁴²⁵ 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.

⁴²⁶ Foreign Assets Control Regulations, North Korean Travel and Financial Transactions; Information and Informational Materials, 60 Fed. Reg. 8933, 31 CFR part 500.

⁴²⁷ Foreign Assets Control Regulations, 65 Fed. Reg. 38165, 31 CFR part 500.

⁴²⁸ 31 CFR part 515.

Third, Transaction Control Regulations,⁴²⁹ prohibiting any person within the United States⁴³⁰ 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,⁴³¹ 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, 1992.⁴³²

B. Embargo on Transactions with Cuba

Specific authority for a total trade embargo on Cuba was contained in section 620(a) of the Foreign Assistance Act of 1961,⁴³³ albeit almost totally restrictive controls had been placed on U.S. exports to Cuba even earlier,⁴³⁴ under the general authority of the Export Control Act of 1949. 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.⁴³⁵

With the export embargo already being enforced, the Cuban Import Regulations⁴³⁶ added an additional ban on imports from Cuba, placing all transactions under the authority of the Trading With the Enemy Act (TWEA), based on the specific addition of TWEA to the statutory authority for the regulations.⁴³⁷ 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.⁴³⁸ After several changes, these regulations still remain in force. The embargo on transactions with Cuba is 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

⁴²⁹ 31 CFR part 505.

⁴³⁰ Any “person within the United States” includes foreign subsidiaries of U.S. firms.

⁴³¹ Formerly 31 CFR part 520.

⁴³² Foreign Funds Control Regulations, 60 Fed. Reg. 33725, 31 CFR part 520.

⁴³³ Public Law 87-195, 22 U.S.C. 2370(a)(1).

⁴³⁴ 25 Fed. Reg. 1006.

⁴³⁵ Proclamation 6447, 27 Fed. Reg. 1085.

⁴³⁶ 31 CFR 515, 27 Fed. Reg. 1085.

⁴³⁷ 27 Fed. Reg. 2765.

⁴³⁸ 28 Fed. Reg. 6974.

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)⁴³⁹ 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;⁴⁴⁰ 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 the 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 of the TWEA, to which provisions for civil penalties, forfeitures, and judicial review are added.

⁴³⁹ Public Law 102-484, 22 U.S.C. 6001 et seq.

⁴⁴⁰ Public Law 104-114; 31 CFR 515 and 559, 22 USC 6021 NOTE et seq.

THE CUBAN LIBERTY AND DEMOCRATIC SOLIDARITY ACT

In 1996, the Cuban Liberty and Democratic Solidarity Act was enacted to strengthen further U.S. sanctions against Cuba.⁴⁴¹ 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 U.S. 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.⁴⁴² 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. property in Cuba: Grupos Domos, a Mexican telecommunications company; Sherritt International, a

⁴⁴¹ Public Law 104-114; 222 U.S.C. 6021 et seq.

⁴⁴² 61 Fed. Reg. 30655.

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 1985⁴⁴³ 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.⁴⁴⁴ Section 505 of the International Security and Development Act of 1985⁴⁴⁵ also gives the President broader

⁴⁴³ Public Law 99-83, 22 U.S.C. 2349 aa-8, aa-9.

⁴⁴⁴ Executive Order 13357, 69 Fed. Reg. 56665.

⁴⁴⁵ Public Law 99-83, 22 U.S.C. 2349 aa-8, aa-9.

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 1991,⁴⁴⁶ 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.⁴⁴⁷ 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.⁴⁴⁸ 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. Under criteria set forth in section 586H, those sanctions may be waived by the President if he makes a certification of fundamental changes in Iraqi leadership, policies, or actions.

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

⁴⁴⁶ 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.

⁴⁴⁷ 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.

⁴⁴⁸ IEEPA does provide an exception for the import or export of informational materials, in the “Berman Amendment” Public Law 95-223, Sec. 203(b).

exceptions. It also authorizes the President to ban imports into the United States from any country that has not imposed a ban on trade with Iraq, if the President 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 Emergency Wartime Supplemental Appropriations Act of 2003⁴⁴⁹ authorized the President to suspend the application of any provision of the Iraq Sanctions Act and others provisions of section 1503 until September 30, 2004, later extended to September 30, 2005.⁴⁵⁰ Acting on this authority, President Bush suspended all provisions of the Act except for the existing penalty provisions (Sec. 586e) on May 7, 2003.⁴⁵¹

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.⁴⁵² 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 notice to certain Congressional Committees. Finally, Section 1603 makes the sanctions in Section 586G(a) of the Iraq

⁴⁴⁹ Public Law 108-11, Sec. 1503.

⁴⁵⁰ Public Law 108-106, Sec. 2204.

⁴⁵¹ 68 Fed. Reg. 26459.

⁴⁵² 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.

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 Iran.

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 Act⁴⁵³ 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

⁴⁵³ 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 2006.⁴⁵⁴ 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.⁴⁵⁵

The Iran Freedom Support Act⁴⁵⁶ extended the Iran-Libya Sanctions Act of 1996 (ISA) until December 31, 2011, and eliminated Libya from the application of its provisions. The Act amends the ISA to allow for a six-month Presidential waiver, on a case-by-case basis, of sanctions imposed on an individual for investment in the development of petroleum resources in Iran provided that the President certifies to the appropriate congressional committees that the waiver is vital to U.S. national security interests. It allows for presidential initiation of investigations into the possible imposition of sanctions on persons engaged in petroleum investment activity in Iran, and it stipulates that a determination on the basis of that investigation should be made by the President within 180 days. The Act provides for the mandatory imposition of sanctions on persons materially contributing to the ability of Iran to acquire or

⁴⁵⁴ Public Law 107-24, enacted August 3, 2001

⁴⁵⁵ 69 Fed. Reg. 24907, May 5, 2004.

⁴⁵⁶ Public Law 109-293, enacted September 30, 2006.

develop weapons of mass destruction or advanced conventional weapons in destabilizing numbers and types. In addition, it amends the provision on the termination of sanctions by adding a new criterion that Iran pose no significant threat to U.S. national security, interests, or allies before sanctions can be terminated.

ISA was expanded significantly in the 111th Congress. The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010⁴⁵⁷ extended the ISA to December 31, 2016. It prohibits the sale of refined gasoline to Iran; the provision of shipping insurance or other services to help Iran import gasoline; or the supply of equipment to or the construction of oil refineries in Iran. The Act adds three sanctions to the existing menu of six sanctions in ISA. The President is required to impose three out of nine specified sanctions. The additional sanctions are (1) the prohibition of any transactions in foreign exchange with the sanctioned entity; (2) the prohibition of credit or payments to the sanctioned entity; and, (3) the prohibition on any transactions involving U.S.-based property of the sanctioned entity. The Act mandates that firms certify that they are not in violation of ISA as a condition of receiving a U.S. government contract. It also amends ISA by adding a prohibition on licensing of nuclear materials, facilities, or technology to any country which is the parent country of an entity determined to be sanctioned under ISA for providing WMD technology to Iran.

A waiver may be provided on vital national security interest grounds. The Act strengthens the existing statute to make mandatory the beginning of an investigation of potentially sanctionable activity, and makes mandatory a decision on sanctionability within 180 days of the beginning of such an investigation. However, it adds a "special rule" that no investigation of a potential violation need be started if a firm has ended or pledged to end its violating activity in/with Iran. The Act bans all imports of Iranian origin from the United States, with the exception of informational material, and removes the exemption for luxury goods. It also creates an exemption on the existing ban on U.S. exports to Iran for the exportation of services for Internet communications and for goods or services needed to help non-governmental organizations support democracy in Iran. The Act also provides mandatory sanctions on financial institutions that help Iran's sanctioned entities.

⁴⁵⁷ Public Law 111-195, enacted July 1, 2010.

EMERGENCY PROTECTION FOR IRAQI CULTURAL ANTIQUITIES ACT OF 2004

Title III of the Miscellaneous Trade and Technical Corrections Bill of 2004⁴⁵⁸ 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.⁴⁵⁹ 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 Council Resolution 661 of 1990.⁴⁶⁰ 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 1986⁴⁶¹ 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 1989,⁴⁶² and section 4408 of the Anti-Drug Abuse Act of 1988⁴⁶³ 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

⁴⁵⁸ Public Law 108-429, enacted December 3, 2004.

⁴⁵⁹ Public Law 108-429; 19 U.S.C. 2603.

⁴⁶⁰ Adopted by the UN Security Council on August 6, 1990.

⁴⁶¹ Public Law 99-570, enacted October 27, 1986.

⁴⁶² Public Law 100-204, 19 U.S.C. 2492.

⁴⁶³ Public Law 100-690, enacted November 18, 1988.

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 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 1990⁴⁶⁴ 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

⁴⁶⁴ Public Law 101-243, section 103.

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. In January 2002, President George W. Bush signed the Foreign Operations Appropriations Act for FY2002,⁴⁶⁵ 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.⁴⁶⁶ 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 FY2003,⁴⁶⁷ 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.

⁴⁶⁵ Public Law 107-115, enacted January 10, 2002.

⁴⁶⁶ Under Sec. 722 of the USA PATRIOT Improvement and Reauthorization Act of 2005, Public Law 109-177, the President was also required to designate and withhold assistance from major importers and exporters of precursor chemicals for methamphetamines.

⁴⁶⁷ Public Law 107-228, enacted September 30, 2002.

E. Sanctions Related to Missile Proliferation and the Use of Chemical or Biological Weapons⁴⁶⁸

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 (MTCR) equipment or technology that contributes to the acquisition, design, development or 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 which are described in AECA Sec. 73(a)(1).

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

⁴⁶⁸ 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.

the national security of the United States and notifies and reports to certain 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 1991⁴⁶⁹ 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

⁴⁶⁹Public 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.⁴⁷⁰ 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.⁴⁷¹ 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 or 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

⁴⁷⁰ 64 Fed. Reg. 41784; 31 CFR Parts 538, 550, and 560.

⁴⁷¹ Public Law 106-387, enacted October 28, 2000.

515.560(a).

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, 2004⁴⁷². 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.⁴⁷³ 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.⁴⁷⁴

DARFUR PEACE AND ACCOUNTABILITY ACT OF 2006

The Darfur Peace and Accountability Act of 2006⁴⁷⁵ was signed by the President on October 13, 2006. It strengthens the sanctions initiated in the Act of 2004 relating to assets and visas, and locks in place already-imposed sanctions until certain conditions are met. The codified sanctions include restrictions on foreign aid, pursuant to the foreign operations appropriations, FY2006, and restrictions imposed by the President under the authority invoked in Executive Order 13067.

The Act also requires the denial of most foreign assistance to any third country found to be not in compliance with U.N. Security Council Resolutions 1556 (2004) and 1591 (2005); though it also authorizes the President to waive this application if he finds it in the national interest to do so. The Act recommends, but does not make mandatory, that the President “should take all necessary and appropriate steps to deny the Government of Sudan access to oil revenues, including by prohibiting entry at United States ports to cargo ships or oil tankers...”

SUDAN ACCOUNTABILITY AND DIVESTMENT ACT OF 2007

The Sudan Accountability and Divestment Act of 2007⁴⁷⁶ was signed by President Bush on December 31, 2007. The Act provides a legal framework by which States, local governments and certain other investors can divest Sudan-related assets from their portfolios. Specifically, the Act permits states and localities that choose to do so to adopt measures to divest from companies involved in four key business sectors in Sudan, namely oil, power production, mineral extraction, and military equipment. Likewise, it allows mutual fund and private pension fund managers to sell securities of companies involved in these

⁴⁷² Public Law 108-497

⁴⁷³ Public Law 108-19, enacted April 25, 2003.

⁴⁷⁴ Public Law 108-19, enacted April 25, 2003.

⁴⁷⁵ Public Law 109-344, enacted October 13, 2006.

⁴⁷⁶ Public Law 110-174, enacted December 31, 2007.

four business sectors in Sudan, while maintaining that managers must otherwise abide by their normal fiduciary responsibilities and comply with relevant laws and regulations in performing this task. It requires federal government contractors to certify that they are not conducting business operations in any of the four key sectors in Sudan identified in the measure and grants to the President waiver authority for federal procurement certification if he determines and certifies to Congress that it is in the national interest to do so. The Act requires the Administration to report on the efficacy of current sanctions on Sudan and provides for termination of sanctions conditioned on the government of Sudan abiding by UN Security Council Resolution 1769, ceasing attacks on civilians, demilitarizing the Janjaweed militia, allowing unfettered humanitarian relief delivery, and granting refugees right of return.

H. Sanctions to Address the Illicit Diamond Trade

CLEAN DIAMOND TRADE ACT OF 2003

The Clean Diamond Trade Act of 2003⁴⁷⁷ establishes measures for the importation and exportation of rough diamonds. 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 than 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.”

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. This report, released in September 2006, found that while the United States has enhanced the quality of its rough diamond trade data by improving its collection processes, the system remain vulnerable to illicit trade. GAO also found that the United States lacks an effective system for confirming receipt of imports—a Kimberley Process

⁴⁷⁷ Public Law 108-19, enacted April 25, 2003

requirement for avoiding possible diversions of rough diamond imports, and that the United States has not developed a plan for monitoring the U.S. Kimberley Process Authority, but was in the process of doing at that time.⁴⁷⁸

I. Sanctions Against Burma

Sec. 570 of the Export Financing, Foreign Operations, and Related Programs Appropriations Act of 1997⁴⁷⁹ established conditional prohibitions on certain assistance to Burma, sanctions on new investments in Burma, and restrictions on visas issued to officials of Burma. The Act restricted U.S. foreign assistance with the exception of support for humanitarian, counter-narcotics, and democracy programs. It directed the U.S. representatives at international financial institutions to oppose lending to Burma. In addition to mandatory sanctions, the statute provided for the imposition of a ban on new investment in the event that democratically-elected leader Aung San Suu Kyi is rearrested, exiled, or has been physically harmed, or if the government commits large scale repression or violence against the democratic opposition.

BURMESE FREEDOM AND DEMOCRACY ACT OF 2003

On July 28, 2003, President George W. Bush signed the Burmese Freedom and Democracy Act of 2003.⁴⁸⁰ 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

⁴⁷⁸ GAO-06-978, "Need to Enhance Implementation of Clean Diamond Trade Act," September 2006.

⁴⁷⁹ P.L. 104-208, enacted September 30, 1996.

⁴⁸⁰ Public Law 108-61, enacted July 28, 2003.

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 27, 2010, Congress renewed the import restrictions contained in the Act for an additional year, pursuant to the renewal provisions in the original Act.⁴⁸¹

TOM LANTOS BLOCK BURMESE JUNTA'S ANTI-DEMOCRATIC EFFORTS (JADE) ACT OF 2008

The Block Burmese JADE Act of 2007⁴⁸² was signed into law by President Bush on July 29, 2008. The Act expands current financial and diplomatic restrictions against government officials, further restricts Burmese imports, and authorizes the appropriations of funds to individuals and groups to promote democracy in Burma. Specifically, the Act forbids the issuance of visas for travel to the United States to leaders of the following groups: the State Peace and Development Council (SPDC - the ruling junta), the Burmese military, or the Union Solidarity Development Association (USDA); nor should visas be issued to members of these groups involved with the suppression of public protests of 2007, gross human rights violations, or immediate family members of these individuals.

The President is directed to establish within 120 days of enactment a list of these persons as well as any other Burmese persons or entities that provide substantial economic and political support for the SPDC, the Burmese military or the USDA. The Act allows for the blocking of assets for the above-mentioned individuals and provides for a prohibition on financial transactions between U.S. persons and the abovementioned individuals or members of the SPDC. The Act provides that these sanctions may be terminated upon Presidential determination and certification to Congress that the SPDC has unconditionally released all political prisoners, entered into substantive dialogue with democratic forces on the transition to democratic government, and allowed humanitarian access to populations affected by the armed conflict.

The Act amends the Burmese Freedom and Democracy Act of 2003 to prohibit the importation of jadeite and rubies from Burma, and articles of jewelry containing jadeite and rubies from Burma. The Act requires the establishment of a system to verify that imports of jadeite and rubies and jewelry made from jadeite and rubies do not originate in Burma and expresses the sense of Congress to establish a global system of controls to prevent trade in Burmese products covered in the Act.

⁴⁸¹ Public Law 111-210.

⁴⁸² Public Law 110-286.

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.⁴⁸³ 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. Security Council Resolution 1373. The Act requires that the President prohibit the export to Syria of any item on the U.S. Munitions List (USML) of the International Traffic in Arms Regulations or the Commerce Control List (CCL) 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. President Bush implemented the Syrian Accountability and Lebanese Sovereignty Restoration Act by Executive Order 13338 on May 11, 2004. In addition to implementing the mandatory prohibitions on the export of items listed on the USML or the CCL, the President chose to restrict the export of other U.S. products to Syria, excepting food and medicine, and to ban aircraft owned or controlled by Syria from landing in or overflying the United States.

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

⁴⁸³ Public Law 108-175, enacted December 12, 2003.

conditions are met.⁴⁸⁴

The Belarus Democracy Reorganization Act of 2006⁴⁸⁵ reaffirmed existing prohibitions on export financing and U.S. opposition to multilateral export financing. In addition, it specifies that the President may use existing authorities to deny entrance to the United States to the senior leadership of the Government of Belarus, their immediate families, or other individuals that derive significant financial benefit from business dealings with the current government. It gives the sense of Congress that the President should block any property or interests in property— including payments or transfers of any property, the export or re-export of any goods, technology, or services, or the performance of any contract—owned by the government of Belarus, its senior officials and immediate family members, or other individuals that derive significant financial benefit from business dealings with the current government.

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.

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, 1997.⁴⁸⁶ 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 12 months on the situation in Hong Kong, including the development of its democratic institutions.⁴⁸⁷

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

⁴⁸⁴ Public Law 108-347, enacted October 20, 2004.

⁴⁸⁵ Public Law 109-480, enacted January 12, 2007.

⁴⁸⁶ Public Law 102-383, enacted October 5, 1992.

⁴⁸⁷ The annual reporting requirement lapsed in 2007.

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.⁴⁸⁸ 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 Act⁴⁸⁹ 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 domestic shipping 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 they were 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. The law is sometimes questioned by U.S. trading partners for its alleged discriminatory impact, and some 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 raised national security considerations. Section 5021 of the Omnibus Trade and Competitiveness Act of 1988 amended title VII of the Defense Production Act of 1950⁴⁹⁰ 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 "Exon/Florio" statute grants the President the authority to block proposed or pending foreign "mergers, acquisitions, or takeovers" of "persons engaged in

⁴⁸⁸ Title VI of Public Law 106-286, enacted October 10, 2000.

⁴⁸⁹ Recodified by Public Law 109-304, at title 46 of the United States Code.

⁴⁹⁰ 50 U.S.C. App. 2170, as added by Public Law 100-418, section 5021, enacted August 23, 1988.

interstate commerce in the United States” that threaten to impair the national security. Congress directed, however, that before this authority can be invoked the President must conclude that other U.S. laws are inadequate or inappropriate to protect the national security, and that he must have “credible evidence” that the foreign investment will impair the national security.

In 1992, Congress amended the Exon-Florio statute through Section 837(a) of the National Defense Authorization Act for Fiscal Year 1993 (P.L. 102-484). Known as the “Byrd” amendment after the amendment’s sponsor, the provision requires the Committee on Foreign Investment in the United States (CFIUS) to investigate proposed mergers, acquisitions, or takeovers in cases where two criterion are met:

- (1) the acquirer is controlled by or acting on behalf of a foreign government; and
- (2) the acquisition results in control of a person engaged in interstate commerce in the United States that could affect the national security of the United States.⁴⁹¹

In July 2007, the 110th Congress passed the Foreign Investment and National Security Act of 2007 (FINSa) signed by President Bush on July 26, 2007 and designated as P.L. 110-49. On January 23, 2008, President Bush issued Executive Order 13456 implementing the law. P.L. 110-49 establishes CFIUS by statutory authority, has the Secretary of the Treasury⁴⁹² serve as the Chairman of CFIUS,⁴⁹³ requires the President to conduct a National Security investigation of certain proposed investment transactions, and provides a broader oversight role for Congress. The measure provides for CFIUS to have 30 days to conduct a review of a “covered” foreign investment transaction, 45 days to conduct an investigation, and 15 days for the President to make his determination. The President retains his authority as the only officer with the authority to suspend or prohibit mergers, acquisitions, and takeovers, and the measure places additional

⁴⁹¹ Public Law 102-484, October 23, 1992.

⁴⁹² The United States Trade Representative and the Director of the Office of Science and Technology were added through E.O. 13456, issued January 23, 2008.

⁴⁹³ Executive Order 11858 of May 7, 1975, 40 F.R. 20263 established the Committee with six members: the Secretaries of State, the Treasury, Defense, Commerce, and the Assistant to the President for Economic Affairs, and the Executive Director of the Council on International Economic Policy. Executive Order 12188, January 2, 1980, 45 F.R. 969, added the United States Trade Representative and substituted the Chairman of the Council of Economic Advisors for the Executive Director of the Council on International Economic Policy. Executive Order 12661, December 27, 1988, 54 F.R. 779, added the Attorney General and the Director of the Office of Management and Budget. Executive Order 12860, September 3, 1993, 58 F.R. 47201, added the Director of the Office of Science and Technology Policy, the Assistant to the President for National Security Affairs, and the Assistant to the President for Economic Policy. Executive Order 13286, Section 57, February 28, 2003 added the Secretary of Homeland Security. P.L. 110-49 reduced the membership of CFIUS to six Cabinet members and the Attorney General, it added the Secretary of Labor and the Director of National Security as ex officio members, and removed seven White House appointees.

requirements on firms that resubmitted a filing after previously withdrawing a filing before a full review could be completed.

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 2002,⁴⁹⁴ 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 1988,⁴⁹⁵ which in turn replaced similar authorities under section 102 of the Trade Act of 1974⁴⁹⁶ that expired on January 3, 1988. Except for the authority to proclaim certain 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 Trade Act of 2002 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 1974,⁴⁹⁷ 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;⁴⁹⁸ (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 1988⁴⁹⁹ 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.

⁴⁹⁴ Public Law 107-210, enacted August 6, 2002, 19 U.S.C. 3801-3813.

⁴⁹⁵ Public Law 100-418, enacted 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, enacted July 2, 1993, 19 U.S.C. 2902(e).

⁴⁹⁶ Public Law 93-618, enacted January 3, 1975, 19 U.S.C. 2112.

⁴⁹⁷ Public Law 93-618, 19 U.S.C. 2133.

⁴⁹⁸ Public Law 93-618, 19 U.S.C. 2135.

⁴⁹⁹ 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 of 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 Act⁵⁰⁰ 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 Act⁵⁰¹ 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

⁵⁰⁰ Public Law 100-418, 22 U.S.C. 5304 note.

⁵⁰¹ Public Law 103-465, enacted December 8, 1994, 19 U.S.C. 3551, 3555, 3581.

congressional intent for future free trade agreements. In this regard, section 108 of the Act⁵⁰² 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 2000⁵⁰³ 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 2002.⁵⁰⁴

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-

⁵⁰² Public Law 103-182, enacted December 8, 1993, 19 U.S.C. 3317.

⁵⁰³ Public Law 106-200, enacted May 18, 2000.

⁵⁰⁴ See also the discussion on specific trade agreement authorities, which follows.

zero” negotiations.

The Uruguay Round Agreements Act provides certain limited, residual proclamation authority to the President with respect to tariffs. Specifically, 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.⁵⁰⁵ 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 Act⁵⁰⁶ 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.

⁵⁰⁵ 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.

⁵⁰⁶ Public Law 103-465, 19 U.S.C. 3521.

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 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. Trade Promotion Authority applies to agreements entered into before July 1, 2007.

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 of 1974 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 of 1974 (the general “safeguard” authority) 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 of 1974 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 1988,⁵⁰⁷ as amended, requires the President to determine, before any major foreign country

⁵⁰⁷ Public Law 100-418, 19 U.S.C. 2905.

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 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 Trade Act of 2002 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 seeks to provide 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 an 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 "fast track" 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. Therefore, "for any agreement subject to trade authorities procedures under [the Trade Act of 2002], the draft implementing bill and statement of administrative action [are to be] developed by the President in close collaboration with the Committees of jurisdiction in both Houses of Congress. This has been the practice under prior fast track legislation."⁵⁰⁸

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

⁵⁰⁸ Senate Report 107-139, H.R. 3005.

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 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 number of 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, the United States-Morocco Free Trade Agreement, the Dominican Republic – Central America – United States Free Trade Agreement, the United States – Bahrain Free Trade Agreement, the United States – Oman Free Trade

Agreement, and the United States – Peru Free Trade Agreement. By contrast, Congress approved the United States – Jordan Free Trade Agreement without fast track/trade promotion authority procedures.

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,⁵⁰⁹ 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 also 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 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

⁵⁰⁹ Public Law 96-39, enacted July 26, 1979, 19 U.S.C. 2504.

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)(3) 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 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.

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 2104(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 that may be in the final agreement, and 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 (i.e., changes to U.S. antidumping, countervailing duty, and safeguard laws); 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 fast track 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.⁵¹⁰

As provided under section 151 of the Trade Act of 1974,⁵¹¹ 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 seek to reduce or eliminate numerous nontariff measures, such as quotas, restrictive licensing systems, and discriminatory product standards.

The agreements 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,

⁵¹⁰ Public Law 100-418, 19 U.S.C. 2903.

⁵¹¹ Public Law 93-618, 19 U.S.C. 2191.

intellectual property, and investment.

The Understanding on Rules and Procedures Governing the Settlement of Disputes creates procedures for the 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 among all WTO Members 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.

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 Act⁵¹²); (2) authorities to implement the results of tariff negotiations (section 111 of the Act⁵¹³); (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 Act⁵¹⁴); and (4) objectives regarding extended Uruguay Round negotiations and other related provisions (sections 131, 135 and 315 of the Act⁵¹⁵).

Specifically, sections 121-130 of the Act⁵¹⁶ 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. 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

⁵¹² Public Law 103-465, 19 U.S.C. 3511.

⁵¹³ Public Law 103-465, 19 U.S.C. 3521.

⁵¹⁴ Public Law 103-465, 19 U.S.C. 3531-3538.

⁵¹⁵ Public Law 103-465, 19 U.S.C. 3551, 3555, and 3581.

⁵¹⁶ Public Law 103-465, 19 U.S.C. 3531-3538.

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. 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 implements 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 and Agreements

A number of agreements have been or are being negotiated under the auspices of the WTO since the conclusion of the Uruguay Round. These agreements relate to information technology, telecommunications, financial services, and maritime services. In addition, the Members are currently negotiating a comprehensive agreement, under the "Doha Development Agenda" 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 70 participants representing about 97 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.⁵¹⁷

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 69 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

⁵¹⁷ Pres. Proc. No. 7011, June 30, 1997, 62 Fed. Reg. 35,909.

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.

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 56 WTO Members that made improved commitments in financial services during these negotiations, 53 Members 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.

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.

The Doha Development Agenda

At the fourth Ministerial meeting of the WTO in Doha, Qatar, in November

2001, the WTO Members agreed to launch a new round of multilateral trade negotiations. The negotiations became known as the Doha Development Agenda, as the Members agreed to place the needs and interests of developing countries at the heart of the negotiations. The work program combined ongoing negotiations on agriculture and services liberalization (part of a “built-in” agenda contemplated under the Uruguay Round) with new negotiations on tariff and non-tariff trade barriers for industrial products, WTO rules on dumping and subsidies and several other issues. As of this writing, however, the Members still had not reached an agreement on “modalities” (the methods and formulas by which negotiations are conducted).

U.S. WTO DISPUTE SETTLEMENT FUND

Section 5201 of the Trade Act of 2002⁵¹⁸ 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 1974,⁵¹⁹ 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

⁵¹⁸ Public Law 107-210, enacted August 6, 2002.

⁵¹⁹ Public Law 93-618, 19 U.S.C. 2241.

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 1974,⁵²⁰ 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.

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

⁵²⁰ Public Law 93-618, 19 U.S.C. 2242.

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.

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.

The main issues identified in the 2008 Section 1377 Review include several general issues (regulatory independence and transparency, excessively high mobile termination rates, barriers to the use of Voice over Internet Protocol technology, and concerns with conformity assessment requirements) and the following country-specific issues: (1) competitive access to the major supplier's network in Australia and Germany; (2) impediments to market access in China; (3) problems interconnecting with the major supplier in El Salvador and Guatemala; (4) the universal service surcharge in Jamaica; (5) the telecom equipment testing requirement in Mexico; (6) delays in licensing basic telecommunications services in Oman; and (7) access to leased lines in Singapore.

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 1998.⁵²¹ 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.

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 1951,⁵²² 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 1962.⁵²³ The Tariff

⁵²¹ Public Law 105-206, enacted July 22, 1998.

⁵²² Public Law 49-50, ch. 141, enacted June 16, 1951.

⁵²³ Public Law 87-566, enacted May 24, 1962.

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 1962,⁵²⁴ 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 1990.⁵²⁵ 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 1997.⁵²⁶

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 1974.⁵²⁷ Section 126 contains 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

⁵²⁴ Public Law 87-794, enacted October 11, 1962, 19 U.S.C. 1351.

⁵²⁵ Public Law 101-382, enacted August 20, 1990.

⁵²⁶ Public Law 105-206, enacted July 22, 1998.

⁵²⁷ Public Law 93-618, 19 U.S.C. 2136.

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 plurilateral WTO Agreement on Government Procurement 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 1974,⁵²⁸ as amended, currently 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 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

⁵²⁸ 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.

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

U.S. trade policy toward the former communist countries of East and Central Europe and the former Soviet Union has changed with the end of the cold war and the collapse of the Soviet Union in the 1990s. U.S. trade policy with China

and some of the other current and former Asian communist countries has also changed as those countries have implemented economic reforms and U.S. relations with them have opened up. As part of the change in policy, the United States revised the NTR status of those countries, in some cases eliminating the applicability of Title IV and, in other cases, maintaining the applicability of Title IV but extending conditional NTR under the presidential waiver or full compliance provisions.

PNTR

The following countries have been granted permanent normal trade relations status. Unless otherwise indicated, each country had been subject to the provisions of Title IV of the Trade Act of 1974, was then granted conditional NTR status under the presidential waiver provision or under the full compliance provision of Title IV, and then was granted PNTR. The countries are listed with the dates on which they received PNTR by presidential proclamation under the authority of legislation passed by Congress and signed by the President: Afghanistan (June 6, 2002);⁵²⁹ Albania (June 29, 2000); Armenia (January 7, 2005); Bulgaria (October 1, 1996); Cambodia (October 25, 1996);⁵³⁰ Czech Republic and Slovakia (April 14, 1992);⁵³¹ Estonia (September 6, 1991); Georgia (December 29, 2000); German Democratic Republic (East Germany) (October 3, 1990);⁵³² Hungary (April 14, 1992); Kyrgyzstan (June 29, 2000); Laos (February 4, 2005);⁵³³ Latvia (September 6, 1991); Lithuania (September 6, 1991); Mongolia (July 1, 1999); Poland (February 23, 1987);⁵³⁴ Romania (November 7, 1996); Serbia and Montenegro (the former Yugoslavia) (December 4, 2003);⁵³⁵ Ukraine (March 23, 2006); and Vietnam (December 29, 2006).

⁵²⁹ Afghanistan was not subject to Title IV of the Trade Act of 1974, but its NTR status was suspended February 14, 1986 and then restored by presidential proclamation under the authority of section 1118 of the Continuing Appropriations Act of 1986 (P.L.99-190).

⁵³⁰ Cambodia was not subject to Title IV but its NTR status was suspended under the authority of a provision of the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418). It was restored unconditionally by the President under P.L.104-203.

⁵³¹ Czechoslovakia was granted PNTR on April 14, 1992. The Czech Republic and Slovakia each retained its PNTR status after the breakup of Czechoslovakia in 1993.

⁵³² Although initially subject to Title IV, the former German Democratic Republic received PNTR status upon its unification with the Federal Republic of Germany (West Germany) on October 3, 1990.

⁵³³ Laos was not subject to Title IV. Its NTR status was suspended under another authority and was restored unconditionally under P.L. 108-429.

⁵³⁴ Poland was not subject to Title IV, but its NTR status was suspended on November 1, 1982, by presidential proclamation under section 125 (d) of the Trade Act of 1974, as amended. It was restored unconditionally by presidential proclamation on February 23, 1987.

⁵³⁵ Yugoslavia was never subject to Title IV nor were any of the newly independent republics of the former Yugoslavia. However, the NTR status of Montenegro and Serbia was withdrawn under the authority of P.L. 102-420 on October 16, 1992 and was restored under the same authority on December 4, 2003.

In some cases, Congress granted PNTR before a country completed its WTO negotiations (e.g., Albania, Bulgaria, Cambodia, Estonia, Latvia, and Lithuania). In other cases, Congress granted PNTR only after the country completed its WTO negotiations (e.g., Armenia, Georgia, Kyrgyz Republic, Mongolia, and, most recently, Vietnam).

The Case of China

In 2000, Congress passed legislation granting the President the authority to extend PNTR to China by proclamation but linked that authority to the terms for China's accession to the World Trade Organization (WTO).⁵³⁶ The legislation stipulated that before the authority could go into effect, the President had to certify that the terms of China's accession to the WTO were at least equivalent to those terms that the United States and China agreed to under their 1999 bilateral agreement that was part of the WTO accession process. On November 13, 2001, the House received a message from the President with that certification, and the President granted PNTR by proclamation on December, 2001, under the authority granted by P.L. 106-286.

P.L. 106-286 includes a provision codifying an import surge mechanism negotiated as part of China's WTO accession. 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. P.L. 106-286 also establishes a Congressional-Executive Commission on China to focus on monitoring human rights and the rule of law in China and requires USTR to submit an annual report to Congress on China's compliance with WTO obligations.

Countries Still Subject to Title IV

The following countries remain subject to Title IV of the Trade Act of 1974, as amended.

Azerbaijan

Azerbaijan was granted conditional NTR status on April 21, 1995, under the presidential waiver provisions of Title IV and that status was renewed annually. On June 3, 1997, the President determined that Azerbaijan was in full compliance with the Jackson-Vanik requirements, but its status remains subject to semi-annual reviews as stipulated under Title IV. That status has been favorably determined continuously.

Belarus

Belarus was granted conditional NTR status in February 1993 under the

⁵³⁶Public Law 106-286, enacted May 26, 2000. The President signed the bill into law on October 10, 2000.

presidential waiver provisions of Title IV and that status was renewed annually until 2001. In 2001, Belarus's waiver status was not renewed by the June 3, 2001 deadline (apparently through an oversight). It was extended again on July 2, 2001, and renewed continuously since then.

Cuba

Cuba remains subject to Title IV and is denied any NTR status. Cuba is also subject to a trade embargo.

Kazakhstan

In February 1993, Kazakhstan was granted conditional NTR status under the presidential waiver provisions of Title IV. On December 5, 1997, the President determined that Kazakhstan is in full compliance with Jackson-Vanik requirements and its NTR status is subject to semi-annual compliance reviews. Kazakhstan's full compliance has been favorably determined continuously.

Moldova

Moldova received conditional NTR status under the presidential waiver provisions of Title IV in July 1992 and was determined to be in full compliance with those provisions on June 3, 1997. Since that time, Moldova's full compliance has been favorably determined continuously in semi-annual reviews.

North Korea

North Korea remains subject to Title IV and is denied any NTR status. North Korea is also subject to a trade embargo.

Russia

Russia was granted conditional NTR status in June 1992 under the presidential waiver provisions of Title IV. On September 24, 1994, the President determined that Russia was in full compliance with those provisions, and its full compliance has been favorably determined continuously since that time in semi-annual reviews.

Tajikistan

Tajikistan was granted conditional NTR status in November 1993 under the presidential waiver provisions of Title IV. On December 5, 1997, the President determined that Tajikistan was in full compliance with those provisions, and its full compliance has been favorably determined continuously since that time in semi-annual reviews.

Turkmenistan

Turkmenistan was granted conditional NTR status in October 1993 under the

presidential waiver provisions of Title IV. On December 5, 1997, the President determined that Turkmenistan was in full compliance with those provisions, and its full compliance has been favorably determined continuously since that time in semi-annual reviews.

Uzbekistan

Uzbekistan was granted conditional NTR status in January 1994 under the presidential waiver provisions of Title IV. On December 5, 1997, the President determined that Uzbekistan was in full compliance with those provisions, and its full compliance has been favorably determined continuously since that time in semi-annual reviews.

North American Trade Relations

Section 1102 of the Omnibus Trade and Competitiveness Act of 1988⁵³⁷ 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, labor standards, 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 border region, the North American Development Bank. The NAFTA side agreements were signed in a White House ceremony on September

⁵³⁷ Public Law 100-418, enacted August 23, 1988, 19 U.S.C. 2901 note.

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.⁵³⁸

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 1993⁵³⁹ approved the Agreement 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. The Act states that U.S. law prevails over the Agreement if there is a conflict. The Act also establishes a Federal-state consultation process concerning NAFTA obligations affecting state laws. Finally, under the statute, 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

⁵³⁸ Proclamation No. 6641, 58 Fed. Reg. 68,191 (1993).

⁵³⁹ Public Law 103-182, enacted December 8, 1993, 19 U.S.C. 3301 note.

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 Act establishes rules of origin, which are to ensure application of NAFTA preferential tariff treatment only to goods originating in Mexico or Canada. 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. Implementing NAFTA Article 1902(2)(a), the statute further provides, at section 408, that any amendment enacted after the NAFTA enters into force that is made to section 303 or Title VII of the Tariff Act of 1930 (antidumping and countervailing duties), or to any other statute that provides for judicial review of final agency determinations in antidumping or countervailing duty proceedings, or indicates the standard or review that is to be applied, will apply to goods from NAFTA countries only to the extent specified in the amendment.⁵⁴⁰

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

⁵⁴⁰ Public Law 103-182, section 408, 19 U.S.C. 3438. Section 303 of the Tariff Act of 1930 was repealed in 1994. In 2006, the U.S. Court of International Trade held that the Bureau of Customs and Border Protection improperly applied the now repealed Continued Dumping and Subsidy Offset Act (CDSOA) to imports from Canada and Mexico because the CDSOA did not specify that it applied to such goods. The CDSOA, which was codified in Title VII, required the annual distribution of antidumping and countervailing duties to domestic producers who had supported the underlying antidumping and countervailing duty petitions. *Canadian Lumber Trade Alliance v. United States*, 425 F.Supp.2d 1321 (Ct. Int'l Trade 2006), aff'd, 517 F.3d 1319 (Fed. Cir. 2008)(some unrelated portions vacated), cert. denied, 129 S.Ct. 344 (2008).

NAFTA, subject to congressional approval.

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 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.⁵⁴¹ *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

⁵⁴¹ 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 fiber based upon an earlier showing of short supply.

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

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 1984⁵⁴² 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

⁵⁴² Public Law 98-573, title IV, enacted October 30, 1984.

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 1985⁵⁴³ 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 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

⁵⁴³ Public Law 99-47, enacted June 11, 1985, 19 U.S.C. 2112.

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.⁵⁴⁴ 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

⁵⁴⁴ Public Law 99-47, enacted June 11, 1985, 19 U.S.C. 2112 note.

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 Bank, Gaza Strip and qualifying industrial zones.⁵⁴⁵ 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, through January 2, 1988, 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. This authority provided a basis for U.S. entry into the United States-Canada Free-Trade Agreement, signed by the parties December 22 and 23, 1987, and January 2, 1988. Following requirements and procedures set out in the Trade Act, the President on July 25, 1988, transmitted to the Congress a copy of the 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

⁵⁴⁵ Public Law 104-234, enacted October 2, 1996.

legislation, which passed the House on August 9, 1988 and the Senate on September 19, 1988, 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 (NAFTA) entered into force, covering trade among the United States, Canada, and Mexico. The NAFTA incorporates or otherwise carries forward most of the provisions of the United States-Canada Free-Trade Agreement or supersedes the bilateral agreement in certain areas, such as rules of origin.

UNITED STATES-CANADA FREE-TRADE AGREEMENT

At the time, the United States-Canada Free-Trade Agreement (FTA) was one of the most comprehensive bilateral trade agreements ever negotiated, creating one of the world's largest internal markets for goods and services. Along with their commitment to implement the FTA on the federal level, the two governments agreed to ensure that state, provincial, and local governments within their jurisdiction abide by FTA obligations unless otherwise provided in the Agreement. Each party agreed to accord national treatment to the goods, services, and investment of the other party to the extent provided in the Agreement; the national treatment obligations of the General Agreement on Tariffs and Trade (GATT) are incorporated into the FTA for purposes of trade in goods.

The central provision of the Agreement is the phased out elimination of tariffs on all goods traded between the two countries within 10 years (*i.e.* by January 1, 1998) in three staging categories. The Agreement contains rules of origin based primarily on changes in tariff classifications intended to ensure that only products 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 GATT, and contains obligations aimed at liberalizing or harmonizing 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 to respond to injurious import surges, or safeguards, may be taken on a bilateral or global basis.

The Agreement sets out a general dispute settlement process for the avoidance or settlement of disputes arising under the FTA providing for consultations, possible mediation and arbitral panels, and suspension of FTA benefits for non-

compliance with adverse panel reports. A major element of the Agreement is establishment in Chapter Nineteen of a mechanism, initiated by request of either party, for review by binational panels and extraordinary challenge committees of final antidumping and countervailing duty determinations involving U.S. or Canadian products in lieu of judicial review in the country in which the determination is issued.

UNITED STATES-CANADA FREE-TRADE AGREEMENT
IMPLEMENTATION ACT OF 1988

The United States-Canada Free-Trade Agreement Implementation Act of 1988⁵⁴⁶ approved the Agreement, the accompanying statement of administrative action, and changes in U.S. laws necessary or appropriate to implement obligations under the Agreement. The act also sets forth the relationship between Agreement obligations and U.S. laws, contains 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 1990.⁵⁴⁷

The act provides that federal laws prevail over the Agreement if there is a conflict between the two, but that the Agreement prevails over conflicting state or local laws. The act also prohibits private rights of action based on the Agreement or congressional approval of 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.

The President was authorized to proclaim the modifications in U.S. rates of duty necessary to implement the scheduled phase out and elimination of all tariffs on trade with Canada within 10 years. The statute implements the rules of origin set forth in the Agreement to ensure application of preferential tariff treatment only to goods originating in Canada. 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

⁵⁴⁶ Public Law 100-449, enacted September 28, 1988, 19 U.S.C. 2112 note.

⁵⁴⁷ Public Law 101-382, enacted August 20, 1990.

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 provisions in Chapter Nineteen of the Agreement establishing binational panel and extraordinary challenge committee review of final antidumping and countervailing duty determinations. The act authorizes the Department of Commerce and the U.S. International Trade Commission to implement Chapter Nineteen panel and committee decisions, provides for limited constitutional review in U.S. courts of the binational panel system, sets out procedures and criteria for the selection of the panelists appointed by the United States, and authorizes appropriations for the U.S. Secretariat, a body established to facilitate the operation of Chapter Nineteen, and for other administrative expenses.

The United States and Canada suspended the operation of the bilateral agreement upon entry into force of the NAFTA for such time as the two governments remain parties to the NAFTA. As provided in section 107 of the NAFTA Implementation Act, specified provisions of the United States-Canada FTA Implementation Act are suspended during the suspension of the bilateral agreement. Provisions of the U.S.-Canada FTA Implementation Act that carry out FTA obligations that are in effect under the NAFTA either 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 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. 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 (such as the right for compensation for expropriation or properties) that Chilean investors currently enjoy under the U.S. legal system. Chile and the United States also agree to treat investment in accordance with customary international law including fair and equitable treatment and full protection and security.

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. With respect to most violations of obligations under the FTA, dispute settlement procedures allow for the prevailing party in a dispute may impose trade sanctions or seek fines where the losing party does not comply with an adverse decision. Sanctions or fines are to be assessed based on the “value” of the violation. With respect to violation of labor or environmental obligations, a dispute settlement panel may establish a fine against the violating party. That fine is capped at \$15 million. Under the dispute settlement chapter, such fines are to be paid back to the violating party to be used to remedy the labor or environmental violations. If a party does not pay its fine in a labor or environmental dispute, the complaining party may suspend tariff benefits, up to the amount of the fine.

UNITED STATES-CHILE FREE TRADE AGREEMENT IMPLEMENTATION ACT

The United States-Chile Free Trade Agreement Implementation Act, signed

into law on August 3, 2003⁵⁴⁸, 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 2002⁵⁴⁹.

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

⁵⁴⁸ Public Law 108-77

⁵⁴⁹ Public Law 107-210

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, which include protections to prevent abuse of the temporary entry provisions, similar to (but not identical to) to those applied to the H1-B visa program.

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 Singaporean 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. Singapore 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. With respect to most violations of obligations under the FTA, dispute settlement procedures allow for the prevailing party in a dispute may impose trade sanctions or seek fines where the losing party does not comply with an adverse decision. Sanctions or fines are to be assessed based on the “value” of the violation. With respect to violation of labor or environmental obligations, a dispute settlement panel may establish a fine against the violating party. That fine is capped at \$15 million. Under the dispute settlement chapter, such fines are to be paid back to the violating party to be used to remedy the labor or environmental violations. If a party does not pay its fine in a labor or environmental dispute, the complaining party may suspend tariff benefits, up to the amount of the fine.

UNITED STATES-SINGAPORE FREE TRADE AREA IMPLEMENTATION ACT

The United States-Singapore Free Trade Agreement Implementation Act, signed into law on August 3, 2003⁵⁵⁰, 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 2002⁵⁵¹.

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

⁵⁵⁰ Public Law 108-78

⁵⁵¹ Public Law 107-210

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, 2004⁵⁵², 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 2002⁵⁵³.

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

⁵⁵² P.L. 108-286

⁵⁵³ P.L. 107-210

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, 2004⁵⁵⁴, 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

⁵⁵⁴ P.L. 108-302

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.

United States-Central America- Dominican Republic trade relations

UNITED STATES –CENTRAL AMERICA- DOMINICAN REPUBLIC FREE TRADE AGREEMENT

On January 16, 2002, the United States, Guatemala, Honduras, El Salvador, Nicaragua, and Costa Rica announced their intentions to explore a free trade agreement. Following passage of the Trade Act of 2002 on August 6, 2002, Congress granted “fast track” trade negotiating authority to the President, paving the way for talks to begin. The first of nine rounds of negotiations began in San José, Costa Rica on January 27, 2003. On August 4, 2003, the United States announced its intention to negotiate a separate FTA with the Dominican Republic. Negotiations with the Central American countries concluded on December 17, 2003, except for Costa Rica, which continued in bilateral talks with the United States until January 25, 2004. The U.S.-Dominican Republic FTA was concluded on March 15, 2004, and it was announced that it would be “docked” with the U.S.-Central America FTA. On May 28, 2004, the United States Trade Representative (USTR) and representatives of the Central American countries signed the U.S.-Central America Free Trade Agreement (CAFTA). The Dominican Republic, having completed separate negotiations, was added to the agreement on August 5, 2004 in a subsequent signing by all

parties. The new agreement was titled the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR).

The CAFTA-DR is the first free trade agreement between the United States and a group of smaller developing economies. CAFTA-DR is a regional trade agreement with all parties subject to the same set of obligations and commitments, but with each country defining its own market access on a bilateral basis with the United States. It is a comprehensive and reciprocal trade agreement, replacing U.S. unilateral preferential trade treatment extended to these countries under the Generalized System of Preferences (GSP), Caribbean Basin Economic Recovery Act (CBERA) and the Caribbean Basin Trade Partnership Act (CBTPA.) The agreement includes the following sections:

Tariff Elimination: On U.S. *imports* of manufactured goods from the region, all tariffs and quotas were eliminated immediately, including those on textile and apparel products that meet the agreement's rules of origin. On 80% of U.S. manufactured *exports*, tariffs and quotas are eliminated immediately. Tariffs on the remaining manufactured goods will be phased out over a 10-year period.

Agriculture: Duties on 50% of U.S. agricultural *exports* fell to zero upon implementation, with the rest phased out over a period of up to 20 years. Over 99% of U.S. agricultural *imports* from the region, with the exception of sugar, enter the United States duty-free upon implementation. The agreement allows each country limited exceptions: sugar (United States), fresh potatoes and onions (Costa Rica), and white corn (rest of Central America). These goods will continue to be subject to quotas or tariff-rate quotas. All parties agreed to establish a Sanitary and Phytosanitary (SPS) Committee to implement a SPS agreement.

Textiles and Apparel: All textile and apparel goods receive duty-free treatment, retroactive to January 1, 2004, provided they meet the agreement's rules of origin. With exceptions, the rules allow articles to enter duty-free if assembled from components made in a CAFTA-DR partner country or the United States.

Services: The agreement covers both cross-border services and investment in an establishment of a local services presence. It further provides broader market access and greater regulatory transparency for most industries including telecommunications, insurance, financial services, distribution services, computer and business technology services, and tourism.

Investment: The CAFTA-DR protects all forms of investment, 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 CAFTA-DR countries on an equal footing with domestic 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 (such as due process and the right to receive a fair market value for property in the event of an expropriation) that investors of

CAFTA-DR countries currently enjoy under the U.S. legal system. CAFTA-DR countries and the United States also agree to a minimum standard of treatment, under which they treat investment in accordance with customary international law, including fair and equitable treatment and full protection and security. The agreement clarifies that this provision, as applied to covered investment, prescribes the customary international law minimum standard of treatment of aliens and that concepts of fair and equitable treatment and full protection and security do not require treatment beyond the international law minimum and or create additional substantive rights for investors. In addition, a determination that there has been a breach of another FTA provision, or of a separate international agreement, does not establish that there has been a breach of the minimum standard of treatment obligation. Once the agreement enters into force, investors of each party will be able to resolve disputes directly with the respective host country through a transparent, binding international arbitration mechanism.

Intellectual Property Rights (IPR): *Copyrights:* The Agreement ensures that authors, composers, and other copyright owners have the exclusive right to make their works available online, and that copyright owners have rights to temporary copies of their works on computers, in order to protect music, videos, software, and text from widespread unauthorized sharing via the Internet. Each government commits to protect copyrighted works for extended terms (e.g., life of the author plus seventy years), consistent with U.S. standards. The Agreement includes strong anti-circumvention provisions, requiring each government to prohibit tampering with technologies (e.g. embedded codes on discs) that are designed to prevent piracy and unauthorized distribution over the Internet.

Patents & Trade Secrets: Patent terms can be adjusted to compensate for unreasonable delays in granting the original patent, consistent with U.S. practice. Grounds for revoking a patent are limited to the same grounds required to originally refuse a patent, thus protecting against arbitrary revocation. Test data submitted to a government for the purpose of product approval will be protected against unfair commercial use for a period of 5 years for pharmaceuticals and 10 years for agricultural chemicals.

Trademarks: Each government is required to establish transparent procedures for the registration of trademarks. The Agreement applies the principle of “first-in-time, first-in-right” to trademarks and geographical indications. Each government agrees to develop an on-line system for the registration and maintenance of trademarks, as well as a searchable database.

IPR Enforcement: The Agreement requires each government to criminalize end-user piracy, providing strong deterrence against copyright piracy and trademark counterfeiting. IPR laws will be enforced against goods-in-transit to deter violators from using ports or free-trade zones to traffic in pirated products. To deter piracy, the Agreement mandates both statutory and actual damages for copyright piracy and trademark counterfeiting. Under these provisions,

monetary damages can be awarded even if actual economic harm (e.g., retail value or profits made by violators) cannot be determined.

Government Procurement: Consistent with the overall framework of free trade agreements, the provisions on government procurement require national treatment and nondiscrimination with respect to the awarding of government contracts that are both covered by the agreement's provisions and above the agreed upon monetary thresholds. Generally, the government procurement provisions contain reciprocal obligations regarding tendering procedures, qualification of suppliers, offsets, invitations to participate in procurements, tender and selection procedures, awarding of contracts, transparency, and challenge procedures. Disputes are generally subject to the terms of the dispute settlement chapters. The government contracts that are covered by the chapter are laid out in separate annexes, with commitments at the federal, state and local levels.

Customs Procedures: The chapter describes rules defining an "originating good" for purposes of extending tariff benefits, including a *de minimis* rule for use of third-party inputs. Its calls for consultations among parties and cooperation among customs authorities to verify and document the origin of goods for purposes of countering illegal trans-shipment of goods. The trade capacity building chapter provides assistance for this purpose.

Labor: The Agreement states that neither party shall "fail to effectively enforce" its own 'labor laws'" in trade-related matters between the countries. This is the only labor obligation enforceable through dispute settlement procedures in the Agreement. "Labor laws" are defined as a country's own statutes or regulations directly related to any of the "internationally recognized worker rights" (further defined as those relating to the freedom of association; the right to collective bargaining; the elimination of all forms of compulsory or forced labor; the abolition of child labor; and acceptable conditions of work relating to minimum wages, maximum hours, and occupational safety and health (i.e., the same as those enumerated in Title V of the Trade Act of 1974. Each country also commits to "strive to ensure" that its domestic law recognizes and protects International Labor Organization (ILO) principles listed in *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* (1998) ("ILO Declaration"). This list differs from the above-referenced U.S. list by one principle: the elimination of employment and occupational discrimination replaces acceptable conditions of work. Parties also recognize that it is inappropriate to weaken or reduce domestic labor protections to encourage trade or investment. The Agreement contains a labor cooperation mechanism to provide enhanced opportunities to improve labor standards and advance common commitments on labor matters.

Environment: The Agreement commits Parties to effectively enforce their own environmental laws in a manner affecting trade; this is the single provision of the Environment Chapter that is enforceable through the Agreement's dispute settlement provisions. The Parties affirm that it is inappropriate to encourage

trade or investment by weakening domestic environmental laws, and the governments commit to “strive to ensure” that this does not occur. The Agreement establishes an Environmental Affairs Council to oversee implementation of the Environment Chapter and to consider cooperation activities developed under an Environmental Cooperation Agreement (ECA) negotiated to complement the FTA. The Environment Chapter also creates a process for the public to file submissions concerning a Party’s failure to effectively enforce its environmental laws, and provides for the establishment of a secretariat to address such submissions. The ECA identifies priority areas for environmental cooperation and capacity building among the Parties. The ECA also establishes an Environmental Cooperation Commission (ECC) and obligates the ECC to develop a work program that reflects each Party’s national priorities for cooperative activities.

Dispute Settlement: The agreement sets out detailed procedures for the resolution of disputes between the parties over compliance with agreement obligations, with high standards of openness and transparency. If a dispute panel finds that a party has violated the CAFTA-DR, the disputing parties, where appropriate, may agree on an “action plan” to resolve the dispute. With respect to most violations of obligations under the CAFTA-DR, dispute settlement procedures allow for the prevailing party in a dispute to impose trade sanctions where the losing party does not comply with an adverse decision or with any agreed upon “action plan.” The defending party may request that the level of proposed sanctions be arbitrated if it believes them to be “manifestly excessive” or, alternatively, it may choose to pay an annual monetary assessment to the prevailing country in lieu of sanctions. Sanctions or fines are to be based on the “value” of the violation. The fine is ordinarily to be paid to the complaining country, but if the disputing parties agree, it may be paid into a jointly administered fund to assist the defending party in complying with its agreement obligations. In the event of non-compliance with a labor or environmental obligation, the complaining party is initially limited to asking the dispute settlement panel to establish a fine against the violating party. That fine is capped at \$15 million annually, adjusted for inflation. Under the dispute settlement chapter, such fines are to be paid back to the violating party to be used to remedy the labor or environmental violations. If a party does not pay a fine, whether assessed in lieu of sanctions or assessed initially in a labor or environmental dispute, the complaining party may suspend tariff or other trade agreement benefits in accordance with the agreement.

UNITED STATES –CENTRAL AMERICA- DOMINICAN REPUBLIC FREE TRADE
AGREEMENT IMPLEMENTATION ACT

The Dominican Republic-Central America-United States Free Trade

Agreement Implementation Act, signed into law on August 2, 2005⁵⁵⁵, approves the agreement and makes changes in laws necessary or appropriate to implement obligations under the agreement. Beginning with El Salvador on March 1, 2006, the United States implemented the agreement for each country on a rolling basis upon their compliance with conforming obligations. On January 1, 2009, Costa Rica, after an extended delay, became the last country to implement the agreement.

Sections 101-109 provide congressional approval of the agreement and the statement of administrative action proposed to implement the agreement. They further define the agreement's relationship to United States law, the proclamation authority for the President for such actions necessary to properly implement the Act, and the administration of dispute settlement proceedings.

Section 201 authorizes the President to proclaim tariff modifications as determined necessary to implement the agreement and to terminate CAFTA-DR country beneficiary status with respect to the Generalized System of Preferences (GSP), Caribbean Basin Economic Recovery Act (CBERA), and Caribbean Basin Trade Partnership Act (CBTPA) upon the agreement entering into force.

Section 202 provides for additional safeguard duties for certain agricultural products, under specified conditions.

Section 203 codifies the rules of origin defined in Chapter 4 of the agreement. A good is considered an "originating good" if: (1) the good is wholly obtained or produced entirely in the territory of one or more of the CAFTA-DR countries; (2) is produced entirely in the territory of one or more the CAFTA-DR countries, and either non-originating materials undergo an applicable change in tariff classification set out in Annex 4.1 or the good otherwise satisfies any applicable regional value-content or other requirements specified in Annex 4.1, and satisfies all other applicable requirements of this section; or (3) the good is produced entirely in the territory of one or more of the CAFTA-DR countries, exclusively from materials as calculated in the accompanying value-content methods. The value-content method is adjusted for certain automotive goods. The section includes an accumulation rule, which defines limitations on the duty-free treatment of a product made from materials originating from multiple CAFTA-DR countries, and a "short supply" rule for duty-free treatment of articles made from materials found not to be available in commercial quantities.

Sections 204-208 define customs user fee rules, the retroactive application for certain liquidations and reliquidations of textile and apparel goods, penalties and exceptions thereof for disclosure of incorrect information and false certifications of origin, and record keeping requirements for certification of origin.

Section 209 authorizes the President to direct the Secretary of the Treasury to verify and enforce applicable customs laws, regulations, and procedures regarding trade in textile or apparel goods, and determine the accuracy of any claim that an export qualifies as an "originating good."

⁵⁵⁵ Public Law 109-53

Sections 311-315 authorize the President to provide relief from imports benefitting from the agreement through the filing of a petition requesting an adjustment to the obligations of the agreement before the United States International Trade Commission (ITC). The ITC shall promptly initiate an investigation to determine if imports entering under the agreement are entering in such increased quantities as to 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. Should the ITC determine in the affirmative, it is empowered to recommend to the President the amount of import relief that is necessary to remedy or prevent the injury found by the ITC. A detailed report is to be submitted by the ITC to the President and made public. The President shall provide such relief from imports and provide and facilitate efforts by the domestic industry to make adjustment to import competition. The President is authorized to provide relief in the form of suspension of any further reduction in the duty or an increase in the rate of duty for a limited period of time. The ITC may also respond to future requests to reconsider the continued need for such relief. Import relief is prohibited beyond 10 years after the agreement enters into force, except for articles whose period of tariff elimination exceeds 10 years.

Sections 321-328 authorize the President to use textile and apparel safeguard measures. The President determines if relief is to be considered, based on a determination that imports entering into the United States have increased to quantities such 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. The President is authorized to provide relief through increased rates of duty for a period of up to three years, but increases duties may not be levied beyond five years from the date the agreement enters into force.

Section 401 amends the Trade Agreements Act of 1979 to make products or services of any foreign country or instrumentality that is a party to the Agreement eligible for U.S. government procurement.

Section 402 amends the CBERA to define "former beneficiary country" as a country that ceases to be designated as a beneficiary country under the Act because the country has become a party to a free trade agreement with the United States. It modifies CBERA's formula for determining rules of origin for duty-free treatment of eligible articles to include articles from former beneficiary countries. It further declares that an article that is a good of a former CBTPA beneficiary country for purposes of the Tariff Act of 1930 or the Uruguay Round Agreements Act, as the case may be, shall not be eligible for preferential treatment, unless it is a good from the Dominican Republic under this Act and the article, or good used in its production, undergoes production in Haiti.

Section 403 requires the President to submit biennial reports for 14 years on CAFTA-DR country progress in implementing the labor provisions of the agreement. It further requires periodic meetings between the U.S. Secretary of

Labor and CAFTA-DR country labor ministers.

United States-Bahrain Trade Relations

UNITED STATES-BAHRAIN FREE TRADE AGREEMENT

Negotiations for a U.S.-Bahrain Free Trade Agreement began on January 26, 2004, and were completed on May 27, 2004. The United States and Bahrain, represented by U.S. Trade Representative Robert B. Zoellick and H.E. Abdulla Hassan Saif, the Bahraini Minister of Finance & National Economy, signed the agreement on September 14, 2004. The implementing legislation was signed into law in January 11, 2006. The agreement entered into force on August 1, 2006.

The United States-Bahrain FTA includes the following sections:

Tariff Elimination: The FTA will eliminate tariffs on virtually all trade between the countries within ten years.

Agriculture: This agreement covers all agricultural products. Under the Agreement, Bahrain provides immediate duty-free access for U.S. agricultural exports in 98% of agricultural tariff lines. Bahrain phases out tariffs on the remaining products within ten years. The United States provides immediate duty-free access on 100% of Bahrain's current exports of agricultural products to the United States.

Textiles and Apparel: Textile and apparel trade are duty-free immediately. The Agreement requires qualifying textiles and apparel to contain either U.S. or Bahraini yarn and fabric and contains a temporary transitional allowance for textiles and apparel that do not meet these requirements.

Services: The FTA mutually opened services markets. Key services sectors covered by the Agreement include audiovisual, express delivery, telecommunications, computer and related services, distribution, healthcare, services incidental to mining, construction, architecture and engineering. Financial service suppliers will have the right to establish subsidiaries, branches and joint ventures in the partner country. They will also enjoy the benefits of strong regulatory transparency, including prior notice and comment and license approval within 120 days.

Intellectual property rights (IPR): *Copyrights:* The Agreement ensures that authors, composers, and other copyright owners have the exclusive right to make their works available online, and that copyright owners have rights to temporary copies of their works on computers, in order to protect music, videos, software, and text from widespread unauthorized sharing via the Internet. Each government commits to protect copyrighted works for extended terms (e.g., life of the author plus seventy years), consistent with U.S. standards. The Agreement includes strong anti-circumvention provisions, requiring each government to

prohibit tampering with technologies (e.g. embedded codes on discs) that are designed to prevent piracy and unauthorized distribution over the Internet.

Patents & Trade Secrets: Patent terms can be adjusted to compensate for unreasonable delays in granting the original patent, consistent with U.S. practice. Grounds for revoking a patent are limited to the same grounds required to originally refuse a patent, thus protecting against arbitrary revocation. Test data submitted to a government for the purpose of product approval will be protected against unfair commercial use for a period of 5 years for pharmaceuticals and 10 years for agricultural chemicals.

Trademarks: Each government is required to establish transparent procedures for the registration of trademarks. The Agreement applies the principle of “first-in-time, first-in-right” to trademarks and geographical indications. Each government agrees to develop an on-line system for the registration and maintenance of trademarks, as well as a searchable database.

IPR Enforcement: The Agreement requires each government to criminalize end-user piracy, providing strong deterrence against copyright piracy and trademark counterfeiting. IPR laws will be enforced against goods-in-transit to deter violators from using ports or free-trade zones to traffic in pirated products. To deter piracy, the Agreement mandates both statutory and actual damages for copyright piracy and trademark counterfeiting. Under these provisions, monetary damages can be awarded even if actual economic harm (e.g., retail value or profits made by violators) cannot be determined.

Each side holds that the intellectual property chapter does not “affect the ability of either Party to take necessary measures to protect public health by promoting access to medicines for all, in particular concerning cases such as HIV/AIDS, tuberculosis, malaria, and other epidemics as well as circumstances of extreme urgency or national emergency.” The FTA also expressly states that it will not prevent effective utilization of the 2003 WTO consensus allowing developing countries that lack pharmaceutical manufacturing capacity to import drugs under compulsory licenses.

Investment: Unlike most other U.S. free trade agreements, the agreement with Bahrain does not contain an investment chapter. Instead, investment obligations between the two countries are primarily addressed in a bilateral investment treaty (BIT) that predates the FTA.⁵⁵⁶ Certain FTA obligations, however, apply to “BIT investment” of one party that supplies services in the territory of the other FTA party, or that is an investor in a financial institution of the other party.⁵⁵⁷ Treatment of such investment is subject to obligations in FTA chapters on cross-border trade in services (Chapter Ten), financial services

⁵⁵⁶ Treaty Between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment, with Annex, signed September 29, 1999, entered into force May 30, 2001, S. Treaty Doc. 106-25 (2000).

⁵⁵⁷ A “BIT investment” is a “covered investment” as defined in Article 1(e) of the U.S.-Bahrain BIT, i.e., “an investment of a national or company of a Party in the territory of the other Party.” U.S.-Bahrain FTA, Art. 1.3

(Chapter Eleven), and telecommunications (Chapter Twelve), as the case may be. For example, while the term “cross-border trade in services” does not include the supply of a service in the territory of an FTA party by a BIT investment (Art. 10.3), FTA obligations involving market access, domestic regulation, and regulatory transparency do expressly apply to measures by an FTA party affecting the supply of a service in its territory by such an investment (Art. 10.1.3).

Sanitary and Phytosanitary Measures: Both parties commit to a science-based regime for sanitary and phytosanitary measures and transparency procedures for developing and implementing technical regulations, conformity assessment procedures and standards.

Government Procurement: Consistent with the overall framework of free trade agreements, the provisions on government procurement require national treatment and nondiscrimination with respect to the awarding of government contracts that are both covered by the agreement’s provisions and above the agreed upon monetary thresholds. Generally, the government procurement provisions contain reciprocal obligations regarding tendering procedures, qualification of suppliers, offsets, invitations to participate in procurements, tender and selection procedures, awarding of contracts, transparency, and challenge procedures. Disputes are generally subject to the terms of the dispute settlement chapters. The government contracts that are covered by the chapter are laid out in separate annexes, with commitments at the federal, state and local levels.

Customs Procedures: The FTA requires transparency and efficiency in customs administration, including publication of laws and regulations on the Internet and procedural certainty and fairness. Both governments agree to share information to combat illegal transshipment of goods, and special customs cooperation measures to prevent illegal transshipments in the textile and apparel sector. In addition, the FTA requires customs procedures designed to facilitate the rapid clearance through customs of express delivery shipments.

Labor: The Agreement states that neither party shall “fail to effectively enforce” its own ‘labor laws’” in trade-related matters between the countries. This is the only labor obligation enforceable through dispute settlement procedures in the Agreement. “Labor laws” are defined as a country’s own statutes or regulations directly related to any of the “internationally recognized worker rights” (further defined as those relating to the freedom of association; the right to collective bargaining; the elimination of all forms of compulsory or forced labor; the abolition of child labor; and acceptable conditions of work relating to minimum wages, maximum hours, and safety and health (i.e., the same as those enumerated in Title V of the Trade Act of 1974. Each country also commits to “strive to ensure” that its domestic law recognizes and protects International Labor Organization (ILO) principles listed in *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* (1998) (“ILO Declaration”). This list differs from the above-referenced U.S. list by one

principle: the elimination of employment and occupational discrimination replaces acceptable conditions of work. Parties also recognize that it is inappropriate to weaken or reduce domestic labor protections to encourage trade or investment. The Agreement contains a labor cooperation mechanism to provide enhanced opportunities to improve labor standards and advance common commitments on labor matters.

Environment: The Agreement states that neither Party shall fail to effectively enforce its own environmental laws in a manner affecting trade and investment; this is the only obligation in the Environment Chapter that is enforceable through the Agreement's dispute settlement provisions. The Parties affirm that it is inappropriate to encourage trade or investment by weakening or reducing protections afforded under domestic environmental laws, and commit to "strive to ensure" that this does not occur. The Parties commit to undertaking cooperative environmental activities, including means to enhance the mutual supportiveness of multilateral environmental agreements and trade agreements to which they both are party. As a complement to the FTA, the governments negotiated a Memorandum of Understanding on Environmental Cooperation that identifies ongoing and future areas for cooperation, and establishes a Joint Forum on Environmental Cooperation to strengthen the capacity of Bahrain to protect the environment and to develop a Plan of Action identifying priority projects for environmental cooperation.

Transparency/Anti Corruption/Anti-Bribery: The Agreement requires each government to prohibit bribery, including bribery of foreign officials, and establish appropriate criminal penalties to punish violators. Each government also commits to adopt or maintain measures protecting whistle-blowers.

Dispute Settlement: The agreement sets out detailed procedures for the resolution of disputes between the parties over compliance with agreement obligations, with high standards of openness and transparency. With respect to most violations of obligations under the FTA, dispute settlement procedures allow for the prevailing party in a dispute to impose trade sanctions where the losing party does not comply with an adverse decision. The defending party may request that the level of proposed sanctions be arbitrated if it believes them to be "manifestly excessive" or, alternatively, it may choose to pay a fine in lieu of sanctions. The fine is ordinarily to be paid to the complaining country, but if the parties agree, it may be paid into a jointly administered fund to assist the defending party in complying with agreement obligations. Sanctions or fines are to be based on the "value" of the violation. In the event of non-compliance with a labor or environmental obligation, the complaining party is initially limited to asking the dispute settlement panel to establish a fine against the violating party. That fine is capped at \$15 million annually, adjusted for inflation. Under the dispute settlement chapter, such fines are to be paid back to the violating party to be used to remedy the labor or environmental violations. If a party does not pay a fine, whether assessed in lieu of sanctions or assessed initially in a labor or environmental dispute, the complaining party may suspend tariff or

other trade agreement benefits in accordance with the agreement.

UNITED STATES-BAHRAIN FREE TRADE AGREEMENT IMPLEMENTATION ACT

The United States-Bahrain Free Trade Implementation Act, signed into law on January 11, 2006⁵⁵⁸, approves the Agreement and makes changes in U.S. laws necessary or appropriate to implement obligations under the Agreement.

Section 201 authorizes the President to: (1) proclaim tariff modifications necessary or appropriate to carry out the Agreement; (2) proclaim tariff modifications, subject to consultation and layover, necessary or appropriate to maintain concessions granted to Bahrain by the Agreement; and (3) substitute an ad valorem rate for goods under the Agreement for which the base rate is a specific or compound rate of duty, for purposes of carrying out tariff modifications. It also requires the President to terminate the designation of Bahrain as a beneficiary developing country for purposes of the Generalized System of Preferences (GSP) program under the Trade Act of 1974 on the date the Agreement enters into force.

Section 202 prescribes rules of origin with respect to the reduction and elimination of duties imposed by the United States and Bahrain on goods imported directly from Bahrain or the United States into the other country's territory. It also specifies content requirements, allowing certain textile and apparel goods to be considered originating goods.

Section 203 amends the Consolidated Omnibus Budget Reconciliation Act of 1985 to prohibit the charging of a fee for certain customs services for goods imported from, and originating in, Bahrain. It also prohibits any service exempted from such fees from being funded with money from the Customs User Fee Account.

Section 204 authorizes the President to direct the Secretary of the Treasury, pending the verification process under the Agreement, to confirm the authenticity and claims of origin of Bahraini textiles and apparel goods, to take certain actions, including: (1) suspension of liquidation of the entry of any Bahraini textile or apparel good linked to unlawful activity; (2) publication of the name and address of any person subject to verification; (3) denial of preferential tariff treatment for such textiles or goods; and (4) denial of entry into the United States of such textiles or goods.

Section 205 requires the Secretary of the Treasury to prescribe regulations to carry out provisions of this title relating to rules of origin, customs user fees, and presidential proclamation authority under the HTS.

Section 311 authorizes an entity (including a trade association, firm, certified or recognized union, or group of workers) to petition the International Trade Commission (ITC) for an adjustment to U.S. obligations (import relief) under the Agreement; requires the ITC, upon the filing of a petition, to: (1) transmit a

⁵⁵⁸ Public Law 109-169

copy of the petition to the U.S. Trade Representative; (2) investigate whether an Bahraini article is being imported into the United States in such increased quantities that it constitutes a substantial cause of serious injury or threat to a domestic industry producing a similar article; (3) make a determination on a petition within 120 days after the start of an investigation; (4) report to the President on its determination with a recommendation on the amount of import relief necessary to remedy or prevent an injury to a domestic industry and to help the affected domestic industry to make a positive adjustment to import competition; and (5) make its report public and publish a summary in the Federal Register.

Section 313 requires the President, not later than 30 days after receiving an ITC report affirming serious injury to a domestic industry, to provide import relief as recommended by the ITC and exempts the President from providing import relief if he determines that the cost of providing such relief outweighs its economic and social benefits. The section also sets forth the types of import relief which the President may grant, including suspension of any further reduction in the duty imposed on an imported article and an increase in the duty on such article. The aggregate period during which import relief may be granted is limited to three years.

Section 314 prohibits any import relief under this title 10 years after the Agreement enters into force, unless the President determines that the government of Bahrain has consented to such relief.

Section 315 authorizes the President to compensate Bahrain for reductions or eliminations of duties under the Agreement.

Section 316 amends the Trade Act of 1974 to apply to ITC investigations conducted under this Act the procedural requirements of the Tariff Act of 1930 concerning release of confidential business information.

Section 321 authorizes any interested party to petition the President to adjust U.S. obligations under the Agreement to reflect serious damage or actual threat to a domestic industry from the reduction or elimination of a duty on an Bahraini textile or apparel article which is in competition with articles produced by a domestic industry (safeguard relief).

Section 322 authorizes the President, if an affirmative serious damage determination is made, to provide safeguard relief to remedy or prevent the damage and to facilitate adjustment by the domestic industry to import competition, including to increase the rate of duty imposed on the article.

Section 323 limits the aggregate period during which safeguard relief may be granted to three years.

Section 324 authorizes the President to exempt certain articles from safeguard relief.

Section 326 terminates the authority to provide safeguard relief 10 years after the date on which certain duties are eliminated under the Agreement.

Section 327 authorizes the President to compensate Bahrain if safeguard relief is ordered under this title.

Section 328 restricts the authority of the President to release confidential business information provided in a safeguard review proceeding.

Section 401 amends the Trade Agreements Act of 1979 to make products or services of any foreign country or instrumentality that is a party to the Agreement eligible for U.S. government procurement.

United States-Oman Trade Relations

UNITED STATES-OMAN FREE TRADE AGREEMENT

On November 15, 2004, the President notified Congress of his intent to negotiate an FTA with Oman. FTA negotiations between the two countries began on March 12, 2005, and concluded on October 3, 2005. The agreement was signed by the U.S. Trade Representative Rob Portman and Omani Minister of Commerce and Industry Maqbool bin Ali Sultan on January 19, 2006. Implementing legislation was transmitted to Congress on June 26, 2006, and was approved on September 19 and signed into law on September 26, 2006 (P.L. 109-283). The agreement entered into force on January 1, 2009.

Tariff Elimination: The Agreement provides that 100% of bilateral trade in industrial and consumer products will become duty-free immediately upon entry into force of the Agreement. In addition, Oman and the United States will phase out tariffs on the remaining handful of products (such as some agricultural products) within 10 years.

Agriculture: The Agreement covers all agricultural products. Oman will provide immediate duty-free access for U.S. agricultural exports in 87% of agricultural tariff lines. The United States will provide immediate duty-free treatment for 100% of Oman's agricultural exports to the United States. Both countries will phase out tariffs on remaining agricultural products within ten years.

Services: Both countries will provide market access across their entire services regime for businesses wishing to either establish a presence locally in the other country or supply services cross-border (i.e. by electronic means.) The agreement includes a chapter requiring transparency in the publication of laws, regulations, procedures and administrative rulings. The Parties also reaffirm their resolve to eliminate bribery and corruption in international trade and investment. Financial service suppliers will have the right to establish subsidiaries, branches, and joint ventures in the partner country, to expand their operations, and to offer a full range of financial services including financial information, data processing, and financial advisory services.

Intellectual Property Rights (IPR): *Copyrights:* The Agreement ensures that authors, composers, and other copyright owners have the exclusive right to make their works available online, and that copyright owners have rights to temporary copies of their works on computers, in order to protect music, videos, software, and text from widespread unauthorized sharing via the Internet. Each

government commits to protect copyrighted works for extended terms (e.g., life of the author plus seventy years), consistent with U.S. standards. The Agreement includes strong anti-circumvention provisions, requiring each government to prohibit tampering with technologies (e.g. embedded codes on discs) that are designed to prevent piracy and unauthorized distribution over the Internet.

Patents & Trade Secrets: Patent terms can be adjusted to compensate for unreasonable delays in granting the original patent, consistent with U.S. practice. Grounds for revoking a patent are limited to the same grounds required to originally refuse a patent, thus protecting against arbitrary revocation. Test data submitted to a government for the purpose of product approval will be protected against unfair commercial use for a period of 5 years for pharmaceuticals and 10 years for agricultural chemicals.

Trademarks: Each government is required to establish transparent procedures for the registration of trademarks. The Agreement applies the principle of “first-in-time, first-in-right” to trademarks and geographical indications. Each government agrees to develop an on-line system for the registration and maintenance of trademarks, as well as a searchable database.

IPR Enforcement: The Agreement requires each government to criminalize end-user piracy, providing strong deterrence against copyright piracy and trademark counterfeiting. IPR laws will be enforced against goods-in-transit to deter violators from using ports or free-trade zones to traffic in pirated products. To deter piracy, the Agreement mandates both statutory and actual damages for copyright piracy and trademark counterfeiting. Under these provisions, monetary damages can be awarded even if actual economic harm (e.g., retail value or profits made by violators) cannot be determined.

Investment: The agreement protects all forms of investment, 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 Oman on an equal footing with domestic 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 (such as due process and the right to receive a fair market value for property in the event of an expropriation) that investors of Oman currently enjoy under the U.S. legal system. Oman and the United States also agree to a minimum standard of treatment, under which they treat investment in accordance with customary international law, including fair and equitable treatment and full protection and security. The agreement clarifies that this provision, as applied to covered investment, prescribes the customary international law minimum standard of treatment of aliens and that concepts of fair and equitable treatment and full protection and security do not require treatment beyond the international law minimum or create additional substantive rights for investors. In addition, a determination that there has been a breach of another FTA provision, or of a separate international agreement, does not establish that there has been a breach

of the minimum standard of treatment obligation. Once the agreement enters into force, investors of each party will be able to resolve disputes directly with the respective host country through a transparent, binding international arbitration mechanism.

Textiles and Apparel: The U.S. and Oman will eliminate tariffs on the same schedule on a product-by-product basis. For the majority of products, tariffs will be eliminated either immediately or in 5 years. Generally, textile and apparel products must contain either U.S. or Omani yarn and fabric in order to qualify for duty-free treatment. However, the Agreement also provides, on a temporary basis, duty-free treatment for limited quantities of textile and apparel products that do not meet this requirement.

Telecommunications: All service suppliers are entitled to reasonable and nondiscriminatory access to the telecom network, thereby preventing local firms from having preferential or “first right” of access.

E-Commerce: Each government commits to nondiscriminatory treatment of digital products and agrees not to impose customs duties on digital products transmitted electronically. For digital products delivered on hard media (such as a DVD or CD), customs duties will be based on the value of the media (for instance, the disc), not on the value of the movie, music or software contained on the disc.

Sanitary and Phytosanitary Measures: Both parties commit to a science-based regime for sanitary and phytosanitary measures and transparency procedures for developing and implementing technical regulations, conformity assessment procedures and standards.

Government Procurement: Consistent with the overall framework of free trade agreements, the provisions on government procurement require national treatment and nondiscrimination with respect to the awarding of government contracts that are both covered by the agreement’s provisions and above the agreed upon monetary thresholds. Generally, the government procurement provisions contain reciprocal obligations regarding tendering procedures, qualification of suppliers, offsets, invitations to participate in procurements, tender and selection procedures, awarding of contracts, transparency, and challenge procedures. Disputes are generally subject to the terms of the dispute settlement chapters. The government contracts that are covered by the chapter are laid out in separate annexes, with commitments at the federal, state and local levels.

Customs Procedures: The Agreement requires transparency and efficiency in customs administration, including publication of laws and regulations on the Internet and procedural certainty and fairness. Both governments agree to share information to combat illegal transshipment of goods. The Agreement requires special customs cooperation measures to prevent fraud in the textile and apparel sector, and customs procedures designed to facilitate the rapid clearance through customs of express delivery shipments. Rules of origin are intended to ensure that only U.S. and Omani goods benefit from the Agreement.

Labor: The Agreement states that neither party shall “fail to effectively enforce” its own ‘labor laws’” in trade-related matters between the countries. This is the only labor obligation enforceable through dispute settlement procedures in the Agreement. “Labor laws” are defined as a country’s own statutes or regulations directly related to any of the “internationally recognized worker rights” (further defined as those relating to the freedom of association; the right to collective bargaining; the elimination of all forms of compulsory or forced labor; the abolition of child labor; and acceptable conditions of work relating to minimum wages, maximum hours, and occupational safety and health (i.e., the same as those enumerated in Title V of the Trade Act of 1974. Each country also commits to “strive to ensure” that its domestic law recognizes and protects International Labor Organization (ILO) principles listed in *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up* (1998) (“ILO Declaration”). This list differs from the above-referenced U.S. list by one principle: the elimination of employment and occupational discrimination replaces acceptable conditions of work. Parties also recognize that it is inappropriate to weaken or reduce domestic labor protections to encourage trade or investment. The Agreement contains a labor cooperation mechanism to provide enhanced opportunities to improve labor standards and advance common commitments on labor matters.

Environment: The Agreement states that neither Party shall fail to effectively enforce its own environmental laws in a manner affecting trade or investment; this is the only obligation in the Environment Chapter that is enforceable through the dispute settlement provisions of the trade agreement. The Parties agree that it is inappropriate to encourage trade or investment by weakening domestic environmental laws, and commit to “strive to ensure” that this does not occur. The Parties commit to undertaking cooperative environmental activities, including means to enhance the mutual supportiveness of multilateral environmental agreements and trade agreements to which they both are party. As a complement to the FTA, the governments developed a Memorandum of Understanding on Environmental Cooperation noting the parties’ intent to cooperation on environmental protection and sustainable development, and establishing a Joint Forum on Environmental Cooperation to strengthen the capacity of Oman to protect the environment and to develop a Plan of Action identifying priority projects for environmental cooperation.

Transparency/Anti-Bribery: Each government must publish its laws and regulations governing trade, publish proposed measures in advance, and provide an opportunity for public comment on them. Each government must ensure that a trader from the other country can obtain prompt and fair review of a final administrative decision affecting its interests.

The Agreement also requires each government to prohibit bribery, including bribery of foreign officials, and establish appropriate criminal penalties to punish violators. Each government also agrees to work toward adopting or to maintain measures protecting whistle-blowers.

Dispute Settlement: The agreement sets out detailed procedures for the resolution of disputes between the parties over compliance with agreement obligations, with high standards of openness and transparency. With respect to most violations of obligations under the FTA, dispute settlement procedures allow for the prevailing party in a dispute to impose trade sanctions where the losing party does not comply with an adverse decision. The defending party may request that the level of proposed sanctions be arbitrated if it believes them to be “manifestly excessive” or, alternatively, it may choose to pay a fine (ordinarily to the complaining party) in lieu of sanctions. Sanctions or fines are to be based on the “value” of the violation. The fine is ordinarily to be paid to the complaining country, but if the parties agree, it may be paid into a jointly administered fund to assist the defending party in complying with its agreement obligations. In the event of non-compliance with a labor or environmental obligation, the complaining party is initially limited to asking the dispute settlement panel to establish a fine against the violating party. That fine is capped at \$15 million annually, adjusted for inflation. Under the dispute settlement chapter, such fines are to be paid back to the violating party to be used to remedy the labor or environmental violations. If a party does not pay a fine, whether assessed in lieu of sanctions or assessed initially in a labor or environmental dispute, the complaining party may suspend tariff or other trade agreement benefits in accordance with the agreement.

UNITED STATES-OMAN FREE TRADE AGREEMENT IMPLEMENTATION ACT

Section 101 approves the United States-Oman Free Trade Agreement (Agreement) entered into on January 19, 2006, with the government of Oman, and the statement of administrative action proposed to implement the Agreement, both submitted to Congress on June 26, 2006. The agreement entered into force on January 1, 2009⁵⁵⁹.

Section 201 authorizes the President to proclaim tariff modifications necessary or appropriate to carry out the Agreement. It also requires the President to terminate the designation of Oman as a beneficiary developing country under the Generalized System of Preferences program on the date the Agreement enters into force.

Sections 202-206 prescribe rules of origin on goods imported directly from Oman or the United States into the other country's territory. It specifies content requirements allowing certain textile and apparel goods to be considered originating goods. It authorizes the President to direct the Secretary of the Treasury to confirm the authenticity and claims of origin of Omani textiles and apparel goods, to take certain actions, including: (1) suspension of liquidation of the entry of any Omani textile or apparel good linked to unlawful activity; and

⁵⁵⁹ Public Law 109-283

(2) denial of preferential tariff treatment and denial of U.S. entry for such textiles or goods.

Section 311 authorizes an entity (including a trade association, firm, certified or recognized union, or group of workers) to petition the ITC for an adjustment to U.S. obligations (import relief) under the Agreement. It requires the ITC, upon the filing of a petition, to: (1) transmit a copy of the petition to the U.S. Trade Representative; (2) investigate whether an Omani article is being imported into the United States in such increased quantities that it constitutes a substantial cause of serious injury or threat to a domestic industry producing a similar article; (3) make a determination on a petition within 120 days after the start of an investigation; (4) report to the President on its determination with a recommendation on the amount of import relief necessary to remedy or prevent an injury to a domestic industry and to help the affected domestic industry to make a positive adjustment to import competition; and (5) make its report public and publish a summary in the Federal Register.

Sections 313-316 require the President, not later than 30 days after receiving an International Trade Commission (ITC) report affirming serious injury to a domestic industry, to provide import relief as recommended by the ITC unless the cost of providing such relief outweighs its economic and social benefits. It sets forth the types of import relief which the President may grant. It limits the aggregate period during which import relief may be granted to three years. It generally prohibits any import relief under this title more than 10 years after the Agreement enters into force.

Sections 321-328 authorize any interested party to petition the President to adjust U.S. obligations to reflect serious damage or actual threat to a domestic industry from the reduction or elimination of a duty on an Omani textile or apparel article which is in competition with articles produced by a domestic industry (safeguard relief). It extends a 10 year authority to the President, if an affirmative serious damage determination is made, to provide safeguard relief for not more than three years, in order to remedy or prevent the damage and to facilitate U.S domestic industry adjustment to import competition.

Section 401 amends the Trade Agreements Act of 1979 to make products or services of any foreign country or instrumentality that is a party to the Agreement eligible for U.S. government procurement.

United States-Peru Trade Relations

UNITED STATES-PERU TRADE PROMOTION AGREEMENT

On December 7, 2005, the United States and Peru concluded the U.S.-Peru Trade Promotion Agreement (PTPA), a bilateral free trade agreement (FTA). On January 6, 2006, President Bush notified Congress of his intention to enter into an FTA with Peru. The Agreement was signed on April 12, 2006 by U.S. Trade Representative Rob Portman and Peruvian Minister of Foreign Trade and

Tourism Alfredo Ferrero Diez Canseco. President Bush signed the implementing bill for the FTA on December 14, 2007⁵⁶⁰. The Agreement entered into force on February 1, 2009.

The agreement includes the following sections:

Tariff Elimination: The U.S.-Peru FTA provides for the elimination of duties on bilateral trade between the United States and Peru in all qualifying goods with the exception of sugar. Tariff elimination will be implemented in stages, varying from immediate for the majority of tariff lines to a 17-year phase-in period. Upon implementation of the agreement, more than 99% of U.S. and 80% of Peruvian industrial and textile tariff lines will be duty free.

Agriculture: The Agreement grants duty-free treatment immediately to more than two-thirds of current U.S. farm exports to Peru. Upon implementation, more than 89% of U.S. and 56% of Peruvian agricultural tariff lines will be duty free.

Textiles and Apparel: Textile and apparel products that meet the Agreement's rules of origin requirements will receive duty-free treatment immediately after the agreement's implementation. The rules of origin requirements are generally based on the "yarn forward" standard to encourage production and economic integration. A "de minimis" provision allows limited amounts of specified third-country content to go into U.S. and Peruvian apparel to provide producers in both countries with flexibility. A special textile safeguard provides for temporary tariff relief if increased imports prove to be damaging to domestic producers.

Services: The commitments in services cover both cross-border supply of services and the right to invest and establish a local services presence. Market access to services is supplemented by requirements for regulatory transparency. In financial services, the agreement includes core obligations of nondiscrimination, most favored nation treatment, and additional provisions on transparency of domestic regulatory regimes.

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 Peru on an equal footing with domestic 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 (such as due process and the right to receive a fair market value for property in the event of an expropriation) that investors of Peruvian countries currently enjoy under the U.S. legal system. Peru and the United States also agree to a minimum standard of treatment, under which they treat investment in accordance with customary international law, including fair and equitable treatment and full protection and security. The agreement clarifies that this

⁵⁶⁰ Public Law 110-138

provision, as applied to covered investment, prescribes the customary international law minimum standard of treatment of aliens and that concepts of fair and equitable treatment and full protection and security do not require treatment beyond the international law minimum and or create additional substantive rights for investors. In addition, a determination that there has been a breach of another FTA provision, or of a separate international agreement, does not establish that there has been a breach of the minimum standard of treatment obligation. Once the agreement enters into force, investors of each party will be able to resolve disputes directly with the respective host country through a transparent, binding international arbitration mechanism.

Intellectual Property Rights: *Copyrights:* The Agreement ensures that authors, composers, and other copyright owners have the exclusive right to make their works available online, and that copyright owners have rights to temporary copies of their works on computers, in order to protect music, videos, software, and text from widespread unauthorized sharing via the Internet. Each government commits to protect copyrighted works for extended terms (e.g., life of the author plus seventy years), consistent with U.S. standards. The Agreement includes strong anti-circumvention provisions, requiring each government to prohibit tampering with technologies (e.g. embedded codes on discs) that are designed to prevent piracy and unauthorized distribution over the Internet.

Patents & Trade Secrets: Patent terms can be adjusted to compensate for unreasonable delays in granting the original patent, consistent with U.S. practice. Grounds for revoking a patent are limited to the same grounds required to originally refuse a patent, thus protecting against arbitrary revocation. Test data submitted to a government for the purpose of product approval will be protected against unfair commercial use for a period of 5 years for pharmaceuticals and 10 years for agricultural chemicals.

Trademarks: Each government is required to establish transparent procedures for the registration of trademarks. The Agreement applies the principle of “first-in-time, first-in-right” to trademarks and geographical indications. Each government agrees to develop an on-line system for the registration and maintenance of trademarks, as well as a searchable database.

IPR Enforcement: The Agreement requires each government to criminalize end-user piracy, providing strong deterrence against copyright piracy and trademark counterfeiting. IPR laws will be enforced against goods-in-transit to deter violators from using ports or free-trade zones to traffic in pirated products. To deter piracy, the Agreement mandates both statutory and actual damages for copyright piracy and trademark counterfeiting. Under these provisions, monetary damages can be awarded even if actual economic harm (e.g., retail value or profits made by violators) cannot be determined.

Government Procurement: Consistent with the overall framework of free trade agreements, the provisions on government procurement require national treatment and nondiscrimination with respect to the awarding of government contracts that are both covered by the agreement’s provisions and above the

agreed upon monetary thresholds. Generally, the government procurement provisions contain reciprocal obligations regarding tendering procedures, qualification of suppliers, offsets, invitations to participate in procurements, tender and selection procedures, awarding of contracts, transparency, and challenge procedures. Disputes are generally subject to the terms of the dispute settlement chapters. The government contracts that are covered by the chapter are laid out in separate annexes, with commitments at the federal, state and local levels.

Customs Procedures and Rules of Origin: The Agreement includes comprehensive rules of origin provisions that would ensure that only U.S. and Peruvian goods could benefit from the Agreement. The Agreement also includes customs procedures provisions, including requirements for transparency and efficiency, procedural certainty and fairness, information sharing, and special procedures for the release of express delivery shipments.

Labor: Each party is required to adopt and maintain in its statutes, regulations, and practices there under, the basic International Labor Organization (ILO) principles stated in the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998)* (“ILO Declaration”). The Agreement defines this list as: (a) freedom of association; (b) effective recognition of the right to collective bargaining; (c) the elimination of all forms of compulsory or forced labor; (d) the effective abolition of child labor including additional protections against the “worst forms of child labor,” (such as prostitution, pornography, war and drug trafficking); and (e) the elimination of employment and occupational discrimination. To establish a violation of an obligation, a Party must demonstrate that the other Party has failed to adopt or maintain the statute, regulation, or practice in a manner affecting trade or investment between the Parties.

Neither party shall waive or derogate from its statutes or regulations implementing the principles listed in the “ILO Declaration” on matters affecting trade or investment between the Parties. Neither party shall fail to effectively enforce its “labor laws” through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the parties. “Labor laws” are defined as those incorporating the principles of the ILO Declaration described above, plus “acceptable condition of work with respect to minimum wages, hours at work, and occupational safety and health.” The Agreement contains a labor cooperation and capacity building mechanism which identifies priorities and includes coordination and joint activities.

All labor obligations in the Agreement are enforceable through the Agreements general dispute resolution procedures.

Environment: The Agreement commits the Parties to effectively enforce their domestic environmental laws, as well as laws and other measures to fulfill obligations under seven listed multilateral environmental agreements. It further commits both governments to not weaken their environmental laws to encourage trade or investment. With some variations, all obligations in the Environment

Chapter are subject to the same dispute settlement procedures and enforcement mechanisms as commercial obligations. The Parties agree to undertake cooperative environmental activities, including efforts to enhance the mutual supportiveness of multilateral environmental agreements and trade agreements to which they both are party. The Parties also commit to promoting the sustainable use of biological diversity and its related components.

The Agreement establishes an Environmental Affairs Council to oversee implementation of the Environment Chapter and to consider cooperation activities developed under an Environmental Cooperation Agreement (ECA). The Agreement creates a process for the public to file submissions concerning a Party's failure to effectively enforce its environmental laws, and provides for the establishment of a secretariat to address such submissions.

The Environment Chapter includes an Annex on Forest Sector Governance to addresses the environmental and economic consequences of trade associated with illegal logging and illegal trade in wildlife. The Annex specifies steps the Parties will take to enhance forest sector governance and to promote legal trade in timber products. As a complement to the FTA, the Parties negotiated the Environmental Cooperation Agreement which provides a framework for environmental capacity building in Peru and identifies projects to promote environmental protection. The ECA establishes an Environmental Cooperation Commission which is obligated to develop a work program that reflects each Party's environmental priorities.

Dispute Settlement: The agreement sets out detailed procedures for the resolution of disputes between the parties over compliance with agreement obligations. The agreement's dispute settlement procedures allow for the prevailing party in a dispute to impose trade sanctions where the losing party does not comply with an adverse decision. The defending party may request that the level of proposed sanctions be arbitrated if it believes them to be "manifestly excessive" or, alternatively, it may choose to pay an annual monetary assessment in lieu of sanctions. Sanctions or fines are to be based on the "value" of the violation. The fine is ordinarily to be paid to the complaining country, but if the parties agree, it may be paid into a jointly administered fund to assist the defending party in complying with its agreement obligations. If a party does not pay a fine, the complaining party may suspend tariff or other trade agreement benefits in accordance with the agreement. Unlike most, earlier U.S. free trade agreements with labor and environmental chapters, the agreement with Peru does not limit the use of its general dispute settlement procedures to specified provisions of those chapters or limit the initial remedy for non-compliance with an adverse panel report to the payment of a fine by the non-complying party.

UNITED STATES-PERU TRADE PROMOTION AGREEMENT IMPLEMENTATION ACT

The United States-Peru Free Trade Agreement Implementation Act⁵⁶¹ approves the agreement and makes changes in U.S. laws necessary or appropriate to implement obligations under the agreement. Section 201 provides the President with the authority to proclaim tariff modifications to carry out the Agreement. It requires the President to terminate the designation of Peru as a beneficiary developing country for purposes of the General System of Preferences program under the Trade Act of 1974 on the date the Agreement enters into force. Section 202 provides for additional duties, under specified conditions, on certain agricultural safeguard goods.

Section 203 prescribes certain rules of origin with respect to the reduction and elimination of duties imposed by the United States and Peru on certain goods wholly obtained or produced entirely in the territory of the other country. It specifies content requirements allowing certain textile and apparel goods to be considered originating goods. It also prescribes a special rule for certain automotive goods.

Section 204 amends the Consolidated Omnibus Budget Reconciliation Act of 1985 to prohibit the charge of a fee for certain customs services with respect to originating goods under the Agreement. It prohibits any service exempted from such fees from being funded with money from the Customs User Fee Account.

Section 205 amends the Tariff Act of 1930 to exempt: (1) an importer from penalties for making an incorrect claim that a good qualifies as an originating good under the Agreement if the importer voluntarily and promptly makes a corrected declaration and pays any duties owing; and (2) an exporter or producer from penalties for making false certifications of origin under the Agreement if such person, promptly after issuing such certification, has reason to believe that it contains or is based on incorrect information, and voluntarily provides a written notice to every recipient of it. It exempts persons from penalties if: (1) the information was correct at the time it was provided in a Peru Trade Promotion Agreement (PTPA) certification of origin but was later rendered incorrect because of a change in circumstances; and (2) the person promptly and voluntarily provides written notice of the change in circumstances to all recipients of such certification. The Section provides that, if the U.S. Customs and Border Protection (CBP) or U.S. Immigration and Customs Enforcement of the Department of Homeland Security finds indications of a pattern of conduct by an importer, exporter, or producer of false or unsupported representations that goods qualify under the rules of origin, CBP may suspend preferential tariff treatment under the Agreement for entries of identical goods covered by subsequent representations by the individuals until it determines that the representations conform with such rules.

Section 206 authorizes the CBP to re-liquidate an entry and refund any excess

⁵⁶¹ Public Law 110-138, enacted December 14, 2007.

duties (including merchandise processing fees) paid on a good qualifying under the rules of origin for which no claim for preferential treatment was made at the time of importation if the importer takes certain actions within one year after such importation.

Section 207 requires a person who issues a PTPA certification of origin for a good exported from the United States to make, keep for at least five years after such certification is issued, and render for examination and inspection all records and supporting documents related to such certification.

Section 208 authorizes the President to direct the Secretary of the Treasury, during the period of a verification procedure by the government of Peru, to determine: (1) that an exporter or producer in Peru is complying with applicable customs laws, regulations, and procedures regarding trade in textile or apparel goods; or (2) that a claim is accurate that such a good exported or produced by the exporter or producer qualifies as an originating good, or is a good of Peru. It requires the Secretary to: (1) suspend preferential tariff treatment under the Agreement of any textile or apparel good that a person subject to such verification has produced or exported if the Secretary believes there is insufficient information to sustain a claim for such treatment; (2) deny preferential treatment to such goods if the Secretary decides that a person has provided incorrect information to support a claim for such treatment; (3) detain such goods if the Secretary considers there is insufficient information to determine their country of origin; and (4) deny entry to such goods if the Secretary determines that a person has provided erroneous information of their origin.

Section 208 authorizes: (1) the President to deny preferential treatment and entry into the United States to such textile and apparel goods, if the Secretary determines that the information obtained from verification is insufficient to make a determination; and (2) the Secretary to publish the name of any person engaged in circumvention of applicable laws, regulations, or procedures affecting trade in such goods, or who has failed to demonstrate that it produces or is capable of producing them.

Title III, Subtitle A provides authorization for import relief measures. Section 311 authorizes an entity (including a trade association, firm, certified or recognized union, or group of workers) to petition the International Trade Commission (ITC) for an adjustment to U.S. obligations under the Agreement. It requires the ITC, upon the filing of a petition, to investigate promptly whether, as a result of the reduction or elimination of a duty provided for under the Agreement, a Peruvian article is being imported into the United States in such increased quantities as to be a substantial cause or threat of serious injury to the domestic industry producing an article like, or directly competitive with, the imported article. It exempts from such an investigation any Peruvian articles receiving import relief under the Agreement.

Section 313 requires the President, after receiving an affirmative injury determination from the ITC, to provide (including the extension) in the

aggregate up to four-years of import relief to remedy or prevent such injury and to facilitate efforts of the domestic industry to make a positive adjustment to import competition. It includes among such relief measures: (1) suspension of any further reduction provided by the Agreement in the duty imposed on such article; and (2) an increase in the rate of duty imposed on such article to a level that does not exceed an amount determined according to a specified formula. Section 314 prohibits any import relief 10 years after the Agreement enters into force, except for articles whose period for tariff elimination exceeds 10 years.

Section 315 applies to the four-year import relief provided by the President under section 313 the compensation authority of the Trade Act of 1974 which authorizes the President to grant Peru new concessions as compensation for the imposition of import relief in a bilateral safeguard investigation in order to maintain the general level of reciprocal concessions under the Agreement.

Section 316 amends the Trade Act of 1974 to apply to ITC investigations conducted under this Act the procedural requirements of the Tariff Act of 1930 concerning release of confidential business information.

Title III, Subtitle B concerns safeguard measures in textile and apparel. Section 321 authorizes an interested party to request the President to adjust U.S. obligations under the Agreement. It requires the President, pursuant to such a request, to determine whether, as a result of the elimination of a duty under the Agreement, a Peruvian textile or apparel article is being imported into the United States in such increased quantities as to constitute a substantial cause or threat of serious damage to a domestic industry producing an article like, or directly competitive with, the imported article.

Section 322 authorizes the President, if an affirmative serious damage determination is made, to provide certain import relief to remedy or prevent the damage and to facilitate adjustment by the domestic industry, including to increase the rate of duty imposed on the article to a level that does not exceed an amount determined according to a specified formula. Section 323 limits such relief (including the extension) in the aggregate to three years.

Section 326 prohibits any import relief under Subtitle B of Title III with respect to any article five years after the Agreement enters into force. Section 327 applies to any import relief provided by the President under this subtitle the compensation authority of the Trade Act of 1974, which authorizes the President to grant Peru new concessions as compensation for the imposition of import relief in a textile and apparel safeguard proceeding, in order to maintain the general level of reciprocal concessions under the Agreement.

Section 328 prohibits the President from releasing confidential business information received in connection with an investigation or determination under this subtitle unless the submitting party had notice, at the time of submission, that such information would be released, or the party subsequently consents to such release. It requires any party submitting such confidential business information also to provide a nonconfidential version of the information, in which the confidential business information is summarized or, if necessary,

deleted.

Section 331 relates to cases under Title II of the Trade Act of 1974. The section requires the ITC, whenever it makes an affirmative determination that an imported article constitutes a substantial cause or threat of serious injury to a domestic industry producing an article like or directly competitive with it, also to find (and report to the President) whether imports from Peru that qualify as originating goods are a substantial cause or threat of serious injury to such industry. It authorizes the President to exclude goods of Peru from any import relief action if they are not a substantial cause or threat of serious injury to the domestic industry.

Section 401 under Title IV amends the Trade Agreements Act of 1979 to make eligible for U.S. government procurement products or services of a foreign country or instrumentality that is a party to the Agreement.

Under section 501 of Title V, the President is directed to establish an Interagency Committee to oversee and obtain verification whether the producer or exporter of Peruvian timber products to the United States has complied with applicable laws of Peru governing the harvest of, and trade in, such products. It authorizes the Committee to direct CBP to take certain action including to detain or to deny entry of shipments of Peruvian timber products pending verification. Section 502 requires the United States Trade Representative (USTR) to report to Congress on steps taken by the United States and Peru on carrying out the Agreement with respect to trade in timber products of Peru.

Section 601 of Title VI, the Consolidated Omnibus Budget Reconciliation Act of 1985 is amended to extend certain customs fees for the processing of merchandise entered into the United States through December 13, 2014. Section 602 amends the Tax Increase Prevention and Reconciliation Act of 2005 to increase the amount of any corporate estimated tax installment otherwise due by a corporation with assets of not less than \$1 billion in July, August, or September 2012 to 115.75% of such amount.

Chapter 7: ORGANIZATION OF TRADE POLICY FUNCTIONS

Congress

The Constitution of the United States grants Congress the sole power to “regulate commerce with foreign nations,” and to “lay and collect . . . [d]uties”⁵⁶² Consequently, the executive branch’s role in operating the U.S. trade agreements program and applying duties or other import restrictions is based upon, and limited to, specific legislation or authorities delegated by the Congress.

For example, periodic delegations of authority by Congress to the President to proclaim changes in U.S. tariff treatment in the context of trade agreements have been limited in scope and time, and use of that authority has been subject to certain pre-negotiation procedures and negotiating objectives and priorities. Congress has also granted Federal agencies permanent authority to administer certain laws and programs, such as trade remedy laws and Trade Adjustment Assistance, under certain specific guidelines and subject to Congressional oversight, including appropriations.

The roles of the Congress and the President in developing trade policy became more formalized under section 102 of the Trade Act of 1974⁵⁶³, which granted authority to the President to enter into reciprocal trade agreements affecting U.S. laws. In authorizing an expedited, no amendment procedure for consideration of trade agreements, Congress preserved its oversight role by including in the legislation procedures for consultation and notification *before* the submission of a draft implementing bill by the executive. Congress also laid out the negotiating objectives that the President is to pursue in trade agreements. “Fast track” authority was also granted by the Omnibus Trade and Competitiveness Act of 1988 and the Trade Act of 2002 (*See* chapter 6).

Congress relies upon a number of mechanisms to exercise its Constitutional prerogative to shape and oversee U.S. trade policy. For instance, Section 2017 of the Trade Act of 2002 establishes the Congressional Oversight Group (COG). The COG must be convened by the Chairman of the Committee on Ways and Means and the Chairman of the Committee on Finance not later than 30 days after the convening of a new Congress. The COG is comprised of the chairmen and ranking members of the Ways & Means and Finance Committees, three additional members from each committee (but not more than two from the same party) and the chairmen and ranking members (or their designees) of committees that would have jurisdiction over provisions of law affected by trade agreement negotiations conducted during the Congress. Each Member of the COG is to be accredited as an official adviser to the U.S. delegation to trade negotiations.

The purpose of the COG is to provide the President and the United States

⁵⁶² U.S. CONST. art. I, § 8, cls. 1-2.

⁵⁶³ Public Law 93-618, approved January 3, 1975.

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. 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 a 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. At the request of a majority of the COG, the President must meet with the COG before initiating trade negotiations, or at any other time concerning such negotiations.

Similarly, under Section 161 of the Trade Act of 1974, at the beginning of each Congress, the Speaker of the House, based on the recommendation of the Chairman of the Ways & Means Committee, picks five members of the Committee (not more than three of whom are from the same political party), who are designated as congressional advisers on trade policy and negotiations. The President Pro Tempore of the Senate, at the recommendation of the chairman of the Senate Committee on Finance, picks five members of the Committee (not more than three of whom are from the same political party), who are designated as congressional advisers on trade policy and negotiations. The Speaker and the President Pro Tempore of the Senate may designate up to three additional members (and not more than two from the same party) as advisers who sit on committees with jurisdiction over legislation likely to be affected by anticipated trade matters and negotiations. Before selecting these additional Members, the Speaker and the President Pro Tempore of the Senate must consult with the Chairman and Ranking Member of the Committee on Ways and Means and the Committee on Finance, as appropriate, and the chairman and ranking member of the committee on which the Member sits. Each designated Member is to be accredited as an official adviser to the U.S. delegation to trade negotiations. USTR must keep each adviser who is a member of the Committee on Ways and Means and the Committee on Finance informed on matters affecting U.S. trade policy. With respect to a possible agreement, USTR must keep these advisors apprised of U.S. objectives, the status of the negotiations and changes to U.S. law that may be necessary to implement the agreement. For Members designated from committees other than the Committee on Ways and Means and the Committee on Finance, USTR must keep those advisers informed on trade matters and negotiations with respect to which the Members were designated. Finally, other Members and staff

designated by the chairmen of the committees on which the advisers sit can access information provided to those advisers.

More generally, section 161 of the Trade Act of 1974, as amended, requires the United States Trade Representative to consult *on a continuing basis* with the Committee on Ways and Means, the Committee on Finance and other committees, as appropriate, on the development, implementation and administration of U.S. trade policy including: (1) bilateral and multilateral negotiation objectives, (2) recently concluded trade agreements and trade dispute resolution, (3) actions taken, or to be taken under U.S. trade law, (4) other important trade developments requiring a response.

Consistent with this continuing consultation requirement, Section 162 of the Trade Act of 1974, as amended, requires the President to transmit a copy of the agreement to each House of Congress (if the President has not already done so) together with a statement reflecting the President's reasons for entering into the agreement, as soon as practicable after a trade agreement is entered into. Similarly, Section 163 of the Trade Act of 1974, as amended, 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.

There are also individual report requirements found throughout U.S. trade legislation (*e.g.*, the annual ITC study on the impact of the Caribbean Basin Initiative on U.S. industries and consumers and on the economy of the beneficiary countries required under section 215 of the Caribbean Basin Economic Recovery Act). And of course, Congress can also request that the U.S. International Trade Commission perform studies and analyses under section 332 of the Tariff Act of 1930 on various current trade issues. Finally, provisions of the Trade Act of 2002 included multiple reporting requirements (reprinted in Chap. 14):

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| 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

In these ways, as well as through its power to authorize and appropriate funds for the functions of major trade agencies, Congress retains a significant role in shaping and overseeing U.S. trade policy.

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 challenge a foreign country's trade barriers or lack of enforcement of intellectual property, 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 trade policy. Thus, various interagency coordinating mechanisms have been used to bring together conflicting views and interests and resolve them in a way that establishes 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.

In 1975, The Trade Agreements Committee was replaced by the Trade Policy Committee (TPC). And today, pursuant to section 242 of the Trade Expansion Act of 1962, as amended, the TPC is composed of the United States Trade Representative (who chairs the TPC), the Secretaries of Commerce, State, Treasury, Agriculture and Labor. USTR also has the authority to invite other agencies to attend meetings, as appropriate. The TPC's responsibilities include (1) assisting and making recommendations to the President and the USTR in carrying out their functions under the trade laws; (2) assisting the President and advising the USTR in developing and implementing U.S. trade policy objectives; and advising the President and the USTR on the relationship between U.S. trade policy objectives and other major policy areas.

The Trade Policy Staff Committee (TPSC) is the working level interagency trade group, with members drawn from the office-director level of member agencies. More than 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 Trade Policy Review Group (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 1962⁵⁶⁴ established the Office of the Special Representative for Trade Negotiations. The stated purpose of Congress for 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 1962 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.⁵⁶⁵

Section 141 of the Trade Act of 1974⁵⁶⁶ 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 1930⁵⁶⁷, the Trade Expansion Act of 1962⁵⁶⁸ and the Trade Act of 1974⁵⁶⁹.

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

⁵⁶⁴ Public Law 87-794, approved October 11, 1962.

⁵⁶⁵ Public Law 97-456, approved January 12, 1983, added a third deputy trade representative.

⁵⁶⁶ Public Law 93-618, approved January 3, 1975.

⁵⁶⁷ Public Law 71-361, approved June 17, 1930.

⁵⁶⁸ Public Law 87-794, approved October 11, 1962.

⁵⁶⁹ Public Law 93-618, approved January 3, 1975.

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, 1980,⁵⁷⁰ 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 1984⁵⁷¹ specified that the USTR, through the interagency organization, is responsible for developing and coordinating U.S. policies on trade in services.

Section 1601 of the Omnibus Trade and Competitiveness Act of 1988 (OTCA)⁵⁷² amended section 141 of the 1974 Act to set out 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 issue and coordinate trade policy guidance to 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 chair the Trade Policy Committee.

In addition, the Omnibus Trade and Competitiveness Act also included the sense of Congress that the USTR should serve as the senior representative on any body the President establishes to advise him on overall economic policies in

⁵⁷⁰ 44 Fed. Reg. 69273.

⁵⁷¹ Public Law 98-573, approved October 30, 1984.

⁵⁷² Public Law 100-418, section 1601, approved August 23, 1988.

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 Omnibus Trade and Competitiveness Act also made the USTR responsible for (1) identifying and coordinating the application of agency resources to specific unfair trade practices cases; (2) identifying and referring to the appropriate Federal department information concerning unfair trade acts, policies and practices that are (a) inconsistent with a trade agreement and have a significant adverse impact on U.S. commerce; or (b) have a significant adverse effect on domestic companies or industries too small or financially weak to bring a case; (3) identifying practices that significantly adversely affect U.S. commerce, which could be addressed if U.S. trade negotiating objectives were realized; and (4) identifying, biennially, U.S. policies and practices that would be actionable under U.S. unfair trade practices laws if a U.S. trading partner engaged in them. The Act also established an unfair trade practices committee to assist the USTR. Members of the committee include representatives of the Department of State, Bureau of Economics and Business Affairs; the Department of Commerce, United States and Foreign Commercial Services; the Department of Commerce, International Trade Administration; and the Department of Agriculture, Foreign Agricultural Service.

Under OTCA, the Congress also 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 1995⁵⁷³ 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. In 1997, Congress passed legislation to waive this restriction so that Deputy USTR Charlene Barshefsky could become USTR⁵⁷⁴.

Section 406 of the Trade and Development Act of 2000⁵⁷⁵ 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.

⁵⁷³ Public Law 104-65, approved December 19, 1995.

⁵⁷⁴ Public Law 105-5, approved March. 17, 1997.

⁵⁷⁵ Public Law 106-200, approved May 18, 2000.

U.S. DEPARTMENT OF COMMERCE

The Department of Commerce was established in 1903 as the Department of Commerce and Labor (32 Stat. 826, 5 U.S.C. 591). A 1913 act of Congress split the Department of Commerce and Labor into two separate departments (37 Stat. 737, 15 U.S.C. 1501). 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, 1980,⁵⁷⁶ 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, trade adjustment assistance to firms, research and analysis, and monitoring 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, ensures an effective export control and treaty compliance system and promotes continued U.S. strategic technology leadership to advance U.S. national security, foreign policy and economic objectives. 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.

⁵⁷⁶ 45 Fed. Reg. 11862, as amended by 46 Fed. Reg. 13537.

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.⁵⁷⁷ The fifth act of Congress passed on July 31, 1789, provided for the establishment of customs districts and ports of entry, the appointment of customs officers, and the method of collecting the duties. Establishment of the “customs service” actually predated the establishment of its parent agency, the Treasury Department, which was established on September 2, 1789.⁵⁷⁸ On March 3, 1927, the Bureau of Customs was established as a separate agency under the Treasury Department.⁵⁷⁹ The Bureau was redesignated the U.S. Customs Service on August 1, 1973.⁵⁸⁰

On November 25, 2002, President George W. Bush signed the Homeland Security Act of 2002 (the Act)⁵⁸¹ which established the DHS as a new cabinet-level agency. Section 403 of the Act transferred the functions, personnel, assets, and liabilities of the U.S. Customs Service to the Secretary of Homeland Security.⁵⁸² Section 411 of the Act established the U.S. Customs Service as a distinct entity within DHS, under the authority of the Under Secretary for Border and Transportation Security. Section 411 also established the Commissioner of Customs as the head of the U.S. Customs Service within DHS. The Commissioner is to be appointed by the President with the advice and consent of the Senate.⁵⁸³ Section 1502 of the Act required the President to submit a reorganization plan to Congress within 60 days of enactment. The George W. Bush Administration submitted two reorganization plans to Congress in compliance with Section 1502. The first reorganization plan was submitted on January 7, 2003⁵⁸⁴, and it reflected the organization of the Department as set out in the Act. However, the second reorganization plan submitted by the Administration contained a new organizational structure that eliminated the U.S. Customs Service as a distinct agency within DHS. It took the inspection-related components of the Customs Service, the inspection-related component of the Immigration and Naturalization Service, the Border Patrol, and a segment of the inspection-related components of the Animal and Plant Health Inspection Service, and created a new agency called the Bureau of Customs and Border Protection, now officially designated as U.S. Customs and Border Protection

⁵⁷⁷ 1 Stat. 24, An Act for Laying a Duty on Goods, Wares and Merchandise Imported into the United States.

⁵⁷⁸ 1 Stat. 65, An Act to Establish the Treasury Department.

⁵⁷⁹ 44 Stat. 1381.

⁵⁸⁰ Treasury Department Order 165-23, April 4, 1973.

⁵⁸¹ P.L. 107-296, Nov. 25, 2002.

⁵⁸² Ibid, 116 Stat. 2178.

⁵⁸³ Ibid, 116 Stat. 2179.

⁵⁸⁴ U.S. Congress, House Select Committee on Homeland Security, *Reorganization Plan for the Department of Homeland Security*, Communication from the President of the United States, 108th Cong., 1st sess., January 7, 2003, H.Doc. 108-16 (Washington: GPO, 2003).

(CBP). The investigative elements of the former U.S. Customs Service and Immigration and Naturalization Service were transferred to the U.S. Immigration and Customs Enforcement (ICE). CBP's is charged with preventing terrorists and terrorist weapons from entering the United States, while also facilitating the flow of legitimate trade and travel. For example CBP also has responsibility to prevent illegal immigration; regulate and facilitate international trade; collect import duties; enforce U.S. trade and drug laws; and protect Americans and U.S. agricultural and economic interests by preventing the importation of harmful pests, diseases, and contaminated, diseased, infested, or adulterated agricultural and food products. As the primary enforcement agency at the border, CBP enforces more than 400 laws and regulations on behalf of approximately 60 federal agencies. In the customs area, CBP is responsible for assessing and collecting duties, excise taxes, penalties, and other fees due on imported goods; interdicting and seizing illegally entered merchandise; processing persons, 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; enforcing laws on copyright, patent, and trademark rights; and administering quotas and other import restrictions. In performing these functions, CBP maintains close ties with private business associations, international organizations, and foreign customs services. Section 402 of the Security and Accountability for Every Port (SAFE Port) Act,⁵⁸⁵ established an Office of International Trade to set CBP's policies on trade facilitation and enforcement, manage trade programs, and oversee trade compliance. Among its responsibilities, the office develops guidelines for screening cargo shipments for tariff, intellectual property, and import safety problems.

Customs Revenue Functions

Section 415 of the Homeland Security Act of 2002⁵⁸⁶ defined customs revenue functions as follows:

- (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.

⁵⁸⁵ P.L. 109-347, 120 Stat. 1924, Oct. 13, 2006.

⁵⁸⁶ P.L. 107-296, 116 Stat. 2180-1, Nov. 25, 2002.

(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, and 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.

Authority for Customs Revenue Functions

During the debate surrounding the transfer of the U.S. Customs Service to DHS, concerns were raised regarding the commercial or revenue aspects of Customs missions, and how these would be managed in the new Department. The decision was made that the authority over specific Customs revenue functions would be retained by the Treasury Department which had been the U.S. Customs Service's parent agency for more than 200 years. Section 412(a)(1) of the Homeland Security Act⁵⁸⁷ states:

(a) RETENTION OF CUSTOMS REVENUE FUNCTIONS BY SECRETARY OF THE TREASURY.—

(1) RETENTION OF AUTHORITY.—Notwithstanding section 403(a)(1), authority related to Customs revenue functions that was vested in the Secretary of the Treasury by law before the effective date of this Act under those provisions of law set forth in paragraph (2) shall not be transferred to the Secretary by reason of this 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

⁵⁸⁷ Ibid, 116 Stat. 2179.

Secretary of the Treasury. The Secretary of the Treasury shall consult with the Secretary regarding the exercise of any such authority not delegated to the Secretary.

(2) STATUTES.—The provisions of law referred to in paragraph (1) 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 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.

On May 15, 2003, the Treasury Department issued Treasury Order 100-16⁵⁸⁸ which set forth the delegation of authority over customs revenue functions specifying which regulations require the signatures of both the Secretaries of the Treasury and Homeland Security, which regulations DHS has the authority to sign on behalf of the Secretary of the Treasury, and which regulations the Secretary of the Treasury retains the sole signing authority. This delegation of authority became effective May 15, 2003.

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, 1916⁵⁸⁹ 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 1974⁵⁹⁰.

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. A Commissioner with less than 1 year of

⁵⁸⁸ 19 C.F.R. § 0.

⁵⁸⁹ 39 Stat. 795.

⁵⁹⁰ Public Law 93-618, approved January 3, 1975.

continuous service as a Commissioner may not be designated as Chairman.

Statutory authority for the Commission's responsibilities is provided primarily by the Tariff Act of 1930⁵⁹¹, the Agricultural Adjustment Act⁵⁹², the Trade Expansion Act of 1962⁵⁹³, the Trade Act of 1974⁵⁹⁴, the Trade Agreements Act of 1979⁵⁹⁵, the Trade and Tariff Act of 1984⁵⁹⁶, the Omnibus Trade and Competitiveness Act of 1988⁵⁹⁷ and the Uruguay Round Agreements Act⁵⁹⁸.

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 that benefit from subsidies or are priced below fair value.⁵⁹⁹ 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 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 importation of goods into the United States.⁶⁰⁰ 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.⁶⁰¹ 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.⁶⁰²

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

⁵⁹¹ Public Law 71-361, approved June 17, 1930.

⁵⁹² Public Law 73-10, approved May 12, 1933.

⁵⁹³ Public Law 87-794, approved October 11, 1962.

⁵⁹⁴ Public Law 93-618, approved January 3, 1975.

⁵⁹⁵ Public Law 96-39, approved July 26, 1979.

⁵⁹⁶ Public Law 98-573, approved October 30, 1984.

⁵⁹⁷ Public Law 100-148, approved August 23, 1988.

⁵⁹⁸ Public Law 103-465, approved December 8, 1994.

⁵⁹⁹ Sections 704, 734, and 751; 19 U.S.C. 1671c, 1673c, and 1675c.

⁶⁰⁰ 19 U.S.C. 1337.

⁶⁰¹ 19 U.S.C. 1332.

⁶⁰² 19 U.S.C. 1484(e).

probable impact of reducing or eliminating the protection.⁶⁰³

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.⁶⁰⁴ The ITC performs a similar advisory role in relation to duty-free treatment under the Generalized System of Preferences.⁶⁰⁵ Under section 201 of the 1974 Trade Act,⁶⁰⁶ 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 410⁶⁰⁷ of the 1974 Trade Act provide for ITC monitoring and investigation of various aspects of trade with nonmarket economy countries. Similarly, Sections 421 – 423 of the Trade Act provides for ITC investigations to determine whether imports for China are causing “market disruption” to U.S. producers of a like or directly competitive product.

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 Act of 1974.⁶⁰⁸ 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,

⁶⁰³ 19 U.S.C. 1981, 2253.

⁶⁰⁴ 19 U.S.C. 2151.

⁶⁰⁵ 19 U.S.C. 2151, 2163.

⁶⁰⁶ 19 U.S.C. 2251.

⁶⁰⁷ 19 U.S.C. 2240, 2436.

⁶⁰⁸ 19 U.S.C. 2155.

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 2004⁶⁰⁹.

⁶⁰⁹ Public Law 108-429, approved December 3, 2004.