Trade Law: An Introduction to Selected International Agreements and U.S. Laws

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Summary

U.S. trade obligations derive from international trade agreements, including the General Agreement on Tariffs and Trade (GATT), the other World Trade Organization (WTO) agreements, and additional bilateral and regional trade agreements, as well as domestic laws intended to implement those agreements or effectuate U.S. trade policy goals. This report provides an overview of both sources of U.S. trade obligations, focusing on a select group of agreements, provisions, and statutes that are most commonly implicated by U.S. trade interests and policy.

Historically, parties to international trade agreements were obligated to reduce two kinds of trade barriers: tariffs and non-tariff trade barriers. Whereas the former may hinder an imported product's ability to compete in a foreign market by imposing an additional cost on the product's entry into the market, the latter has the potential to bar an import from entering that market altogether by, for example, restricting the number of such imports that can enter the market or imposing prohibitively strict packaging and labeling requirements. Consequently, at their most basic, international trade agreements obligate their parties to convert at least some of their non-tariff trade barriers into tariffs, set a ceiling on the tariff rates for particular products, and then progressively reduce those rates over time. In addition, international trade agreements have increasingly broadened their scope to target domestic policies that appear to operate as unfair trade practices and to establish elaborate trade dispute settlement mechanisms. As illustrated in this report, the typical international trade agreement today disciplines its parties' use of tariffs and trade barriers, authorizes its parties to use discriminatory trade measures to remedy certain unfair trade practices, and establishes a dispute settlement body.

Domestic trade laws, meanwhile, can broadly be classified as laws (1) authorizing trade remedies, including remedies for violations of trade agreements, countervailing duties for subsidized imports, and antidumping duties for imports sold at less than their normal value, (2) setting domestic tariff rates and providing special duty-free or preferential tariff treatment for certain products, and (3) authorizing the imposition of trade sanctions to protect U.S. security or achieve other policy goals. In addition to describing these domestic laws, this report summarizes the constitutional authorities of Congress and the executive branch over international trade. Finally, the report identifies many of the federal agencies and entities charged with overseeing the development of new trade agreements and the administration and enforcement of federal trade laws. Among the federal agencies and entities discussed are the United States Trade Representative (USTR), the International Trade Administration (ITA), the International Trade Commission (ITC), the United States Customs and Border Protection (CBP), and the United States Court of International Trade (CIT).

This report is not intended as a comprehensive review of trade law. It is an introductory overview of the legal framework governing trade-related measures. The agreements and laws selected for discussion are those most commonly implicated by U.S. trade interests, but there are U.S. trade obligations beyond those reviewed in this report.

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Introduction

The post-World War II era has been characterized by a global movement toward liberalizing trade and creating frameworks under which trade disputes can be avoided and resolved.[1] In particular, the trade agreements of the last half-century can be seen as adopting the view that government bodies need a global legal framework to ensure that they effectively conform their countries' policies and laws with their citizens' interests.[2] Legal theorists posit that trade policy failure, in both the global and domestic arenas, as well as inequitable power dynamics among countries engaged in trade negotiations, are the products of a legal architecture that does not sufficiently discipline how governments represent their citizens' interests.[3] In this vein, the international trade law regime has attempted to strengthen its enforcement mechanism over time to ensure that national governments comply with trade law despite shifting domestic pressures.[4]

As international trade law has developed, there has been interplay between domestic and global trade law. Initially, international trade agreements focused on tariffs, but, over time, their scope has broadened to encompass aspects of domestic policymaking and they have established fairly stringent dispute settlement mechanisms. This interplay, however, has led to criticism that trade agreements infringe national sovereignty and autonomy by (1) limiting the kinds of policy decisions a country can make and (2) giving international trade dispute settlement bodies too much power to shape and constrain domestic law.

This report provides an overview of the legal framework that governs trade-related measures. This framework is composed of both international agreements and domestic laws. The particular agreements and statutes selected for this report are those that are most commonly implicated by U.S. trade interests and policy. This report is not intended to be a comprehensive review of trade law.

Part I: United States Trade Obligations Under International Law

A single trade issue, such as dumping (the sale of goods in foreign markets at lower prices than in the domestic market), can be governed by both international agreements *and* federal laws. This report first discusses international trade agreements and then turns to domestic law.

The United States has international trade obligations under (1) the World Trade Organization (WTO) agreements, which include the General Agreement on Trade and Tariffs (GATT) and other "covered agreements;"[5] (2) its own free trade agreements; and (3) other international agreements

[1] *See* WORLD TRADE ORGANIZATION, WORLD TRADE REPORT 2007 iii, 247 (2007).

[2] *Id.* at 80 (2007).

[3] *Id.* at 79.

[4] *See id.* at 118.

[5] The term "covered agreements" refers to the Marrakesh Agreement, the Agreements in Annexes I and 2 of that Agreement, and any Plurilateral Trade Agreement in Annex 4 of that Agreement. Appellate Body Report, *Brazil – Measures Affecting Desiccated Coconut*, p.13 WT/DS22/AB/R (Feb. 21, 1997). The Marrakesh Agreement and the contents of its annexes will be discussed further in "The Uruguay Round, Marrakesh Agreement, and World Trade Organization."

with narrower policy goals, such as the conservation of natural resources. The scope of this report, however, is limited to obligations incurred under agreements that seek to liberalize international trade. In the WTO context, trade agreements are categorized as either multilateral (accepted by all WTO Members as a condition of membership) or plurilateral (accepted by only some WTO Members). Other free trade agreements may be classified as bilateral agreements (which bind only two countries) and regional agreements (which bind countries within a discrete region of the world). No matter their classification, most trade agreements have a corresponding body of domestic law.

The Uruguay Round, Marrakesh Agreement, and World Trade Organization

After World War II, developed nations sought to establish an open trade network to facilitate the recovery of the global economy. These negotiations yielded a proposal for an International Trade Organization (ITO), and, as a temporary fix until the ITO Charter could be negotiated, the General Agreement on Trade and Tariffs 1947 (GATT 1947). The expectation was that the GATT 1947 would expire once a more comprehensive trade agreement, the ITO Charter, was developed and ratified.[6] Then the ITO would interpret and administer the ITO Charter.

However, the ITO never materialized, and, therefore, despite its provisional nature, the GATT 1947 became a permanent fixture in international trade.[7] Its provisional character never disappeared, however, as reflected by the fact that its signatories were called "Contracting Parties," rather than Members, to dispel any concern that an international organization had been established. In addition, the GATT 1947 was never considered a comprehensive trade agreement because it consisted mainly of the commercial policy provisions of the ITO charter.

Partly as a response to concerns about the GATT 1947's strength and breadth, Contracting Parties engaged in a series of "rounds" of multilateral trade negotiations over the ensuing decades: the Dillon Round (1960-1962), the Kennedy Round (1964-1967), the Tokyo Round (1973-1979), the Uruguay Round (1986-1994), and the ongoing Doha Development Round. Each round of talks sought to liberalize new markets, lower tariffs, and identify solutions to different kinds of trade barriers.[8] It was not until the Uruguay Round that the Contracting Parties finally reached an agreement on a charter for an international trade organization: the WTO.

The agreements completed in the Uruguay Round are detailed in the Marrakesh Agreement. Part of this Agreement is the Agreement Establishing the World Trade Organization (the WTO Agreement). The other texts negotiated during the Uruguay Round are annexed to the WTO Agreement. Annex 1 contains 13 multilateral agreements on trade in goods as well as the General Agreement on Trade in Services and the Agreement on Trade-Related Aspects of Intellectual Property Rights.[9] Annex 2 contains the Dispute Settlement Understanding, which sets out the

[6] WORLD TRADE REPORT, *supra* note 2, at 80.

[7] *See id.*

[8] The Kennedy Round was the first round to go beyond tariffs and deal with certain non-tariff measures. *Id.* at 184. However, since then, non-tariff barriers have become a major part of multilateral trade negotiations.

[9] The other agreements included in this annex are: the Agreement on Agriculture, the Agreement on Sanitary and Phytosanitary Measures, the Agreement on Textiles and Clothing (which terminated in January 2005), the Agreement on Technical Barriers to Trade, the Agreement on Trade-Related Investment Measures, the Agreement on Anti-dumping, the Agreement on Customs Valuation, the Agreement on Preshipment Inspection, the Agreement on Rules of (continued...)

process by which WTO Members may resolve disputes over the meaning or application of a WTO agreement. Annex 3 contains a Trade Policy Review mechanism, providing for periodic review of a WTO Member's trade laws and policies. Annexes 1 through 3, and the agreements therein, must be accepted by a country as a condition of its membership in the WTO. Accordingly, all of these agreements, along with the other provisions of the Marrakesh Agreement, were approved and implemented in U.S. law through the Uruguay Round Agreements Act (URAA, P.L. 103-465, 19 U.S.C. § 3501 *et seq.*), which then-President Bill Clinton signed into law on December 8, 1994.

The General Agreement on Tariffs and Trade (GATT) 1994

The GATT 1994, which is found in Annex I of the WTO Agreement, consists of (a) the GATT 1947, (b) certain protocols, waivers, and tariff concessions made pursuant to the GATT 1947, and (c) interpretations of particular language and provisions of the GATT 1947. At its most general, the GATT sets the maximum tariffs for particular goods and countries, provides disciplines for the regulation of imports and exports, and lists exceptions to these obligations. This report surveys many of the articles of the GATT that are considered fundamental as well as those that are frequently raised in WTO consultations or disputes over a WTO Member's domestic trade measures.

The Nondiscrimination Provisions of the GATT

The GATT seeks to prohibit WTO Members from discriminating between "like products" on the basis of their origins. More specifically, the GATT bars WTO Members from discriminating between like products because they originated in different WTO Members or because they originated in a WTO Member's territory rather than domestically. The GATT articles that lay out this prohibition, Article I and Article III, are therefore known as the nondiscrimination provisions. Although "like product" is used in both provisions, the GATT does not offer a single precise and absolute definition of the term.[10] Consequently, to determine whether two products are "like," WTO panels and the Appellate Body engage in a case-by-case analysis to discern whether the two products are in a competitive relationship given the products' properties and end uses, consumer preferences, and tariff classification.[11]

Article I: Most Favored Nation Treatment

Article I of the GATT requires WTO Members to grant immediate and unconditional most-favored-nation (MFN) treatment to the products of other Members.[12] This means that any privilege that a WTO Member grants in the context of customs duties or rules regarding

(...continued)

Origin, the Agreement on Import Licensing, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Safeguards.

[10] *See* Report of the Appellate Body, *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, p. 21 (Oct. 4, 1996) (writing that the concept of "like product" is "like an accordion").

[11] *See* Report of the Appellate Body, *EC-Asbestos*, WT/DS135/AB/R, ¶ 99 (Mar. 12, 2001); Working Party Report on Border Tax Adjustments, BISD 18S/97 (Dec. 2, 1970).

[12] GATT, Art. I:1. Note that domestic U.S. law refers to MFN status as "normal trade relations." Internal Revenue Restructuring and Reform Act of 1998, P.L. 105-206 § 5003, 112 Stat. 685 (1998).

importation or exportation to any product imported from one country, whether a WTO Member or not, must also be granted to any like product imported from all WTO Members.[13]

Article III: National Treatment

Article III articulates the basic principle of "national treatment": Members must treat products from other Members no less favorably than they treat their own domestic products.[14] Accordingly, Article III addresses the *internal* taxation and regulation of imported products to prevent countries from using internal laws and taxes, not simply import tariffs and quotas, to protect their domestic industries. As written, Article III forbids Members from using internal taxes, charges, and regulations that affect the "internal sale, offering for sale, purchase, transportation, distribution or use of products," as well as internal quantitative regulations, so as to "afford protection to domestic production."[15]

In fact, Article III prescribes different standards for national treatment depending on whether the particular measure is a tax or regulation. When a measure is an internal tax or charge, Article III:2 forbids its application if it either (1) is *in excess* of those taxes or charges applied to like domestic products[16] or (2) dissimilarly taxes imported and domestic products so as to afford protection to a domestic product that is directly competitive with, or substitutable for, the imported product.[17] Alternately, when the practice in question is a regulation, such as a local content requirement, advertising ban, or labeling requirement,[18] Article III:4 proscribes its application if it treats foreign products less favorably than like domestic products.[19]

As a result of Article III's complexity, Members have disputed whether a particular measure should be classified as a tax, subject to the requirements of Article III:2, or a regulation, subject to

[13] Note that free trade agreements are often facially inconsistent with this requirement but have generally been permitted under Article XXIV. *See infra* "Article XXIV: Customs Unions and Free Trade Areas."

[14] *See* Art. III:1.

[15] GATT, Art. III:1.

[16] Report of the Appellate Body, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R, pp. 22-23 (June 30, 1997). Under this standard, "[e]ven the smallest amount of 'excess' is too much" under this standard. Report of the Appellate Body, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, p. 23 (Oct. 4, 1996).

[17] *Japan – Alcoholic Beverages*, *supra* note 16, at p. 24. Note that the strict "in excess" standard applies only to the small group of products that are considered "like," that is, products that are perfect substitutes for each other. GATT, Interpretative Note Ad Art. III:2; *Canada – Periodicals*, *supra* note 16, at p. 28. In contrast to "like products," "directly competitive and substitutable products" refers to both perfect and imperfect substitutes. *Id.* Therefore, when the complaining Member's products are directly competitive with, but not necessarily perfect substitutes for, the respondent's domestic products, the respondent's tax is not subject to the "in excess" standard but rather to a two-prong test that asks whether (1) the imported and domestic products are similarly taxed, and, if so, (2) whether the dissimilar taxation is applied so as to protect domestic production. *Japan – Alcoholic Beverages*, *supra* note 16, at p.24.

[18] One example of internal regulation that the Appellate Body has deemed violative of national regulation is the Korean dual retail scheme that the U.S. and Australia challenged in 1999. In those two cases, Korean measures confined sales of imported beef to stores bearing a "Specialized Imported Beef Store" sign. The panel held that both the requirement that imported beef be sold only in certain stores and the requirement that those stores bear a specialized sign violated Article III:4. Report of the Panel, *Korea – Various Measures on Beef*, WT/DS161/R, paras. 641-643 (July 31, 2000).

[19] Note that the Appellate Body has defined "like domestic product" more broadly for the purposes of the Article III:4 test than it has for the purposes of the test for internal taxes and charges laid out in Article III:2. *See* Report of the Appellate Body, *EC – Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/ R, ¶ 99 (Mar. 12, 2001). The Appellate Body considers the term "like domestic product" in Article III:4 to include a small group of imperfectly substitutable products in addition to perfectly substitutable products. *See id.*

the requirements of Article III:4.[20] There are also frequent disputes involving the likeness or substitutability of the affected domestic and imported products.[21] Moreover, in some disputes, Members have defended their challenged measure on the grounds that it is not "internal," and, therefore, is not subject to the constraints of Article III at all.[22] For example, in *China – Auto Parts*, which arose partly under Article III:2, China argued that the charges in question were not *internal* measures but rather valid methods of classifying imports for the purposes of assessing the correct tariff on those imports at the border.[23] In that case, the measures in question were Chinese policies that permitted customs officials to classify imports of unassembled auto parts as motor vehicles, and therefore subject to a higher tariff, provided that the unassembled parts had the "essential character" of a motor vehicle and entered China in a single shipment.[24] The Appellate Body found that when a duty or charge is collected is not determinative of whether the duty or charge is "internal."[25] Instead, the Appellate Body held that the test is not when a duty or charge is *collected* but rather when the payer's *obligation to pay* accrues.[26] Where that obligation is triggered by an event that occurs within the customs territory, such as the distribution or sale of that product within the importing country, rather than at the moment of importation, the tax is considered an internal measure for the purposes of Article III:2 even though it might be assessed prior to that event occurring.[27]

A second issue under Article III is whether it permits WTO Members to distinguish between "like products" solely on the basis of their process or production method (PPM). For example, can a WTO Member discriminate against an imported product purely because it was produced in an environmentally unsustainable way? To date, Article III case law does not permit a Member to regulate two differently on the basis of such a distinction if it results in the imported good being treated less favorably than the like domestic item.[28] Nevertheless, there is language in WTO decisions indicating that less favorable treatment of a like imported product may be permitted if it

[20] *E.g.*, Report of the Panel, *U.S. – Measures Affecting Tobacco*, BISD 41S/131 paras. 21, 75 (Oct. 4, 1994) (stating that the U.S. considered the provisions as *enforcement* measures for an underlying regulation and not as a form of a tax or internal charge on a product within the meaning of Article III:2, which required the Panel to determine whether the provisions were indeed "separate fiscal measures" within the realm of Article III:2); Report of the Panel, *U.S. – Taxes on Automobiles*, DS31/R, ¶ 5.42 (Oct. 11, 1994) (unadopted) (summarizing the first issue for the Panel's consideration as whether the CAFE measure fell within the category of "internal taxes or other internal charges" under Article III:2 or, rather, whether it fell within the category of "laws, regulations, and requirements" under Article III:4 because it was actually a requirement *enforced* by penalty payments).

[21] *E.g.*, *Canada –Periodicals*, *supra* note 16, at p.3 (describing Canada's argument that split-run and non-split-run periodicals are like products); *Japan –Alcoholic Beverages*, *supra* note 16, at p.4 (describing Japan's argument that shochu and vodka are like products).

[22] *See generally* Report of the Appellate Body, *China – Measures Affecting Imports of Automobile Parts*, WT/DS340/AB/R (Dec. 15, 2008).

[23] *See id.* at paras. 14, 30, 47.

[24] *Id.* at paras. 17, 111.

[25] *Id.* at ¶ 158 (noting that "ordinary customs duties may be collected after the moment of importation and internal charges may be collected at the moment of importation.").

[26] *Id.*

[27] *China – Auto Parts*, *supra* note 22, at paras. 161-163.

[28] Moreover, any *prohibition* on the import resulting from that product's PPM (and not a product-related characteristic) could constitute a quantitative restriction prohibited under Article XI, which is discussed later in this report. *See* Panel Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, paras. 7.11-7.17, WT/DS58/R (May 15, 1998).

can be explained by factors unrelated to foreign origin,[29] and some scholars have suggested that there is room for a WTO panel or Appellate Body to find a Member acted consistently with Article III and according less favorable treatment to an import because of its PPM.[30]

Article II: Tariffs

The original goal of the GATT was to move countries toward imposing tariffs, rather than non-tariff trade barriers,[31] that could then be reduced over time. Article II of the GATT embodies this goal by requiring each WTO Member to abide by the tariff schedule that it has submitted to the WTO. The goods that are subject to the negotiated tariff rates are called "bound" items.

Article II forbids Members from imposing tariffs on goods from other Members that are less favorable than the tariff rates listed in the applicable schedule.[32] Furthermore, Members may not impose any other duty or charge on a product's importation that exceeds the duties that existed at the date the Members entered the WTO.[33] There are, however, exceptions to Article II. Under Article II:2, tariff concessions do not prevent Members from levying internal taxes consistent with Article III:2 (these are often called "border tax adjustments"),[34] antidumping or

[29] *E.g.*, Appellate Body Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, ¶ 96, WT/DS302/AB/R (April 25, 2005)) ("[T]he existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product ...").

[30] *E.g.*, *generally* Robert Howse and Donald Regan, *The Product/Process Distinction – An Illusory Basis for Disciplining 'Unilateralism' in Trade Policy*, 11 EUR. J. INT'L L. 249 (2000) (arguing that regulatory schemes that rely on process or production based distinctions related to non-protectionist policies are consistent with Article III). *But see* Steve Charnovitz, *Law of Environmental PPMs in the WTO: Debunking the Myth of Illegality*, 27 Yale J. Int'l L. 59, 91 (2002) (writing that the optimism similar to that expressed by Howse and Regan "that future WTO panels will tolerate origin-neutral PPMs in the context of Article III would be unfounded.").

[31] An example of a non-tariff trade barrier is the Korean dual retail scheme that the WTO panel ruled against in 2000. *Korea –Beef*, *supra* note 18, at paras. 641-643. As explained earlier, under that scheme, Korea confined sales of imported beef to stores bearing a "Specialized Imported Beef Store" sign. *Id.* These kinds of trade barriers pose unique obstacles to trade liberalization in part because, unlike tariffs, they can not be overcome simply by a willingness to pay more money for the privilege of exporting products to a foreign country.

[32] GATT, Art. II:1(a).

[33] *See id.* at Art. II:1(b).

[34] Border tax adjustments have particular significance in environmental policy. When a country wants its producers to internalize a particular environmental cost, it usually wants to do so without depriving the domestic industry affected of its global competitiveness. Consequently, it may impose a border tax adjustment (BTA) to "level the playing field," that is, prevent imports from countries whose producers do not internalize that cost from being cheaper than domestic products whose producers do. However, not all taxes are eligible for treatment as a BTA. *See, e.g.*, Report of the Panel, *United States – Taxes on Petroleum and Certain Imported Substances*, B.I.S.D. 34S/136 paras. 5.2.3 – 5.2.4 (1987) (hereinafter *US – Superfund*); Working Party Report on Border Tax Adjustments, BISD 18S/97, ¶ 14 (1970). Taxes levied on producers, such as social security charges and payroll taxes, are not eligible for treatment as a BTA, but taxes levied on *products* are. *See, e.g.*, *US – Superfund*, *supra*, at ¶ 5.2.4; Working Party Report on Border Tax Adjustments, BISD 18S/97, ¶ 14. Accordingly, in *U.S. – Superfund*, a GATT panel upheld a BTA imposed by the United States on imported *products* derived from certain petro and inorganic chemicals. *US – Superfund*, *supra*, at paras. 5.2.6-5.2.7. Having deemed the tax eligible for treatment as a BTA, the panel then considered whether the tax in fact met the qualifications, listed in Article II:2(a) for exemption from Article II:1. *Id.* at paras. 5.2.7-5.2.10. *See also* Art. II:2(a) (exempting charges only if they are "equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part.") The panel found that the tax constituted a BTA that was, in principle, consistent with Article III:2 and, therefore, exempt from, rather than an infringement of, Article II:1. *US – Superfund*, *supra*, at ¶ 5.2.10.

countervailing duties consistent with the GATT and other relevant agreements, and fees or other charges commensurate with the cost of services rendered.[35]

Despite Article II's importance to the GATT, its enforcement can be difficult because WTO Members frequently disagree about which duty applies to a particular good. A country's tariff schedules address categories and sub-categories of products but do not expressly identify and provide a tariff rate for every potential product variation and nuance.[36] Despite these problems, a country's customs agency must rely on the tariff schedules as written to identify the kind of product under consideration and apply a tariff rate. This leads to problems like the one encountered in *EC – Chicken Classification*, in which Brazil complained that the European Union incorrectly classified fresh chicken packed in salt as fresh chicken cuts rather than salted chicken cuts.[37] At issue was an EU regulation that provided the customs agency with guidance on the distinction between salted and fresh chicken cuts, stating that chicken must be "deeply and homogenously impregnated with salt in all parts" to be subject to the ad valorem duty that was more favorable to foreign imports than the duty that was applied to fresh chicken.[38]

Article VIII: Fees and Formalities

Article VIII:1 of the GATT requires that all fees and charges imposed in connection with importation or exportation be (1) limited in amount to the approximate cost of services rendered, and (2) not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.[39] The first prong (limiting the amount to the cost of services rendered) is actually a dual requirement as it requires (a) that a service was rendered, and (b) that the level of the charge does not exceed the approximate cost of that service.[40] Moreover, the term "services rendered" means services rendered to the individual importer in question.[41]

One of the early disputes involving Article VIII was *US – Customs User Fee*, which was heard by a GATT panel in 1987. In that case, the European Union and Canada challenged the GATT-consistency of an *ad valorem* processing fee charged by the U.S. Customs Service on all commercial merchandise entering the United States.[42] The amount of the fee charged varied depended only on the appraised value of the merchandise, not on the costs incurred by the Customs Service of processing the merchandise.[43] The United States argued that the fee was commensurate with the services rendered because it was commensurate with the sum costs of the Customs Service's commercial operations.[44] The panel disagreed, finding that if the "cost of

[35] GATT, Art. II:2.

[36] *See, e.g.*, Report of the Panel, *EC-Salted Chicken Cuts*, WT/DS269/ R, p. 2 (May 30, 2005). In negotiating tariff concessions, countries generally use a broad formula and do not look at every possible product individually. The result is that the actual classification of many products is not discussed at all. *Id.*

[37] *Id.* at 2, 10-12.

[38] *Id.* at 7, 18.

[39] Article VIII:4 provides a non-exhaustive list of the type of governmental activities connected to importation or exportation to which Article VIII applies. These activities include licensing, statistical services, documentation, inspection, and quarantine.

[40] Report of the Panel, *U.S. – Customs User Fee*, BISD 35/S245, ¶ 69 (Feb. 2, 1988).

[41] *Id.* at paras. 77, 80.

[42] *Id.* at ¶ 7.

[43] *Id.* at paras. 8, 10, 26.

[44] *US – Customs User Fee*, at ¶ 28.

services rendered" referred to the total cost of the relevant government activities, rather than to the actual cost of the services rendered to the individual importers charged, Article VIII:1 would not provide an objective standard by which the equitable apportionment of these fees could be ascertained.[45] Accordingly, it ruled that it the U.S. processing fee was inconsistent with Article VIII:1 to the extent that it caused fees to be levied in excess of the approximate cost of the services provided to each individual importer.[46]

Similarly, in *Argentina – Textiles*, the panel found that Article VIII:1 forbade Argentina from imposing an *ad valorem* duty with no fixed fee on textile and footwear imports. In that case, Argentina was calculating an average import price for each tariff line of textiles, apparels, and footwear to determine what the specific minimum duty was for products in that category.[47] Upon the importation of an article within that tariff line, Argentina then applied either the specific minimum duty or an *ad valorem* duty with no fixed fee depending which duty was higher.[48] While Argentina claimed that it applied the higher *ad valorem* duty only to recoup the costs of the "statistical services" involved in calculating the average import price for tariff line, the panel ruled that because the *ad valorem* duty had no fixed maximum fee, it was inherently not limited to the approximate cost of the services rendered and therefore inconsistent with Article VIII:1.[49]

In addition, in *U.S. – Certain EC Products*, a WTO panel ruled that Article VIII barred the United States from increasing bonding requirements on imports from the European Communities in order to secure the collection of future additional import duties that it was going to impose, once authorized by the DSB, for the European Communities' non-compliance with a WTO decision.[50] The United States argued that the increased bonding requirements were a fee for the "early release of merchandise," but the panel found that the United States failed to provide any evidence that the bonding requirements represented any approximate costs of such services.[51]

Article IX: Marks of Origin

Article IX of the GATT disciplines marks of origin laws, that is, laws setting requirements for the labeling of certain products with their country or region of origin. Under Article IX:1, WTO Members may not accord to the products of other Members "treatment with regard to marking requirements" that is "less favorable than the treatment accorded to like products of any third country." Article IX thus requires most favored nation treatment in marks of origin laws just as Article I requires most-favored nation treatment in the broader context of tariffs, other charges, and all rules and formalities connected to importation and exportation. In addition, while Article IX:2 recognizes that origin marking is important for protecting consumers against fraudulent or misleading labels, it calls on WTO Members to reduce the trade barriers that may result from domestic origin marking requirements.

[45] *Id.* at ¶ 81.

[46] *Id.* at ¶ 86.

[47] Report of the Panel, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel, and Other Items*, WT/DS56/R, ¶ 2.6 (Nov. 25, 1997).

[48] *Id.*

[49] *Id.* at paras. 2.20, 6.75.

[50] Report of the Panel, *U.S. – Import Measures on Certain Products from the European Communities*, WT/DS165/R, pp. 3 – 5 (July 17, 2000).

[51] *Id.* at ¶ 6.70.

Article IX is not so broad, however, as to govern measures requiring the labeling of process and production methods, even when the measure requires this labeling based on the location where the good was produced or harvested.[52] In *US – Tuna/Dolphin I*, an unadopted report, a GATT panel rejected Mexico's allegations that provisions of the U.S. Dolphin Protection Consumer Information Act (DPCIA) were inconsistent with Article IX.[53] The provisions challenged created civil penalties for selling tuna products with labels or other indications that the tuna was harvested in a manner not harmful to dolphins if the tuna was caught in particular locations by certain methods.[54] The GATT panel agreed with the United States that these labeling provisions were subject to the nondiscrimination rules set by Article I and Article III:4, not the marks of origin rules set by Article IX.[55] The panel reasoned that because Article IX does not entail a national treatment requirement, but only a most favored nation requirement, it was intended to regulate the marking of *origin* of imported products, but not the marking of products or their process and production methods generally.[56]

Article XI: General Elimination of Quantitative Restrictions

Quantitative prohibitions and restrictions on imports include non-tariff trade barriers such as import and export licenses, quotas, bans, and embargoes. In essence, quantitative restrictions are absolute restrictions on imports because they impose fixed rules that cannot be overcome by the importer. Unlike internal regulations enforced at the border, quantitative restrictions hinder the opportunity for a product to enter into, rather than simply compete in, the enforcing country's market.[57]

Article XI:1, a cornerstone GATT obligation, bars WTO Members from placing quantitative prohibitions or restrictions on the importation of any other Member's products or the exportation of any domestic product to another Member's territory. In doing so, Article XI illustrates the strong preference of GATT and Uruguay Round negotiators for tariffs as opposed to non-tariff border restrictions.[58] These negotiators intentionally made tariffs the border protection of choice because they are more transparent and easily satisfied without bringing trade to a halt unlike quantitative restrictions, and, perhaps most importantly, they are capable of definitive reduction over time.[59]

Despite the strong policy choice behind it, Article XI does provide exceptions to its rule, including (1) export prohibitions or restrictions temporarily applied to prevent or relieve critical shortages facing the exporting Party, and (2) import restrictions designed to remove a temporary surplus of the like domestic product.[60] In addition, other GATT articles may be implicated by the

[52] *See, e.g.*, Report of the Panel, *U.S. – Restrictions on Imports of Tuna*, DS21/R (Sept. 3, 1991) (unadopted).

[53] *Id.* at ¶ 2.12.

[54] *Id.*

[55] *Id.* at ¶ 5.41

[56] *US – Tuna/Dolphin I*, *supra* note 52, at ¶ 5.41.

[57] Panel Report, *India—Measures Affecting the Automotive Sector*, ¶ 7.224, WT/DS146/R, WT/DS175/R (December 21, 2001).

[58] GATT, Art. XI:1. *See* Report of the Panel, *Turkey – Restrictions on Imports of Textile and Clothing Products*, WT/DS34/R ¶ 9.63 (May 31, 1999).

[59] *See Turkey – Textiles*, *supra* note 58, at ¶ 9.63.

[60] GATT, Art. XI:2.

imposition of quantitative restrictions.[61] Under Article XIII, for example, quantitative restrictions must be applied in accordance with most favored nation treatment.

Article XX: General Exceptions to the GATT and "the Chapeau"

Article XX identifies 10 policy-related exceptions to the provisions of the GATT that may justify a GATT-inconsistent measure. To qualify for an exception, the violative measure must not only fall within the scope of one of the 10 exceptions, but it must also be applied in a manner that does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or be a disguised restriction on international trade. This condition on the measure's application is referred to as "the chapeau" of Article XX because it is contained in the introductory clause, or the "hat," of Article XX.

Among the 10 measures excepted from the GATT's provisions are those measures (1) necessary to protect public morals; (2) necessary to protect human, animal, or plant life and health; (3) relating to products of prison labor; (4) imposed for the protection of national treasures of artistic, historic, or archaeological value; or (5) relating to the conservation of exhaustible natural resources which operate in conjunction with restrictions on domestic production or consumption.

Article XX operates as an affirmative defense in a WTO dispute settlement proceeding. Consequently, Article XX is raised after a Member's measures are deemed inconsistent with the GATT and is invoked by the defending Member who bears the burden of proving that Article XX exempts the measures concerned from the provisions of the GATT. The defending Member must first show that the measure fits within one of the exceptions covered by Article XX. For Article XX exceptions that require the defending Member to prove that the measure is "necessary" to achieve an identified goal (e.g., to protect human, animal, or plant health), this means that the defending Member must make a *prima facie* case that (1) the common interests or values protected by the measure are important, (2) the measure materially contributes to the realization of the ends it pursues, and (3) the restrictive impact of the measure on international commerce is outweighed by its contribution to the stated values or interests.[62] The complaining Member may then rebut the defending Member's arguments by showing that there are less restrictive alternatives available. Then the defending Member must show that these alternatives would not be effective or feasible.[63]

If the defending Member is successful in showing that the measure fits into one of the stated Article XX exceptions, it must next show that the measure satisfies the "chapeau," meaning that, as applied, the measure does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. Compliance with this standard is generally considered more difficult than establishing that a measure fits into one of the 10 policy exceptions. For example, the United States failed to satisfy the chapeau in *U.S. – Shrimp*. In that case, the United States banned all shrimp harvested under the laws of nations that were not certified by the United States as having sufficient laws to protect

[61] *E.g.*, GATT, Art. XIII (requiring quantitative restrictions to be applied on an MFN basis); GATT, Art. XII (permitting the imposition of quantitative restrictions to safeguard a Member's balance of payments).

[62] Report of the Appellate Body, *Korea – Various Measures on Beef*, WT/DS161/AB/R ¶ 157 (July 31, 2000).

[63] Report of the Appellate Body, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WT/DS332/AB/R ¶ 156 (Dec. 3, 2007).

the sea turtles within their waters.[64] In effect, certification was granted only to those nations that, *inter alia*, required their shrimp trawlers to use "Turtle Excluder Devices" that were comparable in effectiveness to those used in the United States.[65] The Appellate Body found that the U.S. measure was, essentially, the imposition of the U.S. regulatory scheme on all other WTO Members, regardless of the different conditions occurring within their countries.[66] Accordingly, the Appellate Body wrote that discrimination results "not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries."[67]

Article XXI: National Security Exceptions to the GATT

Article XXI lists three very specific occasions when international or domestic security interests trump a Member's obligations under the GATT. In any one of these three situations, a Member's noncompliance with the GATT will not be considered a violation of its provisions. These occasions occur when:

(1) the Member's noncompliance is the refusal to disclose information and the Member considers the disclosure contrary to its essential security interests;

(2) the Member considers noncompliance necessary to protect its essential security interests relating to fissionable materials, the traffic in arms or other materials for the purpose of supplying a military establishment, or a time of a war or emergency in international relations, or

(3) the Member's noncompliance occurs in its pursuit of its obligations under the UN Charter for the maintenance of international peace and security.

In general, Article XXI is understood as intending to remove legitimate national security matters from the scope of GATT obligations and to discourage use of the exception for measures with commercially-inspired goals.[68] Moreover, some countries, including the United States, have taken the position that the Article is "self-judging," that is, that each WTO Member may determine whether a particular matter is contrary to or necessary for the protection of its essential security interests and that determination cannot be reviewed by WTO panels or the Appellate Body.[69] While this position raises questions about the proper role of dispute settlement proceedings in this area, to date there is no WTO case law on the application of Article XXI.

Despite the absence of case law, Article XXI has played a role in the diplomatic discourse that precedes, and in some cases eliminates the need for, a request for consultations. For example, when WTO Members have threatened to request consultations over the Cuban Liberty and

[64] Report of the Appellate Body, *U.S. – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R paras. 3, 4 (Oct. 12, 1998).

[65] *Id.* at ¶ 4.

[66] *Id.* at paras. 164-65.

[67] *Id.* at ¶ 165.

[68] Decision Concerning Article XXI of the General Agreement; Decision of November 30, 1982 (L/5426), GATT, BISD (1983).

[69] Dapo Akande and Sope Williams, *International Adjudication on National Security Issues: What Role for the WTO?*, 43 VA. J. INT'L L. 365, 373-74 n.24 and accompanying text (2003).

Democratic Solidarity (LIBERTAD) Act of 1996 ("Helms-Burton Act," P.L. 104-114, 22 U.S.C. 6021 *et seq.*), the United States responded with claims that the measure was justified under Article XXI. The goal behind the LIBERTAD Act was to dissuade other countries from investing in Cuba and to generally undercut the Fidel Castro regime. To achieve this goal, the law codified and strengthened the long-standing embargo against Cuba, making parties liable under U.S. law for trafficking in property expropriated by Cuba from U.S. citizens without compensation and requiring the U.S. State Department to deny visas to officials of companies that had trafficked in such property.[70] The European Union asked for WTO consultations, stating that the LIBERTAD Act would violate both the GATT and the GATS by, inter alia, restraining E.U. companies who export goods to Cuba or trade in goods from Cuba and excluding E.U. citizens from entering the United States.[71] During the ensuing meetings and negotiations between the United States and the European Union, the United States contended that, if the LIBERTAD Act was indeed inconsistent with the WTO agreements, it was justified under Article XXI. Moreover, because, in its view, it is up to the country invoking Article XXI to determine when a particular trade measure is justified by national security concerns, the United States argued that any WTO panel would lack competence to assess the use of Article XXI and, consequently, there could be no WTO proceedings on any dispute resulting out of the consultations on this issue.[72] This dispute never actually came before a panel because the two governments reached a diplomatic solution in the form of a Memorandum of Understanding, and the European Union requested that the panel suspend its work.[73]

Article XXIII: The Basis for WTO Dispute Settlement

Article XXIII provides the basis for dispute settlement under both the GATT and under the other WTO agreements. Article XXIII entitles any WTO Member who considers that a benefit granted by the GATT is being "nullified or impaired or that the attainment of any objective of the Agreement is being impeded" to have recourse to WTO dispute settlement procedures.[74] Most often, the nullification or impairment of a benefit (or the impeding of the realization of an objective) results from a violation of an obligation prescribed by a WTO agreement, but Article XXIII states that it could also result from a Member's application of a measure that does not conflict with the provisions of a WTO agreement or from "any other situation."[75] However, disputes alleging nullification and impairment of trade benefits from non-violative actions occur much less frequently than disputes alleging violations of WTO agreements.

In general, proving nullification or impairment requires showing that the affected imports are subject to and benefiting from a WTO agreement market access concession (e.g., a tariff) and their competitive position is being *upset* by the challenged measure.[76] However, when the

[70] P.L. 104-114, §§ 102, 401.

[71] Request for Consultations by the European Communities, *United States – The Cuban Liberty and Democratic Solidarity Act*, WT/DS38/1 (May 13, 1996).

[72] C. O'Neal Taylor, *Impossible Cases: Lessons from the First Decade of WTO Dispute Settlement*, 28 U. PA. J. INT'L ECON. L. 309, 378 (2007).

[73] *European Union—United States: Memorandum of Understanding Concerning the U.S. Helms-Burton Act and the U.S. Iran and Libya Sanctions Act*, Apr. 11, 1977, 36 I.L.M 429 (1997).

[74] GATT, Art. XXIII. *See* Appellate Body Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products*, ¶ 84 WT/DS90/AB/R (Aug. 23, 1999).

[75] GATT, Art. XXIII:1.

[76] Report of the Panel, *Japan – Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.82, WT/DS44/AB/R (continued...)

complaining Member demonstrates that the challenged measure violates an obligation prescribed by a WTO agreement, the measure is considered *prima facie* to constitute a case of nullification or impairment.[77] In other words, there is a presumption that a breach of the rules adversely affects other Members, and, consequently, it shifts the burden to the defending Member to *disprove* the presumed nullification or impairment.[78] To date, very few Members have tried to rebut this presumption, and it appears that none have succeeded, which has led some to suggest that the presumption may be rebuttable only in theory.[79]

Article XXIV: Customs Unions and Free Trade Areas

WTO Members' participation in free trade agreements and customs unions[80] is facially inconsistent with the MFN obligation because parties to these arrangements may grant lower tariff rates and more favorable treatment to each other's goods without granting those benefits to the goods of other WTO Members. However, these arrangements are permitted under Article XXIV as vehicles of trade liberalization.[81]

Like Articles XX and XXI, Article XXIV operates as a defense to justify an otherwise GATT-inconsistent measure, namely a measure related to the formation of customs unions or free trade areas. Article XXIV justifies these measures only if the formation of the customs union or free trade area in question would be made impossible if the measure concerned was not allowed.[82] It is unclear at this time, however, how a WTO panel or the Appellate Body would determine whether a measure satisfies this standard.

Under Article XXIV:8(a), the members of both customs unions and free trade areas are required to eliminate "duties and other restrictive regulations of commerce" with respect to "substantially all" trade between them. The "substantially all" standard offers customs unions and free trade areas some flexibility in the degree to which they liberalize the trade between them.[83]

(...continued)

(Mar. 31, 1998).

[77] Dispute Settlement Understanding, Art. 3.8.

[78] *Id.*

[79] *E.g.*, PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 185 (Cambridge University Press 2008) (2008).

[80] The distinction, under Article XXIV:8, between customs unions and free trade area lies in the different GATT requirements placed on how these two groups treat trade with third countries (i.e., non-members of the customs union or free trade area). *Compare* GATT, Art. XXIV:8(a) (defining customs union) *with id.* at Art. XXIV:8(b) *and* Art. XXIV:5(b) (defining free trade area). Broadly speaking, a member of a free trade area can restrain trade with a non-member country more than it restrains trade with the other members of the free trade area *so long as*, in doing so, the member country does not constrain trade with the non-member more than it had prior to the formation of the free trade area. A member of a customs union, on the other hand, can never restrain trade with non-member countries *even if*, in doing so, it does not constrain trade with the non-member more than it had prior to the formation of the customs union.

[81] GATT, XXIV:5(b)-(c), XXIV:8(b).

[82] Appellate Body Report, *Turkey – Restrictions on Imports of Textile and Clothing Products*, ¶ 46, WT/DS34/AB/R (Oct. 22, 1999). ("Article XXIV can justify the adoption of a measure which is inconsistent with certain other GATT provisions only if the measure is introduced upon the formation of a customs union, and only to the extent that the formation of the customs union would be prevented if the introduction of the measure were not allowed.")

[83] *Id.* at ¶ 48. Other than noting this flexibility, the Appellate Body has offered little guidance on the meaning of "substantially all." Instead, in *Turkey – Textiles*, it simply noted that the term "substantially all the trade" is "not the same as *all* the trade, and also that [it] is something considerably more than merely *some* of the trade." *Id.* at ¶ 48.

Furthermore, in *Argentina – Footwear*, the Appellate Body found that Article XXIV:8(a)'s requirement to eliminate all tariffs and commerce-restricting regulations on trade among customs union members did not prohibit Argentina's imposition of safeguard measures on countries who were part of a customs union (MERCOSUR) with Argentina.[84]

Other WTO Agreements Reached During the Uruguay Round

All multilateral trade agreements negotiated during the Uruguay Round are binding on WTO Members.[85] These are agreements that a country must accept in order to become a WTO Member. As mentioned, these agreements were implemented in U.S. law through the Uruguay Round Agreements Act ("URAA," P.L. 103-465, 19 U.S.C. § 3501), which then-President Bill Clinton signed into law on December 8, 1994.

The WTO agreements selected for discussion below are those that are still in effect, impose substantive, rather than purely procedural, requirements on WTO Members, and have been commonly cited in WTO consultations and disputes. As with the overview of the selected provisions of the GATT above, the following section is not a comprehensive list or discussion of all of the agreements that are annexed to the Marrakesh Agreement. Instead, it is intended only as an introduction to the WTO agreements that are frequently mentioned as governing common types of trade measures.

Antidumping Agreement

Article VI of the GATT condemns dumping, the practice of exporting a product at a price lower than the price charged for that product in the exporter's home market, when it causes or threatens material injury to an established industry in the territory of another Member or materially retards the establishment of a domestic industry.[86] The Agreement on Implementation of Article VI of the GATT 1994 (the "Antidumping Agreement") provides substantive and procedural requirements for WTO Members to follow in conducting antidumping investigations and imposing antidumping duties. All WTO Members must inform the Committee on Antidumping Practices when they initiate anti-dumping actions and provide reports on all ongoing investigations. If a Member fails to comply with either the substantive or procedural components of the Antidumping Agreement, it can be taken to WTO dispute settlement. No action against the dumping of exports from another Member can be taken except in accordance with the provisions of the GATT, as interpreted by the Antidumping Agreement.[87]

Antidumping duties may only be imposed by a WTO Member if, following an investigation, that Member determines that a product is being dumped and the dumped imports are causing injury to a domestic industry. Consequently, many WTO disputes center around the validity of how a WTO Member has reached its conclusion about the occurrence of dumping and the size of the duties

[84] Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (Dec. 14, 1999).

[85] However, under the Uruguay Round Agreements Act (URAA, P.L. 103-465, 19 U.S.C. § 3501 *et seq.*), U.S. law prevails over conflicting provisions of WTO agreements until Congress or the executive branch acts to harmonize U.S. law with WTO agreements and rulings. *See* 19 U.S.C. § 3512(a).

[86] GATT, Art. VI:1.

[87] AD Agreement, Art. 18.

necessary to remedy it. In particular, the U.S. practice of using "zeroing"[88] to assess a country's dumping margin has been a frequent subject of WTO dispute settlement proceedings[89] and is discussed later in this report.

Under the Antidumping Agreement, the first step in assessing a dumping margin is calculating the normal value and the export price of the product. The normal value is ordinarily the market price in the country of export.[90] However, there may be circumstances when investigating authorities have authority to use a different method of determining the normal value.[91] The second step in determining the dumping margin is comparing the export price and the normal value. Article 2.4 of the Antidumping Agreement requires this comparison be fair, made at the same level of trade (i.e., ex-factory, wholesale, or retail), and made with sales that occurred, as nearly as possible, at the same time.[92]

Once dumping is established, the Member must determine the presence, or absence, of injury. The Antidumping Agreement only condemns dumping that causes or threatens injury to the domestic industry. Consequently, diagnosing the presence of an injury to a domestic industry resulting from the dumping is critical. This process entails identifying (1) the scope of the domestic industry, (2) whether there is an injury, or threat of injury, to that domestic industry, and (3) whether there is a causal link between the dumping and the industry. In turn, injury can take three forms: a material injury, a threat of material injury, or the material retardation of that domestic industry's establishment.[93]

Under Article 4.1, the scope of the domestic industry flows from the definition of "like product," but does not necessarily include *every* producer of a like product.[94] Instead, for purposes of analyzing the effects of dumping, the domestic industry is simply a group of domestic producers whose combined output is sufficient to constitute a major proportion of domestic production.[95]

Article 3 of the Antidumping Agreement provides a framework under which Members are obligated to conduct their dumping investigations.[96] These obligations are considered *substantive*

[88] Zeroing, which is discussed in greater detail later in this report, involves aggregating the dumping margins for all of the different versions of a single product but assigning the value of zero to each sub-product's dumping margin when that sub-product's export price *exceeds* its normal (home market) value. *See infra* "Antidumping Duties and "Zeroing": Remedies for Imports Sold at Less Than Fair Value." In effect, zeroing means that the margins for sub-products sold at less than their normal value are not offset in a dumping investigation by the margins for sub-products that are sold at more than their normal value. *Id.* Consequently, a dumping margin determined under zeroing is likely to be higher than a dumping margin determined without zeroing. *See id.*

[89] CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by Jeanne J. Grimmett.

[90] AD Agreement, Art. 2.1.

[91] *E.g.*, *id.* at Art. 2.2. (permitting a different method to be used when either there are no sales of like product in the exporting country or the particular market situation does not permit a proper comparison).

[92] Allowances shall be made on a case-by-case basis for certain differences that affect price comparability and, in some circumstances, for costs incurred between transportation and resale and/or profits accruing. AD Agreement, Art. 2.4,

[93] AD Agreement, Art. 3 n. 9.

[94] AD Agreement, Art. 4.1 ("... the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products ...").

[95] *Id.*; Report of the Panel, *Mexico – Antidumping Duties on Steel Pipes and Tubes from Guatemala*, ¶ 7.322, WT/DS331/R (June 8, 2007).

[96] *E.g.*, AD Agreement, Art. 3.1 ("A determination of injury ... shall be based on positive evidence and involve an (continued...)

in WTO law, not merely procedural.[97] Under Article 3.5, the injury suffered by the domestic industry must be shown to be caused by the dumping. Article 3.5 contains a non-attribution requirement: investigating authorities must examine any known factors other than the dumped imports that are injuring the domestic industry at the same time and not attribute the injury caused by these other factors to the dumped imports. This does not necessarily mean that the dumping needs to be the *principal* cause of the domestic industry's injury, but it does ensure that the injury ascribed to the dumped imports is caused wholly by those dumped imports and not by other factors.[98]

Agreement on Subsidies and Countervailing Measures

Like the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures (ASCM) is an agreement meant to expand, clarify, and implement some of the original provisions of the GATT. One of these provisions, Article VI addresses measures taken to offset any subsidy granted to an imported product. The second, Article XVI, requires Members to notify subsidies and be prepared to discuss limiting those subsidies if they cause serious damage to other Members. However, neither Article VI nor Article XVI defines the term "subsidy" or provides clear and comprehensive rules for governments who are either offering, or responding to, subsidies. Consequently, these provisions were deemed vague and inconsistently applied, and support developed for a new, clearer, and more comprehensive agreement on subsidies. Accordingly, the ASCM was developed to discipline Members' use of subsidies and their responses to countering the effects of certain subsidies.

Among the advantages that the ASCM provides over the subsidy provisions of Articles VI and XVI of the GATT is a more precise definition of subsidy. The ASCM defines "subsidy" as a financial contribution by a government or public body within a WTO Member's territory that confers a benefit.[99] A financial contribution may take the form of (1) a direct transfer of funds, such as a grant, loan, or loan guarantee; (2) government revenue (i.e., a tax) "otherwise due" but foregone or not collected; (3) governmental provision of goods or services other than general infrastructure; (4) governmental payments to a funding mechanism or the government's entrusting a private body to carry out at least one of the functions described above.[100] In addition, WTO panels and the Appellate Body have interpreted the word "benefit" broadly to include receipt of a financial contribution on terms that are more favorable than those available to the recipient in the marketplace.[101]

(...continued)

objective examination of both (a) the volume of the imported imports and the effect of the dumped imports ..."); Art. 3.2 ("[T]he investigating authorities shall consider whether there has been a significant increase in dumped imports ..."); Art. 3.4 ("The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing ...").

[97] Appellate Body Report, *Thailand – Anti-dumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, ¶ 106, WT/DS122/AB/R (Mar. 12, 2001).

[98] Van Den Bossche, *supra* note 79, at 536.

[99] ASCM, Art. 1.1.

[100] *Id.*

[101] Report of the Appellate Body, *Canada – Aircraft*, WT/DS70/AB/R ¶ 149 (Aug. 2, 1999) (approving of the WTO panel's finding that a financial contribution only confers a benefit if it is provided on terms that are more advantageous than market terms).

The ASCM entitles a WTO Member to respond to subsidized imports in two ways. One authorized response is to use the WTO dispute settlement process to seek withdrawal of the subsidy or the removal of its adverse effects. The second authorized response is to launch a domestic investigation and ultimately charge an extra duty, known as a countervailing duty, on subsidized imports that are injuring domestic producers. For a subsidy to be remedied under either procedure, it must be specific in law or fact to an enterprise, industry, or group thereof.[102] Prohibited subsidies, as described below, are considered specific *per se*.

The ASCM divides subsidies into two categories: prohibited and actionable. Prohibited subsidies are contingent upon either export performance or the use of domestic over imported products.[103] If a subsidy is deemed prohibited, the WTO dispute settlement body will recommend that the subsidizing Member withdraw the subsidy without delay and specify a time-period in which the measure should be withdrawn.[104]

All other subsidies are actionable, meaning they *may* be subject to dispute settlement or domestic remedies *if* they are used in a way that causes adverse effects to the interests of the complaining Member.[105] There are three types of adverse effects: (1) material injury to the domestic industry of the complaining member; (2) nullification or impairment of the Member's WTO benefits (such as tariff concessions on a particular product); and, (3) serious prejudice to the Member's interests.[106]

Regardless of whether the subsidies are prohibited or actionable, if the defending Member does not remove a subsidy or its adverse effects within a set compliance period, the WTO dispute settlement body may, upon request, authorize the complaining Member to impose new or additional tariffs, known as countervailing duties, against the subsidizing Member's exports.[107] The goal of these countervailing duties is to effectively restore the benefits that are supposed to accrue to the complaining Member under the WTO agreements. As discussed in the later section on domestic investigations of foreign subsidies,[108] Members may also impose countervailing duties against subsidized imports without first requesting consultations and bringing the dispute before a WTO panel. However, when a Member imposes countervailing duties without first

[102] ASCM, Arts. 1.2, 2. In general, under Article 2, a subsidy is specific if it distorts the flow of resources. *See* MARC BENITAH, THE LAW OF SUBSIDIES UNDER THE GATT/WTO SYSTEM, 259 (2001). For example, if the U.S. gives a subsidy to all U.S. industries, that subsidy is not specific because it does not direct more resources to a particular part of U.S. territory. However, that subsidy would be specific if the U.S. gave it to only those industries that are in Alabama. *See* ASCM, Art. 2.2. In that case, the flow of resources would be distorted within the United States since more resources would be directed to one particular state, Alabama. In addition, to geographic distortion, the ASCM is also concerned with distortion among industries, enterprises, and groups of industries or enterprises. However, it can be difficult to define an "industry" or "group of industries." Accordingly, a WTO Panel has suggested that a subsidy to any industry or group of industries is specific unless it is "sufficiently broadly available through an economy as not to benefit a particular limited group of producers of certain products." Report of the Panel, *U.S. – Upland Cotton*, WT/DS267/R, ¶ 7.1142 (Sept. 8, 2004).

[103] ASCM, Art. 3.1.

[104] *Id.* at Art. 4.7.

[105] *Id.* at Art. 5.

[106] *Id.*

[107] These countervailing measures can be imposed on any of the defending Member's exports, but the amount of the countervailing duty must not exceed the full amount of the subsidy. *See* ASCM, Art. 19.2.

[108] *Infra* notes 346-361.

litigating the dispute, it may do so only if it initiates and conducts its investigation of the foreign subsidies in accordance with the provisions of the ASCM.[109]

The interpretation of the ASCM is at issue in the "Boeing-Airbus cases"[110] between the United States and the European Union. The United States first requested dispute settlement proceedings in 2004, alleging that the European Union provided a prohibited subsidy in the form of "launch aid" from the governments of Germany, the United Kingdom, France, and Spain to aid the development, production, and marketing of Airbus planes.[111] Specifically, the United States argued that these member states of the European Union provided launch aid loans at less than commercial rates with repayment. Moreover, if Airbus fails to sell enough aircraft to repay the loans, the member states indefinitely extended or forgave the outstanding balances on the loans.[112] The European Union counterclaimed, alleging that the U.S. also provided illegal subsidies to its aerospace companies via sham contracts with the Department of Defense and NASA, tax breaks from Illinois and Washington states, and bonds from Kansas.[113] On September 4, 2009, the WTO released an interim confidential panel decision responding to the U.S. challenge. The interim report found that some of the EU launch aid was actionable, some prohibited, and some, notably the loans from the European Investment Bank, did not violate the ASCM.[114] In response to the WTO pane's final ruling, Airbus issued a statement conceding that the WTO panel had deemed past launch aid loans from the European Union to constitute a subsidy under the ASCM.[115]

Agreement on Safeguards

A safeguard measure is a temporary restriction imposed on imports to allow a domestic industry time to adjust to import surges. These measures can be applied even in the absence of the unfair trade actions required for antidumping or countervailing duties. Possible safeguards include quotas, tariffs, and tariff rate quotas. Under Article 2.2 of the Agreement on Safeguards, however, a safeguard measure must be product, not country, specific.[116] Because safeguard measures disturb the balance of rights and obligations, the Members affected by a safeguard are entitled to appropriate trade compensation.[117]

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[109] ASCM, Art. 10.

[110] *U.S. – Large Civil Aircraft*, DS137; *EC and Certain Member States – Large Civil Aircraft*, DS136.

[111] Request for Consultations by the United States, *EC – Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/1 (Oct. 12, 2004).

[112] *Id.*

[113] Request for Consultations by the European Communities, *U.S. – Measures Affecting Trade in Large Civil Aircraft*, WT/DS317/1 (Oct. 12, 2004).

[114] *See* Daniel Pruzin, *WTO Panel to Issue Final Ruling in U.S. Complaint Against Airbus in April*, INT'L TRADE DAILY (Dec. 9, 2009); Daniel Pruzin and Gary G. Yerkey, *WTO Panel Issues Preliminary Ruling in U.S. Complaint Against Airbus Subsidies*, INT'L TRADE DAILY (Sept. 8, 2009).

[115] Daniel Pruzin, *WTO Panel Issues Final Ruling Upholding Key U.S. Claims Against European Airbus*, INT'L TRADE DAILY (Mar. 24, 2010). The press release from Airbus is available at http://www.airbus.com/en/presscentre/pressreleases/pressreleases_items/2010_03_23_wto_panel_report.html (last visited May 5, 2010).

[116] In other words, safeguard measures must be applied without discrimination between the Members supplying the product. For example, if the steel industry of Member A suffers serious injury as a result of a sudden surge of imports of steel from Members B and C, Member A, if it chooses to impose a safeguard measure, must impose the measure against imports from *both* Members B and C. Member A cannot choose to overlook the damage caused by Member B's steel industry and impose the safeguard measure only against Member C.

[117] Agreement on Safeguards, Art. 8.1. The amount and character of this compensation is determined by consultation (continued...)

The foundation for both domestic and international safeguard law is Article XIX of the GATT, which permits Members to apply safeguards where two conditions are met: (1) imports are increasing as a result of *both* unforeseen developments and the effect of obligations incurred by Members under GATT, and (2) imports are increasing in such quantities as to cause or threaten serious injury to domestic producers of *like or directly competitive* products.[118] Both the U.S. law on safeguard measures, discussed later in this report, and the WTO Agreement on Safeguards are based on Article XIX.

The Agreement on Safeguards lays out (1) substantive requirements that must be met in order to apply a safeguard,[119] (2) procedural requirements for the application of a safeguard measure,[120] and (3) characteristics of, and conditions relating to, a safeguard measure.[121] Today, all safeguard measures must comply with *both* Article XIX of the GATT and the Agreement on Safeguards.[122]

Under the Agreement on Safeguards, a Member may apply a safeguard measure only when it determines that the product is being imported in such increased quantities as to cause or threaten serious injury to the domestic industry that produces like or directly competitive products.[123] The Appellate Body has clarified the "increased imports" requirement to mean an increase that is "recent, sudden, sharp, and significant."[124] This means that the legality of a safeguard hinges in part on the rate and amount of the increase in the *recent* past. Import trends that precede the *recent* past (e.g., import trends over the previous *five* years rather than the previous two) are not grounds for imposing a safeguard measure, and, if older data and more recent data show conflicting trends, the most recent data on imports takes precedence in a determination of a safeguard measure's legality.[125] Moreover, WTO panels have narrowly interpreted the causation element: the domestic industry's injury must be caused solely by the import surge and not by any other factor.[126]

(...continued)

between the two Members. *Id.* at Art. 12.3. If the Members fail to reach an agreement on compensation, the affected exporting Member may suspend the application of substantially equivalent concessions or other obligations to the trade of the Member applying the safeguard. *Id.* at Art. 8.2.

[118] GATT, Art. XIX:1(a).

[119] *See, e.g.*, Agreement on Safeguards, Art. 2.1.

[120] *See, e.g.*, *id.* at Art. 3 (requiring Members to apply a safeguard measure only after undertaking and publishing an investigation made pursuant to procedures that were previously established and publicly available); Art. 12.1 (requiring Members to immediately notify the WTO when they initiate a safeguard investigation).

[121] *See, e.g.*, Agreements on Safeguards, Art. 7 (limiting the duration of safeguard measures to four years with the possibility of one four-year extension).

[122] Van Den Bossche, *supra* note 79, at 673.

[123] Agreement on Safeguards, Art. 2.1.

[124] Report of the Panel, *U.S. – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, ¶ 8.31 (Jul. 31, 2000). *See also* Report of the Appellate Body, *Argentina-Footwear*, WT/DS121/AB/R p. 47 (Dec. 14, 1999) ("... the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury.'").

[125] Van Den Bossche, *supra* note 79, at 677.

[126] Report of the Panel, *Korea – Safeguard Measure on Imports of Certain Diary Products*, WT/DS98/R, paras. 7.89-7.90 (June 21, 1999) ("[I]f the national authority has identified factors other than increased imports which have caused injury to the domestic industry, it shall ensure that any injury caused by such factors is not considered to have been caused by the increased imports ... the [national] authority has the obligation not to attribute to the increased imports any injury caused by other factors."). This interpretation of the causation element is often referred to as non-attribution.

Agreement on Rules of Origin

Rules of origin are used by WTO Members for a variety of commercial reasons. For example, goods from developing-country Members generally benefit from lower import duties in developed country Members under tariff preference programs. Accordingly, developing countries want to ensure that the importing developed country imposes a tariff on those goods that recognizes that they originated in the country that benefits from the tariff preference. Rules of origin are also used to implement other commercial policy measures, such as origin marking requirements and the application of most favored nation treatment to imported goods. However, in a globalized economy it can be difficult to determine which country is the country of origin of a particular product. While the general standard is where the last "substantial transformation"[127] occurred, countries employ three different standards for determining where that was (1) where a certain percentage of value was added to the good, (2) where the activity occurred that resulted in the product being classified under a different tariff heading, and (3) where a specified production process occurred.[128] Because the rules to determine the origin of imported goods differ among WTO Members with some Members deciding which rule to apply based on the purpose for which the product's origin is being determined, a Member's application of its rules of origin is common fodder for disputes.[129]

Aware of the problems arising from the lack of harmonization from countries' use of different rules of origin, WTO Members agreed during the Uruguay Round to the Agreement on Rules of Origin. The Agreement provides a work program by which Members' negotiate a uniform set of "rules of origin used in non-preferential commercial policy instruments."[130] In other words, it calls on Members to harmonize all rules of origin except for those related to the granting of tariff *preferences* (i.e., more favorable tariff treatment to like products from certain countries).[131] The phrase "non-preferential commercial policy instruments" includes, *inter alia*, most favored nation treatment, antidumping and countervailing duties, and safeguard measures.[132]

Once the Harmonization Work Program is completed, all WTO Members will apply only one set of non-preferential rules of origin for all purposes. However, this work program is currently running more than 10 years behind schedule.[133] Until WTO Members reach an agreement that harmonizes their nonpreferential rules of origin, Article 2 of the Agreement, which governs the application of rules of origin during the "transition period," is the major source of guidance on these rules. Among Article 2's lengthy list of directives is both a national treatment and an MFN

[127] "Substantial transformation" occurs if an imported article is subjected to a manufacturing process that results in the article having a name, character, or use different from the one it had when it was imported. *See* 19 C.F.R. §§ 134.1(d)(1), 134.35.

[128] Rod Falvey and Geoff Reed, *Rules of Origin as Commercial Policy Instruments*, 43 INT'L ECON. REV. 393, 394 (2002).

[129] *E.g.*, Request for Consultations, *U.S. – Certain Country of Origin Labeling Requirements*, WT/DS384/1 (Dec. 4, 2008); Request for Consultations, *U.S. – Rules of Origin for Textiles and Apparel*, WT/DS243/1 (Jan. 22, 2002); Request for Consultations, *U.S. – Tariff Rate Quota for Imports of Groundnuts*, WT/DS111/1 (Jan. 8, 1998).

[130] Agreement on Rules of Origin, Arts. 1.1, 1.2.

[131] This kind of preferential treatment is discussed in greater length in the section on the Generalized System of Preferences. *See infra* notes 388-396.

[132] Agreement on Rules of Origin, Art.t 1.2.

[133] *See Unfinished Rules of Origin Business*, WASH. TRADE DAILY (May 5, 2010); WORLD TRADE ORGANIZATION, WTO ANNUAL REPORT 2009, 41 (2009); Van Den Bossche, *supra* note 79, at 435.

requirement,[134] a prohibition on the use of rules of origin as a primary means of protecting domestic industries or favoring a particular Member's imports,[135] and a requirement that rules of origin not themselves create restrictive, distorting, or disruptive effects on trade.[136] In the name of transparency, Members are also required to notify the WTO Committee on Rules of Origin of their respective rules of origin.[137]

Agreement on Agriculture

Liberalizing agricultural trade is an important and contentious subject in trade negotiations. Consequently, while the GATT 1947 never excluded agriculture, in practice, countries found it mutually convenient to treat agriculture as though it was. The Uruguay Round negotiations changed that by subjecting agriculture to the general provisions of the GATT and to a separate sector-specific agreement (the Agreement on Agriculture). The contentiousness of agricultural support arises because policies in favor of farmers and agricultural producers are often perceived as unfair trade practices that undermine the objectives of the GATT.

The Agreement on Agriculture focuses on three areas: market access,[138] export competition,[139] and domestic support programs for agriculture.[140] In terms of market access, the Agreement requires Members to negotiate tariff schedules for agricultural products and binds them to the market access commitments contained therein.[141] In addition, the Agreement provides Members with the option of using a Special Agricultural Safeguard if either (1) the volume of imports of a product that is the subject of a concession exceeds a set trigger level, or (2) the price of imports of a product that is the subject of a concession falls below a set trigger price.[142] If a Member chooses to impose this safeguard, the additional customs duty can only be maintained until the end of the year in which it was imposed.[143]

As for export competition, the Agreement also imposes schedules of commitments for export subsidies.[144] These schedules require Members to quantify their agricultural subsidies in terms of the money spent and the agricultural products subsidized, cap their subsidies at those amounts, and then lower those caps over a six-year period (1995-2000). The Agreement also requires Members to "work towards the development" of internationally agreed upon standards to discipline the provision of export credits and export credit guarantees, which, generally involve one Member's private financial institutions extending financing to other countries that want to

[134] Agreement on Rules of Origin, Art. 2(d).

[135] *Id.* at Art. 2(b); Report of the Panel, *US – Rules of Origin for Textiles and Apparel Products*, WT/DS243/R, ¶ 6.36 (June 20, 2003).

[136] *Id.* at Art. 2(c).

[137] *Id.* at Art. 2(a).

[138] *See* Agreement on Agriculture, Arts. 4.2, 5.

[139] *See id.* at Arts. 3.3, 9 , 10.2, 10.4.

[140] *See id.* at Arts. 3.1, 3.2, 6.1, 6.4, 6.5.

[141] *Id.* at Art. 4.1.

[142] *Id.* at Art. 5.1. Both Article 5.1 and Article 5.2 govern the "trigger level" and the "trigger price" at which a Member may impose a safeguard.

[143] Agreement on Agriculture, Art. 5.4.

[144] *Id.* at Art. 3.3.

purchase their country's agricultural exports.[145] Finally, with respect to food aid, Members agreed, among other things, to ensure that the provision of international food aid is not tied to commercial exports of agricultural products to the countries receiving the aid.[146]

Articles 6 and 7 of the Agreement govern domestic support, specifically a Member's measures that favor its agricultural producers.[147] These domestic support measures include price supports, input subsidies, and payments based on planting. Article 6 refers to the domestic support commitment schedules, in which Members specified their agricultural support reduction commitments.[148] However, not all domestic support programs need to be included in a Member's calculation of its agricultural support, which permits Members to avoid reducing all of their agricultural support programs.[149] For example, domestic support measures that have, at most, minimal trade-distorting effects or effects on production do not need to be included in a Member's calculation of its agricultural support.[150] These measures include, *inter alia*: domestic food assistance programs (e.g., food stamps), agricultural research, infrastructure services, disaster assistance, and environmental programs.[151] In addition, direct payments under production *limiting* programs do not need to be reduced if either (1) the payments are based on a fixed area and yields, (2) the payments are made on 85% or less of the base level production, or (3) the payments are made on a fixed number of heads of livestock.[152]

For nearly a decade after the Marrakesh Agreement was signed, agricultural subsidies were governed solely by the terms of the Agreement on Agriculture so that they could not be challenged as prohibited or actionable subsidies under the Agreement on Subsidies and Countervailing Measures (ASCM) if they conformed with the Agreement on Agriculture.[153] However, this so-called "Peace Clause" expired at the end of 2003, and agricultural subsidies are now subject to the requirements of the ASCM.

Article 20 of the Agreement on Agriculture calls for continuing negotiations to further liberalize agricultural trade. Those negotiations are underway as part of the Doha Round,[154] which has yet to be concluded.

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[145] *Id.* at Art. 10.2.

[146] *Id.* at Art. 10.4.

[147] *Id.* at Arts. 6.1, 7.

[148] In these commitments, the "Total Aggregate Measurement of Support" (or "Total AMS") refers to the sum of all domestic support provided in favor of agricultural producers. Agreement on Agriculture, Art. 1(h).

[149] *See id.* at Arts. 6.2, 6.4, Annex 2. Article 6.4 states that Members are not required to include in their calculation of Total AMS: "(i) product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of that Member's total value of production of a basic agricultural product during the relevant year; and (ii) non-product-specific domestic support which would otherwise be required to be included in a Member's calculation of its Current AMS where such support does not exceed 5 per cent of the value of that Member's total agricultural production." For developed countries, these 5% levels are the *de minimis* percentage that does not need to be included in their AMS. *See id.* at Art. 7.2(b).

[150] Agreement on Agriculture, Annex 2:1.

[151] *Id.* at Annex 2:2.

[152] *Id.* at Art. 6.5.

[153] *Id.* at Art. 13(a) (stating that "During the implementation period ... domestic support measures that conform fully to the provisions of Annex 2 to this Agreement shall be: (i) non-actionable subsidies for purposes of countervailing duties; [and] (ii) exempt from actions based on Article XVI of GATT and Part III of the Subsidies Agreement....").

[154] The Doha Development Round is discussed at *infra* notes 232-235 and accompanying text.

Agreement on Technical Barriers to Trade

Technical barriers to trade (TBT) are generally certain kinds of measures intended to regulate a product's characteristics or their related production methods. The goal of the WTO Agreement on Technical Barriers to Trade ("TBT Agreement") is to strike a balance between permitting countries to have regulatory autonomy to advance public policy and avoiding unnecessary obstacles to international trade. To achieve that balance, the TBT Agreement disciplines the imposition of technical regulations,[155] standards,[156] and conformity assessment procedures,[157] all of which are most frequently adopted to protect the environment or human health, to ensure the quality of products, to prevent deceptive practices, or to achieve some other legitimate objective. The key difference between technical regulations and standards is that compliance with the former is mandatory while compliance with the latter is voluntary.[158] Conformity assessment procedures (CAPS), on the other hand, are the procedures used to determine compliance with either a technical regulation or a standard.[159]

The TBT Agreement covers both agricultural and manufactured products, but it does not apply to sanitary and phytosanitary measures, which are discussed below. Typical TBT measures covered by the Agreement are ingredient labeling requirements for food products or pharmaceuticals, regulations of the volume and appearance of packaging, and labeling or packaging requirements for dangerous chemicals or toxic substances. There is debate, however, over whether the TBT Agreement also applies to process or production methods that do not affect the characteristics of the final product that is put on the market.[160] For example, it is unclear whether the TBT Agreement covers technical regulations that distinguish between products solely upon the environmental effects caused by their manufacturing processes.[161]

The TBT Agreement has different provisions for each of the three technical barriers to trade that it regulates: standards, technical regulations, and conformity assessment procedures. To the extent that the TBT Agreement has been the subject of WTO consultations and disputes, most of the resulting case law interprets the provisions addressing technical regulations.

There are four basic substantive provisions relating to technical regulations: (1) in applying technical regulations, Members must provide MFN status to other Members' products;[162] (2) in applying technical regulations, Members must ensure that they do not violate the national

[155] A "technical regulation" lays down product characteristics or their related processes and production methods with which compliance is mandatory. For example, it could include or be limited to "terminology, symbols, packaging, marking, or labeling requirements as they apply to a product, process, or production method." TBT Agreement, Annex 1.1.

[156] Compliance with standards is voluntary, unlike compliance with technical regulations. *Compare* TBT Agreement, Annex 1.2 *with* TBT Agreement, Annex 1.1.

[157] A "conformity assessment procedure" is a procedure used "to determine that relevant requirements in technical regulations or standards are fulfilled." TBT Agreement, Annex 1.3.

[158] *Compare* TBT Agreement, Annex 1.1 *with* TBT Agreement, Annex 1.2.

[159] TBT Agreement, Annex 1.3.

[160] Van Den Bossche, *supra* note 79, at 808.

[161] Andrew Mitchell and Christopher Tran, *The Consistency of the EU Renewable Energy Directive with the WTO Agreements* 11 (Georgetown Law and Econ. Research Paper No. 1485549, 2009), *available at* http://scholarship.law.georgetown.edu/fwps_papers. *See* HEINRICH WOHLMEYER, THE WTO, AGRICULTURE, AND SUSTAINABLE DEVELOPMENT 128-29 (2002).

[162] TBT Agreement, Art. 2.1.

treatment principle (i.e., Members must not accord imported products less favorable treatment than that accorded to like products of national origin);[163] (3) Members must ensure that technical regulations are not prepared, adopted, or applied with a view to, or effect of, either being more trade restrictive than necessary to fulfill a legitimate objective or creating unnecessary obstacles to international trade;[164] and (4) Members should base their technical regulations on international standards unless international standards would, because of unique country conditions, result in ineffective or inappropriate regulations.[165]

Finally, in an effort to increase the transparency of countries' TBT measures, Article 2.9.1 requires Members to publish notice, as early as possible, of the technical content of a proposed technical regulation if that regulation either was created in the absence of an international standard, deviates from the content of the relevant international standard, or may have a significant effect on the trade of other Members. Moreover, in formulating the technical regulation, a Member must allow reasonable time for other Members to make comments in writing, discuss these comments upon request, and take these written comments and the results of the discussions into account.[166]

Agreement on Sanitary and Phytosanitary Measures

Sanitary and phytosanitary measures ("SPS measures") are measures intended to protect human, animal, or plant life or health from food-safety risks and other risks relating to pests or diseases. They include, for example, bans on imported beef to prevent the spread of mad cow disease or a food-safety regulation requiring all imported chicken meat to be heated to a certain temperature for a specified length of time.[167]

While SPS measures can be thought of as a subset of technical barriers to trade, as noted above, a measure can not be covered by both the SPS and the TBT Agreements.[168] Therefore, SPS and TBT measures are mutually exclusive for the purposes of applying WTO obligations.[169]

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[163] *Id.*

[164] *Id.* at Art. 2.2.

[165] *See id.* at Art. 2.4. In *EC-Sardines*, the Appellate Body explained that an *ineffective* technical regulation is one that lacks the capacity to accomplish all of the objectives pursued, and an *inappropriate* technical regulation is one that is not suitable for the fulfillment of all of the objectives pursued. Appellate Body Report, *EC-Sardines*, WT/DS231/AB/R, p.83 (Sept. 26, 2002).

[166] TBT Agreement, Art. 2.9.4. The United States SPS Enquiry Point is under the U.S. Department of Agriculture's Foreign Agricultural Service. The WTO Committee on Sanitary and Phytosanitary measures releases a downloadable list of Members' enquiry points, which is available on the WTO Documents Online website. *E.g.*, Committee on Sanitary and Phytosanitary Measures, *National Enquiry Points. Note by the Secretariat* G/SPS/ENQ/25 (Oct. 15, 2009) *available at* http://docsonline.wto.org/gen_search.asp?searchmode=simple (enter document symbol G/SPS/ENQ/25) (last visited Feb. 17, 2010). An alphabetical list of Members' enquiry points for the TBT Agreement is also posted online. Committee on Technical Barriers to Trade, *National Enquiry Points. Note by the Secretariat* G/TBT/ENQ/36 (Feb. 5, 2010) *available at* http://www.wto.org/english/tratop_e/TBT_e/tbt_enquiry_points_e.htm (last visited Feb. 17, 2010).

[167] For more on SPS measures and concerns, read CRS Report RL33472, *Sanitary and Phytosanitary (SPS) Concerns in Agricultural Trade*, by Geoffrey S. Becker.

[168] *Id.* at Art. 1.5. *See* Report of the Panel, *EC – Measures Concerning Meat and Meat Products*, WT/DS26/R/USA, ¶8.29 (Aug. 18, 1997) ("Since the measures in dispute are sanitary measures, we find that the TBT Agreement is not applicable to this dispute.").

[169] Consequently, dispute settlement proceedings involving the TBT and SPS Agreements may require resolution of whether the measure in question is best characterized as a TBT or an SPS measure. Because it is more difficult to prove (continued...)

Article 2.2 of the SPS Agreement bars SPS measures that are (1) not based on scientific principles, (2) maintained without sufficient scientific evidence, or (3) applied more broadly than is necessary to protect human, animal, or plant life or health. Article 2.3 borrows language from the chapeau of Article XX of the GATT by barring SPS measures that (1) "arbitrarily or unjustifiably discriminate" between Members where identical or similar conditions prevail or (2) are applied in a manner that constitutes a "disguised restriction" on international trade.

In line with Article 2, Article 3.1 of the SPS Agreement instructs Members to base their SPS measures on international standards, guidelines, or recommendations where they exist. Three sources of international standards are: the Codex Alimentarius Commission (CODEX), the World Organization for Animal Health (OIE), and the International Plant Protection Convention (FAO). SPS measures that conform to these organizations' international standards or guidelines are deemed necessary and presumed consistent with both the SPS Agreement and the GATT.[170] If there is not a relevant international standard, Members may still apply SPS measures to imports so long as the measures are based on sufficient scientific evidence.[171] If the scientific evidence is insufficient, Members may *provisionally* adopt SPS measures on the basis of the available information but must seek to obtain additional information for a more objective assessment of the risk and review the SPS measure within a reasonable period of time.[172]

As with the TBT Agreement, the SPS Agreement seeks to increase the transparency of a Member's SPS regulatory regime so that countries can identify relevant SPS measures and respond accordingly. Consequently, the SPS Agreement requires each Member to establish an Enquiry Point, which responds to other Members' reasonable questions about a country's SPS regulations and notifies other Members of new or changed SPS regulations when the regulation will significantly affect trade and either no relevant international standard exists or the new regulation differs from the relevant international standard.[173]

General Agreement on Trade in Services

The General Agreement on Trade in Services (GATS) is designed to liberalize trade in services. Unlike international trade in goods, which is largely governed by measures imposed at countries' borders, trade in services tends to be governed mostly by internal regulations. Internal regulations might, for example, restrict the number of drugstores allowed within a geographical area, define technical safety requirements for airline companies, or prohibit banks from selling certain financial products.[174] As this list suggests, the GATS disciplines a wide range of domestic measures, but some of its provisions, including those on market access and national treatment, are

(...continued)

that a measure is valid under the SPS Agreement, the defending Member will generally try to characterize it as a TBT measure rather than an SPS measure. Scott Anderson, Partner, Sidley Austin LLP, Lecture at Georgetown University Law School's Academy of WTO Law and Policy (Nov. 19, 2009). *See also* Van Den Bossche, *supra* note 79, at 840 ("[I]t could be to the advantage of a complaining Member to challenge a measure under the SPS Agreement rather than the TBT Agreement.")

[170] SPS Agreement, Art. 2.2.

[171] *See id.* at Arts. 2.2, 5.1.

[172] *Id.* at Art. 5.7.

[173] *Id.* at Annex B para. 3, Art. 7.

[174] Van Den Bossche, *supra* note 79, at 477.

limited by the scope of each country's commitments, which are defined in the national schedules and subject to progressive reduction .[175]

If the specific service sector being regulated by a Member's measure is not exempted or excluded from the relevant provisions of the GATS, the GATS disciplines a broad swath of domestic measures affecting trade in that service sector. The GATS does not define "service," however, and, instead, regulates the supply of a service in four "modes": (1) from a service supplier in one Member to a consumer in another Member without travel (e.g., an architecture firm mails blueprints to a consumer overseas), (2) in the territory of one Member to a consumer of any other Member (e.g., in the U.S. to a foreign tourist), (3) by a service supplier of one Member with a commercial presence in the territory of any other member (e.g., by a commercial bank with branches in a foreign country), and (4) by a service supplier of one Member travelling temporarily to provide services in another Member (e.g., by a consultant on an overseas business trip).[176]

Among the measures that affect trade in services and are subject to the GATS are laws, regulations, procedures, and administration actions that concern the purchase, payment, or use of a service and are issued by a central, regional, or local government.[177] Only measures affecting the supply of services in the exercise of governmental authority are excluded from GATS obligations.[178] By broadly defining "service" and "supply of service," the GATS disciplines not merely measures affecting the supply of the actual service (e.g., a measure regulating the supply of accounting services to an overseas firm) but also measures affecting the production, distribution, marketing, sale, and delivery of that service.[179]

Because the GATS permits Members to specify how they will reduce market access barriers to trade in services, whether a particular measure is GATS-inconsistent generally hinges on the scope of the national schedules of commitments of the Member imposing the measure. Unlike the GATT, under which the nondiscrimination provisions apply to goods from *all* Members, the GATS permits Members to schedule (1) exemptions from the Most Favored Nation (MFN) treatment obligation,[180] and (2) specific service sector commitments to the national treatment obligation.[181] As a result, each Member limits the scope of its obligations not to discriminate between services provided by firms from different Members and between services provided by foreign, rather than domestic, firms.[182] In addition to its basic obligations and Members' national schedules of commitments, the GATS also contains a number of annexes addressing the special situations of individual services sectors.

The GATS does not compel a government to privatize services industries or outlaw government or private monopolies. However, the GATS is concerned with increasing transparency.

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[175] *See id.*

[176] GATS, Art. I:2.

[177] *Id.* at Art. XXVIII.

[178] *Id.* at Art. I:3(b).

[179] *Id.* at Art. XXVIII(b).

[180] *Id.* at Arts. II:1; V, V *bis*.

[181] GATS, Arts. XVI, XVII, XXI.

[182] Furthermore, Article XXI of the GATS allows a WTO Member to modify or withdraw any of its scheduled commitments once three years have elapsed from the date the commitment entered into force, subject to certain conditions, including possible compensation to Members affected by the change.

Consequently, similar to the Agreements on Technical Barriers to Trade and Sanitary and Phytosanitary Measures, Article III of the GATS requires governments to publish all relevant laws and regulations and to set enquiry points that can provide foreign companies and governments with information about entering and competing in a service sector.[183] This is particularly important because the services sectors may be regulated by multiple government entities at both the national and local levels. Consequently, service providers seeking to do business internationally may be stymied by a lack of transparency in how a country licenses its service providers or regulates service delivery. U.S. service providers continue to cite the lack of transparency in the development and implementation of foreign countries' regulations as a primary obstacle to increasing foreign trade in services. If the policy goals behind the GATS are achieved, Members' will presumably have an improved understanding of all other Members' services regulations.[184]

Agreement on Trade-Related Intellectual Property Rights

The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) sets minimum standards for the intellectual property rights that WTO Members must offer their nationals and the enforcement of those rights. Developing countries, however, have delayed compliance periods.

The basic tenet of TRIPS is the extension of most-favored-nation status and national treatment to intellectual property rights (IPR). Consequently, any advantage in IPR protection granted to nationals of one WTO Member must be granted to nationals of all other WTO Members, and Members must treat nationals of other WTO Members no less favorably in terms of IPR protection than they treat their own nationals.[185] The term "nationals" in the TRIPS Agreement refers to natural or legal persons that are either domiciled in a particular country or have a real and effective industrial or commercial establishment there.

Prior to the TRIPS Agreement, intellectual property rights were primarily regulated at the international level by treaties administered by the World Intellectual Property Organization (WIPO). Most of the obligations of the WIPO treaties are now incorporated by reference into Articles 2.1 and 9.1 of the TRIPS Agreement so that compliance with the WIPO treaties remains the baseline for compliance with the TRIPS Agreement.[186] However, the TRIPS Agreement also builds on WIPO treaties by establishing additional minimum obligations, most notably in the areas of copyright, trademarks, geographical indications,[187] patents, and undisclosed information (i.e., trade secrets).[188] The TRIPS Agreement also has "exception clauses," which permit WTO

[183] *Id.* at Art. III:1, 4. The WTO Council for Trade in Services releases an alphabetical list of each Member's enquiry points, which is available on the WTO Documents Online website. *E.g.*, Council for Trade in Services, *Contact and Enquiry Points Notified to the Council for Trade in Services. Note by the Secretariat.* S/ENQ/78 (Mar. 23, 2001) *available at* http://docsonline.wto.org/gen_search.asp?searchmode=simple (enter document symbol S/ENQ/78). The United States' enquiry point is the Chair of the Trade Policy Sub-Committee on Services in the Office of the United States Trade Representative. *Id.* at p. 20.

[184] *See* GATS, pmbl.

[185] TRIPS, Arts. 3, 4.

[186] *See id.* at Arts. 2.1, 9.1.

[187] "Geographical indications" are essentially the labels that identify a good as originating in a particular territory, region, or locality to which a certain quality, reputation, or other characteristic of the good is generally attributed. For example, a geographical indication is the label that identifies a bottle of sparkling wine as "Champagne" or a bottle of whiskey as "Kentucky bourbon."

[188] In addition, the TRIPS Agreement is arguably a better tool for creating uniform international IPR protection (continued...)

Members to pass measures that authorize particular forms of IPR "infringement" without running afoul of TRIPS Agreement obligations.[189]

In an early dispute over an exception clause, the European Communities alleged that Section 110(5) of the U.S. Copyright Act of 1976 (P.L. 94-443, 17 U.S.C.§101 *et seq*.) as amended by the Fairness in Music Licensing Act of 1998 (P.L. 105-298) was inconsistent with the TRIPS Agreement because it permitted the playing of radio and television music in certain retail, drinking, and food service establishments without the payment of a royalty fee.[190] The U.S. argued that these exceptions were permissible under the TRIPS Agreement because they were covered by Article 13, which permits WTO Members to create limited exceptions to the exclusive rights of copyright holders.[191] The panel found that Article 13 permits a WTO Member to provide exceptions to the exclusive rights of copyright holders only if (1) those exceptions are clearly defined,[192] (2) when utilized, those exceptions do not create economic competition with the ways that right holders normally extract economic value from copyrights and thereby deprive them of significant or tangible commercial gains,[193] and (3) when utilized, those exceptions do not cause or have the potential to cause an unreasonable loss of income to the copyright owner.[194]

Applying this standard, the panel found that one, but not both, of the exceptions contained in Section 110(5) were covered by Article 13. Specifically, the panel stated that the "homestyle" exception, which allows small restaurants and retail outlets to amplify music broadcasts with equipment commonly used in private homes without authorization or payment of a royalty to the copyright holder, met the requirements of Article 13. In reaching this conclusion, it noted that only a small percentage of all eating, drinking, and retail establishments in the U.S. was eligible to use the exception and this small group was further narrowed by the additional requirement that they use "homestyle" equipment (i.e., commonly available stereo systems).[195] In contrast, the "business" exception, which allowed food service, drinking, and small retail establishments to amplify copyrighted music without authorization or payment of a fee, did not meet the

(...continued)

standards. There are 13 WIPO treaties covering intellectual property rights and member states can pick and choose which of those treaties to join. As a result, the country of Guinea, for example, has chosen to sign only four of the 13 WIPO treaties dedicated to defining basic standards of intellectual property protection, whereas the United States has chosen to sign nine. Consequently, under the WIPO treaty regime, not all countries incurred the same breadth of IPR obligations. However, all WTO Members incurred the same breadth of IPR obligations because all WTO Members must sign the TRIPS Agreement. Consequently, as a WTO Member, Guinea will be obligated to comply with all of the standards defined in the TRIPS Agreement once its compliance period has passed, even though it declined to adopt some of those standards in the context of WIPO treaties. For a list of WIPO treaties and member states, visit http://www.wipo.int (last visited Jan. 28, 2010).

[189] *E.g.*, TRIPS, Arts. 13 (permits measures inconsistent with TRIPS Agreement copyright obligations), 17 (permits measures inconsistent with TRIPS Agreement trademark obligations), 26.2 (permits measures inconsistent with TRIPS Agreement industrial design obligations), 30 (permits measures inconsistent with TRIPS Agreement patent obligations). For more on intellectual property rights and international trade, read CRS Report RL34292, *Intellectual Property Rights and International Trade*, by Shayerah Ilias and Ian F. Fergusson.

[190] Report of the Panel, *U.S. – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R, paras. 2.1-2.10 (June 15, 2000).

[191] *Id.* at paras. 3.3-3.4 (June 15, 2000). *See* TRIPS, Art. 13 ("Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.").

[192] Report of the Panel, *U.S. – Section 110(5) of the U.S. Copyright Act*, WT/DS160/R, ¶ 6.113 (June 15, 2000).

[193] *Id.* at paras. 6.165, 6.183.

[194] *Id.* at paras. 6.226-6.229.

[195] *Id.* at paras. 6.143, 6.145.

requirements of Article 13 because a substantial majority of U.S. eating and drinking establishments and close to half of all U.S. retail establishments could make use of the exception.[196]

Dispute Settlement Understanding

The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (Dispute Settlement Understanding or DSU) significantly strengthened the earlier GATT dispute settlement mechanism. The DSU creates a Dispute Settlement Body (DSB) with representatives of all the WTO Members, which administers the WTO dispute settlement system.

If a Member wants to challenge another Member's trade practices, it submits a written request for consultation to the DSB identifying the measures at issue and the legal basis for the complaint.[197] A consultation is an opportunity to settle the dispute without a panel being established. It is confidential and will not work prejudice on either Member in any further proceedings.[198]

If consultations fail to resolve the dispute within 60 days, or one party refuses to enter them, the complaining party may request a panel.[199] If the DSB establishes a panel, that panel is authorized to receive pleadings and rebuttals, hear oral arguments, and engage in other forms of fact development.[200] The panel then issues an interim report on which the two parties can comment.[201] A final report addressing, if not adopting, the parties' comments follows.[202]A party to the dispute can appeal the legal interpretations or findings in a final report to the Appellate Body.[203] Subject to the "negative consensus rule," the DSB will ultimately adopt the findings of the panel, or, if the panel's decision was appealed, those of the Appellate Body.[204] The negative consensus rule states that these findings should be adopted unless they are rejected by a consensus of Members on the DSB.[205]

After adoption, the Member deemed in violation of a WTO obligation will generally be given a reasonable period of time to bring its measures into compliance (usually between eight and 15 months).[206] If the measures are not brought into compliance or the adequacy of compliance is disputed, the parties may negotiate a settlement providing for compensation (i.e., additional trade concessions) to the injured party.[207] If these negotiations fail, the complaining Member may then

[196] *Id.* at ¶6.133.

[197] DSU, Art. 4.

[198] *Id.* at Art. 4:6.

[199] *Id.* at Art. 4:3, 7. But note that in cases of urgency, including those which concern perishable goods, the consultation and panel proceedings are accelerated to the greatest extent possible. *Id.* at Arts. 4:8, 9.

[200] *See id.* at Art. 13.

[201] DSU, Art. 15.

[202] *Id.* at Art. 16.

[203] *Id.* at Art. 17.

[204] *Id.* at Art. 17:14.

[205] The negative consensus rule applies at other points in the dispute settlement process as well. For example, if a consensus of Members on the DSB rejects the establishment of a panel, no panel will be established. Similarly, if a consensus of Members on the DSB rejects the authorization of a requested countermeasure against a Member who has not complied with a WTO decision, the complaining Member's request for authorized retaliation will be denied.

[206] *Id.* at Art. 21:3.

[207] DSU, Art. 22:2.

seek authority from the DSB to retaliate, namely to suspend some of its WTO obligations that benefit the defending Member.[208]

The WTO Plurilateral Agreements

The preceding sections of this report discussed the multilateral agreements contained in the Marrakesh Agreement. All countries must accept those agreements as a condition of WTO membership. However, some WTO agreements are called "plurilateral agreements," which indicates that a country is not required to accept them as a condition of WTO membership.[209] Consequently, only some Members, including the United States, have agreed to the two plurilateral agreements discussed below. These agreements are contained in Annex 4 of the Marrakesh Agreement. Initially there were four plurilateral agreements in Annex 4, but both the International Dairy Agreement and the International Bovine Meat Agreement terminated in 1997.

Agreement on Government Procurement

To date, 40 countries have signed the Agreement on Government Procurement (AGP) and several more (notably China, Jordan, and Moldova) are currently negotiating accession to it.[210] The AGP seeks to grant foreign suppliers of goods and services increased access to government procurement opportunities. To achieve this goal, the AGP is designed to both reduce laws and regulations that discriminate against foreign products or services and increase the transparency of government procurement procedures.[211]

The general obligations of the AGP only apply to government contracts with a value exceeding the monetary threshold for the procuring entity.[212] These thresholds are identified in the five annexes contained in Appendix I so that Annex 1 contains the threshold for central government entities, Annex 2 contains the threshold for sub-central government entities, etc.[213] For procurement contracts exceeding these thresholds, Article III of the AGP provides that each party must provide to the products, services, and suppliers of other parties treatment no less favorable than that which is accorded to (1) domestic products, services, and suppliers, and (2) products, services, and suppliers of any other party.[214] Each party must ensure that its entities do not treat

[208] *Id.* For more on dispute settlement in the WTO, read CRS Report RS20088, *Dispute Settlement in the World Trade Organization (WTO): An Overview*, by Jeanne J. Grimmett.

[209] In the WTO context, there are multilateral and plurilateral trade agreements, but outside of the WTO context, two other kinds of trade agreements exist: bilateral agreements (which bind only two countries) and regional agreements (which bind countries within a discrete region of the world).

[210] Note that countries who are not parties to the AGP frequently have similar obligations under regional or free trade agreements, which, in some cases may even be stricter than the obligations contained in the AGP.

[211] For a thorough overview of U.S. procurement obligations under the AGP and regional free trade agreements, read CRS Report RL32211, *International Government-Procurement Obligations of the United States: An Overview*, by Todd B. Tatelman.

[212] AGP, n. 2. Every two years the Office of the United States Trade Representative determines and publishes the procurement thresholds for the implementation of various international procurement agreements, including the AGP. *E.g.*, Procurement Thresholds for Implementation of the Trade Agreements Act of 1979, 74 Fed. Reg. 68,907 (Dec. 29, 2009). Currently, the threshold for goods and services procured by the government of the United States in a process governed by the AGP is $203,000. *Id.* This threshold applies until December 31, 2011.

[213] *Id.* at n. 1. However, the breadth of states' commitments in these annexes varies widely, and, to date, 12 U.S. states have made no commitments to the AGP.

[214] *Id.* at Art. 3:1.

locally established suppliers less favorably on the basis of foreign affiliation or ownership.[215] Moreover, parties may not discriminate against locally-established suppliers on the basis of the country of production of the good or service in question if that country is a party to the AGP.[216] Similarly, Article IV mandates that the rules of origin applied for the purposes of government procurement be the same as the rules of origin applied in the normal course of trade at the time of the transaction in question.[217]

Article V provides limited exemptions from these AGP obligations to address the special financial and trade needs of developing countries. For example, developing countries may negotiate with other parties mutually acceptable exclusions from the rules on national treatment for certain entities, products, or services.[218] In addition, developed countries, including the United States, have established their own limited exemptions from the AGP in the annexes to the AGP.[219]

Article VI requires that technical specifications prescribing the characteristics (such as quality, performance, safety, dimensions, symbols, packaging, marking, or labeling) of either the products or services to be procured must not be prepared, adopted, or applied with a view to or effect of creating unnecessary obstacles to trade.[220] Instead, they must be written in terms of performance and based on international standards if possible, or, if no international standards are available, on national technical regulations, or recognized national standards.[221]

As for transparency, Article IX requires the Parties' entities to publish an invitation to participate in all cases of intended procurement.[222] Each notice of proposed procurement must state (1) the contact point with the entity from which further information may be obtained; (2) the subject matter of the contract; (3) the time-limits set for the submission of tenders or an application to be invited to tender; and (4) the addresses from which documents relating to the contracts may be requested.[223] Additionally, when it is possible to provide other information (e.g., any economic or technical requirements or any options for further procurement), Article IX requires its inclusion in the notice as well.[224]

Article XX and XXI govern the procedures for challenging a breach of the AGP. Article XX requires Parties to provide timely, transparent, and effective procedures that enable suppliers to challenge alleged breaches of the AGP in the context of procurements in which they have, or have had, an interest.[225] Parties must provide suppliers with the opportunity for their challenges to a procurement process or decision to be heard by a court or impartial and independent review

[215] *Id.* at Art. III:2(a).

[216] *Id.* at Art. III:2(b).

[217] AGP, Art. IV:1.

[218] *Id.* at Art. V, V:4.

[219] *E.g.*, *id.* at United States Annex IV (excluding all transportation and dredging services, among others, from the AGP). These exceptions are what prevent U.S. laws with narrow "buy American" provisions from running afoul of the AGP. For more on the Buy American Act, 41 U.S.C. §§ 10a through 10d, read CRS Report 97-765, *The Buy American Act: Requiring Government Procurements to Come from Domestic Sources*, by John R. Luckey.

[220] *See* AGP, Art. VI:1. However, there are exceptions to this provided in the annexes.

[221] *Id.* at Art. V:2.

[222] *Id.* at Art. IX: 1. There are some exceptions to this rule in Article XV. *Id.*

[223] *Id.* at Art. IX:7, 8.

[224] AGP, Art. IX:6.

[225] *Id.* at Art. XX:2.

body.[226] If a Party, rather than a supplier, wishes to challenge the failure of another Party to carry out its AGP obligations, it can rely on the Dispute Settlement Understanding to initiate consultations.[227]

WTO panels have rendered very few decisions in the government procurement area. Nevertheless, one of the most famous dispute settlement proceedings involving the AGP arose out of a Massachusetts law (An Act Regulating State Contracts with Companies Doing Business with or in Burma, 1996 Mass. Acts 239, ch. 130) that barred state entities from procuring goods or services from any person or business organization doing business with Burma. The European Union commenced dispute settlement proceedings against the U.S. on the grounds that the Massachusetts law would prevent certain European companies from bidding on government contracts in Massachusetts, in violation of the AGP.[228] However, the European Union suspended those proceedings when the U.S. Supreme Court held that the law was pre-empted by a federal statute imposing sanctions on Burma (Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997, P.L. 104-208, 110 Stat. 3009).[229]

Agreement on Trade in Civil Aircraft

The Agreement on Trade in Civil Aircraft ("Aircraft Agreement"), which entered into force on January 1, 1980, predates the formation of the WTO. It remains, however, as one of the two WTO plurilateral agreements that are in force for WTO Members who have accepted it. Thirty countries, including all major aircraft manufacturing and exporting countries, are signatories to this agreement,

The Aircraft Agreement seeks to establish an international framework to encourage continued technological development of aeronautics, provide fair and equal competitive opportunities for civil aircraft producers of the signatory nations, and eliminate some of the adverse trade effects resulting from governmental support of civil aircraft development, production, and marketing. Specifically, the Aircraft Agreement requires signatories to eliminate tariffs on civil aircraft, engines, flight simulators, and related parts, and to provide these benefits on a nondiscriminatory basis to other signatories.

Article 4 of the Aircraft Agreement forbids signatories from requiring or unduly pressuring airlines and aircraft manufacturers to procure civil aircraft from a particular source that would create discrimination against suppliers from any other signatory.[230] Article 5 forbids quantitative restrictions and other licensing requirements that would restrict imports and exports of civil aircrafts in a manner that is inconsistent with the GATT. Article 6 requires signatories to apply the provisions of the Agreement on Subsidies and Countervailing Measures (ASCM) to their civil aircraft industries, which explains why the Boeing-Airbus disputes[231] deal largely with the ASCM rather than the Aircraft Agreement.

[226] *Id.* at Art. XX:2, 6.

[227] *Id.* at Art. XXI.

[228] M.J. TREBILCOCK AND ROBERT HOWSE, THE REGULATION OF INTERNATIONAL TRADE 584 (2005).

[229] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372-74 (2000).

[230] Agreement on Trade in Civil Aircraft, Art. 4.2.

[231] *U.S. – Large Civil Aircraft*, DS137; *EC and Certain Member States – Large Civil Aircraft*, DS136.

The Doha Development Round

While the Marrakesh Agreement marked the completion of the Uruguay Round, it also committed Members to reopen negotiations on agriculture and services at the beginning of the 21st century. Accordingly, new negotiations began in early 2000 and were expanded into a new WTO Round the following year. November 2009 marked the eighth year of the Doha Development Round, making it the longest-running negotiation in the postwar era.

The Doha Ministerial Declaration is effectively the charter for the Doha Round of talks.[232] It urges Members to focus on the unique concerns of developing and least-developed countries in the negotiations. Hence, the Doha Round is formally known as the Doha Development Round. The Declaration states that negotiations should be conducted transparently and open to all Members as well as to states and customs territories that are currently in the process of accession.[233] In addition to the needs of developing and least-developed countries, top items on the Doha Round's agenda are trade in agriculture,[234] non-agricultural market access (sometimes called "NAMA"),[235] and trade in services.

All of the agreements under negotiation must be adopted as one final agreement. Consequently, until the Doha Round of negotiations is concluded, the few agreements that Members have reached cannot be permanently implemented. Concluding negotiations in the Doha Round, however, has proven difficult because of the number of countries involved and the differences between them. Commentators have drawn different conclusions from the lack of finality: some worry it portends the demise of the multilateral trading system, while others think it merely reflects a shift in how multilateral negotiations are conducted.

Free Trade Agreements in Effect and Pending Congressional Approval

A free trade agreement is an agreement involving two or more trading partners under which trade barriers are reduced or eliminated. The U.S. first entered free trade agreements with Israel and Canada respectively. Today, the United States has free trade agreements with 17 countries, including nations in Asia, the Middle East, South and Central America, and Africa.

Any free trade agreement is non-self-executing, meaning that these agreements have no legal effect domestically until legislation implementing the agreement is enacted.[236] Because congressional action is necessary to approve a free trade agreement, these agreements and their implementing legislation are called congressional-executive agreements.[237]

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[232] For more on the Doha Development Agenda, see CRS Report RL32060, *World Trade Organization Negotiations: The Doha Development Agenda*, by Ian F. Fergusson.

[233] Doha Ministerial Declaration, paras. 48, 49 (Nov. 14, 2001).

[234] For more on the implications of the Doha Round on U.S. Agriculture, see CRS Report RS22927, *WTO Doha Round: Implications for U.S. Agriculture*, by Randy Schnepf and Charles E. Hanrahan.

[235] For more on the Doha Round's non-agricultural market access negotiations, see CRS Report RL33634, *The World Trade Organization: The Non-Agricultural Market Access (NAMA) Negotiations*, by Ian F. Fergusson.

[236] 19 U.S.C. § 2903.

[237] For a more in-depth explanation of the difference between congressional-executive agreements and treaties, read CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather* (continued...)

The following discusses the only two regional free trade agreements to which the United States is a party: the North American Free Trade Agreement (NAFTA) and the Dominican-Republic Central America-United States Free Trade Agreement (DR-CAFTA). It then addresses pending free trade agreements and the negotiations for a third regional free trade agreement: the Trans-Pacific Partnership Agreement. The United States is a party to 15 *bilateral* free trade agreements, which are listed on the United States Trade Representative's website.[238]

This report discusses only a few selected provisions of the following trade agreements. The United States negotiates free trade agreements that, more or less, comport with the "model FTA" developed by the Office of the U.S. Trade Representative (USTR). This model FTA evolved out of the NAFTA framework and the trade agreement negotiating objectives mandated by Congress.[239] Under this model, the United States pursues trade liberalization in trade in goods through provisions on nondiscrimination, tariff reduction, sanitary and phytosanitary measures, technical barriers to trade, and other obligations that resemble those found in the GATT and WTO agreements on trade in goods. In addition, the model FTA covers trade in services, with specialized provisions on telecommunications and financial services, investment, government procurement, competition policy, trade remedies, the scope and enforcement of intellectual property rights, and dispute settlement.[240] Finally, provisions on labor rights and environmental cooperation have become increasingly standard, and there seems to be a movement toward establishing anti-corruption and electronic commerce obligations as well.[241] While the text of the free trade agreements generally establishes each country's obligations, the contracting countries reserve exceptions to these obligations in the annexes. Consequently, a full understanding of each country's obligations under a free trade agreement comes from reading both the body and the annexes to each agreement.

The free trade agreement chapters selected for discussion below, namely investment, intellectual property, and labor, illustrate notable processes and trends in the evolution of the model FTA. Investment has always been a crucial chapter for U.S. free trade agreements, but the language of the model provisions has changed over time to reflect concern that initial NAFTA arbitral tribunals' interpretations of these provisions overly limited government regulatory power.[242] The core investment provisions of NAFTA have, in turn, been renegotiated and redrafted to incorporate the NAFTA parties' understanding of the concepts.[243] In the case of intellectual property rights, the model FTA has increasingly expanded the rights of intellectual property holders beyond those required by the Trade-Related Intellectual Property Rights Agreement and NAFTA.[244] Finally, the model FTA's approach to labor issues has evolved from addressing labor

(...continued)

Than as Treaties, by Jeanne J. Grimmett.

[238] Office of the United States Trade Representative, Free Trade Agreements, http://www.ustr.gov/trade-agreements/free-trade-agreements (last visited May 6, 2010).

[239] *See* C. O'Neal Taylor, *Of Free Trade Agreements and Models*, 19 IND. INT'L & COMP. L. REV. 569, 577, 581 (2009); U.S. GEN. ACCOUNTING OFFICE, GAO-08-59, AN ANALYSIS OF FREE TRADE AGREEMENTS AND CONGRESSIONAL AND PRIVATE SECTOR CONSULTATION UNDER TRADE PROMOTION AUTHORITY ACT 18-19 (2007), http://www.gao.gov/new.items/d0859.pdf (last visited June 24, 2010).

[240] Taylor, *supra* note 239, at 586.

[241] *Id.* at 590-91 n. 127-28.

[242] *Id.* at 591-92.

[243] *Id.* at p. 592, n.134.

[244] *Id.* at p. 593.

issues outside of the agreement's text to incorporating them into the final agreement and, more recently, expanding upon the labor provisions so as to, perhaps, bolster their significance relative to the other trade issues addressed.[245]

North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) entered into force on January 1, 1994. It created the world's largest free trade bloc by linking the United States, Canada, and Mexico. The major goals of this agreement, as with any free trade agreement, are tarrification (the conversion of non-tariff trade barriers into tariffs), tariff reduction, and, ultimately, tariff elimination.[246] NAFTA also contains dispute settlement provisions that are separate from those used by the WTO.[247]

Investment Provisions

In general, NAFTA requires Parties to provide the principles of most favored nation status and national treatment to investors.[248] Chapter Eleven of NAFTA lists certain protections for investors of one Party who have investments in the territory of another. Some of these protections take the form of substantive obligations to accord investors of another Party "fair and equitable treatment and full protection and security" in accordance with international law[249] and to prohibit specified requirements on the investments of foreign investors.[250] Furthermore, no Party may "directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation" except in certain circumstances.[251]

These protections also include binding arbitration to resolve investor-state disputes. When an investor from a NAFTA country believes that another Party has breached an obligation and the investor has suffered a loss as a result, the investor has the right to file a claim for arbitration against the allegedly offending nation.[252] The investor does not need to obtain the permission or participation of its own government before filing a claim.[253]

[245] For more on how the U.S. approach to addressing labor in free trade agreements has evolved, read CRS Report RS22823, *Overview of Labor Enforcement Issues in Free Trade Agreements*, by Mary Jane Bolle. As Bolle points out, the pending free trade agreements discussed later in this report illustrate yet another approach in how the model FTA addresses labor issues.

[246] *See* NAFTA, Arts. 302-315.

[247] *Id.* at Chapters 19 and 20.

[248] *Id.* at Arts. 1102, 1104.

[249] *Id.* at Art. 1005(1).

[250] *Id.* at Art. 1106.

[251] NAFTA, Art. 1110. A Party *may* nationalize or expropriate an investment "(a) for a public purpose; (b) on a non-discriminatory basis, (c) in accordance with due process of law and Article 1105(1), and (d) on payment of compensation...." *Id.*

[252] *Id.* at Arts. 1116, 1117.

[253] CRS Report RL31638, *Foreign Investor Protection Under NAFTA Chapter 11*, by Robert Meltz.

Intellectual Property Provisions

Chapter 17 of NAFTA obligates parties to accord national treatment to citizens of other NAFTA parties in the protection and enforcement of their intellectual property rights.[254] The scope of the intellectual property rights to receive protection is delineated by both NAFTA and four separate international agreements on intellectual property: the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, the Berne Convention for the Protection of Literary and Artistic Works, the Paris Convention for the Protection of Industrial Property, and *either* the 1978 or the 1991 International Convention for the Protection of New Varieties of Plants.[255] If a party has not acceded to one of these agreements, it must make every effort to do so.[256] NAFTA further demarcates the scope of its intellectual property protection in Article 1705 (on copyright), Article 1708 (on trademarks), Article 1709 (on patents), Article 1711 (on trade secrets), Article 1712 (on geographical indications), and Article 1713 (on industrial designs).

In terms of enforcement, each party must ensure that enforcement procedures are available under its domestic law so as to permit effective action to be taken against any act of infringement of intellectual property rights covered by NAFTA.[257] Moreover, each party must provide criminal procedures and penalties in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.[258] Article 1718 establishes additional enforcement mechanisms to prevent the *importation* of counterfeit trademark goods or pirated copyright goods.

Labor

Unlike most other trade agreements to which the U.S. is a party, NAFTA does not contain labor provisions but rather incorporates a side agreement on labor: the North American Agreement on Labor Cooperation ("NAALC").[259]

NAALC contains an "enforce your own laws" standard with respect to labor, requiring each party to promote compliance with and effectively enforce its own labor law through appropriate government action.[260] It further requires that each Party ensure that persons with legally recognized interests under its law have appropriate access to administrative, quasi-judicial, judicial, or labor tribunals.[261] Each Party's law must ensure that these persons have recourse to appropriate procedures to enforce rights arising under its labor law (including relevant laws on occupational safety and health, employment standards, industrial relations, and migrant workers).[262] Each Party must ensure that these procedures result in a final decision on the merits and are "fair, equitable, and transparent," which means, in part, that they comply with due process of law, are open to the public, afford the parties an opportunity to support their positions, and do

[254] NAFTA,. Art. 1703.

[255] *Id.* at Art. 1701(2).

[256] *Id.* at Art. 1701(3).

[257] *Id.* at Art. 1714.

[258] NAFTA, Art. 1717(1).

[259] Available at http://www/worldtradelaw.net/nafta/naalc.pdf.

[260] NAALC, Art. 3.1.

[261] *Id.* at Arts. 4.1, 4.2.

[262] *Id.* at Art. 4.

not entail unreasonable charges, time limits, or unwarranted delays.[263] Finally, each Party must promote public awareness of its labor law.[264]

NAALC also establishes the Commission for Labor Cooperation to oversee the implementation of the Agreement, develop recommendations for its further elaboration, create technical assistance programs, and facilitate Party-to-Party consultations.[265]

Dominican Republic-Central America-United States Free Trade Agreement

In August 2004, the United States signed the CAFTA-DR with Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic; a year later, the President signed the requisite implementing legislation (P.L. 109-53, 119 Stat. 462, 19 U.S.C. § 4001 *et seq.*). It is the first free trade agreement between the United States and a group of smaller developing economies. As with other free trade agreements, CAFTA-DR requires each party to accord (1) most favored nation status to the other parties and (2) national treatment to the other parties' goods and investors.[266] It also contains schedules of each Party's tariff concessions[267] and dispute settlement provisions that, like NAFTA's, are distinct from the WTO's DSU.[268]

Investment

The agreement establishes a legal framework for investors. Like NAFTA, CAFTA-DR provides certain protections to investors of one Party who have investments in the territory of another. All forms of investment are protected, including real property, enterprises, debt, concessions, and intellectual property. Some of these protections take the form of substantive obligations while others permit investors to submit to binding international arbitration a claim for damages against another Party.[269]

The key substantive protections (1) create a standard of minimum treatment,[270] (2) require compliance with the principle of national treatment,[271] and (3) require all Parties to accord all other Parties most favored nation status.[272] In addition, Article 10.7 forbids any Party from expropriating or nationalizing a covered investment either directly or indirectly unless it is done for a public purpose and in a non-discriminatory manner, accompanied by payment of prompt and

[263] *Id.* at Art. 5.1.

[264] *Id.* at Art. 7.

[265] NAALC, Arts. 8, 10.

[266] CAFTA-DR, Arts. 1.2, 3.2, 10.3.1, 10.4.

[267] *Id.* at Annex III.

[268] CAFTA-DR, Chapter 20.

[269] *E.g.*, *id.* at Arts. 10.5, 10.15.

[270] Under Art. 10.5 the Parties must accord investments of investors of another Party "fair and equitable treatment and full protection and security" in accordance with international law.

[271] CAFTA-DR, Art. 10.3.

[272] *Id.* at Art. 10.4.

adequate compensation, and performed in accordance with due process of law.[273] Article 10.7 lays out four requirements for fair and adequate compensation as well.[274]

In addition, as under NAFTA, when a disputing party considers that an investment dispute cannot be settled by consultation and negotiation, the claimant may submit to arbitration under Article 10.16 that the respondent breached a substantive obligation, an investment agreement, or an investment authorization, which resulted in loss or damage to the claimant.[275] The first claim brought under this provision was filed by a U.S. rail management company, Railroad Development Corp., against the government of Guatemala in June 2009.[276] Railroad Development Corp. alleges breaches of both substantive obligations and of the investment agreement between RDC and the Guatemalan government.[277]

Intellectual Property Provisions

Like chapter 17 of NAFTA, chapter 15 of CAFTA-DR obligates parties to accord national treatment to citizens of other CAFTA parties in the protection and enforcement of their intellectual property rights.[278] However, it also illustrates how the intellectual property provisions in the U.S. model FTA have evolved beyond those contained in chapter 17 of NAFTA. The model FTA, over time, has enhanced the minimum scope of intellectual property protection by limiting what is non-patentable, limiting government regulatory power, and expanding the forms protected by patents and copyrights.[279]

For example, CAFTA-DR requires its parties to ratify or accede to a greater number of international intellectual property agreements than NAFTA. These include but are not limited to: the WIPO Copyright Treaty, the WIPO Performance and Phonograms Treaty, the Patent Cooperation Treaty, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, the Trademark Law Treaty, and the 1991 International Convention for the Protection of New Varieties of Plants.[280] CAFTA – DR further demarcates the scope of its intellectual property protection in Article 15.2 (on trademarks), Article 15.3 (on geographical indications), Article 14.4 (on domain names on the internet), Articles 15.5 and 15.6 (on copyright), and Article 15.9 (on patents).

CAFTA-DR has similar, if also more detailed and specific, enforcement provisions those in NAFTA. In addition to mandating civil procedures, CAFTA-DR requires its parties to provide criminal procedures and penalties in cases of willful trademark counterfeiting or copyright or

[273] *Id.* at Art. 10.7.1. Additionally, it must comply with the minimum standard of treatment prescribed in Article 10.5. *Id.*

[274] *Id.* at Art. 10.7.2 ("Compensation shall: (a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place; (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable.")

[275] CAFTA-DR, Art. 10.16.

[276] *RDC Seeks Compensation for Alleged CAFTA-DR Violations*, INT'L TRADE DAILY (July 15, 2009).

[277] *Id.*

[278] CAFTA-DR, Art. 15.1(8).

[279] Taylor, *supra* note 239, at 593.

[280] CAFTA-DR, Art. 15.1.

related rights piracy on a commercial scale.[281] Unlike NAFTA, CAFTA-DR adds that the willful importation or exportation of counterfeit or pirated goods is *unlawful* and criminally punishable.[282]

Labor Provisions

Unlike NAFTA, labor provisions were written into CAFTA-DR, rather than incorporated through a side agreement. However, the provisions in CAFTA-DR resemble those found in NAALC. For example, like NAALC, the CAFTA-DR contains an "enforce your own laws" standard with respect to labor.[283] A Party is in compliance with this standard if it is following a course of action or inaction that "reflects a reasonable exercise of ... discretion or results from a *bona fide* decision regarding the allocation of resources."[284]

In addition, the CAFTA-DR also requires Parties to provide persons with legally recognized interests under its law with access to tribunals for the enforcement of the Party's labor laws and to judicial proceedings that comply with due process of law, are open to the public (except where justice requires otherwise), afford the parties an opportunity to support their positions, do not entail unreasonable charges, time limits, or unwarranted delays, and are accompanied by a written final decision on the merits of the case that is made publicly available without undue delay.[285]

Finally, to ensure compliance with these obligations, Article 16.6 provides that a Party may request consultations with another Party regarding any labor-related matter by delivering a written request. If the consulting Parties fail to resolve the matter and it concerns whether a Party is conforming to its substantive obligations under Article 16.2, the complaining Party may resort to one of the dispute settlement mechanisms described in Chapter 20.

Pending Free Trade Agreements with South Korea, Panama, and Colombia

The 111th Congress inherited free trade agreements with South Korea, Panama, and Colombia that were signed in time to be considered under the fast track procedures described in the Bipartisan Trade Promotion Act of 2002 (P.L. 107-210, 116 Stat. 993, 19 U.S.C. § 3801 *et seq.*,), which expired at the end of June 2007.[286] However, Congress has yet to approve implementing legislation for any of these three agreements, and the President, in the cases of the South Korea and Panama agreements, has yet to submit implementing legislation to Congress for approval.

While awaiting congressional approval, the text of each of these three agreements was amended as a result of the 2007 "Bipartisan Trade Deal" between Congress and the George W. Bush Administration.[287] This trade deal, which was reached on May 10, 2007, and, therefore, is

[281] *Id.* at Art. .51.11(26)(a).

[282] *Id.*

[283] *Id.* at Art. 16.2.1(a) ("A Party shall not fail to effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties ...").

[284] *Id.* at Art. 16.2.1(b).

[285] *Id.* at Arts. 16.2.2, 16.2.3.

[286] Fast track procedures are discussed in greater detail later in this report. See *infra* "Article I of the Constitution and Legislative Branch Authority."

[287] Peru & Panama FTA Changes, http://waysandmeans.house.gov/Media/pdf/110/05%2014%2007/05%2014%2007.pdf (last visited May 10, 2010).

sometimes called the "May 10, 2007 understanding," required changes in the Peru, South Korea, Panama, and Colombia trade agreements in the areas of labor, environment, intellectual property, foreign investors' rights, and port security.[288] Essentially, the May 10, 2007, understanding modified the model FTA, and, consequently, countries that had already passed domestic legislation regarding pending free trade agreements with the United States incorporated the changes.[289] Among the most frequently discussed provisions of the Bipartisan Trade Deal are those on labor and the environment. The labor provisions require U.S. free trade agreement partners to adopt, maintain, and enforce five labor standards stated in the 1998 International Labor Organization Declaration: freedom of association, the effective recognition of the right to collective bargaining, the elimination of all forms of forced or compulsory labor, the effective abolition of child labor, and the elimination of discrimination in respect of employment and occupation.[290] Moreover, both the labor and environment provisions subject allegations of the labor and environmental chapters to the same general dispute settlement system used for trade violations.[291]

U.S.-South Korean Free Trade Agreement

U.S.-South Korean Free Trade Agreement (KORUS FTA) was signed by President George W. Bush shortly before the expiration of fast track authority in 2007. Since then, the Administration has not submitted any implementing legislation to Congress nor indicated whether and when it will send such legislation. If approved, KORUS FTA would be the second largest free trade agreement (next to NAFTA) in which the U.S. participates.

Most of the concerns with the agreement center on reciprocity in the auto trade. According to the opponents of the agreement, the United States would lift tariffs on most South Korean imports while leaving in place both South Korea's non-tariff barriers on many U.S.-made vehicles and its high tax rates on the most probable U.S. exports.[292] These opponents believe that this scheme creates an imbalance in the flow of trade benefits under the agreement that would favor South Korean manufacturers.

The KORUS FTA addresses the auto trade specifically, requiring Korea to amend its laws to enable (1) certain vehicles to avoid a Special Consumption Tax and (2) vehicles over a set size to be taxed at a lower rate than they are currently.[293]

Panama Free Trade Agreement

The Panama Trade Promotion Agreement (Panama TPA) was signed by President George W. Bush just two days before the expiration of fast-track authority. Many believe the Panama TPA

[288] *Id.*

[289] *See* Lucien O. Chauvin, *Peru's Congress Approves Amendments to Free Trade Agreement with United States*, Int'l Trade Daily (June 29, 2007).

[290] Peru & Panama FTA Changes, *supra* note 288, at I:A.

[291] *Id.* at I:D, II:C.

[292] *E.g.*, *The Imbalance in U.S.-Korea Auto Trade: Hearing Before the S. Subcomm. on Interstate Commerce, Trade, and Tourism*, 110th Cong. (statement of John T. Bozzella, Chrysler LLC), *available at* http://commerce.senate.gov/public/?a=Files.Serve&File_id=4cdb954e-eb52-4a37-8a9b-84e79c549204. For more on the policy debate surrounding the KORUS FTA, read CRS Report RL34330, *The Proposed U.S.-South Korea Free Trade Agreement (KORUS FTA): Provisions and Implications*, coordinated by William H. Cooper.

[293] *See id.* at Art. 2.12.2(a).

will be the first of the three free trade agreements pending before the 111th Congress to be considered. But, even if implemented, the Panama TPA is unlikely to have a major effect on the U.S. economy because Panama trades very little with the United States.[294]

The main obstacle to congressional approval of the Panama TPA are labor and tax haven issues. The first issue mostly concerns a Panamanian law requiring a minimum of 40 workers to start a union. The second concerns questions about Panama's transparency with respect to tax laws and money laundering.[295] On April 19, 2010, House Ways and Means Chairman Sander Levin said that the Panama TPA would move forward if Panama implements labor law reforms consistent with the International Labor Organization and passes a tax treaty.[296]

Colombia Free Trade Agreement

The Colombia Free Trade Agreement (CFTA) was signed in November 2006. United States labor unions have objected to the Agreement on the grounds that Colombian workers cannot fully exercise their labor rights.[297] In addition, Congress may have erected a procedural roadblock to its implementation.[298]

In the meantime, the United States Trade Representative (USTR)[299] released plans to establish benchmarks for progress on the CFTA. On July 29, 2009, the USTR published a request for comments on how the USTR could work with the Colombian government to secure advancement in the rights of Colombia's workers.[300] Specifically, the USTR expressed interest in understanding whether (1) there are gaps in Colombia's ability to enforce labor rights, (2) the Colombian government is taking adequate steps to protect workers from acts of intimidation or violence related to the exercise of labor rights, and (3) Colombia is making sufficient progress in efforts to prosecute perpetrators of this violence and intimidation.

Like the Panama TPA and KORUS FTA, the CFTA mirrors many prior free trade agreements and permits a firm's adherence to certain "acceptable" labor conditions as a standard in the government procurement process.[301] Additionally, Colombia has agreed to remove significant

[294] CRS Report RL32540, *The Proposed U.S.-Panama Free Trade Agreement*, by J. F. Hornbeck.

[295] *Id.* The GAO recently listed Panama as one of 50 tax haven or financial privacy jurisdictions around the world. *Id.*

[296] Rossella Brevetti, *Rep. Levin Says Panama FTA Could Move if Certain Steps Taken*, INT'L TRADE DAILY (Apr. 20, 2010).

[297] On April 22, 2010, House Ways and Means Chairman Sander Levin (D-Mich.) said that Colombia had made "no progress" in improving its labor laws. Adam Behsudi, *Levin Says Colombia Has Made No Improvements on Labor Rights*, INSIDE U.S. TRADE (Apr. 30, 2010).

[298] The Bush administration introduced implementing legislation for CFTA on April 8, 2008 (H.R. 5724/S. 2830, 110th Cong.). In response, the House voted on April 10, 2008, to make fast-track authority inapplicable to the Agreement (H.Res. 1092, 110th Cong.). Consequently, before the CFTA can advance, new implementing legislation must be submitted. At this point, it is unclear whether or when this might happen. Moreover, the House Parliamentarian and Senate Parliamentarian disagree about whether the fast-track procedure will govern the 111th Congress' consideration of CFTA. *Colombia, Panama, Korea FTAs Await Obama in 2009*, 26 INT'L TRADE REP. 123 (2009). If passed, S.Res. 206 (Johanns) (111th Cong.) would express the sense that the United States should immediately implement the CFTA.

[299] For more on the USTR, *see infra* "Part III: Selected U.S. Agencies and Federal Entities with Responsibility for Aspects of International Trade."

[300] Request for Comments Concerning Free Trade Agreement With the Republic of Colombia, 74 Fed. Reg. 37,759 (July 29, 2009).

[301] CFTA, Art. 9.6.7.

investment and services barriers, including a requirement that U.S. firms hire Colombian nationals rather than U.S. citizens to provide professional services.[302]

Trade Negotiations for the Trans-Pacific Partnership Agreement

In December 2009, the USTR notified Congress of the President's intent to enter into negotiations for a regional, Asia-Pacific trade agreement, known as the Trans Pacific Partnership (TPP) Agreement. In that letter, the USTR identified its current TPP negotiating partners as Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, and Vietnam. The first negotiating session is expected to take place in Australia in March 2010.[303]

The USTR has stated its intent to follow the expired fast-track procedures as it proceeds with TPP negotiations.[304] Under this expired 2002 law, the Administration's notification to Congress would have triggered a 90-day consultation period after which the Administration could enter into negotiations.[305]

The structure of the TPP remains unclear because negotiations are ongoing. There appear to be three options: (1) a single integrated agreement that would supersede existing bilateral free trade agreements, (2) a grouping of existing and new free trade agreements with the United States,[306] and (3) both a new set of TPP rules and existing U.S. bilateral trade agreements so that parties could choose which of the two sets of rules to apply in a particular circumstance.[307]

Part II: The U.S. Constitution and Separation of Powers

The Constitution gives Congress and the Executive separate but complementary authority over the regulation of international trade. Consequently, international trade law and its domestic implementation is perhaps best understood as a joint effort between these two branches. Consistent with its constitutional authority, the Congress enacts trade laws, which the Executive implements and enforces. However, in the context of international trade agreements, the roles can seem reversed, with the Executive negotiating the agreement and the Congress "implementing" it with legislation.

[302] CRS Report RL34470, *The Proposed U.S.-Colombia Free Trade Agreement: Economic and Political Implications*, by M. Angeles Villarreal. *See* CFTA, Art. 11.4(1)(iv).

[303] CRS Report R40502, *The Trans-Pacific Partnership Agreement*, by Ian F. Fergusson and Bruce Vaughn.

[304] Request for Comments Concerning Proposed Trans-Pacific Partnership Trade Agreement, 74 Fed. Reg. 66,720 (Dec. 16, 2009); *Administration to Send Formal TPP Notification to Congress Within Days*, INSIDE U.S. TRADE (Dec. 11, 2009).

[305] Request for Comments, *supra* note 304. *See* 19 U.S.C. § 3802.

[306] Of the eight negotiating parties, the United States currently has free trade agreements with Singapore, Chile, Australia, and Peru.

[307] *Decision on TPP Structure Among Key Challenges Facing Negotiators*, INSIDE U.S. TRADE (Dec. 18, 2009).

Article I of the Constitution and Legislative Branch Authority

Article 1, section 8 of the United States Constitution gives Congress the authority to (1) "lay and collect taxes, duties, imposts, and excises," (2) "regulate commerce with foreign nations," and (3) "make all laws which shall be necessary and proper" to carry out these specific powers. Whereas Congress was initially only concerned with the conditions under which an import could enter the U.S.,[308] it has, over time, used its authority over international trade to regulate virtually all areas of trade policy, including how the Executive negotiates a trade agreement, how a negotiated trade agreement can be implemented, how domestic industries can obtain "remedies" for injury resulting from import competition, and how trade sanctions can be imposed.

Article II of the Constitution and Executive Branch Authority

Article II of the U.S. Constitution gives the President authority, subject to the advice and consent of the Senate, to make treaties and appoint ambassadors.[309] In addition, several clauses in Article II (namely, the clauses relating to the grant of executive power, the appointment of ambassadors, the submission of treaties, and the authority of the Commander in Chief) have been construed as operating together to vest the President with the vast share of the responsibility for conducting foreign relations.[310] Consequently, the President is widely understood as having the authority to both negotiate trade agreements and execute laws affecting foreign commerce (e.g., through customs enforcement, collection of duties, implementation of trading remedy laws, and the administration of export and import polices).

Separation of Powers in Practice: Fast Track and Trade Remedies

The following historical overview of two commonly discussed legal issues in international trade (fast track authority and import competition) illustrates how Congress and the executive branch have exercised their constitutional authorities over aspects of trade policy in response to changing concerns.

Fast Track Authority: Trade Act of 1934, Trade Act of 1974, and Bipartisan Trade Promotion Act of 2002

In the name of job creation, the Tariff Act of 1930 ("Smoot-Hawley Tariff Act," 46 Stat. 590, 19 U.S.C. § 1202 *et seq.*) established the highest tariffs in U.S. history. However, other countries quickly responded by closing off their markets, offsetting any new jobs resulting from the Tariff

[308] A comparison of the first U.S. "trade" law with more recent trade laws illustrates the increasing scope and complexity of U.S. trade law. The first U.S. "trade" law took up only four pages in the Statutes at Large. *See* "An Act for Laying a Duty on Goods, Wares, and Merchandises imported into the United States," 1 Stat. 24 (1789). It dealt solely with tariff rates on 75 categories of goods. *Id.* In contrast, the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418, 102 Stat. 1107) covered 468 pages in the Statutes at Large and dealt with tariff schedules, antidumping, countervailing duty, and other unfair trade practices procedures, intellectual property rights, trade negotiating authority, and many other matters.

[309] U.S. CONST. art. II, § 2.

[310] U.S. CONST. art. II, § 1; *American Ins. Assn v. Garamendi*, 539 U.S. 396, 414 (2002); *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936); Saikrishna B. Prakash and Michael Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L. J. 231, 234 (2001).

Act. In part because of this international response to the Tariff Act, Congress was persuaded that the U.S. needed international agreements that reduced tariffs. Accordingly, Congress passed the Trade Agreements Act of 1934 ("1934 Trade Act," Pub. L. 316, 48 Stat. 943, 19 U.S.C. § 1351 *et seq.*) as an amendment to the Tariff Act, authorizing the President to adjust tariffs by negotiating reciprocal agreements with foreign countries.[311]

Since Congress first granted the President negotiating authority in international trade with the 1934 Trade Act, Congress has periodically renewed, and occasionally expanded, that authority. When Congress has expanded the President's negotiating authority, it has often done so by substantially reducing the possibility that Congress will delay a trade agreement's implementation or demand amendments. This kind of legislation is commonly known as trade promotion, or "fast track," authority (TPA). At its most basic, TPA resembles a guarantee that a trade agreement negotiated by the President will receive expedited congressional consideration.[312] Consequently, the Executive generally favors TPA because it gives U.S. negotiators both flexibility and credibility to negotiate a trade agreement with another country.

The modern form of TPA was first codified by the Trade Act of 1974 (P.L. 93-618, 88 Stat. 1978, 19 U.S.C. § 2101 *et seq.*), which developed out of a proposal by President Nixon for authority to negotiate tariff concessions during the Tokyo Round of the GATT.[313] While the precise form of TPA can vary by the law establishing it, generally it authorizes the President to pursue certain negotiating objectives and entitles the Administration's proposed implementing legislation for the resulting agreement to receive an up-or-down vote in Congress within a short amount of time of submission and without amendment. However, in return for Congress giving up some control over the content of new trade agreements, the President is generally required to consult with Congress about pending trade agreements, and, potentially, to conduct certain cost and impact assessments of the agreement.[314]

TPA was last granted by the Bipartisan Trade Promotion Act of 2002 (P.L. 107-210, 116 Stat. 993, 19 U.S.C. § 3801 *et seq.*), but it expired at the end of June 2007.[315] While Congress has withheld TPA before, some worry that, without TPA, foreign governments will hesitate to engage in substantive trade negotiations with the U.S. because Congress can demand amendments to negotiated trade agreements or delay their implementation indefinitely.[316]

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[311] 19 U.S.C. § 1351.

[312] However, unlike a guarantee, Congress can negate the application of TPA to particular agreements. For example, in 2008, the House of Representatives exercised its authority to set rules for its handling of proposed legislation, including implementing legislation for trade agreements, reject the application of TPA to the implementing legislation for the Colombia Free Trade Agreement. H.Res. 1092, 110th Cong.

[313] CRS Report RL33743, *Trade Promotion Authority (TPA): Issues, Options, and Prospects for Renewal*, by J. F. Hornbeck and William H. Cooper; CRS Report RL31844, *Trade Promotion Authority (Fast-Track Authority for Trade Agreements): Background and Developments in the 107th Congress*, by Lenore Sek.

[314] 19 U.S.C. §§ 3803-3808.

[315] A grant of TPA is typically included in Title I of the Trade Act of 1974 (P.L. 93-618, 88 Stat. 1978, 19 U.S.C. § 2101 *et seq.*), which prescribes congressional power over presidential actions in international trade. 19 U.S.C. §§ 2191-2194.

[316] For example, the President lacked fast track authority between May 1994 and August 2002. David A. Gantz, *The "Bipartisan Trade Deal," Trade Promotion Authority and the Future of U.S. Free Trade Agreements*, 28 ST. LOUIS. U. PUB. L. REV. 115, 131 (2008). However, the only major U.S. trade agreement successfully concluded without fast-track authority was the U.S.-Jordan Free Trade Agreement. *Id.*

Import Competition: Tariff Act of 1930 and Trade Act of 1974

While the Tariff Act of 1930 is most often cited for raising tariffs, it, along with the Trade Act of 1974, is the primary source of modern U.S. trade remedy law. The objective of trade remedy laws is to mitigate the adverse impact of import competition, particularly as a result of certain unfair trade practices, on domestic industries and workers. The three most frequently applied U.S. trade remedy laws are countervailing duty law, antidumping law, and safeguard law.[317] The first two are contained in the Tariff Act of 1930 while safeguard law is contained in the Trade Act of 1974.

The first U.S. trade remedy law was a countervailing duty law created largely in response to Germany subsidizing its sugar exports.[318] When Germany increased the subsidy to offset the new U.S. duty, Congress made the countervailing duty more flexible by setting the amount of the duty at the amount of the subsidy granted.[319] Over time, this countervailing duty law was amended and incorporated into Title VII of the Tariff Act of 1930.[320]

U.S. antidumping law followed a similar path of development. In the early 20th century, Congress became concerned with foreign companies selling their products in the U.S. at a price less than that which they charged in their home market.[321] Consequently, Congress enacted the Antidumping Act of 1916 (Pub. L. 64-271, 39 Stat. 798, *repealed by* Miscellaneous Trade and Technical Corrections Act of 2004, P.L. 108-429, 118 Stat. 2434). Title II of the 1921 Emergency Tariff Act ("Antidumping Act of 1921," Pub. L. 67-10, 42 Stat. 9) transformed the original antidumping system into the current model, which imposes an offsetting duty on articles exported to the U.S. at a price less than that charged in the home market.[322] This system was then incorporated into Title VII of the Tariff Act of 1930.

The third kind of trade remedy law (i.e., safeguards) developed in the mid-20th century in response to the tariff reductions achieved by international agreements.[323] President Truman, as a concession to Congress, agreed to set up a procedural mechanism to allow U.S. industries to apply for relief from U.S. tariff cuts negotiated as part of the GATT.[324] Congress codified this "escape clause" in section seven of the Trade Agreements Extension Act of 1951. With the Trade Expansion Act of 1962 (Pub. L. 87-794, 76 Stat. 872), the Kennedy Administration succeeded in tightening the "escape clause" standards because of foreign complaints that its use was

[317] CRS Report RL32371, *Trade Remedies: A Primer*, by Vivian C. Jones.

[318] Ronald A. Brand, *GATT and the Evolution of the United States Trade Law*, 18 BROOK. J. INT'L L. 101, 114 (1992). By the end of the 19th century, the success of Germany's sugar beet industry had guided Germany to the forefront of the world's sugar production. Steven B. Webb, *Agricultural Production in Wilhelminian Germany: Forging an Empire with Pork and Rye*, 42 J. ECON. HIST. 309, 314-315 (1982).

[319] Brand, *supra* note 318, at 114.

[320] The Trade Act of 1974 expanded the scope and tightened the procedural requirements of U.S. countervailing duty law, and the Trade Agreements Act of 1979 (P.L. 96-39, 93 Stat. 150) brought U.S. countervailing duty law into compliance with the ASCM.

[321] Brand, *supra* note 318, at 114.

[322] Antidumping Act of 1921, §§ 201-212, 42 Stat. at 9.

[323] *See* Warren Maruyama, *Evolution of the Escape Clause: Section 201 of the Trade Act of 1974 as Amended by the Omnibus Trade and Competitiveness Act of 1988*, 1989 BYU L. Rev. 393, 400 (1989).

[324] *See id.* at 401.

undercutting U.S. tariff concessions.[325] However, these standards were loosened again with the Trade Act of 1974.[326]

Part III: Selected U.S. Agencies and Federal Entities with Responsibility for Aspects of International Trade

United States Trade Representative

The Office of the United States Trade Representative (USTR) is part of the Executive Office of the President. The USTR is the principal vehicle through which the U.S. conducts trade negotiations and implements U.S. trade policy. It is also responsible for keeping Congress informed of any WTO dispute settlement proceeding involving the United States. Persons or entities desiring an investigation of potential noncompliance with a trade agreement contact the USTR, which handles Section 301 complaints against foreign unfair trade practices. The USTR also oversees the administration of other aspects of U.S. trade law, including the Generalized System of Tariff Preferences (commonly called the GSP), which permits duty-free entry for imports from developing countries,[327] and telecommunications reviews under Section 1377.[328] The USTR is also involved in reviewing recommendations from the International Trade Commission under Sections 201[329] on safeguards and 337 on intellectual property right infringement.[330]

United States International Trade Administration

The International Trade Administration (ITA), which is located in the U.S. Department of Commerce, is responsible for making determinations in both countervailing duty and anti-dumping cases. Specifically, the ITA must determine whether there are subsidies in a

[325] *See id.* at 402-03.

[326] *See id.* at 403.

[327] For more on the GSP, see *infra* notes 390-396 and accompanying text.

[328] Section 1377 of the Omnibus Trade and Competitiveness Act of 1988 (P.L. 100-418, 102 State. 1107) requires the USTR to review, by March 31 of each year, the operation and effectiveness of U.S. telecommunications trade agreements to determine whether any act, policy, or practice of any foreign country who is a party to one of these agreements has not complied with its obligations. 19 U.S.C. § 3106. These reviews are not discussed in this report.

[329] *Codified at* 19 U.S.C. §§ 2251-2254. For an example of USTR involvement in safeguard cases, see Rossella Brevetti and Christopher S. Rugaber, *ITC Advances Safeguard Case on Standard Pipe from China*, INT'L TRADE DAILY (Oct. 4, 2005) (stating that the USTR will consider a proposal of import made by the International Trade Commission and then make a recommendation on it to President Bush).

[330] Section 337 of the Tariff Act of 1930 (P.L. 71-361, 46 Stat. 590) is not discussed in this report. A Section 337 case is one in which a domestic industry seeks to prove that imported articles have infringed on U.S. patents, federally registered trademarks, copyrights, or mask works. 19 U.S.C. § 1337(a). These cases are ultimately adjudicated before the International Trade Commission, an independent and quasi-judicial agency. For an example of USTR involvement in a Section 337 case, see Rossella Brevetti, *USTR Allows Limited Exclusion Order Against Qualcomm Phone to Become Final*, INT'L TRADE DAILY (Aug. 7, 2007) (stating that the USTR decided to allow the International Trade Commission's limited exclusion order issued in its investigation of Qualcomm mobile phones to become final).

countervailing duty case and whether the sales are made at less than fair value in anti-dumping cases.

United States International Trade Commission

The United States International Trade Commission (ITC) is an independent federal agency with broad investigative responsibilities. One of the ITC's primary duties is its investigative role in the administration of U.S. trade remedy laws, which entails investigating the effects of dumped and subsidized imports on domestic industries and conducting safeguard investigations including investigations under the China-specific safeguard contained in section 3421 of the Trade Act of 1974. The ITC also adjudicates cases involving imports that allegedly infringe intellectual property rights under Section 337 of the Tariff Act of 1930. Finally, the ITC maintains the Harmonized Tariff Schedule, which Customs Services uses to assess the correct tariff on imported goods.

United States Customs and Border Protection

U.S. Customs and Border Protection (CBP) is a part of the Department of Homeland Security. Its primary trade functions include (1) enforcing intellectual property rights at the border, thereby preventing the importation of counterfeit, pirated, or patent-infringing goods, (2) assuring that appropriate duties and fees are paid, and (3) securing trade to and from the U.S. from acts of terrorism. In addition, along with the Food and Drug Administration, CBP seeks to protect American people, resources, and economic well-being from foods or plants that are contaminated, diseased, infested, or adulterated.

United States Court of International Trade

The United States Court of International Trade (CIT) is part of the Judicial Branch. It was created by the Customs Courts Act of 1980 (P.L. 96-417, 94 Stat. 1727),[331] which transformed the United States Customs Court into the Court of International Trade and expanded the CIT's jurisdiction. The President, with the advice and consent of the Senate, appoints the nine judges with lifetime tenure to the CIT.

The CIT, which is located in New York City, has jurisdiction over cases arising anywhere in the nation, but it may also hold hearings in foreign countries. The court may decide any civil action against or by the United States, its officers, or its agencies arising out of any law pertaining to international trade.[332] All litigation involving the Generalized System of Preferences (GSP) is commenced in the Court of International Trade. Appeals may be taken to the United States Court of Appeals for the Federal Circuit, and, ultimately, to the Supreme Court of the United States.

When asked to review the decision of an administrative agency, federal courts apply the "*Chevron*"[333] standard of review, which is often associated with a high level of deference to the

[331] *See generally* 28 U.S.C §§ 251-258 (disciplining appointments to, and the operation of, the Court of International Trade).

[332] Court of International Trade, Jurisdiction of the Court, http://www.cit.uscourts.gov/informational/about.htm (last visited Jan. 22, 2010). *See* 28 U.S.C. §§ 1581, 1582.

[333] The *Chevron* standard of review was developed by the Supreme Court in its 1984 decision in *Chevron U.S.A. v.* (continued...)

agency's decision. The Court of International Trade is no exception.[334] Consequently, when it is reviewing a decision by the U.S. Department of Commerce or ITC to impose antidumping duties or use zeroing[335] to determine a "dumping margin," the CIT frequently respects the agency's decision.[336]

Part IV: Selected Federal Statutes Regulating International Trade

Trade Remedy Laws

Section 301 of the Trade Act of 1974: Remedies for Violations of Trade Agreements and Other Inconsistent or Unjustifiable Foreign Trade Practices

Sections 301 through 310 of the Trade Act of 1974 (commonly referred to as "Section 301") requires the USTR to impose trade sanctions on foreign countries that either (1) violate trade agreements, (2) have acts, policies, or practices that are inconsistent with a trade agreement, or (3) have acts, policies, or practices that are unjustifiable and burden U.S. commerce. [337] Section 301 also gives the USTR the option of imposing trade sanctions on foreign countries that maintain acts, policies, or practices that are unreasonable or discriminatory and burden or restrict U.S. commerce.[338] The USTR is the only body authorized to challenge foreign trade practice on behalf of the United States (or United States industries) under this law.

Before imposing mandatory sanctions under Section 301, the USTR engages in a two-step process. First, the USTR must determine under Section 304(a)(1)[339] whether a foreign country's acts or policies (1) violate U.S. rights under any trade agreement, (2) are inconsistent with a trade agreement, or (3) are unjustifiable *and* burden or restrict U.S. commerce. If the USTR determines that the country's acts or policies fall into one of those categories, then the USTR may, subject to any specific direction of the President, (1) suspend or withdraw benefits of U.S. concessions under the trade agreement, (2) impose duties or other restrictions on the foreign country's goods or services, or (3) enter a binding agreement with the foreign country that commits it to

(...continued)

Natural Resources Defense Council. 467 U.S. 837 (1984). The Court established a two part test for reviewing an agency's statutory interpretation. *See id.* at 842-43. If Congress has spoken directly to the precise question at issue, then the courts must give effect to that interpretation, but, if the statute is instead silent or ambiguous on the issue at hand, then courts must defer to an agency's "permissible construction of the statute." *Id.* at 842-43.

[334] *E.g.*, Paul Muller Indus. GMBH & Co. v. United States, 435 F. Supp. 2d. 1241 (Ct. Int'l Trade 2006).

[335] For a more in-depth discussion of zeroing, see *infra* notes 369-371 and accompanying text.

[336] *E.g.*, Paul Muller Indus, 435 F. Supp. 2d. 1241; Timothy Brightbill, Jennifer Kwon, and Matthew W. Fogarty, *19 U.S.C. 1581(c)—Judicial Review of Antidumping & Countervailing Duty Determinations Issued by the Department of Commerce*, 39 GEO. J. INT'L L. 41, 54-55 (2007) (noting that the CIT's use of a straightforward *Chevron* analysis to ultimately determine that the Department of Commerce's use of zeroing is in accordance with the law, indicates that the CIT seems to want to defer responsibility for WTO compliance to the executive branch).

[337] 19 U.S.C. § 2411(a).

[338] 19 U.S.C. § 2411(b).

[339] Codified at 19 U.S.C. § 2414(a)(1).

eliminating or phasing out the burden or practice in question or to provide the U.S. with compensatory trade benefits.

The USTR is not required to act, however, if a WTO panel or dispute settlement ruling finds that U.S. rights have not been violated. The USTR is also not required to act if it finds (1) that the foreign country is taking satisfactory measures to grant U.S. trade agreement rights; (2) that the foreign country is taking satisfactory measures to either eliminate the practice, provide an imminent solution to it, or provide satisfactory compensatory benefits; or (3) that taking the action would cause serious harm to the U.S. national security.[340]

Any interested person may file a petition with the USTR requesting that action be taken under Section 301.[341] The USTR must review the petitioner's allegations and publish, in the Federal Register, notice of the determination and a summary of the reasons behind it.[342] The USTR can also initiate investigations to determine whether a matter is actionable.[343] If it decides to initiate an investigation, that decision must be published in the Federal Register.[344] On the date the USTR initiates any investigation, it must request consultations with the foreign country concerned.[345]

Countervailing Duties: Remedies for Imports of Subsidized Goods

Title VII of the Tariff Act of 1930[346] governs the process by which the United States decides to impose countervailing duties (CVDs) in response to subsidies by foreign countries. Title VII creates two different sets of rules: one set governs the imposition of CVDs on goods from countries that are part of the Agreement on Subsidies and Countervailing Duties (ASCM) and the other set governs the imposition of CVDs on countries that are *not* part of the ASCM.[347]

The U.S. International Trade Commission and the U.S. Department of Commerce (through the International Trade Administration) jointly investigate allegations of countervailable subsidies. Their investigations commence when an interested party[348] files a countervailing duty petition with both ITA and the ITC alleging that an industry in the United States is materially injured or threatened by reason of the sale of subsidized imports in the United States at less than their fair value.[349] The petition must be filed "by or on behalf of the industry," meaning that the domestic producers or workers who support the petition must account for at least 25% of the total

[340] 19 U.S.C. § 2411(b).

[341] *Id.* at § 2412(a).

[342] *Id.*

[343] *Id.* at § 2412(b).

[344] *Id.*

[345] 19 U.S.C. § 2413(a).

[346] *Id.* at § 1671 *et seq.*

[347] *Compare* 19 U.S.C. § 1671(b) *with* 19 U.S.C. § 1671(c). In practice, the vast majority of subsidies investigations have looked only at allegations of subsidies of other WTO Members.

[348] An "interested party" is defined in 19 U.S.C. § 1677(9) to include, among others, (1) a manufacturer, producer or wholesaler in the United States of a domestic like product, (2) a certified or recognized union or group or workers that is representative of the industry, (3) a trade or business association of a majority of whose members manufacture, produce, or wholesale a domestic like product, and (4) a coalition of firms, unions, or trade associations as already described. 19 U.S.C. § 1677(9). Commerce may also initiate its own investigations, but it rarely does so. UNITED STATES INTERNATIONAL TRADE COMMISSION, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK 1I-4 n.8 (2008).

[349] 19 U.S.C. § 1671(a).

production of the domestic like product and for more than 50% of the production of the domestic like product produced by that portion of the industry expressing support for the petition.[350] Interested parties may file both antidumping and countervailing duty petitions involving the same imported merchandise. Both the ITA and the ITC are willing to review a petition before it is filed to enable the petitioner to learn about any deficiencies in the petition that might delay or prevent the initiation of an investigation.[351]

Once a petition is received, the ITA and the ITC enter the first of two rounds of the investigation. In this first round, the agencies must make preliminary determinations on the existence of both a material injury to domestic industry and of a countervailable subsidy by the foreign country.

The ITC's preliminary determination evaluates whether there is a "reasonable indication" of a material injury, that is, whether the domestic industry is materially injured or threatened with material injury or whether its establishment is materially retarded.[352] However, the ITC will not engage in this preliminary analysis if the allegedly subsidizing country is not a member of the WTO and therefore entitled, under the ASCM, to an injury determination.[353] If, on the other hand, the ITC finds that there is no reasonable indication of material injury, the investigation is terminated and the ITA does not continue its own preliminary investigation.

The ITA's preliminary determination evaluates whether there is a reasonable basis to believe or suspect that a countervailable subsidy is being provided with respect to the subject merchandise.[354] If the ITA and the ITC reach affirmative determinations, namely that there is a reasonable basis to believe the country being investigated is providing countervailable subsidy that is causing a material injury to the domestic industry, the importers of the targeted merchandise must post bond or provide some other security for the estimated subsidy for all entries of the subject merchandise.[355] In addition, at that point, the investigation enters the second round in which both agencies must make final determinations.

The ITA makes its determination first. The ITA must determine whether or not a countervailable subsidy is being provided with respect to the merchandise.[356] Following the ITA's final determination, the ITC determines whether the domestic industry is materially injured or threatened with material injury or whether its establishment in the United States is materially retarded by reason of imports, sales, or likely sales of merchandise that the ITA has deemed subsidized.[357] However, as with the preliminary injury determination, the ITC will not engage in this final analysis if the allegedly subsidizing country is not a member of the WTO.[358]

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[350] *Id.* at § 1671a(c)(4).

[351] UNITED STATES INTERNATIONAL TRADE COMMISSION, ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK 1-4 (2008).

[352] 19 U.S.C. § 1671b(a); ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK, supra note 351, AT II-5.

[353] *Id.* at § 1671(c). Countries who are not members of the ASCM are also not entitled to several other procedural benefits in the CVD process, including a five-year review of countervailing duty orders, suspension of the investigation under 19 U.S.C. § 1671c(c), or a determination of the presence of critical circumstances. *Id.*

[354] *Id.* at § 1671b(b).

[355] *Id.* at § 1671b(d).

[356] *Id.* at § 1671d(a)(1).

[357] 19 U.S.C. § 1671d(b)(1).

[358] *Id.* at § 1671(c). Countries who are not members of the ASCM are also not entitled to several other procedural benefits in the CVD process, including a five-year review of countervailing duty orders, suspension of the investigation (continued...)

If the two agencies' final determinations conclude that a countervailable subsidy was provided with the effect of causing or threatening material injury to a domestic industry or its establishment, then, upon publishing its finding, the Department of Commerce issues a countervailing duty order equal to the net amount of the subsidy.[359] This order instructs the U.S. Customs and Border Protection to collect cash deposits of CVD duties on the merchandise in question when it enters the U.S., but these cash deposits represent an estimate of the actual duties owed.[360] Typically, a final duty is not established unless there is an administrative review of the CVD order.[361]

Antidumping Duties and "Zeroing": Remedies for Imports Sold at Less Than Fair Value

U.S. antidumping law strongly resembles the U.S. countervailing duty laws just discussed. As under CVD law, the processes for the assessment and collection of AD duties are prescribed in Title VII of the Tariff Act of 1930.[362] And, as with CVD law, any interested party may petition the Department of Commerce to investigate allegations of dumping, and these investigations may also be self-initiated by Commerce. The petitions must be filed "by or on behalf of the industry."[363] Like CVD investigations, AD investigations are jointly administered over the course of two rounds by the Department of Commerce and the ITC.

Like countervailable subsidy investigations, the first round of an antidumping investigation requires preliminary determinations by the ITA and the ITC. In this round, the ITC determines whether there is a reasonable indication of material injury, and, if the ITC finds that there is, the ITA assesses 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.[364] Predictably, the second round is the round in which the ITA and ITC make their final determinations on these questions.[365]

As under CVD law, if both the ITA and ITC make affirmative determinations on these questions, then the ITA issues an order instructing the U.S. Customs and Border Protection to collect cash deposits of the AD duties on the merchandise in question when it enters the U.S., but these cash

(...continued)

under 19 U.S.C. § 1671c(c), or a determination of the presence of critical circumstances. *Id.*

[359] *Id.* at § 1671d(c).

[360] DEPARTMENT OF COMMERCE, IMPORT ADMINISTRATION, 2009 ANTIDUMPING MANUAL 2 (2009).

[361] *Id. See* 19 U.S.C. § 1675. For an explanation of administrative reviews and the distinction between "cash deposits" and "final duties," read the section titled "Use of 'Zeroing' in Antidumping Proceedings: Background" in CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by Jeanne J. Grimmett, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by Jeanne J. Grimmett. Although that section is looking only at antidumping duties, AD and CVD law mirror each other in this area.

[362] *Codified by* 19 U.S.C. § 1673 *et seq.* A second law involving AD duties, which is not discussed in this report, is Section 1317 of the Omnibus Trade and Competitiveness Act of 1988. Section 1317 establishes procedures for the U.S. to request a foreign government to act against third-country dumping that is injuring a U.S. industry.

[363] 19 U.S.C. § 1673a.

[364] 19 U.S.C. §§ 1673b(a)(1), 1673b(b)(1).

[365] 19 U.S.C. §§ 1673d(a)(1), 1673d(b)(1).

deposits represent only an estimate of the actual duties owed.[366] Typically, a final duty is not established unless there is an administrative review of the AD order.[367]

Antidumping duties are based on the "weighted average dumping margin" as determined by the ITA under 19 U.S.C. § 1677f-1.[368] In determining the size of a dumping margin for a particular product, the Department of Commerce has used a practice known as "zeroing" in its administrative reviews.[369] Zeroing entails aggregating the dumping margins for all of the sub-products but assigning the value of zero to a sub-product's dumping margin when its export price *exceeds* its normal (home market) value.[370] Critics argue that this method inflates the dumping margins and that the Department of Commerce should, instead, offset the margins for sub-products sold at less their normal value with the margins for sub-products sold at more than their normal value.

While the Court of International Trade has said Commerce's decision to use "zeroing" to calculate the dumping margin is a reasonable and permissible interpretation of the law, the WTO has consistently ruled against the United States in cases brought by U.S. trading partners over the Department of Commerce's use of zeroing.[371] The USTR has argued that zeroing is an acceptable practice under the Agreement on Antidumping because, during the negotiations of the AD Agreement, WTO Members had considered but purposefully declined to adopt a prohibition on zeroing.[372] However, the Dispute Settlement Body is highly unlikely to depart from the reasoning of the adopted reports that ruled against zeroing.[373] Meanwhile, the CIT and Court of Appeals for the Federal Circuit are unlikely to depart from their practice of upholding the validity of zeroing because they have left it to the executive branch to decide whether and how to comply with WTO decisions.[374]

[366] ANTIDUMPING MANUAL, *supra* note 360, at 2. *See* 19 U.S.C. § 1675.

[367] *Supra* note 360 and accompanying text.

[368] 19 U.S.C. § 1673d(c)(B); 19 U.S.C. § 1677f-1.

[369] The Department of Commerce has abandoned its use of zeroing in original investigations since 2007, but it has not altered its practice in other phases of antidumping proceedings.

[370] *See* DEPARTMENT OF COMMERCE, IMPORT ADMINISTRATION, ANTIDUMPING MANUAL CHAPTER 6, 7 (1998).

[371] Paul Muller Indus., 435 F. Supp. 2d. at 1244; Brightbill, Kwon, and Fogarty, *supra* note 336, at 54-55 (noting that the CIT's use of a straightforward *Chevron* analysis to ultimately determine that the Department of Commerce's use of zeroing is in accordance with the law, indicates that the CIT seems to want to defer responsibility for WTO compliance to the executive branch).

[372] *WTO Appellate Body Issues Ruling Affirming Illegality of Zeroing in Mexican Steel Decision*, 25 INT'L TRADE REP. 660 (May 1, 2008).

[373] *See* Report of the Appellate Body, *U.S. – Shrimp*, WT/DS58/AB/RW, paras. 108-109 (Oct. 22, 2001) (stating that adopted panel and Appellate Body reports "should be taken into account where they are relevant" because they create legitimate expectations among WTO Members).

[374] *E.g.*, Koyo Seiko Co. v. United States, 551 F.3d 1286, 1291 (Fed. Cir. 2008) ("The determination whether, when, and how to comply with the WTO's decision on 'zeroing,' involves delicate and subtle political judgments that are within the authority of the Executive and not the Judicial Branch"). Moreover, there is some indication that Congress opposes the Department of Commerce making the administrative changes necessary to comply with the WTO panels and Appellate Body. *E.g.*, Trade Enforcement Act of 2009, H.R. 496, 111th Cong., § 204 (1st Sess. 2009).

Safeguards

Section 201

Sections 201 through 204 of the Trade Act of 1974[375] provide the authority and procedures for the President to take action, including import relief, to facilitate a domestic industry's adjustment to import competition. Successful adjustment to import competition is defined as the domestic industry's ability to successfully compete or its orderly transfer of resources to other productive pursuits.[376]

Under Section 201, if the International Trade Commission determines that an article is being imported in such increased quantities as to be a substantial cause, or threat, of serious injury to the domestic industry producing the like or directly competitive article, the President shall take all appropriate action to facilitate the domestic industry's adjustment.[377] Any entity that is representative of an industry may petition the ITC to make this determination.[378] The law lists several factors, including a relative increase in imports and decline in the proportion of the domestic market supplied by domestic producers, that the ITC must consider in making its determination.[379] However, the statute does not cabin the ITC's investigation to those factors.

If the ITC makes an affirmative determination, it must recommend the action that would address the serious injury, or threat thereof, to the domestic industry.[380] Specifically, it is authorized to recommend, among other actions: an increase or imposition of a duty, a tariff-rate quota, and a modification or imposition of a quantitative restriction.[381] Upon receiving a report of the ITC's determination and recommendations, the President must determine and take "all appropriate and feasible action" to make a positive adjustment to import competition.[382] The President is required to consider certain factors before determining what action to take.[383] If the President concludes that there is no appropriate and feasible action to take, the President must transmit to Congress a document setting forth the reasons for the decision.[384]

China Safeguards

In addition to Section 201, Title IV of the Trade Act of 1974 also provides country-specific safeguards under which the President can provide domestic industries with relief from domestic

[375] *Codified at* 19 U.S.C. §§ 2251-2254.

[376] 19 U.S.C. § 2241(b). Additionally, dislocated workers in the industry must experience an orderly transition to productive pursuits. *Id.*

[377] 19 U.S.C. § 2251(a).

[378] *Id.* at § 2252(a)(1).

[379] If the petition alleges serious injury, the ITC must consider (1) the significant idling of productive facilities in the domestic industry; (2) the inability of a significant number of firms to carry out domestic production operations at a reasonable level of profit, and (3) significant unemployment or underemployment within the domestic industry. 19 U.S.C.§ 22452(c)(1)(A). The statute provides a different set of factors for cases in which the petition alleges only a *threat* of serious injury. 19 U.S.C. § 2252(c)(1)(B).

[380] *Id.* at § 2252(e)(1).

[381] *Id.* at § 2252(e)(2).

[382] *Id.* at § 2253(a)(1).

[383] 19 U.S.C. § 2253(a)(2).

[384] *Id.* at § 2253(b)(2).

market disruption. The two provisions discussed below are both China-specific and scheduled to expire in 2013.[385]

The first provision is the so-called "China safeguard," 19 U.S.C. § 2451, which was adopted as part of the agreement for China's accession to the WTO. 19 U.S.C. §2451 entitles the President to increase duties or other import restrictions for the period and length of time the President deems necessary to remedy an import surge that has been found to threaten market disruption of a domestic producer of a similar product. This provision authorized President Obama to proclaim an additional but temporary duty on certain Chinese tires in September 2009.[386]

The second China-specific provision is 19 U.S.C. § 2451a, an import monitoring provision. It provides that if any WTO Member other than the United States requests consultations with China under the product-specific safeguard provision, the United States Customs Service must monitor imports of those same products into the United States.

Domestic Tariff and Customs Law

Harmonized Tariff Schedule

The Harmonized Tariff Schedule (HTS) was enacted by the Omnibus Trade and Competitiveness Act of 1988.[387] It identifies the "rates of duty" for particular classes and articles of imported and exported goods. The HTS is divided into three columns laying out (1) the rates of duty for products receiving most favored nation treatment, (2) the rates of duty for products that do not receive that treatment, and (3) the rates of duty for special duty-free and other preferential rates that are accorded under free trade agreements and trade preference programs. In addition, there are three different bases for assessing duties: (1) ad valorem rates, which assess duties by the value of the article; (2) specific rates, which assess duties by the weight or quantity of the article; and (3) compound rates, which assess duties by a combination of ad valorem and specific rates. However, Chapters 98 and 99 of the HTS also include special provisions and modifications that permit, in certain circumstances, duty-free or partial duty-free entry of goods that would otherwise be subject to duty. Among the exceptions to the HTS are suspensions or reductions of duties resulting from free trade agreements and other international obligations, from a U.S. tourist's purchases while overseas, and from the application of the Generalized System of Preferences, discussed below.

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[385] 19 U.S.C. § 2451b(c) (requiring termination of these provisions 12 years after the date of entry into force of the Protocol of Accession of the People's Republic of China to the WTO).

[386] Prior to his decision, President Obama received a recommendation from the International Trade Commission that imports of these tires were causing domestic market disruption and should have an additional duty placed on them. China requested consultations with the United States under the WTO shortly after President Obama announced the additional duty. Request for Consultations by China, *US – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/1 (Sept. 16, 2009). China claims that imposition of the temporary tariffs violated the most-favored nation principle of the GATT and were "not properly justified" under both the WTO's Agreement on Safeguards and China's Accession Protocol. *Id.* In December, China requested the establishment of a WTO panel to hear the dispute. Request for the Establishment of a Panel by China, *US – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/2 (Dec. 11, 2009). For more information on the tires dispute, CRS Report R40844, *Chinese Tire Imports: Section 421 Safeguards and the World Trade Organization (WTO)*, by Jeanne J. Grimmett.

[387] P.L. 100-418. It replaced the Tariff Schedules of the United States, enacted as Title I of the Tariff Act of 1930, which had been in effect since 1963.

Generalized System of Preferences

Title V of the Trade Act of 1974, P.L. 93-618, as amended, governs the U.S. Generalized System of Preferences (GSP), which is set to expire on December 31, 2010.[388] The GSP authorizes duty-free treatment for a variety of products from developing countries. It originated in dialogues between the developed and the developing world in which the latter successfully pushed for special access to industrial markets.[389] Under the GSP, any United States producer of an article that competes with GSP imports can petition to have a country or particular group of products removed from the program. Similarly, any foreign exporter can petition for product or beneficiary country status in the program. The President has broad authority to withdraw, suspend, or limit the application of duty free entry under the GSP system.[390]

Two "competitive need" limitations restrict the availability of duty free GSP entry.[391] The first bars duty free entry for a product from a beneficiary country if, during the preceding year, that country exported to the U.S. more than a designated dollar volume of that product. The second bars duty free entry for a product if, during the preceding year, the beneficiary country exported to the U.S. 50% or more of the total U.S. imports of that particular product. However, the President has authority to waive these limitations in certain circumstances under 19 U.S.C. § 2463.[392]

Eligible Countries

A list of GSP qualified nations and territories is contained in HTS General Note 3(c)(ii). 19 U.S.C. § 2462 also lists categories of countries that cannot benefit from the GSP program, including other developed countries, communist states, and nations that collude with other countries to withhold supplies or resources from international trade or otherwise raise the price of goods in a way that could cause serious disruption to the world economy (such as an oil restraining OPEC nation). Outside of these bars on eligibility, the Administration[393] has substantial discretion over which countries and products receive beneficiary status. In determining whether a country is eligible, the Administration must evaluate, among other things, if that country is upholding workers' rights, protecting the property rights of U.S. citizens and corporations, adversely affecting U.S. exports via its investment laws, protecting intellectual property rights, extending equitable and reasonable access to its markets, refraining from unreasonable export practices, reducing trade distorting investment practices (such as export

[388] 19 U.S.C. §§ 2461-2467. For additional background on the GSP and issues involved in its renewal, see CRS Report RL33663, *Generalized System of Preferences: Background and Renewal Debate*, by Vivian C. Jones.

[389] Note that, although this system of tariff preferences contravenes the GATT's most-favored nation principle, the GATT authorized its parties to establish these systems for developing nations in 1971. For more on trade preference systems, read CRS Report RS22183, *Trade Preferences for Developing Countries and the World Trade Organization (WTO)*, by Jeanne J. Grimmett.

[390] 19 U.S.C. § 2464(a).

[391] *Id.* at § 2464(c).

[392] For example, the President can waive the percentage limitation if the President determines that that there is no like or directly competitive article produced in the United States, the import comes from a least developed country and Congress has received notice, the import comes from a country with which the U.S. has a longstanding preferential trade relationship coupled with a trade agreement, or the import is not likely to have an adverse effect on the U.S. industry with which they compete and their duty free entry will serve the national economic interest. 19 U.S.C. § 2463(d).

[393] The statute gives authority to the President to make this and other evaluations, however the President has delegated the responsibility to the United States International Trade Commission (ITC).

performance requirements), and reducing barriers to trade in services.[394] The Administration must also consider whether beneficiary countries are cooperative on drug enforcement and whether they assist terrorists. Although the Administration must consider these and other factors in assessing a country's eligibility, the President may determine that a country qualifies for beneficiary status despite having a less desirable record on any one or set of them if the Administration finds GSP duty free entry would be in the national economic interest of the United States.[395]

The Administration's review of a country's eligibility under the GSP program is ongoing, which allows for disqualification, reinstatement, and graduation of GSP beneficiary nations. The President may graduate a beneficiary country from the GSP program if the Administration determines that the nation is sufficiently developed so as to no longer need the benefits of duty free entry into the U.S. market. Specifically, the Administration must assess the economic development level of the beneficiary country, the competitive position of the imports, and the overall national economic interests of the U.S. Any country designated as a beneficiary nation under the GSP program that is subsequently disqualified or graduated by the Administration must receive notice and an explanation of the decision, permitting the country to respond and negotiate its eligibility.

Eligible Products

In addition to country eligibility, the Administration also issues a list of products from each country that qualify for duty free entry. The GSP program generally excludes leather products, textiles and apparel, watches, certain electronics, and some categories of steel, footwear, and glass from eligibility. A complex body of "rules of origin" determine where goods are from for purposes of the GSP program.[396] Generally, at least 35% of the appraised value of those goods must have been added in the country seeking duty free entry.

In addition, the "rules of origin" in the GSP program favor certain regional economic groups. Goods made in the ANDEAN pact, for example, may be designated as being made in one country for purposes of determining their origin. However, not all third world regional economic groups receive this treatment. The Central American Common Market and the Gulf Council of the Middle East are among the regional economic groups who are excluded from this favorable treatment.

Other Duty Free Entry Programs

In addition to the U.S. GSP program, the United States has similar non-reciprocal duty-free entry programs for particular regions. One program is the Caribbean Basin Initiative of 1983 (CBERA) (P.L. 98-67, as amended, 19 U.S.C. § 2701 *et seq.*), which offers substantial duty free entry to nearly all of the islands in, and many countries bordering, the Caribbean Sea.[397] A second is the Andean Trade Preferences Act of 1991 (19 U.S.C. § 2703(f)), under which the President is authorized to grant duty free treatment to imports of eligible articles from Colombia, Peru,

[394] 19 U.S.C. § 2462(c).

[395] *Id.*

[396] These rules are found in 19 U.S.C. § 2463(b).

[397] CBERA will expire December 31, 2014. For further information on CBERA, see CRS Report RL33951, *U.S. Trade Policy and the Caribbean: From Trade Preferences to Free Trade Agreements*, by J. F. Hornbeck.

Bolivia, and Ecuador. Like the U.S. GSP program, ATPA is set to expire at the end of 2010.[398] A third trade preferences program is contained in the African Growth and Opportunity Act (AGOA) (P.L. 106-200, as amended, 19 U.S.C. §§ 2466a *et seq.*), which authorized the President to designate Sub-Saharan African countries as beneficiary countries eligible to receive duty-free treatment for certain articles.[399]

Laws Authorizing the Imposition of Trade Sanctions

In the past 30 years, the United States has increasingly turned to international trade measures to combat the international narcotics trade, human rights violations, and state-supported terrorism. In general, the imposition of trade sanctions is viewed as an exercise of the Executive's foreign affairs power, which is granted by Article II. Consequently, sanctions tend to be imposed by Executive Orders issued pursuant to the President's broad legislative authority to restrict trade and financial transactions in times of war and national emergency. However, with respect to particular countries, persons, or entities, Congress has occasionally enacted legislation stating when and to what extent the President should curtail trade. Once imposed, sanctions are implemented principally by the U.S. Department of Treasury, Office of Foreign Assets Control[400] (OFAC) and the Commerce Department.

This section briefly discusses two of the most frequently cited sources of the President's authority to impose these sanctions: the Trading with the Enemy Act and the International Emergency Economic Powers Act. However, when the United States imposes unilateral sanctions, it may provoke friction with other countries besides the target country. Those countries may feel that the sanctions either violate U.S. WTO obligations or represent the extraterritorial application of U.S. law. Consequently, sanctions often need to be crafted to minimize U.S noncompliance with international law.

Trading with the Enemy Act

The Trading with the Enemy Act (40 Stat. 411, 50 U.S.C. App. 1. *et seq.*) authorizes the President to prohibit U.S. citizens from trading or attempting to trade with any enemy or ally of an enemy during wartime.[401] It also grants the President the wartime authority, which may be delegated to an administrative agency, to investigate, regulate, or prohibit (1) any transactions in foreign exchange, (2) any transfers of credit or payments through or by a banking institution, to the extent that the transfers involve any interest of any foreign country or a national thereof, (3) the importing or exporting of currency or securities, and (4) a broad range of economic transactions involving foreign property.[402] Finally, TWEA gives the President authority at any point during

[398] For further information on ATPA, see CRS Report RS22548, *ATPA Renewal: Background and Issues*, by M. Angeles Villarreal.

[399] Like CBERA, AGOA is set to expire December 31, 2014. For more information on AGOA, see CRS Report RL31772, *U.S. Trade and Investment Relationship with Sub-Saharan Africa: The African Growth and Opportunity Act*, by Vivian C. Jones.

[400] The regulations implementing each sanction regime are issued by the Office of Foreign Asset Control and arranged, country-by-country, in 31 C.F.R, Chapter V.

[401] 50 U.S.C. app. § 3.

[402] *Id.* at app. § 5.

war to make a proclamation that it shall be unlawful to import into the United States specified goods from a particular country or countries.[403]

International Emergency Economic Powers Act

TWEA was the predecessor of the International Emergency Economic Powers Act, which was enacted in 1977 ("IEEPA," P.L. 95-223, as amended, 50 U.S.C. §§ 1701 *et seq.*). IEEPA effectively creates an alternative basis for economic sanctions against foreign countries. Consequently, whereas TWEA remains the source of the President's authority to impose trade sanctions during *wartime*, IEEPA grants the President the authority to impose trade sanctions during *national emergencies*. Before the President may exercise his IEEPA authorities, however, he must declare a national emergency with respect to the threat involved.[404]

Under IEEPA, so long as the United States has jurisdiction over the person or property involved, the President may, in response to an unusual and extraordinary foreign threat to the security, foreign policy, or economy of the United States, investigate, regulate, or prohibit (1) any transactions in foreign exchange, (2) any transfers of credit or payments through or by a banking institution, to the extent that the transfers involve any interest of any foreign country or a national thereof, (3) the importing or exporting of currency or securities, and (4) any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving foreign property.[405] The President also has broad authority under IEEPA to issue implementing regulations, including regulations prescribing definitions such as who constitutes a "United States person," and, therefore, is subject to the prohibitions and restrictions of the sanctions regime.[406]

While the President must consult with Congress, whenever possible, before declaring a national emergency and exercising IEEPA powers,[407] IEEPA has become the authority for many executive orders over the past several decades. It was first used by President Jimmy Carter in response to the Iranian hostage crisis. President Carter issued an executive order under IEEPA blocking all property of the Iranian government.[408] Similarly, after 9/11, President George W. Bush issued Executive Order Number 13224[409] under IEEPA[410] to block all property and property interests that come within the possession or control of United States persons and that belong to foreign persons deemed to have committed or to pose a significant risk of committing acts of terrorism that threaten the security of U.S. nationals or the U.S. economy.[411]

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[403] *Id.* at app. § 11.

[404] 50 U.S.C. § 1701.

[405] *Id.* at §§ 1701(a), 1702(a)(1). Charitable donations of necessities of life to relieve human suffering, however, are generally excepted from this broad grant of authority. For more on IEEPA, see the relevant sections of CRS Report RL34254, *Executive Order 13438: Blocking Property of Certain Persons Who Threaten Stabilization Efforts in Iraq*, by M. Maureen Murphy.

[406] 50 U.S.C. § 1704.

[407] 50 U.S.C. § 1703(a).

[408] Exec. Order 12170, 44 Fed. Reg. 65,729 (Nov. 14, 1979).

[409] 66 Fed. Reg. 49,079 (Sept. 25, 2001).

[410] In addition to IEEPA, President Bush relied on his authority under the National Emergencies Act (50 U.S.C. § 1601 *et seq.*), the United Nations Participation Act of 1945 (22 U.S.C. §287c), and Section 301 of Title III of the U.S. Code (3 U.S.C. § 301).

[411] Exec. Order No. 13224, 66 Fed. Reg. 49,079 (Sept. 23, 2001).

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