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

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Summary

The United States has trade obligations under multilateral trade agreements, including the General Agreement on Tariffs and Trade (GATT) and the other World Trade Organization (WTO) agreements, as well as bilateral and regional trade agreements. A variety of domestic laws implement these agreements, prescribe U.S. trade policy goals, or regulate international trade to achieve specific foreign policy objectives. This report provides an overview of both international and domestic trade law, focusing on a select group of international agreements 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. However, over time, U.S. trade agreements have become increasingly complex. The U.S. model free trade agreement now targets not only tariffs and non-tariff barriers, but also domestic policies in areas such as labor, environmental law, and electronic commerce that U.S. policymakers consider unfair trade practices. Trade agreements have also evolved to include 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 foreign 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 laws and 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, they have broadened to encompass aspects of domestic policymaking and establish 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

Often, a single trade issue, such as dumping (the sale of goods in foreign markets at lower prices than in the domestic market), is governed by both international agreements *and* federal laws. Accordingly, 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 (February 21, 1997). The Marrakesh Agreement and (continued...)

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] Nevertheless, to dispel any concern that an international organization had been established, the GATT 1947 signatories continued to be called "Contracting Parties" rather than "Members." Moreover, the GATT 1947 was not 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

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the contents of its annexes will be discussed further in "The Uruguay Round, Marrakesh Agreement, and World Trade Organization."

[6] WORLD TRADE REPORT, *supra* footnote 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.

Property Rights.[9] Annex 2 contains the Dispute Settlement Understanding, which sets out the 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 and disciplines certain trade-restricting measures adopted by WTO Members. 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

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

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

[11] *See* Appellate Body Report, *EC–Asbestos*, WT/DS135/AB/R, ¶ 99 (March 12, 2001); Working Party Report on Border Tax Adjustments (December 2, 1980), GATT B.I.S.D. (18th Supp.) at 97.

[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).

"advantage" that a WTO Member grants in the context of customs duties or rules regarding 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]

The term "advantage" in Article I:1 has been given a very broad definition to encompass any more favorable competitive opportunity or commercial status relative to those of like products destined to different WTO Members.[14] It can include, for example, variations in both the procedural and administrative requirements for imports.[15] As a result, variations in the licensing requirements for imports can constitute an advantage under Article I:1.[16] In *EC–Bananas III*,[17] for example, a WTO panel ruled that the European Union had accorded an origin-discriminatory advantage to the products of some WTO Members by imposing additional licensing requirements on imports from other WTO Members.[18] Notably, a measure may be deemed to accord an advantage even if it is written in origin neutral terms.[19]

Similarly, two products may be deemed "like" under Article I:1 even if they are subject to different tariff classifications or, for other reasons, are not exact duplicates.[20] WTO panels and the Appellate Body assess the "likeness" of two products by examining their characteristics, their end-uses, their tariff classification, and consumers' tastes and habits.[21] Where a complaining Member demonstrates that the difference in treatment between imported products is based exclusively on the products' different origins, a WTO panel will presume that there can or will be discrimination between imported products that are "like."[22]Although it is often difficult in other cases to predict whether a given measure would affect "like" products from WTO Members, a measure that affects a broad range of products may be likely to result in discrimination between at least some "like" imports.

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[13] Panel Report, *Indonesia–Certain Measures Affecting the Automobile Industry*, WT/DS54/R, ¶ 14.138 (July 2, 1998). 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] Panel Report, *EC–Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/R/GTM, ¶ 7.239 (May 22, 1997); Panel Report, *Colombia–Indicative Prices and Restrictions on Ports of Entry*, ¶ 7.341, WT/DS366/R (April 27, 2009). In *Colombia–Ports of Entry*, the panel wrote that a measure also gives rise to an Article I:1 "advantage" when it gives an operator the opportunity to "choose how to operate his business in order to enhance his profitability and competitiveness." *Id.* at ¶ 7.351.

[15] *See* Panel Report, *EC–Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/R/USA, paras. 7.193, 7.194 (May 22, 1997).

[16] *See id.* In *EC–Bananas III*, the Appellate Body affirmed a WTO panel report ruling that the European Union's import licensing procedures for bananas were inconsistent with Article I:1 of the GATT because they imposed heightened requirements for banana importers from some WTO Members but not all. Appellate Body Report, *EC–Regime for the Importation, Sale, and Distribution of Bananas*, ¶ 206, WT/DS27/AB/R, (September 9, 1997).

[17] Panel Report, *EC–Regime for the Importation, Sale, and Distribution of Bananas*, WT/DS27/R/USA (May 22, 1997).

[18] *Id.* at paras. 7.193, 7.194.

[19] *See* Panel Report, *Canada–Certain Measures Affecting the Automotive Industry*, paras. 14.123, 14.147, 15.1(c), WT/DS139/R (February 11, 2000).

[20] Rex J. Zedalis, *A Theory of GATT Like Product Common Language Cases*, 27 VAND. J. TRANSNAT'L L. 33, 78-84 (1994). *See* MICHAEL TREBILOCK, UNDERSTANDING TRADE LAW 40-41 (2011).

[21] PETER VAN DEN BOSSCHE, THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION: TEXTS, CASES AND MATERIALS 330-31 (Cambridge University Press 2008) (2008). Panel Report, *U.S.–Certain Measures Affecting Imports of Poultry from China*, ¶ 7.425., WT/DS392/R (September 23, 2010).

[22] Panel Report, *U.S.–Poultry*, *supra* footnote 21, at paras. 7.427, 7.428; Panel Report, *Colombia–Ports of Entry*, *supra* footnote 14, at paras. 7.356, 7.357.

Once a measure is found to have conferred a trade advantage that affects "like" products, that measure will be deemed inconsistent with Article I:1 if it fails to accord the advantage "unconditionally." WTO panels have adopted different interpretations of the term "unconditionally,"[23] but their decisions suggest that conditions may be attached to an advantage only if they do not discriminate, either on their face or as applied, between "like" products on the basis of their countries of origin or destination.[24] For example, an advantage is not accorded "unconditionally" if some countries have to do or pay something to receive it.[25] Similarly, an advantage is not accorded "unconditionally" if some countries have to take a particular action, such as adopt a specified policy, in order for exports to their territories to be eligible to receive it.[26]

Notably, a measure framed in origin neutral terms so as to appear facially consistent with Article I:1 violates the MFN principle if it has a discriminatory impact on imports of like products from some WTO Members relative to others.[27] In *Canada–Autos*,[28] for example, a WTO panel examined a Canadian measure that exempted car imports from a customs duty if their manufacturers satisfied certain requirements, including establishment in Canada and the use of Canadian materials in production.[29] The panel found that the duty exemption was an "advantage" and that, although the exemption was origin neutral on its face, the structure and characteristics of the global automotive industry meant that the criteria for the exemption created origin-based discrimination among auto imports from WTO Members.[30] The panel buttressed this finding with the measure's legislative history, which suggested that the exemption was part of a scheme intended to rationalize production in the *North American* automotive market and encourage *U.S.-owned* car manufacturers to expand their production operations to Canada.[31] In other words, the panel ruled that Canada's import duty exemption was a *de facto* violation of Article I:1 because it

[23] *Compare* Panel Report, *Canada–Autos*, *supra* footnote 19, at paras. 10.23-10.25 (finding that measures are inconsistent with Article I:1 "not because they involve the application of conditions that were not related to the imported product but because they involve conditions that entailed different treatment of imported products upon their origin") *and* Panel Report, *Colombia–Ports of Entry*, *supra* footnote 14, at ¶ 7.362 ("In line with the approach elaborated in the *Canada–Autos* dispute, the Panel considers that it may thus assess whether the advantage is conferred 'immediately and unconditionally' based on whether an advantage... is not similarly accorded to those products originating in Panama for reasons related to [their] origin or the conduct of Panama.") *with* Panel Report, *EC–Conditions for the Granting of Tariff Preferences*, ¶ 7.59, WT/DS246/R (December 1, 2003) (writing that the term "unconditionally" in Article I:1 retains its "ordinary" meaning: "not limited by or subject to any conditions").

[24] *See* Panel Report, *Colombia–Ports of Entry*, *supra* footnote 14, at paras. 7.362- 7.366; Charles Benoit, *Picking Tariff Winners: Non-Product Related PPMS and DSB Interpretations of "Unconditionally" Within Article I:1*, 42 GEO. J. INT'L L. 583, 600 (2011) (writing that the panel decisions "favoring the flexible interpretations" of the term "unconditionally" include the latest panel report—*Colombia–Ports of Entry*—and have "contained lengthier and more in depth discussions of the meaning of Article I:1.").

[25] *See* Van den Bossche, *supra* footnote 21, at 332.

[26] *See id.*

[27] *See* Panel Report, *Canada–Autos*, *supra* footnote 19, at paras. 14.123, 14.147, 15.1(c); Trebilock, *supra* footnote 20, at 41.

[28] Panel Report, *Canada–Certain Measures Affecting the Automotive Industry*, WT/DS139/R (February 11, 2000).

[29] *Id.* at paras. 2.1, 2.2.

[30] *Id.* at paras. 10.43-10.45. In particular, the panel found that the automotive industry relies heavily on "intra-firm trade"—that is, the major automotive corporations in Canada only imported their own make of motor vehicles and those of affiliated companies. *Id*. at paras. 10.43, 10.45.

[31] Panel Report, *Canada–Autos*, *supra* footnote 28, at ¶ 10.49.

was designed to benefit auto imports from particular sources, namely those in the United States and North America, and had the discriminatory effect it intended.[32]

Similarly, in *Indonesia–Autos*,[33] a WTO panel found that an Indonesian measure exempting certain cars from import duties and sales taxes was also inconsistent with Article I:1. In that case, an import's eligibility for the exemptions depended on facially origin-neutral factors, such as the domestic car company's relationship with the foreign importer, the use of local content, and the use of the imported car parts in the assembly in Indonesia of a domestic car.[34] While these criteria, like those in *Canada–Autos*, were framed in origin neutral terms, the panel found that in practice only car imports from Korea could satisfy them.[35] Therefore, the panel ruled that the tax advantages, as applied, were accorded in a fashion that discriminated against products from WTO Members on the basis of their origin.[36]

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 "like" domestic products.[37] Accordingly, Article III reflects concern that WTO Members could use internal taxation schemes, regulations, and other domestic measures 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."[38]

However, 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[39] or (2) dissimilarly taxes imports and domestic products so as to afford protection to a domestic product that is directly competitive with, or substitutable for, the imported product.[40] However, when the measure in question is a "law, regulation, or requirement

[32] *See id*.

[33] Panel Report, *Indonesia–Certain Measures Affecting the Automobile Industry*, WT/DS54/R (July 2, 1998).

[34] *Id*. at paras. 14.145-14.146.

[35] *Id.* at ¶ 14.145.

[36] *Id.*

[37] *See* GATT, Art. III:1. There are frequent disputes over the likeness or substitutability of the affected domestic and imported products. *E.g.*, *Canada–Periodicals*, *supra* footnote 39, at p. 3 (describing Canada's argument that split-run and non-split-run periodicals are like products); *Japan–Alcoholic Beverages*, *supra* footnote 39, at p.4 (describing Japan's argument that shochu and vodka are like products).

[38] GATT, Art. III:1.

[39] Appellate Body Report, *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. Appellate Body Report, *Japan–Taxes on Alcoholic Beverages*, WT/DS8/AB/R, p. 23 (October 4, 1996).

[40] *Japan–Alcoholic Beverages, supra* footnote 39, at p. 24. 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* footnote 39, 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* footnote 39, at p. 24.

affecting their internal sale, offering for sale, purchase, transportation, distribution, or use," Article III:4 proscribes its application if it treats foreign products less favorably than like domestic products.[41]

A wide variety of measures fit the definition of a "law, regulation, or requirement" affecting "internal" transactions, and, as a result, are subject to Article III:4. Examples include local content requirements, advertising bans, and labeling requirements.[42] WTO and GATT panels have also found that, while measures that tax particular products, such as sales taxes, are governed by Article III:2, measures that tax taxpayers for engaging in particular behavior, such as tax credits for specified taxpayer purchases, are assessed under Article III:4.[43] Even border measures—measures that affect importation or exportation—governed by Article XI:1 can be subject to Article III:4.[44] Ultimately, whether a "law, regulation or requirement" is covered by Article III:4 typically depends on whether it might modify the conditions of competition between domestic and imported products in the internal market.[45] Significantly, WTO panels have found that these conditions can be modified not only by measures that regulate the products but also by measures that regulate their manufacturers or producers.[46]

In *Thailand–Cigarettes*,[47] a WTO panel considered the Article III:4 consistency of Thai measures that imposed more reporting, registration, and recordkeeping requirements on resellers of imported cigarettes than were imposed on resellers of domestic cigarettes.[48] Thailand argued, *inter alia*, that the reason for the difference was to ensure that the sale of domestic products and the sale of imports were both subject to the same regulatory regime and legal liabilities.[49]

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[41] 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* Appellate Body Report, *EC–Measures Affecting Asbestos and Asbestos Containing Products*, WT/DS135/AB/ R, ¶ 99 (March 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.*

[42] One example of an internal regulation deemed inconsistent with national treatment is the Korean dual retail scheme that the United States 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. Panel Report, *Korea–Various Measures on Beef*, WT/DS161/R, paras. 641-643 (July 31, 2000).

[43] *Compare U.S.–Measures Affecting Alcoholic and Malt Beverages* (June 19, 1992), GATT B.I.S.D. (39th Supp.) 206, at paras. 5.13-15 (ruling that U.S. excise tax credits for domestic wine and cider producers contravened Article III:2) *with* Panel Report, *U.S.–Tax Treatment for "Foreign Sales Corporations*," WT/DS108/RW, paras. 2.6, 8.144 (August 20, 2001) (ruling that an income tax benefit provided for income earned predominantly as a result of goods manufactured, grown, or extracted within the United States was governed by Article III:4).

[44] Van den Bossche, *supra* footnote 21, at 347. *See* Panel Report, *India–Measures Affecting the Automotive Sector*, WT/DS146/R, paras. 7.224, 7.306 (March 8, 2002).

[45] Panel Report, *Italy–Agricultural Machinery*, GATT B.I.S.D (7th Supp.), 60 at ¶ 12 (October 23, 1958) (emphasis added); Van den Bossche, *supra* footnote 21, at 369.

[46] *See, e.g.,* Panel Report, *Mexico–Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, paras. 8.109-8.113 (October 7, 2005) (finding that both "bookkeeping requirements" imposed on soft drink producers, importers, and exporters and taxes imposed on imported sweeteners affect the use of certain sweeteners within the meaning of Article III:4).

[47] Panel Report, *Thailand–Customs and Fiscal Measures on Cigarettes*, WT/DS371/R, ¶ 7.734 (Jul 15, 2011). For example, businesses selling imported cigarettes were required to, *inter alia*, obtain, complete, and file certain forms on a monthly basis, prepare detailed tax invoices—and retain those invoices for no less than five years, and be subject to audits. *Id.* at paras. 7.651-7.655.

[48] Appellate Body Report, *Thailand–Customs and Fiscal Measures on Cigarettes*, WT/DS371/AB/R, paras. 98-100 (July 15, 2011).

[49] However, in affirming the panel's decision, the Appellate Body wrote that Thailand did not produce evidence to (continued...)

Thailand alleged that because cigarette importers are not legally responsible for paying the taxes on their cigarettes, resellers of imported cigarettes presented a risk of tax evasion in the absence of measures subjecting the sale of imported cigarettes to reporting, collection, and enforcement mechanisms that mirrored those in place for the sale of domestic cigarettes.[50] Therefore, Thailand contended that the measures merely imposed requirements on resellers of imported cigarettes for which there were already "equivalent" requirements imposed on resellers of domestic cigarettes.[51] However, the WTO panel found that the Thai measures were inconsistent with Article III:4 because they could prejudice cigarette suppliers against importing and selling foreign-made cigarettes by raising the operating costs associated with selling imported cigarettes in the Thai market.[52] The panel cited evidence that administrative burdens can and do affect business decisions and that the Thai measures at issue were enforced through penalties and other sanctions, including the denial of tax credits.[53] Accordingly, the WTO panel and Appellate Body agreed that the Thai measures subjected imported cigarettes to less favorable treatment in violation of Article III:4.[54]

Article II: Tariffs

The original goal of the GATT was to move countries toward imposing tariffs, rather than non-tariff trade barriers,[55] 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.[56] 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.[57] 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"),[58] antidumping or

(...continued)

substantiate this assertion. Appellate Body Report, *Thailand–Cigarettes*, *supra* footnote 48, at ¶ 139.

[50] Panel Report, *Thailand–Cigarettes*, *supra* footnote 47, at ¶ 7.740.

[51] *Id.* at paras. 7.668.

[52] *Id.* at ¶ 7.736.

[53] Appellate Body Report, *Thailand–Cigarettes*, *supra* footnote 48, at paras. 137-138, n.204; Panel Report, *Thailand–Cigarettes*, *supra* footnote 47, at paras. 7.719, 7.222, 7.736 7.634.

[54] Appellate Body Report, *Thailand–Cigarettes*, *supra* footnote 48, at ¶ 140; Panel Report, *Thailand–Cigarettes*, *supra* footnote 47, at ¶ 7.738.

[55] 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* footnote 42, 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.

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

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

[58] 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.*, Panel Report, *United States–Taxes on Petroleum and Certain Imported Substances* (June 17, 1987), GATT B.I.S.D. (34th Supp.) 136, (continued...)

countervailing duties consistent with the GATT and other relevant agreements, and fees or other charges commensurate with the cost of services rendered.[59]

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.[60] 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.[61] 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.[62]

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.[63] 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.[64] Moreover, the term "services rendered" means services rendered to the individual importer in question.[65]

(...continued)

at paras. 5.2.3-5.2.4 (hereinafter *US–Superfund*); Working Party Report on Border Tax Adjustments, GATT B.I.S.D. (18th Supp.) 97, at ¶ 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, *supra*, at ¶ 14. Accordingly, in *US–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 assessed 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.

[59] GATT, Art. II:2.

[60] *See, e.g.*, Panel Report, *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.*

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

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

[63] 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.

[64] Panel Report, *U.S.–Customs User Fee* (February 2, 1988), GATT B.I.S.D. (35th Supp.) 245, at ¶ 69.

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

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.[66] 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.[67] 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.[68] The panel disagreed, finding that if the "cost of 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.[69] 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.[70]

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.[71] 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.[72] 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.[73]

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.[74] 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.[75]

[66] *Id.* at ¶ 7.

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

[68] Panel Report, *U.S.–Customs User Fee*, *supra* footnote 64, at ¶ 28.

[69] *Id.* at ¶ 81.

[70] *Id.* at ¶ 86.

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

[72] *Id.*

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

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

[75] *Id.* at ¶ 6.70.

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.

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.[76] 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.[77] The challenged provisions 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.[78] 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.[79] 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.[80]

Article XI: General Elimination of Quantitative Restrictions

Article XI:1 of the GATT bars the institution or maintenance of quantitative restrictions on exports to, and imports from, any WTO Member's territory. Quantitative restrictions limit the amount of a product that may be imported or exported. 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.[81] Common examples of quantitative restrictions include embargoes, quotas, minimum import or export prices, and certain import or export licensing requirements. Only duties, taxes, and other charges are Article XI:1 consistent methods of restricting imports or exports.

By barring WTO Members from placing quantitative prohibitions or restrictions on the importation or exportation of products, Article XI illustrates the strong preference of GATT and

[76] *See, e.g.*, Panel Report, *U.S.–Restrictions on Imports of Tuna*, (September 3, 1991) GATT B.I.S.D. (39th Supp.) 155 (unadopted).

[77] *Id.* at ¶ 2.12.

[78] *Id.*

[79] *Id.* at ¶ 5.41

[80] Panel Report, *US–Tuna/Dolphin I*, *supra* footnote 76, at ¶ 5.41.

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

Uruguay Round negotiators for tariffs as opposed to non-tariff border restrictions.[82] 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.[83]

Although Article XI:1 is a cornerstone GATT obligation, import and export restrictions are the frequent subject of WTO dispute settlement proceedings. In *U.S.–Shrimp*, for example, several WTO Members requested that a panel examine a U.S. ban on shrimp imports from nations whose trawling procedures the United States had not certified as sufficiently protecting sea turtles.[84] The panel wrote that the express prohibition on imported shrimp from non-certified countries was inconsistent with Article XI:1,[85] raising doubts about the WTO consistency of similar measures that ban imports or exports that do not meet certain criteria.

While an import ban can be readily identified as a quantitative restriction, WTO panels have also characterized "discretionary" or "non-automatic" licensing requirements as prohibited quantitative restrictions.[86] As a result, a system under which the licensing authority has universally granted licenses to applicants who satisfy the prerequisites may still violate Article XI:1 if those prerequisites give the licensing authority unfettered discretion to deny a license.[87] In addition, an early GATT case, *Japan–Semi-Conductors*,[88] held that a lengthy license approval process also has a limiting effect on exportation in violation of Article XI:1. In that case, the GATT panel held that three-month delays in an agency's export licensing process restrained exports even though the delays did not result from any "mandatory" law, regulation, or requirement.[89] Japan had required exporters to obtain licenses before exporting certain quantities of semi-conductors, and, after several years, lowered the threshold level of semi-conductors that could be shipped without a license.[90] As a result of this change in policy, the number of license applications almost doubled. The licensing agency found itself unprepared for the sudden increase of applications, and, due to the back-up, applications often could not be processed for several months.[91] The panel held that the practices resulting in the three-month delays in licensing

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

[83] *See* Panel Report, *Turkey–Textiles*, *supra* footnote 82, at ¶ 9.63.

[84] Panel Report, *U.S.–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 7.11, WT/DS58/R (May 15, 1998); Appellate Body Report, *U.S.–Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 2-6 (October 12, 1998). Similarly, in *U.S.–Tuna*, a GATT panel found that a U.S. embargo on tuna imports from countries that did not implement a regulatory regime that prevented certain tuna harvesting practices was inconsistent with Article XI:1. Panel Report, *U.S.–Tuna*, *supra* footnote 76, at ¶ 7.1.

[85] Panel Report, *U.S.–Shrimp*, *supra* footnote 84, at ¶ 7.16. As discussed below, the United States sought, unsuccessfully, to justify the measure under Article XX(b). *See infra* footnotes 109-115 and accompanying text. Ultimately, the Department of State revised its guidelines for the implementation of the country certification program. Notice of Proposed Revisions to Guidelines for the Implementation of Section 609 of P.L. 101-162, 64 *Federal Register* 14481 (March 25, 1994); Revised Guidelines for the Implementation of Section 609 of P.L. 101-162, 64 *Federal Register* 36946 (July 8, 1999).

[86] *See, e.g.,* Panel Report, *India–Quantitative Restrictions on Imports of Agricultural, Textile, and Industrial Products*, WT/DS90/R, paras. 5.129, 5.130 (September 22, 1999).

[87] *See e.g.,* Panel Report, *China–Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, ¶ 7.917 (July 5, 2011).

[88] Panel Report, *Japan–Trade in Semi-Conductors*, (May 4, 1988) GATT B.I.S.D. (35th Supp.), 31.

[89] *Id.* at paras. 108-109, 118.

[90] *Id.* at ¶ 22.

[91] *Id.*

had a limiting effect on exportation and were, therefore, *de facto* quantitative restrictions prohibited by Article XI:1.[92]

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; (2) quantitative restrictions that are "necessary" for the application of standards or regulations for the classification, grading, or marketing of commodities in international trade; and (3) import restrictions designed to remove a temporary surplus of the like domestic product.[93]

Other GATT articles may be implicated by the imposition of quantitative restrictions.[94] 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: (1) fall within the scope of one of the 10 exceptions; and (2) be applied in a manner that does not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. This second condition is referred to as "the chapeau" of Article XX because it is contained in the introductory clause, or the "hat," of Article XX.

The Article XX Exceptions

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

[92] *See id.* at ¶ 118.

[93] GATT, Art. XI:2. *See also* Panel Report, *Canada–Measures Affecting Exports of Unprocessed Herring and Salmon* (March 22, 1988), GATT B.I.S.D. (35th Supp.) 98, at paras. 4.2-4.3 (assessing whether Canada's export restrictions on frozen fish that were not of "No. 1" quality were "necessary" for the purposes of Article XI:2(b)).

[94] *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).

outweighed by its contribution to the stated values or interests.[95] 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.[96]

The Article XX Chapeau

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." Specifically, the defending Member must establish that, as applied, the measure neither (1) creates arbitrary or unjustifiable discrimination between countries where the same conditions prevail nor (2) constitutes a disguised restriction on international trade.[97] The chapeau is intended to strictly discipline the use of the Article XX exceptions so as to distinguish measures intended to protect legitimate interests from measures intended to circumvent a Member's WTO obligations.[98] Accordingly, the chapeau imposes requirements that are more difficult to satisfy than the requirements of any one of the 10 policy exceptions.[99]

Relatively few panel or Appellate Body reports have articulated the standards for determining that a measure is a disguised restriction on international trade. Ostensibly, this analysis involves a heightened analysis of the intent behind the measure's application to discern whether the defending Member's true motive was protectionism. [100] Because the intent behind a measure "may not be easily ascertained," panels may scrutinize the "design, architecture, and revealing structure" for signs of knowing or willful "protective application."[101] A WTO panel may also consider the extent to which the measure's application has a discriminatory effect, such as benefiting a domestic industry to the detriment of a foreign one.[102] Given the rudimentary nature of WTO jurisprudence in this area, it can be difficult to predict whether a given measure would be indefensible under Article XX because its application constituted a disguised restriction on trade.

In contrast to the jurisprudence on "disguised restrictions," a host of WTO panels and Appellate Body reports have declared measures inconsistent with the Article XX chapeau because their application constituted arbitrary or unjustifiable discrimination. These decisions express a strong preference for measures applied after international negotiations or pursuant to an international agreement.[103] The seeming corollary of this preference, moreover, is the distaste that panels and

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

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

[97] *Id.* at ¶ 215.

[98] *See id*.

[99] *See* Appellate Body Report, *U.S.–Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, p. 23 (April 29, 1996) (describing the burden of demonstrating that a measure satisfies the Article XX chapeau as "of necessity, a heavier task than that involved in showing that an exception, such as Article XX(g), encompasses the measure at issue.").

[100] *See* Van den Bossche, *supra* footnote 21, at 650. In addition, the term "restriction" has been construed broadly to encompass both restrictions *on* international trade and discrimination *in* international trade. *See* Panel Report, *European Communities–Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 8.235, WT/DS135/R (September 18, 2000) (citing Appellate Body Report, *U.S.–Gasoline*, *supra* footnote 99, at 25).

[101] Panel Report, *EC–Asbestos*, *supra* footnote 100, at ¶ 8.236.

[102] *See, e.g.*, *id.* at paras. 8.237-8.239.

[103] *See* Appellate Body Report, *U.S.–Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article*
(continued...)

the Appellate Body have shown for measures with a unilateral or coercive character.[104] As discussed below, these preferences are expressed both in the Appellate Body's interpretation of the term "discrimination" and its interpretation of the phrase "arbitrary or unjustifiable."

According to the Appellate Body, "discrimination," for the purposes of the Article XX chapeau, occurs when a measure is applied without regard for the similarity of—or differences between—the conditions in either the importing and exporting countries or two importing countries.[105] In other words, both the differential treatment of countries in which the same conditions prevail as well as the uniform treatment of countries where *different* conditions prevail constitute discrimination.[106] Once a measure's application is deemed discriminatory, a WTO panel will assess the nature of the discrimination to determine whether it is "arbitrary or unjustifiable." This analysis depends on whether the discrimination has a "a legitimate cause or rationale in light of the [Article XX] objectives,"[107] and often requires an assessment of the actions, if any, that the defending Member took to *prevent* foreseeable discrimination.[108]

For example, in *U.S.–Shrimp*,[109] the Appellate Body examined the GATT consistency of a U.S. measure prohibiting the importation of shrimp from countries not certified by the United States as maintaining a regulatory program or fishing environment that satisfied the U.S. standards for sea turtle protection.[110] After determining that the shrimp import ban created discrimination because it was "coercive,"[111] the Appellate Body assessed whether this discrimination was "arbitrary or unjustifiable." It described its approach to this question as "heavily" influenced by the U.S. failure to engage all shrimp exporting Members in negotiations before enforcing the ban.[112]

(...continued)

21.5 of the DSU by Malaysia, WT/DS58/AB/R, ¶ 124 (October 22, 2001) ("Clearly, and 'as far as possible,' a multilateral approach is strongly preferred.") (quoting Principle 12 of the Rio Declaration on Environment and Development).

[104] Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, paras. 171-172, WT/DS58/AB/R, ¶ 172 (October 12, 1998).

[105] *See id.*; Van den Bossche, *supra* footnote 21, at 644.

[106] Van den Bossche, *supra* footnote 21, at 644. *See* Appellate Body Report, *U.S.–Shrimp*, *supra* footnote 104, at ¶ 172.

[107] Appellate Body Report, *Brazil–Tyres*, *supra* footnote 96, at ¶ 225; Appellate Body Report, *U.S.–Gasoline*, *supra* footnote 99, at 23-24. In *Brazil–Tyres*, Brazil sought to justify a ban on retreaded tire imports from countries that were not part of the MERCOSUR customs union by, *inter alia*, claiming that the MERCOSUR exemption was necessary to comply with a ruling by a MERCOSUR abritral tribunal. Panel Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, WT/DS332/R, ¶ 7.270 (June 12, 2007). The Appellate Body held that although Brazil legitimately needed to conform its policies with the arbitral tribunal's decision, in the context of the Article XX chapeau, this need was not a legitimate reason for discriminating between countries. Specifically, the Appellate Body decided that Brazil's discrimination against non-MERCOSUR countries was arbitrary or unjustifiable because the reason for it—compliance with the arbitral tribunal's ruling—was wholly unrelated to Brazil's goal of protecting public and environmental health. Appellate Body Report, *Brazil–Tyres*, *supra* footnote 96, at paras. 228, 232-33.

[108] *See, e.g.,* Appellate Body Report, *U.S.–Gasoline*, *supra* footnote 99, at 28 (stating that the United States failed to adequately export international cooperation and "the resulting discrimination must have been foreseen").

[109] Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, paras. 171-172, WT/DS58/AB/R (October 12, 1998).

[110] *Id.* at ¶ 161.

[111] *Id.* at paras. 161, 164. According to the Appellate Body, the shrimp import ban effectively required other Members to adopt the same sea turtle-protection policies as the United States regardless of the different conditions in the territories of those Members. *Id.* The Appellate Body suggested the Department of State should have incorporated an "inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries" into its implementation of the ban. *Id.* at paras. 161, 165.

[112] Appellate Body Report, *U.S.–Shrimp*, *supra* footnote 109, at ¶ 166 (stating that the U.S. failure to engage these (continued...)

Indeed, the Appellate Body ultimately found that the discrimination was unjustifiable because (1) the import ban reflected U.S. negotiations with some, but not all, WTO Members that export shrimp;[113] and (2) the United States had not even *attempted* to use existing international mechanisms to achieve international cooperation.[114] As a result, the Appellate Body wrote, the ban had a "unilateral character" that heightened both its discriminatory nature and its "unjustifiability."[115]

In a subsequent decision, *U.S.–Shrimp (Article 21.5)*,[116] the Appellate Body clarified what it meant by international cooperation. In that case, Malaysia challenged the adequacy of the measures the United States imposed to implement the Appellate Body's decision in *U.S.–Shrimp*. Specifically, the Department of State had revised its guidelines so that countries could be certified for shrimp imports once they demonstrated either that their shrimp fishing environments did not pose a threat of incidental sea turtle capture or that they had implemented, and were enforcing, a "comparably effective" regulatory program.[117] In determining whether a country's regulatory program was "comparably effective" to U.S. standards, the guidelines stated that the Department of State would "take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations."[118] In addition, the United States commenced international negotiations with Malaysia, the complaining Member, as well as other countries. Although these negotiations did not yield an agreement between the United States and Malaysia, the discrimination caused by the U.S. embargo and shrimp import certification procedures was not "arbitrary or unjustifiable" because the United States had undertaken "serious, good faith efforts" to avoid it.[119]

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;

(...continued)

WTO Members in "serious across-the-board negotiations with the objective of concluding bilateral or multilateral agreements" "bears heavily" on the analysis).

[113] *See* Appellate Body Report, *U.S.–Shrimp*, *supra* footnote 109, at ¶ 172.

[114] *See id.* at ¶ 171.

[115] *Id.* at ¶ 172.

[116] Appellate Body Report, *U.S.–Import Prohibition of Certain Shrimp and Shrimp Products, Recourse to Article 21.5 of the DSU by Malaysia*, WT/DS58/AB/R (October 22, 2001).

[117] Appellate Body Report, *U.S.–Shrimp (Article 21.5)*, *supra* footnote 116, at paras. 6, 7.

[118] *Id.* at ¶ 6. *See also* Revised Guidelines for the Implementation of 609 of P.L. 101-162 Relating to the Protection of Sea Turtles, 64 *Federal Register* 36,946 (July 8, 1999) ("In reviewing any such information, the Department of State will take fully into account any demonstrated differences between the shrimp fishing conditions in the United States and those in other nations, as well as information available from other sources.").

[119] *See* Appellate Body Report, *U.S.–Shrimp (Article 21.5)*, *supra* footnote 116, at paras. 123, 134.

(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.[120] 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.[121] 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 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.[122] 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.[123] 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.[124] This dispute never actually came before a panel because the two governments reached a diplomatic solution in the

[120] Decision Concerning Article XXI of the General Agreement, Decision of November 30, 1982, GATT B.I.S.D. (29th Supp.) 23 (1983).

[121] 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 (2003).

[122] P.L. 104-114, §§102, 401.

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

[124] 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).

form of a Memorandum of Understanding, and the European Union requested that the panel suspend its work.[125]

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.[126] 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."[127] 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.[128] However, when the 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.[129] 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.[130] 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.[131]

Article XXIV: Customs Unions and Free Trade Areas

WTO Members' participation in free trade agreements and customs unions[132] is facially inconsistent with the MFN obligation because parties to these arrangements may grant lower

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

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

[127] GATT, Art. XXIII:1.

[128] Panel Report, *Japan–Measures Affecting Consumer Photographic Film and Paper*, ¶ 10.82, WT/DS44/AB/R (March 31, 1998).

[129] Dispute Settlement Understanding, Art. 3.8.

[130] *Id.*

[131] *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).

[132] 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.

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.[133]

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.[134] 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.[135] 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.[136]

Other WTO Agreements Reached During the Uruguay Round

All multilateral trade agreements negotiated during the Uruguay Round are binding on WTO Members.[137] 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.

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

[134] Appellate Body Report, *Turkey–Restrictions on Imports of Textile and Clothing Products*, ¶ 46, WT/DS34/AB/R (October 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.")

[135] *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.

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

[137] 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).

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.[138] The Agreement on Implementation of Article VI of the GATT 1994 (the Antidumping, or AD, Agreement) provides substantive and procedural requirements for WTO Members to follow in conducting antidumping investigations and imposing antidumping duties, which supplement existing tariffs. 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.[139]

Under the Antidumping Agreement, a domestic investigation of dumping by a WTO Member must be triggered by a written application by or on behalf of a domestic industry.[140] An application meets this standard if domestic producers expressing support for the application produce both a greater percentage of "like products"[141] than the domestic industry opposed to the application and no less than 25% of total production of "like products."[142] All WTO Members must inform the Committee on Antidumping Practices when they initiate anti-dumping actions and provide reports on all ongoing investigations.

The AD Agreement defines dumping as introducing a product into a foreign country's market at an export price lower than the product's "normal value"—that is, its "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country."[143] Accordingly, the first step in assessing a dumping margin is calculating the normal value and the export price of the product. Although the normal value is ordinarily the market price in the country of export,[144] Article 2.2 of the AD Agreement permits WTO Members to use a different methodology for calculating the normal value in certain circumstances.[145] In addition, by incorporating an interpretative note to Article VI of the GATT, Article 2.7 of the AD Agreement permits WTO Members to use surrogate country data to make price comparisons about the normal value of products allegedly dumped by a government-controlled, i.e., nonmarket, economy (NME).[146] Once the normal value is determined, the investigating authorities must

[138] GATT, Art. VI:1.

[139] AD Agreement, Art. 18.

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

[141] Article 2.6 of the Antidumping Agreement defines the term "like product" to mean "a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration."

[142] AD Agreement, Art. 5.4. Panel Report, *Mexico–Antidumping Duties on Steel Pipes and Tubes from Guatemala*, ¶ 7.322, WT/DS331/R (June 8, 2007).

[143] *Id.* at Art. 2.1.

[144] AD Agreement, Art. 2.1.

[145] *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).

[146] Appellate Body Report, *European Communities–Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, ¶ 285 (July 15, 2011). For more information on the application of antidumping law to nonmarket economies, see CRS Report RL33976, *U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview*, by (name redacted). *See also* Alexander Polouektov, *Non-Market Economy Issue in WTO Anti-Dumping Law and Accession Negotiations*, 36 J. WORLD TRADE 1, 18-19, 20-22, 23-25 (2002) (comparing anti-dumping practice and criteria for qualifying as a market economy in selected legislative systems).

calculate the dumping margin by comparing the product's export price with its 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.[147] If the dumping margin is *de minimis*, the investigating Member may not impose anti-dumping duties.[148] Many WTO disputes center around the methodology that a WTO Member uses to calculate the dumping margin. In particular, the practice of using "zeroing"[149] to assess a country's dumping margin has been a frequent subject of WTO dispute settlement proceedings[150] and is discussed later in this report.

To form the basis for anti-dumping duties, dumping must cause or threaten injury to the domestic industry or materially retard its establishment.[151] The presence of injury is determined by examining the import volume of the dumped product, its effect on the prices in the domestic market for a like product, and the resulting impact on domestic producers of the like product.[152] Several additional factors are relevant when the WTO Member is investigating allegations that the dumping causes a *threat* of injury, rather than actual injury.[153] For the purposes of these injury and threat determinations, the term "domestic industry" generally refers to the domestic producers as a whole of a like product or the domestic producers of a major proportion of the total domestic production of a like product.[154] Only in exceptional circumstances may a WTO Member use a narrower regional definition.[155]

Finally, the AD Agreement requires a WTO Member to determine that the dumping *causes* the injury to the domestic industry. Article 3.5 of the Agreement contains a non-attribution requirement: investigating authorities must separate and distinguish the injurious effect of other factors from the injuries effects of the dumped imports to ensure that the imposition of an antidumping duty on the imports at issue would, in fact, be justified.[156]

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[147] 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,

[148] *See* AD Agreement, Art. 5.8.

[149] 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: 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.*

[150] *E.g.,* Panel Report, *U.S.–Antidumping Measures on Polyethylene Retail Carrier Bags from Thailand*, WT/DS383/R (February 18, 2010); Panel Report, *U.S.–Continued Existence and Application of Zeroing Methodology*, WT/DS350/R (February 19, 2009). *See also* CRS Report RL32014, *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by (name redacted) (identifying, *inter alia*, cases that involve zeroing).

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

[152] *Id.* at Art. 3.1.

[153] *See* AD Agreement, Art. 3.7; Panel Report, *Mexico–Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, ¶ 7.131 (February 24, 2000).

[154] AD Agreement, Art. 4.1.

[155] *Id.* at Art. 4.1(ii).

[156] *Id.* at Art. 3.5. Appellate Body Report, *Japan–Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, paras. 223-232 (August 23, 2001).

Ultimately, WTO Members must limit the amount of any antidumping duty imposed to the amount "adequate to remove the injury to the domestic industry,"[157] and the duty must be lifted as soon as it is no longer necessary to counteract the dumping causing the injury.[158] The AD Agreement requires WTO Members to review the need for the continued imposition of any antidumping duty when requested by an interested party.[159] Members must also "terminate" an antidumping duty five years after its imposition unless, after review, the authorities determine that lifting the duty would lead to the continuation or recurrence of dumping and injury.[160]

Agreement on Subsidies and Countervailing Measures

Like the Antidumping Agreement, the Agreement on Subsidies and Countervailing Measures (SCM Agreement) 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 SCM Agreement was developed to discipline Members' use of subsidies and their responses to countering the effects of certain subsidies.

Among the advantages that the SCM Agreement provides over the subsidy provisions of Articles VI and XVI of the GATT is a more precise definition of subsidy. The SCM Agreement defines "subsidy" as a financial contribution by a government or public body within a WTO Member's territory that confers a benefit.[161] 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.[162] 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.[163]

The SCM Agreement 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

[157] AD Agreement, Art. 9.1.

[158] *Id.* at Art. 11.1

[159] *Id.* at Art. 11.2.

[160] *Id.* at Art. 11.3.

[161] SCM Agreement, Art. 1.1.

[162] *Id.*

[163] Appellate Body Report, *Canada–Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R ¶ 149 (August 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).

either procedure, it must be specific in law or fact to an enterprise, industry, or group thereof.[164] Prohibited subsidies, as described below, are considered specific *per se*.

The SCM Agreement divides subsidies into two categories: prohibited and actionable. Prohibited subsidies are contingent upon either export performance or the use of domestic over imported products.[165] 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.[166]

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.[167] 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.[168]

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.[169] 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,[170] 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 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 SCM Agreement.[171]

The interpretation of the SCM Agreement was at issue in the "Boeing-Airbus cases"[172] between the United States and the European Union. The United States first requested dispute settlement

[164] SCM Agreement, 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* SCM Agreement, 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 SCM Agreement 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." Panel Report, *U.S.–Subsidies on Upland Cotton*, WT/DS267/R, ¶ 7.1142 (September 8, 2004).

[165] SCM Agreement, Art. 3.1.

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

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

[168] *Id.*

[169] 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* SCM Agreement, Art. 19.2.

[170] *Infra* notes 484-500.

[171] SCM Agreement, Art. 10.

[172] *U.S.–Large Civil Aircraft*, DS317; *EC and Certain Member States–Large Civil Aircraft*, DS316.

proceedings in 2004, alleging that several European Union countries provided a variety of actionable and prohibited subsidies to Airbus, including, *inter alia*, "launch aid," grants and loans for research and development, and the governmental provision of infrastructure goods and services to develop and upgrade Airbus manufacturing sites.[173] The European Union filed a countersuit, alleging that the U.S. provided actionable and prohibited subsidies to Boeing, including, *inter alia*, state and federal tax incentives, access to NASA and Department of Defense (DOD) facilities and equipment for corporate research and development, and payments by both agencies to Boeing pursuant to contracts for research and development.[174]

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.[175] Because safeguard measures disturb the balance of rights and obligations, the Members affected by a safeguard are entitled to appropriate trade compensation.[176]

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.[177] 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,[178] (2) procedural requirements for the application of a safeguard measure,[179]

[173] Appellate Body Report, *EC–Large Civil Aircraft*, WT/DS316/AB/R, ¶ 1 (June 1, 2011); Request for Consultations by the United States, *EC–Measures Affecting Trade in Large Civil Aircraft*, WT/DS316/1 (October 12, 2004).

[174] Appellate Body Report, *U.S.–Measures Affecting Trade in Large Civil Aircraft*, WT/DS353/AB/R, ¶ 2 (March 23, 2012); Panel Report, *US–Large Civil Aircraft*, WT/DS353/ R, paras. 3.1, 7.940-7.947, 7.111-7.1112 (March 31, 2011).

[175] 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.

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

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

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

[179] *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).

and (3) characteristics of, and conditions relating to, a safeguard measure.[180] Today, all safeguard measures must comply with *both* Article XIX of the GATT and the Agreement on Safeguards.[181]

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.[182] The Appellate Body has clarified the "increased imports" requirement to mean an increase that is "recent, sudden, sharp, and significant."[183] 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.[184] 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.[185]

Agreement on Rules of Origin

Rules of origin are national rules that determine the source of imported goods, and, accordingly what restrictions and duties should apply to their importation. Determining a product's country of origin can be difficult given the increasing globalization of manufacturers' supply chains. *Preferential* rules of origin determine whether a particular good is entitled to enter the importing country on better terms than products from other countries.[186] For example, preferential rules of origin determine whether a product originated in a country that participates in a reciprocal trade agreement with, or benefits from a tariff preference program administered by, the importing country. *Nonpreferential* rules of origin determine a product's country of origin for all other purposes, including application of most favored nation treatment, quantitative restrictions, imposition of antidumping and countervailing duties, and government procurement requirements.[187]

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[180] *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).

[181] Van Den Bossche, *supra* footnote 131, at 673.

[182] Agreement on Safeguards, Art. 2.1.

[183] Panel Report, *U.S.–Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities*, WT/DS166/R, ¶ 8.31 (July 31, 2000). *See also* Appellate Body Report, *Argentina-Footwear*, *supra* footnote 136, at p. 47 ("... 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.'").

[184] Van Den Bossche, *supra* footnote 131, at 677.

[185] Panel Report, *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.

[186] Asif H. Qureshi and Roman Grynberg, *Preferential Rules of Origin and WTO Disciplines with Specific Reference to the U.S. Practice in the Textiles and Apparel Sectors*, 32 LEGAL ISSUES ECON. INTEGRATION 25, 27 (2005); Joseph A. LaNasa III, *Rules of Origin and the Uruguay Round's Effectiveness in Harmonizing and Regulating Them*, 90 AM. J. INT'L L. 625, 626 (1996).

[187] Qureshi and Grynberg, *supra* footnote 186, at 27; LaNasa, *supra* footnote 186, at 626.

There is no international consensus on how countries should formulate their rules of origin. The United States and many WTO Members apply the "substantial transformation" standard under which the source of a given import is the country in which the last "substantial transformation" occurred.[188] However, other countries may identify a product's country of origin as the country in which (1) a certain percentage of value was added to the good; (2) the activity resulting in a particular change in the product's tariff classification occurred; or (3) a specified production process occurred.[189]

By agreeing to the WTO Agreement on Rules of Origin (RO Agreement), WTO Members agreed to a negotiate a uniform set of nonpreferential rules of origin.[190] Once the negotiations (also known as the Harmonization Work Program) are completed, all WTO Members will apply only one set of non-preferential rules of origin for all purposes. However, the negotiations are currently running more than 10 years behind schedule.[191] 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 requirement,[192] a prohibition on the use of rules of origin as a primary means of protecting domestic industries or favoring a particular Member's imports,[193] and a requirement that rules of origin not themselves create restrictive, distorting, or disruptive effects on trade.[194] However, Article 2 has been interpreted rather narrowly, with the WTO panel in *U.S.–Textiles Rules of Origin*[195] emphasizing that, until harmonization is completed, WTO Members retain considerable discretion in designing and applying their respective nonpreferential rules of origin.[196] Nevertheless, in the name of transparency, Members are required to notify the WTO Committee on Rules of Origin of their respective rules of origin.[197]

Agreement on Agriculture

Members' agricultural support policies can be governed by both the Agreement on Agriculture (AA) and other non-agriculture specific WTO Agreements such as the GATT and the SCM

[188] "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.

[189] Qureshi and Grynberg, *supra* footnote 186, at 28; Rod Falvey and Geoff Reed, *Rules of Origin as Commercial Policy Instruments*, 43 INT'L ECON. REV. 393, 394 (2002).

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

[191] *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* footnote 131, at 435.

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

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

[194] Agreement on Rules of Origin, Art. 2(c).

[195] Panel Report, *US–Rules of Origin for Textiles and Apparel Products*, WT/DS243/R (June 20, 2003).

[196] *See, e.g., id.* at paras. 6.24, 6.25, 6.73. In *U.S.–Textiles Rules of Origin*, a WTO panel rejected India's allegations that U.S. rules of origin were inconsistent with Article 2(d) of the RO Agreement. The panel held, *inter alia*, that, unlike the MFN and national treatment provisions of the GATT, which prohibit discrimination between "like products," the MFN and national treatment provisions of the RO agreement prohibit discrimination between *the same* good regardless of its provenance. Panel Report, *U.S.–Textiles Rules of Origin*, *supra* footnote 195, at paras. 6.246-6.249.

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

Agreement.[198] The objective of the AA is to ensure that Members undertake "progressive reductions in agricultural support and protection over an agreed period of time."[199]

An agricultural support or protection program is governed by the AA if it (1) satisfies the SCM Agreement's definition of a "subsidy";[200] and (2) supports a product listed in Annex 1 of the AA.[201] Because WTO Members make commitments under the AA, a covered agricultural support program is inconsistent with the AA if it does not conform with the Member's schedule or domestic support reduction commitments. However, as discussed below, the AA prescribes different rules for export subsidies than domestic agricultural support measures.

Prohibited Export Subsidies Under the AA

Like the SCM Agreement, the AA defines "export subsidies" as subsidies that are contingent on export performance.[202] *Unlike* the SCM Agreement, the AA does not prohibit all export subsidies. Instead, Article 3.3 prohibits Members from providing the six types of export subsidies identified in Article 9.1 to:

- unscheduled agricultural products,[203] and
- scheduled products in excess of the specified reduction commitment levels.[204]

Among the export subsidies listed in Article 9.1 are direct subsidies, payments on the export of an agricultural good, subsidies to reduce the costs of marketing agricultural exports, and subsidies contingent on the product's incorporation in exported products. The AA also prohibits export subsidies and non-commercial transactions that are not identified in Article 9.1 when they circumvent, or threaten circumvention of, the Member's export subsidy commitments.[205]

In *U.S.–Upland Cotton*,[206] Brazil challenged several U.S. policies designed to support a variety of U.S. agricultural industries. Among these policies were the so-called "Step 2 payments" to domestic purchasers and exporters of U.S. cotton. The Commodity Credit Corporation of the U.S. Department of Agriculture provided these commodity certificates and cash payments to exporters of U.S. cotton as compensation for marketing or otherwise enhancing the international

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[198] For additional discussion of the Agreement on Agriculture, see CRS Report RS20840, *Agriculture in the WTO: Limits on Domestic Support*, by (name redacted). However, on those occasions when a conflict arises between the AA and either the GATT or the SCM Agreement's rules, the AA's rules prevail. *See* AA, Art. 21 ("The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement."). Ordinarily, all Annex 1A agreements prevail when there is a conflict with the GATT.

[199] Appellate Body Report, *U.S.–Subsidies on Upland Cotton*, WT/DS267/AB/R, ¶ 49 (March 3, 2005) (emphasis added).

[200] *See* Appellate Body Report, *U.S.–Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R, ¶ 136 (February 24, 2000) (hereinafter *U.S.–FSC*). Accordingly, an economic support program will be deemed a subsidy under the AA if it is a financial contribution by a government that provides a benefit to the recipient.

[201] These products include, *inter alia*, all products covered by first 24 chapters of the Harmonized Tariff System (HTS) that are not fish or fish products.

[202] AA. , Art. 1(e).

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

[204] *Id.*

[205] *Id.* at Art. 10.1.

[206] Panel Report, *U.S.–Subsidies on Upland Cotton*, WT/DS267/R (September 8, 2004).

competitiveness of U.S. cotton when it was more expensive than foreign-grown cotton.[207] Determining that the phrase "contingent on exports" has the same meaning it is given under the SCM Agreement, the Panel found that the Step 2 payments were export subsidies under the AA because, to receive them, exporters had to prove that they had exported U.S. cotton.[208] Furthermore, because the United States had not scheduled export subsidy commitments for upland cotton, the Step 2 payments were inconsistent with U.S. commitments under the AA.[209]

Having found that the Step 2 payments were inconsistent with the U.S. schedule, the Panel in *U.S.–Upland Cotton* did not need to consider whether the payments circumvented U.S. commitments. In contrast, the WTO Appellate Body in *U.S.–FSC*[210] determined that U.S. tax benefits for Foreign Sales Corporations (FSCs) circumvented, but did not violate, U.S. export subsidy commitments. In that case, the tax benefits at issue excluded from a U.S. taxpayer's gross income all income that was earned with respect to goods in transactions involving property that: (1) was manufactured, grown, or extracted within the United States; (2) was held primarily for sale, lease, or rental *outside* the United States; and (3) had a fair market value, no more than 50% of which was attributable to articles manufactured or extracted outside of the United States or direct costs of labor performed outside of the United States. The Appellate Body found that the tax measure was inconsistent with the Agriculture Agreement because it allowed for the provision of an unlimited amount of the subsidy to scheduled agricultural products that already received the maximum level of subsidies specified by the U.S. Schedule.[211] In other words, by implementing the FSC measure, the United States threatened to circumvent, if not actually circumvented, Article 3.3 of the AA.[212]

Domestic Support Programs

In addition to their export subsidy commitments, WTO Members are required by the AA to make and abide by reduction commitments for their domestic subsidy programs. Accordingly, two types of domestic subsidy programs are consistent with the AA: those that are exempt from the subsidizing Member's domestic support reduction commitments and those that are provided in conformity with (i.e., not in excess of) those commitments.[213] A given subsidy program is exempt from a WTO Member's reduction commitments if it is either:

- a so-called "green box" program;[214] or

[207] *Id.* at ¶ 7.696. *See also* P.L. 107-171, §1207; 116 Stat. 134, 161 (2002). For more on *U.S.–Upland Cotton*, see CRS Report RL32571, *Brazil's WTO Case Against the U.S. Cotton Program*, by (name redacted).

[208] *See* Panel Report, *U.S.–Upland Cotton*, *supra* footnote 206, at paras. 7.724, 7.736.

[209] *See id.* at ¶ 7.749 (stating that the Step 2 program violated U.S. obligations under Article 3.3. to "not provide subsidies in respect of any agricultural product not specified in... its Schedule" and Article 8 "not to provide export subsidies otherwise than in conformity" with the AA and its commitments).

[210] Appellate Body Report, *U.S.–Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R (February 24, 2000) (hereinafter *U.S.–FSC*).

[211] *Id.* at ¶ 152.

[212] *Id.* at ¶ 153.

[213] The United States domestic support commitment is approximately $19 billion in AMS. Note by the Secretariat, *Total Aggregate Measurement of Support*, TN/AG/S/13/ADD.3/Rev.1 (November 23 2009).

[214] AA, Art. 7.1 ("Each Member shall ensure that any domestic support measure in favor of agricultural producers which are not subject to reduction commitments because they qualify under the criteria set out in Annex 2 to this Agreement are maintained in conformity therewith.").

- provided at levels that do not exceed the relevant *de minimis* level.[215]

To be considered a "green box" program, a domestic agricultural support program must satisfy the applicable criteria in Annex 2. In addition to requiring that domestic agricultural support programs have "no, or at most minimal, trade-distorting effects or effects on production,"[216] Annex 2 prescribes different requirements for different kinds of domestic agricultural support programs. These programs include, *inter alia*, domestic food aid programs,[217] payments for relief from natural disasters,[218] and payments under environmental programs.[219]

Measures that are *not* exempt from the subsidizing Member's domestic support reduction commitments must be included in the Member's calculation of its "Current Total" Aggregate Measurement of Support, or AMS. This is a monetary measurement of the Member's domestic agricultural support programs and it is reported annually to the WTO.[220] The total can then be compared with Member's commitments to ensure that Members are complying with their reduction commitments. For example, the United States is committed to providing no more than $19.1 billion per year in AMS.[221] Therefore, if the United States provides domestic subsidies covered by the AA in excess of its $19.1 billion AMS commitment, the United States may be in violation of the AA.

[215] AA, Art. 7.2(b) ("Where no Total AMS commitment exists in Part IV of a Member's Schedule, the Member shall not provide support to agricultural producers in excess of the relevant *de minimis* level set out in" Article 6.4). Article 6.4 measures the *de minimis* level of support differently for different kinds of domestic support measures. For "non-product-specific" domestic support, the *de minimis* level of support is 5% of the value of the Member's total agricultural production. The WTO Panel in *Korea–Beef* interpreted the term "non-product-specific" to refer to domestic support granted in favor of all agricultural producers generally rather than only in favor of a particular subset of agricultural producers. Panel Report, *Korea–Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/179/R, ¶ 836 (July 31, 2000). For "product-specific" domestic support, the *de minimis* level of support is 5% of the Member's total value of production of a basic agricultural product during the relevant year. For developing countries, the *de minimis* level of product-specific and non-product-specific domestic is 10%, rather than 5%. AA, Art. 6.5(b).

[216] AA, Annex 2.1. The minimal trade distortion requirement is satisfied if the subsidy is provided through a publicly funded government program and does not provide price support to producers. *Id.*

[217] AA, Annex 2, Art. 4.

[218] *Id.* at Annex 2, Art. 8.

[219] *Id.* at Annex 2, Art. 12. Environmental and conservation programs are exempt from a Member's commitments if, in addition to being provided through a publicly funded government program and avoiding the effect of providing price support to producers: (1) the amount of the payments is limited to the extra costs or loss of income involved in complying with the environmental program; (2) the environmental program is "clearly defined"; and (3) eligibility for the payments is dependent upon the fulfillment of certain conditions, including conditions related to production methods or inputs. *Id.*

[220] The AA requires Members to include all domestic agricultural support measures that are not exempted from the Member's commitments in their calculation of their current total AMS. *See* AA, Arts. 6.4, 7.2. A Member must calculate its AMS in compliance with the methodology prescribed by Article 1 and Annex 3 of the Agreement. AA, Art. 1, Annex 3.1. *See* Panel Report, *Korea–Beef*, *supra* footnote 215, at paras. 825, 830. A WTO Member may challenge another Member's calculation of its current total AMS. *See e.g.,* Panel Report, *Korea–Beef*, *supra* footnote 215, at ¶ 823 (examining the complaining Members' claims that Korea's Current Total AMS, as calculated, violated Articles 3, 6, and 7 of the AA because Korea's domestic support for its beef industry exceeded Korea's scheduled commitments).

[221] Note by the Secretariat, *Total Aggregate Measurement of Support*, TN/AG/S/13, 3, 14 (January 27, 2005). Note that the United States initially reported its base level of agricultural support as $23.9 billion in AMS.

Agreement on Technical Barriers to Trade

Members frequently adopt measures that regulate a product's characteristics or its production methods to protect the environment or human health, to ensure the quality of products, to prevent deceptive practices, or to achieve some other legitimate objective. However, these measures can create obstacles to international trade. To that end, the WTO Agreement on Technical Barriers to Trade (TBT Agreement) is intended to balance the need to protect Members' regulatory autonomy with the need to prevent unnecessary obstacles to international trade.

The TBT Agreement applies to measures that are not governed by the WTO Agreement on Sanitary and Phytosanitary Measures (which focuses primarily on food safety) but that regulate a product's characteristics or process and production method (PPM).[222] A measure meets this definition if it regulates on the basis of either a product's intrinsic qualities, qualities that that are *related* to the product, or qualities that the product *lacks*.[223] Characteristics that are *related* to the product include their identification, presentation, and appearance.[224] In *EC–Sardines*,[225] for example, Peru challenged an EU regulation prescribing common marketing standards for preserved sardines.[226] The EU regulation required that all fish labeled and marketed as "preserved sardines" belong to one species of fish, *Sardina pilchardus*, effectively prohibiting all other fish species from being sold as "preserved sardines" in the EU market.[227] Because the regulation conditioned the "naming" of preserved sardines on product characteristics, the WTO Appellate Body held that it prescribed product *related* characteristics.[228]

The measure in *EC–Sardines* was a positive TBT measure: it specified a characteristic that a product must have in order to carry a particular label. In *EC–Asbestos*,[229] however, the Appellate Body found that measures framed in the negative can also be TBT measures. In that case, Canada challenged a French decree that criminalized, *inter alia*, the sale, import, and placing on the domestic market of asbestos fibers and materials, products, or devices containing those fibers.[230] Although the French measure mandated that all products *not* contain asbestos, it had the same effect, in the Appellate Body's view, as requiring all products to have a shared characteristic because it effectively required all products to be asbestos-free.[231]

The TBT Agreement classifies measures that regulate on the basis of a product's characteristics or PPM as technical regulations, standards, and conformity assessment procedures. Technical regulations are documents that prescribe product characteristics or their related processes and

[222] TBT Agreement, Arts. 1.3, 1.5. Sanitary and phytosanitary measures include measures applied to protect human health from arising from additives, contaminants, toxins or disease-causing organisms in food and feedstuffs, or to protect from risks arising from diseases carried by animals or plants or from the entry of pests.

[223] Appellate Body Report, *EC–Measures Affecting Asbestos and Asbestos-Containing Products*, ¶ 67, WT/DS135/AB/R (March 12, 2001).

[224] *Id.*

[225] Appellate Body Report, *EC–Trade Description of Sardines*, WT/DS231/AB/R (September 26, 2002).

[226] *Id.* at ¶ 2.

[227] *Id.* at ¶ 190.

[228] *Id.* at paras. 190-193.

[229] Appellate Body Report, *EC–Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (March 12, 2001).

[230] *Id.* at ¶ 2.

[231] *See id.* at ¶ 72.

production methods with which compliance is *mandatory*.[232] Technical regulations can include import bans and prohibitions that are related to product characteristics or PPMs.[233] Standards are documents that have been approved by a recognized body and prescribe product characteristics or their related processes and production methods with which compliance is *voluntary*.[234] Conformity assessment procedures (CAPs) are procedures, such as those related to testing, verification, inspection, or certification, that are used to ensure that the requirements prescribed by a given standard and/or technical regulation are satisfied.[235]

The TBT Agreement lays out different commitments for technical regulations, standards, and conformity assessment procedures. However, to date, most of the WTO panel and Appellate Body decisions interpreting the TBT Agreement have focused on the provisions on technical regulations. These provisions are contained in Article 2 of the Agreement. Members must, *inter alia*:

- ensure that their technical regulations provide Most Favored Nation (MFN) status to other Members' products;[236]
- ensure that their technical regulations do not violate the national treatment principle (i.e. Members' technical regulations must not accord imported products less favorable treatment than that accorded to like products of national origin);[237]
- base their technical regulations on international standards unless international standards would, because of unique country conditions, result in ineffective or inappropriate regulations; [238]
- give positive consideration to accepting as equivalent technical regulations of other Members that fulfill the objectives of their own domestic regulations;[239] and
- specify technical regulations based on product requirements in terms of performance rather than design or descriptive characteristics wherever appropriate.[240]

The TBT Agreement also bars Members from preparing, adopting, or applying technical regulations that are "more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment [of that objective] would create."[241] The Agreement provides

[232] TBT Agreement, Annex 1.2. For example, a technical regulation could include or be limited to "terminology, symbols, packaging, marking, or labeling requirements as they apply to a product, process, or production method."

[233] Appellate Body Report, *EC–Asbestos*, *supra* footnote 229, at ¶ 64.

[234] TBT Agreement, Annex 1.1.

[235] *Id.* at Annex 1.3.

[236] TBT Agreement, Art. 2.1.

[237] *Id.*

[238] *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*, *supra* footnote 225, ¶ 289.

[239] TBT Agreement, Art. 2.7.

[240] *Id.* at Art. 2.8.

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

an illustrative non-exhaustive list of "legitimate objectives," which includes: the protection of national security; the prevention of deceptive practices; and the protection of human health or safety, animal or plant life or health, or the environment.[242] WTO panels have suggested that the analysis of whether a technical regulation is, in fact, "more trade-restrictive than necessary" is an inquiry into whether the measure's trade-restrictiveness is required to achieve the Member's chosen level of protection.[243] Accordingly, WTO panels have compared the extent to which a given technical regulation contributes to the achievement of the Member's policy goal with "a potential less trade restrictive alternative measure" to determine whether the latter would similarly fulfill the Member's objective at the chosen level of protection.[244] Notably, a measure that is trade-restrictive and does not contribute to the fulfillment of the Member's objective necessarily violates Article 2.2.[245]

Significantly, unlike the GATT and GATS, the TBT Agreement does not provide Members with an affirmative defense for technical regulations that are inconsistent with the Agreement but necessary for national security or the protection of the environment or human and/or plant life or health.[246] The lack of a general or national security exception to the TBT Agreement has contributed to the view that it is a "stricter" agreement than the GATT or GATS.[247]

In addition to restraining the preparation and adoption of TBT measures that interfere with international trade, the TBT Agreement encourages WTO Members to participate in the work of international standardizing bodies with the aim of achieving broader consensus on the creation and content of international standards.[248] The Agreement also established processes and mechanisms that enhance the transparency of countries' TBT measures and a forum for Members to resolve concerns relating to TBT measures without resorting to formal dispute settlement procedures. Article 2.9.1, for example, requires Members to publish notice of—and allow time for other Members to comment on—proposed technical regulations that were created in the absence of, or deviate from, an international standard or may significantly affect trade. Additionally, representatives from each WTO Member sit on the Committee on Technical Barriers to Trade (TBT Committee), which affords Members the opportunity to consult and resolve concerns relating to the TBT Agreement or the accomplishment of its objectives.[249]

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[242] *Id.* The Agreement also suggests relevant considerations for a Member's assessment of the risks of non-fulfillment of those objectives. *Id.* This illustrative list of considerations includes the available scientific and technical information and the related processing technology or intended end-uses of products. *Id.*

[243] Panel Report, *U.S.–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶ 7.460 WT/DS381/R (September 2011).

[244] *Id.* at paras. 7.465, 7.475, 7.620.

[245] *See* Panel Report, *U.S.–Certain Country of Origin Labelling (COOL) Requirements*, paras. 7.719, 7.720 WT/DS384/R (November 18, 2011).

[246] *Compare e.g.,* GATT, Arts. XX, XXI *with* TBT Agreement, Art. 2.2.

[247] *See, e.g.,* NATHALIE BERNASCONI-OSTERWALDER ET. AL., ENVIRONMENT AND TRADE: A GUIDE TO WTO JURISPRUDENCE 215 (2006) ("[I]n contrast to the GATT, the TBT Agreement offers no exceptions to the national and most-favoured nation treatment obligations in its body text... Thus, the TBT Agreement could be perceived to be stricter than the GATT.").

[248] *E.g.,* TBT Agreement, Art. 2.6 ("With a view to harmonizing technical regulations on as wide a basis as possible, Members shall play a full part, within the limits of their resources, in the preparation by appropriate international standardizing bodies of international standards for products for which they either have adopted, or expected to adopt, technical regulations.").

[249] TBT Agreement, Art. 13.1. The TBT Committee has, for example, been used as a forum to resolve WTO Members' concerns about a technical regulation the country of Colombia implemented to promote the use of biofuels. *See, e.g.,* (continued...)

Agreement on Sanitary and Phytosanitary Measures

Sanitary and phytosanitary measures (SPS measures) are measures intended to protect human, animal, or plant life or health within a WTO Member's territory from food-safety risks and other risks relating to pests or diseases.[250] Possible examples include 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.[251] 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.[252] Therefore, SPS and TBT measures are mutually exclusive for the purposes of applying WTO obligations.[253]

SPS measures covered by the SPS Agreement are those that "may, directly or indirectly, affect international trade."[254] The Agreement defines an SPS measure to include four types of protective or preventative measures: (1) measures to protect animal or plant life or health arising from the entry, establishment, or spread of pests or diseases; (2) measures to protect human or animal life or health from risks arising from additives, contaminants, toxins, or disease-causing organisms in foods, beverages, or feedstuffs; (3) measures to protect human life or health from risks arising from diseases carried by animals, plants, or products, or from the entry, establishment, or spread of pests; and (4) measures to prevent or limit other damage from the entry, establishment, or spread of pests.[255]

Articles 2 and 5 of the SPS Agreement set out Members' basic rights and obligations. Article 2.2 requires WTO Members to ensure that any covered SPS measure is (1) applied only to the extent necessary to protect human, animal or plant life or health; (2) based on scientific principles; and (3) not maintained without sufficient scientific evidence, unless it is provisionally adopted and maintained in conformity with Article 5.7.[256] Article 2.3 requires WTO Members to further ensure that their SPS measures neither "arbitrarily or unjustifiably discriminate between Members where

(...continued)

Committee on Technical Barriers to Trade, *Minutes of the Meeting of 5-6 November 2009*, G/TBT/M/49 at paras. 193-195 (December 22, 2209); Committee on Technical Barriers to Trade, *Specific Trade Concerns Raised in the TBT Committee*, G/TBT/GEN/74/Rev.6, pp. 27-28.

[250] SPS Agreement, Annex A, Art. 1.

[251] For more on SPS measures and concerns, read CRS Report RL33472, *Sanitary and Phytosanitary (SPS) Concerns in Agricultural Trade*, by (name redacted).

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

[253] 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 that a measure is valid under the SPS Agreement, WTO Members tend to characterize their own food-related measures as TBT measures while characterizing those of their adversaries in dispute settlement proceedings as SPS measures. *See* Van Den Bossche, *supra* footnote 21, at 840; Marco Bronckers and Ravi Soopramanien, *The Impact of WTO Law on European Food Regulation*, 2008 EUR. FOOD & FEED L. REV. 361, 363 (2008).

[254] SPS Agreement, Annex A, Art. 1.

[255] *Id.*, Annex A, Art. 1.

[256] *Id.* at Art. 2.2. Article 5.7 states: "[W]here relevant scientific evidence is insufficient, a Member may provisionally adopt sanitary or phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary or phytosanitary measures applied by other Members. In such circumstances, Members shall seek to obtain the additional information necessary for a more objective assessment of risk and review the sanitary or phytosanitary measure accordingly within a reasonable period of time."

identical or similar conditions prevail, including between their own territory and that of other Members" nor are applied "in a manner which would constitute a disguised restriction on international trade." This language prohibiting arbitrary or unjustifiable discrimination and disguised restrictions on trade is also in Article XX of the GATT.

Article 5.3 obligates WTO Members "to avoid arbitrary or unjustifiable distinctions" in the levels of sanitary or phytosanitary protection "if such distinctions result in discrimination or a disguised restriction on international trade." Article 5.6 obligates WTO Members to ensure that their sanitary or phytosanitary measures "are not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection." Notably, a measure will not be deemed to be more trade restrictive than required unless there is a feasible alternative that would achieve the "appropriate level of sanitary or phytosanitary protection" and be "significantly less restrictive to trade."[257]

Like the TBT Agreement, the SPS Agreement requires Members to base their SPS measures on international standards, guidelines, or recommendations where they exist.[258] The three sources of international standards for SPS measures 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.[259] 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."[260] If the scientific evidence is insufficient, Members may provisionally adopt SPS measures on the basis of the available information but must seek additional information for a more objective assessment of the risk and review the SPS measure within a reasonable period of time.[261]

Another core provision of the SPS Agreement requires Members to "base" their SPS measures on "an assessment, as appropriate to the circumstances, of the risks to human, animal, or plant life or health, taking into account risk assessment techniques developed by relevant international organizations."[262] In *EC–Biotech Products*,[263] the WTO panel wrote that a Member satisfies this obligation when (1) an evaluation that meets the SPS Agreement's definition of a "risk

[257] SPS Agreement, Art. 5.6 n. 3.

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

[259] SPS Agreement, Art. 3.2.

[260] *See id.* at Arts. 2.2, 5.1. The Appellate Body has ruled that the scientific evidence supporting a particular measure is "sufficient" if there is a "rational or objective relationship between the SPS measure and the scientific evidence." Appellate Body Report, *Japan–Measures Affecting Agricultural Products*, WT/DS76/AB/R, ¶ 84 (February 22, 1999). This is determined on a case-by-case basis in light of the particular circumstances of the case, including the characteristics of the measure and the quality and quantity of the scientific evidence. *Id.* Moreover, a WTO panel has interpreted the term "scientific evidence" broadly as information produced through a "scientific method." Panel Report, *Japan–Measures Affecting the Importation of Apples*, WT/DS245/R, at paras. 8.92, 8.93 (July 15, 2003).

[261] SPS Agreement, Art. 5.7. Article 5.7 is understood as creating a "qualified exemption" from Article 2.2's mandate not to maintain SPS measures without sufficient evidence. Appellate Body Report, *Japan–Agricultural Products II*, *supra* footnote 260, at ¶ 80.

[262] SPS Agreement, Art. 5.1.

[263] Panel Report, *EC–Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R (September 29, 2006). *See also* Simon Lester, *European Communities–Measures Affecting the Approval and Marketing of Biotech Products*, 101 AM. J. INT'L L. 453 (2007) (describing the legal conclusions reached by the WTO panel in *EC–Biotech Products*). For a more in-depth discussion of the case, see CRS Report RS21556, *Agricultural Biotechnology: The U.S.-EU Dispute*, by (name redacted).

assessment" is conducted, and (2) the measure at issue is "based" on that assessment.[264] Notably, the Member imposing the measure at issue need not perform the risk assessment itself so long as *a* risk assessment that meets the criteria in Annex A of the SPS Agreement was performed.[265]

The type of risk assessment required depends on the purpose of the SPS measure at stake. In the case of measures concerned with pests or disease, the term "risk assessment" means an "evaluation of the likelihood entry, establishment, or spread of a pest or disease... according to the sanitary or phytosanitary measures which might be applied, and of the associated potential biological and ecological consequences."[266] In the case of measures concerned with food additives, a risk assessment is defined as an "evaluation of the potential for adverse effects on human or animal health arising from the presence of additives, contaminants, toxins, or disease-causing organisms in food, beverages or feedstuffs."[267]

Assuming that a WTO panel finds that an SPS measure was imposed after the requisite risk assessment, it will then determine whether the measure was, in fact, "based" on that assessment. According to the WTO Appellate Body's decision in *EC–Hormones*, a measure is based on a risk assessment if the results of the risk assessment "reasonably support" the measure at stake.[268] A measure meets this test if (1) it has a scientific basis, even if it reflects "divergent or minority views"; (2) the defending Member's interpretation and application of that evidence is "objective and coherent"; and (3) there is a scientific basis for determining that the results of the risk assessment warrant the imposition of the SPS measure at issue.[269] Although a WTO panel will determine whether a Member conformed with these requirements, the panel may not substitute its own judgment for that of the risk assessor.[270]

Notably, however, some measures that meet the SPS Agreement's general definition of an SPS measure may be imposed *without* a risk assessment. For example, in *EC–Biotech Products*,[271] a WTO panel found that although the European Union's regulatory regime for the approval and marketing of biotech products was designed to protect the lives and health of humans and plants, the SPS Agreement permitted the EU to temporarily place a moratorium on the approval of applications to market new genetically modified organisms without first conducting the risk assessment described in Article 5.1.[272] The panel stated that SPS measures have *both* the objective of protecting animal, plant, or human life or health *and* the "nature" of "requirements and procedures,"[273] and the moratorium was a decision to delay final substantive approval decisions—

[264] Panel Report, *EC–Biotech Products*, *supra* footnote 263, at ¶ 7.3019.

[265] Appellate Body Report, *EC–Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, ¶ 190 (January 16, 1998).

[266] SPS Agreement, Annex A, Art. 4.

[267] *Id.*

[268] Appellate Body Report, *EC–Hormones*, *supra* footnote 265, at ¶ 193.

[269] Appellate Body Report, *U.S.–Continued Suspension of Obligations in* EC–Hormones *Dispute*, WT/DS320/AB/R, ¶ 591 (October 17, 2008).

[270] *Id.* at ¶ 590.

[271] Panel Report, *EC–Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R (September 29, 2006). *See also* Simon Lester, *European Communities—Measures Affecting the Approval and Marketing of Biotech Products*, 101 AM. J. INT'L L. 453 (2007) (describing the legal conclusions reached by the WTO panel in *EC–Biotech Products*). For a more in-depth discussion of the case, see CRS Report RS21556, *Agricultural Biotechnology: The U.S.-EU Dispute*, by (name redacted).

[272] Panel Report, *EC–Biotech Products*, *supra* footnote 271, at paras. 7.1379, 7.1381-84.

[273] *Id.* at ¶ 7.1380.

not a requirement or a procedure subject to Article 5.[274] Nevertheless, the panel found that, while the moratorium was exempt from the risk assessment requirement, it was subject to and in violation of other provisions of the SPS Agreement.[275]

Finally, in addition to restraining the preparation and adoption of SPS measures that interfere with international trade, the SPS Agreement established processes and mechanisms that enhance the transparency of countries' SPS measures and a forum for Members to resolve concerns relating to SPS measures without resorting to formal dispute settlement. To those ends, the Agreement requires each Member to notify 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.[276] It also establishes the Committee on Sanitary and Phytosanitary Measures to, *inter alia*, facilitate *ad hoc* consultations and negotiations among Members on specific sanitary and phytosanitary issues.[277]

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.[278] 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 limited by the scope of each country's commitments, which are defined in the national schedules and subject to progressive reduction.[279] The GATS also contains a number of annexes addressing specific individual service sectors.[280]

The GATS does not define the term "service" except to exclude "services supplied in the exercise of governmental authority" from its definition.[281] Instead, the GATS purports to regulate measures affecting 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

[274] *Id.* at paras. 7.1379, 7.1381-84.

[275] The panel found that the moratorium violated Article 1(a) of Annex C, which requires Members to ensure that procedures to "check and ensure the fulfillment of sanitary or phytosanitary measures" are "undertaken and completed without delay." Panel Report, *EC–Biotech Products*, *supra* footnote 271, at paras. 7.1530, 7.1570. The European Union was unsuccessful in its attempt to justify the delay in undertaking and completing approval procedures that was caused by the moratorium. *Id.* at paras. 7.1511-7.1529.

[276] SPS Agreement, Annex B, Art. 3.

[277] *Id.* at Art. 12.

[278] Van Den Bossche, *supra* footnote 131, at 477.

[279] *See id.*

[280] *E.g.* GATS, Annex on Air Transport Services; GATS, Annex on Financial Services; GATS, Second Annex on Financial Services; GATS, Annex on Telecommunications.

[281] *See* GATS, Art. I;13(b).

temporarily to provide services in another Member (e.g., by a consultant on an overseas business trip).[282]

Notably, a service supplier under the GATS includes entities engaged in "the production, distribution, marketing, sale and delivery of a service."[283] Measures "affecting trade in services" include any measure "in respect of," *inter alia*, "the purchase, payment or use of a service" or "the presence, including commercial presence, of persons of a Member for the supply of a service in the territory of another Member."[284] Because the GATS defines both "service suppliers" and "measures affecting trade in services" broadly, the GATS applies not only to measures directly regulating the supply of a service, but also a wide range of other measures that affect the service sector.[285]

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,[286] and (2) specific service sector commitments to the national treatment obligation.[287] As a result, each Member limits the scope of its obligations not to discriminate between services provided by firms from different Members[288] and between services provided by foreign, rather than domestic, firms.[289] 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.

The GATS does not compel a government to privatize services industries or outlaw government or private monopolies. However, the GATS is, like the TBT and SPS Agreements discussed above, concerned with increasing transparency. 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.[290] This is particularly important because service sectors may be regulated by multiple government

[282] *Id.* at Art. I:2.

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

[284] *Id.* at Art. XXVIII(c)(i), (iii).

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

[286] GATS, Arts. II:1; V, V *bis*.

[287] *Id.* at Arts. XVI, XVII, XXI.

[288] To see the U.S. exceptions from the GATS MFN obligation, see WTO, General Agreement on Trade in Services, United States of America, Final List of Article II (MFN) Exemptions, GATS/EL/90 (April 1994). This schedule can be found online at http://docsonline.wto.org/gen_home.asp.

[289] To see the U.S. GATS national treatment commitments, see WTO, General Agreement on Trade in Services, United States of America, Schedule of Specific Commitments, GATS/SC/90 (April 1994). This schedule can be found online at http://docsonline.wto.org/gen_home.asp.

[290] *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 (March 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.

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.[291]

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.[292] 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.[293] However, the TRIPS Agreement also builds on WIPO treaties by establishing additional minimum obligations, most notably in the areas of copyright, trademarks, geographical indications,[294] patents, and undisclosed information (i.e., trade secrets).[295] The TRIPS Agreement also has "exception clauses," which permit WTO

[291] *See* GATS, pmbl.

[292] TRIPS, Arts. 3, 4.

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

[294] "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."

[295] In addition, the TRIPS Agreement is arguably a better tool for creating uniform international IPR protection 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, see http://www.wipo.int.

Members to pass measures that authorize particular forms of IPR "infringement" without running afoul of TRIPS Agreement obligations.[296]

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.[297] 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.[298] 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,[299] (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,[300] and (3) when utilized, those exceptions do not cause or have the potential to cause an unreasonable loss of income to the copyright owner.[301]

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).[302] 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 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.[303]

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[296] *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 (name redacted).

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

[298] *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.").

[299] Panel Report, *U.S.–Copyright*, *supra* footnote 297, at ¶ 6.113.

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

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

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

[303] *Id.* at ¶6.133.

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.[304] 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.[305]

If consultations fail to resolve the dispute within 60 days, or one party refuses to enter them, the complaining party may request a panel.[306] 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.[307] The panel then issues an interim report on which the two parties can comment.[308] A final report addressing, if not adopting, the parties' comments follows.[309]A party to the dispute can appeal the legal interpretations or findings in a final report to the Appellate Body.[310] 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.[311] The negative consensus rule states that these findings should be adopted unless they are rejected by a consensus of Members on the DSB.[312]

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).[313] 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.[314] If these negotiations fail, the complaining Member may then seek authority from the DSB to retaliate, namely to suspend some of its WTO obligations that benefit the defending Member.[315]

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[304] DSU, Art. 4.

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

[306] *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.

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

[308] DSU, Art. 15.

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

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

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

[312] 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.

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

[314] DSU, Art. 22:2.

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

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. The WTO "plurilateral agreements," on the other hand, are not prerequisites to WTO membership,[316] and, therefore, only some Members, including the United States, have agreed to them. The two plurilateral agreements discussed below 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. Another plurilateral agreement, the Information Technology Agreement (ITA), was concluded after the Uruguay Round.[317]

Agreement on Government Procurement

To date, 41 countries have signed the Agreement on Government Procurement (AGP) and several more (including China) are negotiating accession to it.[318] 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.

The general obligations of the AGP only apply to government contracts that meet four criteria. First, the AGP does not apply to government contracts below the monetary threshold for the procuring entity.[319] 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.[320] Secondly, the AGP does not apply to procurements by, or necessary for fulfilling a contract with, the government.[321] To determine whether a procurement meets this test, WTO panels may consider whether the government is

[316] 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).

[317] WTO, INFORMATION TECHNOLOGY AGREEMENT–INTRODUCTION, http://www.wto.org/english/tratop_e/inftec_e/itaintro_e.htm. Unlike the Agreement on Government Procurement, the ITA's provisions are solely aimed at tariff reductions and do not establish binding commitments concerning non-tariff barriers.

[318] To see a list of parties and observers, see http://www.wto.org/english/tratop_e/gproc_e/memobs_e.htm. 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.

[319] 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, 76 *Federal Register* 76808, 76809 (December 8, 2011). Currently, the threshold for goods and services procured by the government of the United States in a process governed by the AGP is $202,000. *Id.* This threshold is for effective for the calendar years 2012 and 2013.

[320] AGP, 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.

[321] *See* Panel Report, *U.S.–Procurement of a Sonar Mapping System*, paras. 3.5, 5.1, GPR.DS1/R (April 23, 1992) (unadopted) (explaining that although the United States contended that the AGP did not apply because a subcontractor was procuring the sonar mapping system at issue, rather than the government or the government contractor, the GATT panel determined that the procurement fell within the scope of the AGP); SUE ARROWSMITH, GOVERNMENT PROCUREMENT IN THE WTO 53 (2003).

paying for the good at issue; whether the government will use or benefit from its use; whether the government will possess it; whether the government controls its acquisition process; and whether the procuring entity had a commercial interest in the transaction.[322] In addition, AGP parties have negotiated exceptions for some of their government entities so that their procurements are exempt from the AGP. Third, the AGP only applies to procurements between two parties to the AGP. Consequently, if the U.S. government is procuring a good from a non-party, the United States is not obligated to comply with the provisions of the AGP. Fourth, the object of the procurement must be a covered good or, alternatively, a party not exempted by the party's schedule. While procurements of most goods are covered by the AGP, procurements of most services are not. Nevertheless, the United States provides fairly comprehensive coverage of the service sectors.[323]

For covered government procurement contracts, 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 that provides the procuring party with reciprocal access to its own procurements of that good or service.[324] Furthermore, each party must ensure that its entities do not treat locally established suppliers less favorably on the basis of foreign affiliation or ownership,[325] and parties may not discriminate against locally established suppliers on the basis of the country of production of the good or service in question.[326] For the purposes of applying these obligations, Article IV mandates that the rules of origin applied in the normal course of trade also apply to transactions covered by the AGP.[327]

However, as under the GATT, there are affirmative defenses to violations of the AGP. Article XXII of the AGP authorizes each party to take action, or not disclose information, regarding procurement that "it considers necessary for the protection of its essential security interests relating to the procurement of arms, ammunition or war materials, or to procurement for indispensable for national security or for national defense purposes."[328] The United States identifies several government agencies and types of procurements that it considers are exempt from the AGP by virtue of this national security exception.[329] The second AGP exception authorizes parties to impose or enforce measures affecting procurement that are "necessary to protect public morals, order or safety, human, animal or plant life or health or intellectual property; or relating to the products or services of handicapped persons, of philanthropic institutions or of prison labor," so long as the measures "are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade."[330]

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[322] Arrowsmith, *supra* footnote 321, at 54.

[323] *Id.* at 130. *See also* AGP, Appendix 1, United States, Annex IV, WT/Let/330 (March 1, 2000) (listing services exempted from AGP obligations), *available at* http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm.

[324] AGP, Art. III.1. *See* Arrowsmith, *supra* footnote 321, at 111.

[325] AGP, Art. III.2(a).

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

[327] *Id.* at Art. IV.1.

[328] *Id.* at Art. XXIII.1.

[329] AGP, Appendix 1, United States, Annex I, WT/Let/482/Rev,1 (October 1, 2004) (listing, for example, Department of Energy procurements in support of safeguarding nuclear materials as exempted from the AGP by virtue of the national security exception), *available at* http://www.wto.org/english/tratop_e/gproc_e/appendices_e.htm.

[330] AGP, Art. XXIII.2.

As for transparency, Article IX requires the Parties' entities to publish an invitation to participate in all cases of intended procurement.[331] 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.[332] 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.[333]

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.[334] 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 body.[335] 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.[336]

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.[337] However, the European Union suspended those proceedings when the U.S. Supreme Court held that the law was pre-empted by a federal statute, the Foreign Operations, Export Financing, and Related Programs Appropriations Act of 1997,[338] that imposed sanctions on Burma.[339]

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,

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

[332] AGP, Art. IX.7, 8.

[333] *Id.* at Art. IX.6.

[334] *Id.* at Art. XX.2.

[335] *Id.* at Art. XX.2, 6.

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

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

[338] P.L. 104-208, 110 Stat. 3009.

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

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.[340] 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 (SCM Agreement) to their civil aircraft industries, which explains why the Boeing-Airbus disputes[341] dealt largely with the SCM Agreement rather than the Aircraft Agreement.

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 formally expanded into a new WTO Round the following year.

The Doha Ministerial Declaration is effectively the charter for the Doha Round of talks.[342] 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.[343]

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.

Free and Reciprocal Trade Agreements

A free or reciprocal trade agreement is an agreement involving two or more trading partners under which trade barriers are reduced or eliminated. The United States first entered reciprocal trade agreements with Israel and Canada respectively. Today, the United States has entered into

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

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

[342] For more on the Doha Development Agenda, see CRS Report RL32060, *World Trade Organization Negotiations: The Doha Development Agenda*, by (name redacted).

[343] Doha Ministerial Declaration, paras. 48, 49 (November 14, 2001).

reciprocal trade agreements with 19 countries, including nations in Asia, the Middle East, South and Central America, and Africa.[344]

Any free trade agreement is non–self-executing, meaning that these agreements have no legal effect domestically until legislation implementing the agreement is enacted.[345] Because congressional action is necessary to approve a free trade agreement, these agreements and their implementing legislation are called congressional-executive agreements.[346]

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.[347]

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 U.S. "model FTA." Used as a framework for U.S. trade agreements by the Office of the U.S. Trade Representative (USTR), the model FTA is roughly based on NAFTA and the WTO Agreements but has evolved with congressional involvement and shifting U.S. priorities.[348] Under the current model, the United States pursues trade liberalization in trade in goods through provisions on nondiscrimination, tariff reduction, rules of origin, sanitary and phytosanitary measures, technical barriers to trade, trade remedies, 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, intellectual property rights, and dispute settlement.[349] Although provisions on labor rights and environmental protection were not a part of earlier U.S. trade agreements, they are now standard and increasingly enforceable.[350] Most recently, the model FTA has evolved to include electronic commerce obligations.[351] While the texts of the free trade agreements generally establish 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.

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[344] The United States Trade Representative maintains a list of these agreements on its website: http://www.ustr.gov/trade-agreements/free-trade-agreements.

[345] 19 U.S.C. §2903.

[346] 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 Than as Treaties*, by (name redacted).

[347] Office of the United States Trade Representative, Free Trade Agreements, http://www.ustr.gov/trade-agreements/free-trade-agreements.

[348] *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.

[349] Taylor, *supra* footnote 348, at 586.

[350] For a comparison of labor rights enforcement provisions in U.S. trade agreements, see CRS Report RS22823, *Overview of Labor Enforcement Issues in Free Trade Agreements*, by (name redacted).

[351] Taylor, *supra* footnote 348, at 590-91 n. 127-28.

Congress has played a significant role in the evolution of the model FTA. First and foremost, the Trade Promotion Authority statutes, which authorize the Executive to negotiate and enter into trade agreements with foreign countries, set the U.S. negotiating objectives. In addition, in 2007 Congress and the George W. Bush Administration negotiated the "Bipartisan Trade Deal" or "May 10" understanding.[352] This trade deal required the incorporation of certain provisions into the Peru, South Korea, Panama, and Colombia trade agreements in the areas of labor, environment, intellectual property, foreign investors' rights, and port security.[353] Essentially, the Bipartisan Trade Deal 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.[354] 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.[355] 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.[356]

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.[357] The core investment provisions of NAFTA have, in turn, been renegotiated and redrafted to incorporate the NAFTA parties' understanding of the concepts.[358] 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.[359] Finally, the model FTA's approach to labor issues has evolved from addressing labor issues outside of the agreement's text to incorporating them into the final agreement and, with the May 10 understanding, subjecting allegations of the labor and environmental chapters to the same general dispute settlement system used for trade violations.[360]

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[352] However, in 2010, officials negotiated changes to the text of the U.S.-South Korea Free Trade Agreement that was entered into before the July 1, 2007 deadline for fast track consideration. The implications of these changes for fast track consideration of implementing legislation for the U.S.-South Korea Free Trade Agreement are discussed in CRS Report R41544, *Trade Promotion Authority and the U.S.-South Korea Free Trade Agreement*, by (name redacted).

[353] Peru & Panama FTA Changes, http://waysandmeans.house.gov/Media/pdf/110/05%2014%2007/05%2014%2007.pdf.

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

[355] Peru & Panama FTA Changes, *supra* footnote 353, at I:A.

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

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

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

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

[360] Peru & Panama FTA Changes, *supra* footnote 353, at I:D, II:C.

North American Free Trade Agreement

The North American Free Trade Agreement (NAFTA) between the United States, Canada, and Mexico entered into force on January 1, 1994.[361] NAFTA contains, *inter alia*, tariff reduction schedules, provisions intended reduce nontariff barriers to trade, and dispute settlement provisions that are distinct from the WTO's Dispute Settlement Understanding. NAFTA also has side agreements on labor and the environment.

Investment Provisions

In general, investment law is considered distinct from international trade law.[362] Unlike international trade, which entails a series of exchanges of goods for money, foreign investment refers to a long-term relationship between a private investor and a foreign country.[363] The decision to include investment provisions in NAFTA and subsequent U.S. trade agreements reflected concern that, as these relationships progressed, companies operating abroad were susceptible to expropriation and other means of intervention by their host governments.[364]

Chapter 11 of NAFTA articulates numerous substantive protections for investors. Key protections include parties' obligations to accord foreign investors national and most-favored-nation treatment; conform with a "Minimum Standard of Treatment"; compensate investors adequately for expropriation of their property; and refrain from imposing certain performance requirements, such as requirements that an investment achieve a given level of domestic content or export a given level of goods or services.[365] Articles 1110 and 1105 of NAFTA are reportedly among the most frequently cited NAFTA investment provisions in legal disputes and public controversies.[366] Paragraph 1 of Article 1110 prohibits NAFTA parties from "directly or indirectly" nationalizing or expropriating an investment of an investor of another party in its territory or taking a measure "tantamount to nationalization or expropriation of such an investment" except: (1) for a public purpose; (2) on a non-discriminatory basis; (3) in accordance with due process of law and Article 1105; and (4) on payment of compensation." Paragraph 1 of Article 1105 articulates the "Minimum Standard of Treatment," requiring each party to accord to investments of investors of another party "treatment in accordance with international law, including fair and equitable treatment and full protection and security."

However, whether a given investor is entitled to benefit from these provisions depends, in large part, on whether the investment at issue is covered by Article 1139 of NAFTA. Article 1139 defines "investment" as limited to: an enterprise or interest, equity security, or debt security in such an enterprise; a loan to an enterprise; real estate or other property acquired in the expectation

[361] The full text of the agreement is available at http://www.nafta-sec-alena.org/en/view.aspx?x=343.

[362] *See* RUDOLF DOLZER AND CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 3 (2008).

[363] *See id.*

[364] *See id.* at 4-5. *See also* Judge Charles N. Brower, *NAFTA's Investment Chapter: Dynamic Laboratory, Failed Experiments, And Lessons for the FTAA*, 97 AM. SOC'Y INT'L L. PROC. 251, 251 (2003) (describing the objective of NAFTA's investment chapter as providing "a rule-based investment regime to promote foreign direct investment" by establishing substantive and enforceable protections for investors).

[365] NAFTA, Arts. 1102-1110.

[366] Dolzer and Schreuer, *supra* footnote 362, at 29. *See also* David A. Gantz, *Settlement of Disputes under the Central America–Dominican Republic–United States Free Trade Agreement*, 30 B.C. INT'L & COMP. L. REV. 331, 354 (2007) (stating that these provisions of NAFTA have been subject to the greatest volume of litigation).

or used for economic benefit or other business purposes; and interests arising from the commitment of capital or other resources to economic activity in the territory of the host party.[367] Intellectual property rights, which are expressly included in the definition of "investment" in subsequent U.S. trade agreements, are excluded from the definition in Article 1139 of NAFTA.[368]

If a given investment is covered by Chapter 11's substantive protections, investors of NAFTA parties can enforce those provisions against other NAFTA parties through investor-state arbitration.[369]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.[370] The investor does not need to obtain the permission or participation of its own government before filing a claim.[371] However, the investor must wait to file a claim until a six-month "negotiation" period has passed from the date of the events giving rise to the claim and provide the host state with 90 days' written notice of the intent to file a claim.[372] The investor must also discontinue and/or waive its right to initiate legal actions against the challenged measures before other courts or tribunals.[373] Under the Chapter 11 dispute settlement mechanism, the investor decides whether the arbitration will be governed by the Convention on the Settlement of Investment Disputes (ICSID Convention), the ICSID Additional Facility Rules, or the UNCITRAL (United Nations Commission on International Trade Law) rules.[374]

Intellectual Property

Chapter 17 of NAFTA, which addresses intellectual property, was modeled in part on the WTO's Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement), which was negotiated concurrently with NAFTA.[375] NAFTA's provisions on intellectual property can be divided into three categories: provisions articulating the scope and substance of required intellectual property laws; provisions governing domestic enforcement of intellectual property law; and provisions prescribing the mechanisms for party-to-party dispute resolution.

Article 1701, which belongs in the first category, requires each party to provide "adequate and effective protection and enforcement of intellectual property rights" to the nationals of another

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[367] NAFTA, Art. 1139. *See also* Jennifer Heindl, *Toward a History of NAFTA's Chapter Eleven*, 24 Berkeley J. Int'l L. 672, 684 (2006) (stating that intellectual property rights can not be the subject of claims for expropriation under NAFTA).

[368] In addition to intellectual property, neither loans made to state enterprises nor money claims arising from contracts for the sale of goods or services or the extension of commercial credit are considered "investments" under Article 1139. Heindl, *supra* footnote 367, at 683-84.

[369] NAFTA, Arts. 1120-22.

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

[371] *See generally id.* at Arts. 1119, 1120. *See also* CRS Report RL31638, *Foreign Investor Protection Under NAFTA Chapter 11*, by (name redacted).

[372] NAFTA, Arts. 1119, 1120.

[373] *Id.* at Art. 1121. *See also* Waste Management, Inc. v. United Mexican States, ICSID Case No. ARB/98/2, Award (June 2, 2000), 40 I.L.M. 56 (2001) (finding that the ICSID Additional Facility tribunal lacked jurisdiction because the disputing investor, Waste Management, did not waive its rights to initiate or continue non-NAFTA legal actions). For background on the Tribunal's decision, visit http://www.state.gov/s/l/c3753.htm.

[374] NAFTA, Art. 1120.

[375] Joseph S. Papovich, *NAFTA's Provisions Regarding Intellectual Property: Are They Working as Intended? A U.S. Perspective*, 23 CAN.-U.S. L.J. 253, 255 (2007).

party. At a minimum, this obligation requires that each party give effect to the substantive provisions of 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.[376] Each party must also ensure its laws provide specified levels of protection for copyrights, sound recordings, encrypted program-carrying satellite signals, trademarks, patents, layout designs of semiconductor integrated circuits, industrial designs, rights in geographical indications, and trade secrets.[377] Finally, each party must accord national treatment with regard to the protection and enforcement of the intellectual property rights of another party's nationals.[378]

Articles 1715, 1717, and 1718 of NAFTA fall into the second category. They require that NAFTA parties make civil judicial procedures available to intellectual property right holders; provide criminal procedures and penalties in cases of willful trademark counterfeiting or copyright piracy on a commercial scale; and adopt procedures under which an intellectual property right holders can petition to have infringing goods barred from importation.

As under the TRIPS Agreement, disputes arising under Chapter 17 of NAFTA can be settled under the general dispute settlement mechanism.[379] Accordingly, if a NAFTA panel finds that a defending party has acted inconsistently with its NAFTA obligations for the protection or enforcement of intellectual property rights, the complaining party may seek authorization of trade sanctions for noncompliance with the panel's report.[380]

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").[381] Although NAALC articulates several substantive requirements, few of these requirements are enforceable under the formal mechanism for dispute resolution. Furthermore, NAALC does not permit labor unions or other concerned parties to use the NAALC dispute settlement mechanism to resolve a labor-related dispute with a NAFTA party.

Under NAALC, each party retains the right to set and apply its own "high" labor standards[382] but is required to enforce labor rights through specified procedures, including citizen access to authorities.[383] Each party must further ensure that enforcement proceedings are "fair, equitable,

[376] NAFTA, Art. 1701(2).

[377] *Id.* at Arts. 1705-1713, 1721.

[378] *Id.* at Art. 1703.1.

[379] *Id.* at Annex 2004.

[380] *Id.* at Art. 2019.

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

[382] NAALC, Art. 2 (recognizing the "right of each party to establish its own domestic labor standards" but also requiring each party to ensure that its labor laws and regulations provide for "high labor standards, consistent with high quality and productivity workplaces, and shall continue to strive to improve those standards").

[383] NAALC, Art. 4 (requiring each party to ensure that "persons with a legally recognized interest... have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the party's labor law").

and transparent" and "comply with due process of law."[384] However, a NAALC arbitral panel may only be established to hear a claim by a NAFTA party that another party has engaged in a "persistent pattern of failure ... to effectively enforce its occupational safety and health, child labor or minimum wage technical labor standards" where that the pattern is "trade-related" and "covered by mutually recognized labor laws."[385] If an arbitral decision is rendered and the offending party fails to comply, the panel may impose a monetary enforcement assessment to be paid into a fund improve or enhance labor law enforcement in the defending party.[386] If the defending party does not pay the assessment, the complaining party may suspend trade benefits equal to the amount of that assessment.[387]

NAALC requires each NAFTA party to establish its own National Administrative Office (NAO) to monitor NAFTA-related labor rights issues.[388] In the United States, the NAO is the Office of Trade and Labor Affairs (OTLA) in the U.S. Department of Labor.[389] As the U.S. NAO, OTLA is responsible for, *inter alia*, investigating citizen complaints about another NAFTA party's labor practices, seeking consultations with another party's NAO on specified matters relating to the agreement, and submitting information to the NAALC Secretariat.[390]

Finally, NAALC 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.[391] The Commission also manages the fund into which monetary enforcement assessments levied by NAALC arbitral tribunals are paid.[392]

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. Like NAFTA, CAFTA-DR contains, *inter alia*, tariff reduction schedules, provisions intended reduce nontariff barriers to trade, and dispute settlement provisions that are distinct from the WTO's Dispute Settlement Understanding. Unlike NAFTA, CAFTA-DR has chapters, rather than side agreements, dedicated to labor and environmental protection.

[384] NAALC, Art. 5.1.

[385] *Id*. at Art. 29. However, a party request *consultations* with another NAFTA regarding any matter arising under the NAALC. *Id.* at Art. 22.

[386] NAALC, Art. 39.4, Annex 39.

[387] *Id.* at Art. 41.

[388] *Id.* at Arts. 15-16.

[389] OTLA, HOW LABOR RIGHTS ARE ENFORCED IN FTAS, http://www.dol.gov/ilab/programs/otla/freetradeagreement.htm.

[390] NAALC, Arts. 15-16, 21.

[391] NAALC, Arts. 8, 10.

[392] *Id*. Annex 39.

Investment

Like Chapter 11 of NAFTA, Chapter 10 of CAFTA-DR establishes substantive and enforceable protections for investors in CAFTA-DR parties.[393] Again, key protections include parties' obligations to accord foreign investors national and most-favored-nation treatment; conform with a "Minimum Standard of Treatment"; compensate investors adequately for expropriation of their property; and refrain from imposing certain performance requirements, such as requirements that an investment achieve a given level of domestic content or export a given level of goods or services.[394]

However, CAFTA-DR clarifies and expands upon the two protections that are the most litigated under NAFTA: the "Minimum Standard of Treatment" and compensable expropriation. As to the former, CAFTA-DR clarifies that the concept of "fair and equitable treatment" does not require treatment in addition to or beyond that which is required by customary international law and includes the obligation to accord "due process" in adjudicatory proceedings.[395] This language reflects U.S. experience with NAFTA's "fair and equitable treatment" provision, which was originally interpreted by a tribunal as requiring fair and equitable treatment *in addition to* the treatment required under international law.[396] In terms of the expropriation provisions, CAFTA-DR establishes the presumption that a group of regulatory actions designed to protect "legitimate public welfare objectives, such as public health, safety, and the environment" cannot be treated as compensable indirect expropriation.[397] There is no such exception from NAFTA's expropriation provisions, and its inclusion in CAFTA-DR seems to reflect heightened concern for parties' regulatory sovereignty in the environmental and public health spheres.

As under NAFTA, investors from, and in the territories of, CAFTA-DR parties may enforce the protections accorded them by Chapter 10 through investor-state arbitration.[398] However, as under NAFTA, whether an investor can pursue investor-state arbitration often depends on whether the dispute concerns a covered investment. Notably, CAFTA-DR provides a broader definition of an "investment" than NAFTA. Unlike NAFTA, which provides a positive list of property and interests that qualify as investment, Article 10.28 of CAFTA-DR states that "investment means every asset than an investor owns or controls, directly or indirectly, that has the characteristics of an investment" and provides an illustrative and non-exhaustive list of possible investments that meet this definition.[399] Intellectual property rights is expressly identified as one type of investment covered by Chapter 10 of CAFTA-DR.

Generally, however, the dispute settlement provisions in CAFTA-DR mirror those in NAFTA. CAFTA-DR requires investors to abide by the same six-month "negotiation" period as NAFTA

[393] The text of Chapter 10 is available at http://www.ustr.gov/sites/default/files/uploads/agreements/cafta/asset_upload_file328_4718.pdf.

[394] CAFTA-DR, Arts. 10.3-10.5, 10.7, 10.9.

[395] *Id.* at Art. 10.5.2.

[396] Pope & Talbot v. Canada (Pope & Talbot III), Award on the Merits of Phase Two, Fair and Equitable Treatment, paras. 114-115 (April 10, 2001). *See also* Gantz, *supra* footnote 366, at 357 (writing that, to counteract the tribunal's decision in Pope & Talbot, a binding "Interpretation" was added to NAFTA's Chapter 11 and that Interpretation informed negotiations over CAFTA-DR's "Minimum Standard of Treatment" provision).

[397] CAFTA-DR, Annex 10-C.

[398] *Id.* at Arts. 10.15-10.16.

[399] *Id.* at Art. 10.28.

and provide the host state with 90 days' written notice before submitting a claim to arbitration.[400] The disputing investor must discontinue and/or waive its right to initiate legal actions against the challenged measures before other courts or tribunals.[401] As under NAFTA's investment dispute settlement mechanism, the investor in a dispute under Chapter 10 of CAFTA-DR decides whether the arbitration will be governed by the Convention on the Settlement of Investment Disputes (ICSID Convention), the ICSID Additional Facility Rules, or the UNCITRAL (United Nations Commission on International Trade Law) rules.[402]

CAFTA-DR does contain two significant departures from dispute settlement under NAFTA's Chapter 11. First, under CAFTA-DR, investors may bring claims not only for breach of one of the substantive investor protections but also for a breach of an "investment authorization"[403] or "investment agreement."[404] In effect, this provision significantly widened the scope of investment disputes that could be settled under CAFTA-DR's Chapter 10 beyond those that could be settled under NAFTA's Chapter 11.[405]

Second, unlike the NAFTA parties, CAFTA-DR parties' committed themselves to the creation of an appellate body tasked with reviewing the arbitral tribunals' awards.[406] Specifically, Annex 10-F provides for the establishment of a negotiating group to develop an appellate body or similar mechanism "to provide coherence to the interpretation" of CAFTA-DR's investment provisions.

Intellectual Property Provisions

Chapter 15 of CAFTA-DR expands upon the obligations contained in NAFTA's chapter on intellectual property rights. First, it requires each party to join and give effect to more international agreements on intellectual property. Whereas NAFTA requires its parties to ratify or accede to four international agreements on intellectual property, CAFTA-DR requires its parties to ratify or accede to seven international agreements and make "all reasonable efforts" to ratify or accede to another three.[407]

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[400] *Id.* at Art. 10.16.

[401] *Id.* at Art. 10.18.

[402] CAFTA-DR, Art. 10.16.

[403] CAFTA-DR defines an "investment authorization" as an "authorization that the foreign investment authority of a party grants to a covered investment of an investor of another party." CAFTA-DR, Art. 10.28.

[404] *Compare* CAFTA-DR, Art. 10.16(a) *with* NAFTA, Art. 1116. *See also* Gantz, *supra* footnote 366, at 369. CAFTA-DR defines an "investment agreement" as a "written agreement... between a national authority of a party and a covered investment or an investor of another party that grants the covered investment or investors rights: (a) with respect to natural resources or other assets that a national authority controls; and (b) upon which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself ..." CAFTA-DR, Art. 10.28.

[405] *See* Gantz, *supra* footnote 366, at 369.

[406] *See Central America: Investor-State Dispute Resolution Under DR-CAFTA*, INT'L DISPUTES Q. (White & Case LLP), Fall 2007, *available at* http://www.whitecase.com/idq/fall_2007/ia2 (describing CAFTA-DR's provision on the appellate body as "novel").

[407] CAFTA-DR, Art. 15.1. The seven agreements that CAFTA-DR requires its parties to join are: the WIPO Copyright Treaty, the WIPO Performances and Phonograms Treaty, the Patent cooperation Treaty, the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purpose of Patent Procedure, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellites, the Trademark Law Treaty, and the International Convention for the Protection of New Varieties of Plants. CAFTA-DR, Art. 15.1.2.

Additionally, like NAFTA, CAFTA-DR specifies the level of protection that its parties must accord for different types of intellectual property. However, the list of categories of intellectual property subject to these provisions is slightly different than the list in NAFTA. The list includes: copyrights, encrypted program-carrying satellite signals, trademarks, patents, rights in geographical indications, and Internet domain names.[408]

Further, as under NAFTA, each CAFTA-DR party must accord national treatment with regard to the protection and enforcement of the intellectual property rights of another party's nationals.[409] A footnote in the Agreement clarifies that the term "protection" in the context of national treatment for intellectual property rights includes "the availability, acquisition, scope, maintenance, and enforcement of intellectual property rights" as well as matters affecting "the prohibition on circumvention of effective technological measures" that copyright owners use to restrict unauthorized use and "the rights and obligations" concerning information that identifies the copyright owner of a given work and any terms or conditions on its use.[410]

CAFTA-DR also, like NAFTA, requires its parties to make judicial or administrative procedures available to adjudicate claims brought by intellectual property right holders for unauthorized use; provide criminal procedures and penalties in cases of willful trademark counterfeiting or copyright piracy on a commercial scale; and adopt procedures under which an intellectual property right holders can petition to have infringing goods barred from importation.[411] However, CAFTA-DR also requires its parties to establish criminal penalties for the willful importation or exportation of counterfeit or pirated goods.[412] It also places limits on the liability of Internet service providers for copyright infringements that take place through systems or networks under their control so long as they do not control, initiate, or direct the infringements.[413]

Finally, as under the TRIPS Agreement and NAFTA, disputes arising under Chapter 15 of CAFTA-DR can be settled under the general dispute settlement mechanism.[414] Accordingly, if a CAFTA-DR panel finds that a defending party has acted inconsistently with its CAFTA-DR obligations for the protection or enforcement of intellectual property rights, the complaining party may seek authorization of trade sanctions for noncompliance with the panel's report.[415]

Labor Provisions

Unlike NAFTA, labor provisions were written into CAFTA-DR, rather than incorporated through a side agreement. Like the North American Agreement on Labor Cooperation (NAALC) that accompanied NAFTA, Chapter 16 of CAFTA-DR entitles each party to retain its right to set and apply its own labor standards,[416] but also requires each party to enforce labor rights through

[408] CAFTA-DR, Art 15.2-15.5, 15.8-15.9.

[409] *Id.* at Art. 15.1.8.

[410] *Id.* at 15.1.8 n.3.

[411] *Id.* at Art. 15.11.26(a).

[412] *Id.*

[413] CAFTA-DR, Art. 15.11.27.

[414] *Id.* at Annex 20.2.

[415] *Id.* at Art. 20.16.

[416] *Id.* at Art. 16.1.2 (recognizing the "right of each party to establish its own domestic labor standards" but also requiring each party to "strive" to ensure that its labor laws provide for labor standards that are consistent with "internationally recognized labor rights").

specified procedures, including citizen access to authorities.[417] Each party must further ensure that enforcement proceedings are "fair, equitable, and transparent" and "comply with due process of law."[418]

Another important similarity between NAALC and Chapter 16 of CAFTA-DR is that although both articulate several substantive requirements, only one of these requirements is enforceable under the agreements' formal mechanisms for dispute resolution. Article 16.6.7 of CAFTA-DR expressly provides that no party may have recourse to dispute settlement for any matter arising under its labor chapter except for alleged violations of Article 16.2.1(a), which prohibits parties from failing to "effectively enforce its labor laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the parties."[419] There is one significant difference, however, between the dispute settlement process for labor issues under CAFTA-DR and NAALC. Whereas NAFTA parties have the option of suspending trade benefits for a defending party's failure to pay any monetary enforcement assessment levied by an arbitral tribunal in a labor dispute, CAFTA-DR parties do not. CAFTA-DR parties may only request that a dispute settlement panel impose an annual monetary assessment on a defending party for noncompliance with a CAFTA-DR panel's decision in a labor dispute.[420]As under NAALC, assessments are not paid to the complaining party; they are paid into a fund managed by the Agreement's "Free Trade Commission" for labor and environmental initiatives, including efforts to improve or enhance labor or environmental law enforcement.[421] The Free Trade Commission, which supervises the implementation of CAFTA-DR generally, is comprised of cabinet-level representatives of the parties.[422]

The first formal complaint under Chapter 16 was lodged by the United States against Guatemala in July 2010.[423] The complaint, following a petition filed by the AFL-CIO with the Department of Labor's Office of Trade and Labor Affairs (OTLA),[424] charges that Guatemala's Ministry of Labor failed to both investigate and take appropriate enforcement action against alleged labor law violations and that Guatemala's courts failed to enforce court orders in cases involving labor law violations.[425] Specifically, the U.S. Trade Representative stated in its request that Guatemala's inaction violated its obligations to enforce laws addressing collective bargaining, freedom of association, and working conditions.[426]

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[417] CAFTA-DR, Art. 16.3.1 (requiring each party to ensure that "persons with a legally recognized interest... have appropriate access to tribunals for the enforcement of the party's labor laws").

[418] CAFTA-DR, Art. 16.3.2.

[419] However, as under NAALC, a party may request consultations with another party regarding *any* matter arising under the labor chapter. CAFTA-DR, Art. 16.6.1.

[420] CAFTA-DR, Art. 20.17.

[421] *Id.* at Art. 20.17.4.

[422] *Id.* at Art. 19.1.

[423] Rossella Brevetti, *U.S. Seeks Arbitration Panel in Labor Case Against Guatemala Brought Under CAFTA-DR*, INT'L TRADE DAILY (August 10, 2011).

[424] OFFICE OF TRADE AND LABOR AFFAIRS (OTLA), PUBLIC REPORT OF REVIEW OF OFFICE OF TRADE AND LABOR AFFAIRS U.S. SUBMISSION 2008-01 (GUATEMALA) i (January 16, 2009), *available at* http://www.dol.gov/ilab/media/reports/otla/20090116Guatemala.pdf.

[425] Letter from Ron Kirk, United States Trade Representative, to Luis Velasquez, Minister of Economy for Guatemala (August 9, 2011), *available at* http://www.ustr.gov/webfm_send/3042.

[426] *Id.*

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.[427] At that time, the other countries involved in the TPP negotiations were Australia, Brunei Darussalam, Chile, New Zealand, Peru, Singapore, and Vietnam. Since then, Malaysia formally joined the negotiations. Canada, Japan, and Mexico have also expressed interest in joining.[428]

The USTR intends to proceed with the TPP negotiations as though they were covered by the terms of the Bipartisan Trade Promotion Authority Act of 2002 (Trade Act of 2002). The act entitled trade agreements that satisfied certain requirements, including being "entered into" by July 1, 2007, to receive fast track consideration in Congress.[429] Accordingly, although the TPP cannot be entered into before the date required by the Trade Act of 2002, the Administration provided written notice to Congress of its intent to enter the TPP negotiations 90 days before doing so and has consulted with Congress about the negotiations.[430]

In November 2011, the TPP countries announced the broad outlines of a possible TPP agreement,[431] and the Obama Administration has stated that completing a TPP text by the end of 2012 is one of its trade priorities.[432] The TPP will include chapters on investment, intellectual property, and labor. It will permit arbitration of investor-state disputes subject to "appropriate safeguards."[433] Australia, one of the countries involved in negotiations, is opposed to the inclusion of investor-state dispute settlement clauses in international agreements, and the U.S. trade agreement with Australia does not authorize investor-state dispute settlement. [434]

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[427] Request for Comments Concerning Proposed Trans-Pacific Partnership Trade Agreement, 74 *Federal Register* 66,720 (December 16, 2009). For more information on TPP, see CRS Report R40502, *The Trans-Pacific Partnership Agreement*, by (name redacted) and (name redacted) and CRS Report R42344,*Trans-Pacific Partnership (TPP) Countries: Comparative Trade and Economic Analysis*, by (name redacted).

[428] *See* Request for Comments on Canada's Expression of Interest in the Proposed Trans-Pacific Partnership Trade Agreement, 76 *Federal Register* 76,480 (December 7, 2011); Request for Comments on Mexico's Expression of Interest in the Proposed Trans-Pacific Partnership Trade Agreement, 76 *Federal Register* 76,479 (December 7, 2011); Request for Comments on Japan's Expression of Interest in the Proposed Trans-Pacific Partnership Agreement, 76 *Federal Register* 76,479 (December 7, 2011). *Mr. Sanchez on the TPP*, WASH. TRADE DAILY (March 14, 2012) (stating that it is unclear whether these countries will join the negotiations and that the countries currently negotiating the agreement may need to first reach a consensus on a framework for bringing new countries into the process).

[429] Request for Comments Concerning Proposed Trans-Pacific Partnership Trade Agreement, 74 *Federal Register* 66,720 (December 16, 2009); *Administration to Send Formal TPP Notification to Congress Within Days*, INSIDE U.S. TRADE (December 11, 2009). *See also* P.L. 107-210, 116 Stat. 993, 19 U.S.C. §3801 *et seq.*

[430] Request for Comments, *supra* footnote 429. *See* 19 U.S.C. §3804(a) (requiring the President to provide, at least 90 calendar days before initiating negotiations, written notice to the Congress of the President's intention to enter into negotiations and initiate consultations regarding the negotiations with, *inter alia*, the Committee on Finance of the Senate and the Committee on Ways and Means of the House of Representatives).

[431] The outline is available at http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement.

[432] *The TPP and Innovation*, WASH. TRADE DAILY (March 9, 2012).

[433] Outlines of the Trans-Pacific Partnership Agreement, http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/outlines-trans-pacific-partnership-agreement (November 11, 2011).

[434] Murray Griffin, *TPP Divides Over Investor Dispute Rules; Labor Details Ambitions for TPP Charter*, INT'L TRADE DAILY (March 6, 2012); Amy Tsui, *TPP Talks Begin in March in Melbourne; Will Build on Pre-Round Work, APEC*, INT'L TRADE DAILY (March 3, 2012).

Although the details of the intellectual property chapter remain unclear, Obama Administration officials have stated that, relative to earlier U.S. trade agreements, the TPP will have uniquely high standards for intellectual property and digital economy.[435] The Administration would like to see the TPP's chapter on intellectual property address restrictions in the free flow of information and electronic commerce that affect international trade.[436] However, U.S. proposals for expanded terms of copyright, authority for right holders to prohibit temporary copies of their work, and a notice-and-takedown system under which Internet service providers would be obligated to remove allegedly infringing content from their sites are reportedly facing resistance from other TPP countries.[437]

In terms of labor, the text tabled by the United States reportedly has slightly higher standards than those established by the Bipartisan Trade Deal.[438] As described in the media, the U.S. proposal would detail countries' obligations to uphold and enforce the International Labor Organization commitments identified in the Bipartisan Trade Deal and specify how TPP countries should deal with public-sector complaints about labor violations.[439] For example, the proposal reportedly states that TPP countries should take measures to reduce trade in products made through forced or child labor.[440]

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

In the United States, international trade law is developed and implemented through a joint effort between Congress and the Executive. 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 through legislation.

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.,[441] it has, over time, used its authority over international trade to regulate virtually all areas

[435] *The TPP and Innovation*, WASH. TRADE DAILY (March 9, 2012).

[436] *Id.*

[437] *USTR Faces Resistance on Variety of Copyright Issues in TPP Talks*, INSIDE U.S. TRADE (March 22, 2012).

[438] Amy Tsui, *TPP Talks Begin in March in Melbourne; Will Build on Pre-Round Work, APEC*, INT'L TRADE DAILY (March 3, 2012).

[439] *Id.*

[440] *USTR Tables Labor Proposal that Goes Beyond Mary 10 Template*, INSIDE U.S. TRADE (January 5, 2012).

[441] 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, (continued...)

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.[442] 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.[443] 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 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.[444]

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

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countervailing duty, and other unfair trade practices procedures, intellectual property rights, trade negotiating authority, and many other matters.

[442] U.S. CONST. art. II, §2.

[443] 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).

[444] 19 U.S.C. §1351.

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.[445] 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,[446] which developed out of a proposal by President Nixon for authority to negotiate tariff concessions during the Tokyo Round of the GATT. While the precise form of TPA can vary by the law establishing it, TPA statutes typically: (1) authorize the President to enter certain reciprocal international agreements reducing tariff and nontariff barriers; and (2) entitle those agreements to consideration under fast track procedures in Congress if the President has satisfied additional substantive and procedural conditions.[447] In turn, the fast track procedures promote timely committee and floor action of the legislation at issue by entitling the legislation to receive, for example, an up-or-down vote in Congress without amendment and with limited debate.[448]

TPA was last granted by the Bipartisan Trade Promotion Act of 2002,[449] which expired at the end of June 2007.[450] Congress has occasionally withheld TPA, and it has also approved and implemented at least one trade agreement that was not considered pursuant to the fast track procedures.[451] Nevertheless, some worry that, in the absence of a statute authorizing TPA, foreign governments will hesitate to engage in substantive trade negotiations with the United States because Congress might demand amendments to a negotiated agreement or delay the agreement's implementation indefinitely.[452]

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

[445] 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 Congress.

[446] P.L. 93-618, 88 Stat. 1978, 19 U.S.C. §2101 *et seq*.

[447] *E.g.*, Bipartisan Trade Promotion Authority Act of 2002, P.L. 107-210, 116 Stat. 993; Omnibus Trade and Competitiveness Act of 1988, P.L. 100-418, 102 Stat. 1107. For more on the history of Trade Promotion Authority, see CRS Report RS21004, *Trade Promotion Authority and Fast-Track Negotiating Authority for Trade Agreements: Major Votes*, by (name redacted).

[448] *E.g.*, 19 U.S.C. §§3803-3808. For more discussion of Trade Promotion Authority, see CRS Report R41544, *Trade Promotion Authority and the U.S.-South Korea Free Trade Agreement*, by (name redacted); CRS Report RL33743, *Trade Promotion Authority (TPA) and the Role of Congress in Trade Policy*, by (name redacted) and (name redacted).

[449] P.L. 107-210, 116 Stat. 993, 19 U.S.C. §3801 *et seq.*

[450] 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.

[451] Congress considered, approved, and implemented the Jordan Free Trade Agreement under its regular procedures.

[452] 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).

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. 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.[453] 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.[454] Over time, this countervailing duty law was amended and incorporated into Title VII of the Tariff Act of 1930.[455]

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.[456] 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.[457] This system was then incorporated into Title VII of the Tariff Act of 1930.

The third kind of trade remedy law (safeguards) developed in the mid-20th century in response to the tariff reductions achieved by international agreements.[458] 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.[459] Congress codified this "escape clause" in Section 7 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 undercutting U.S. tariff concessions.[460] However, these standards were loosened again with the Trade Act of 1974.[461]

[453] 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).

[454] Brand, *supra* footnote 453, at 114.

[455] 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 SCM Agreement.

[456] Brand, *supra* footnote 453, at 114.

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

[458] *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).

[459] *See id.* at 401.

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

[461] *See id.* at 403.

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.[462] 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,[463] and telecommunications reviews under Section 1377.[464] The USTR is also involved in reviewing recommendations from the International Trade Commission under Sections 201[465] on safeguards and 337 on intellectual property right infringement.[466]

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

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[462] For an explanation of Section 301 complaints, see the heading below entitled "Section 301 of the Trade Act of 1974: Remedies for Violations of Trade Agreements and Other Inconsistent or Unjustifiable Foreign Trade Practices."

[463] For more on the GSP, see *infra* footnotes 532-547 and accompanying text.

[464] 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.

[465] *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 (October 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).

[466] 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 *USTR Allows Limited Exclusion Order Against Qualcomm Phone to Become Final*, INT'L TRADE DAILY (August 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).

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.[467] In addition, 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),[468] 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.[469] 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*"[470] standard of review, which is often associated with a high level of deference to the

[467] *See, e.g.,* Notice of Commission Decision Not To Review the ALJ's Final Initial Determination,75 *Federal Register* 82071 (December 29, 2010) (describing the ITC's involvement in the investigation and adjudication of allegations that, *inter alia*, the importation of certain flash memory chips and products containing the same violated Section 337).

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

[469] Court of International Trade, Jurisdiction of the Court, http://www.cit.uscourts.gov/informational/about.htm. *See* 28 U.S.C. §§1581, 1582.

[470] 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.[471] Consequently, when it is reviewing a decision by the U.S. Department of Commerce or ITC to impose antidumping duties or use zeroing[472] to determine a "dumping margin," the CIT frequently respects the agency's decision.[473]

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") require 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. [474] 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.[475] 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)[476] 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 eliminating or phasing out the burden or practice in question or to provide the U.S. with

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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.

[471] *E.g.*, Paul Muller Indus. GMBH & Co. v. United States, 435 F. Supp. 2d. 1241, 1243-44 (Ct. Int'l Trade 2006).

[472] For a more in-depth discussion of zeroing, see *infra* notes 509-511 and accompanying text.

[473] *E.g.*, *Paul Muller Indus*., 435 F. Supp. 2d. at 1243-44; 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 and suggests that the court is deferring the responsibility for WTO compliance to the executive branch).

[474] 19 U.S.C. §2411(a).

[475] *Id.* at §2411(b).

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

compensatory trade benefits. For example, in the fall of 2010 the United Steelworkers filed a petition with the USTR alleging that China employed a wide range of WTO-inconsistent policies that unfairly protected and supported their domestic producers in the green energy sector.[477] The USTR responded by initiating an investigation and subsequently requested consultations with China, alleging that that China provided prohibited subsidies to wind turbine manufacturers.[478] In June 2011, the United States and China reached an agreement, and China terminated the subsidy program at issue.[479]

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.[480]

Any interested person may file a petition with the USTR requesting that action be taken under Section 301.[481] 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.[482] The USTR can also initiate investigations to determine whether a matter is actionable.[483]

Countervailing Duties: Remedies for Imports of Subsidized Goods

Title VII of the Tariff Act of 1930[484] governs the process by which the United States decides to impose countervailing duties (CVDs) in response to subsidies by foreign countries that either cause or threaten material injury to U.S. industry. CVDs are additional import duties imposed on the subsidized imports.[485] 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 (SCM Agreement) and the other set governs the imposition of CVDs on countries that are *not* part of the SCM Agreement.[486]

The U.S. International Trade Commission and the U.S. Department of Commerce (through the International Trade Administration) jointly investigate allegations of countervailable subsidies.

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[477] Initiation of Section 302 Investigation and Request for Public Comment: China—Acts, Policies and Practices Affecting Trade and Investment in Green Technology, 75 *Federal Register* 64776 (October 20, 2010).

[478] Request for Consultations by the United States, *China–Measures Concerning Wind Power Equipment*, WT/DS419/1 (January 6, 2011).

[479] *China Withdraws Some Energy Subsidies*, WASH. TRADE DAILY (June 8, 2011); Daniel Pruzin, *China Said to Eliminate Wind Power Subsidy At Center of WTO Proceeding with U.S.*, INT'L TRADE DAILY (June 8, 2011).

[480] 19 U.S.C. §2411(b).

[481] *Id.* at §2412(a).

[482] *Id*.

[483] 19 U.S.C. §2412(b).

[484] *Id*. at §1671 *et seq*.

[485] For information on the application of countervailing duties to imports from non-market economies, see CRS Report RL33976, *U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview*, by (name redacted).

[486] *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.

Their investigations commence when an interested party[487] 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.[488] 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 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.[489] 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.[490]

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.[491] 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 SCM Agreement, to an injury determination.[492] 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.[493] 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.[494] In addition, at that point, the investigation enters the second round in which both agencies must make final determinations.

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[487] 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 1-4 n. 8 (2008).

[488] 19 U.S.C. §1671(a).

[489] *Id.* at §1671a(c)(4).

[490] United States International Trade Commission, *supra* footnote 487, at 1-4.

[491] 19 U.S.C. §1671b(a); ANTIDUMPING AND COUNTERVAILING DUTY HANDBOOK, supra footnote 490, AT II-5.

[492] *Id.* at §1671(c). Countries who are not members of the SCM Agreement 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.*

[493] *Id.* at §1671b(b).

[494] *Id.* at §1671b(d).

The ITA makes its determination first. The ITA must determine whether or not a countervailable subsidy is being provided with respect to the merchandise.[495] 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.[496] 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.[497]

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.[498] The duty levied in that order must be equal to the estimated amount of the government or other public subsidization. The U.S. Customs and Border Protection is then required to collect cash deposits of CVD duties on the merchandise in question when it enters the United States. The cash deposits represent an estimate of the actual duties owed.[499] The final amount of the duties collected will be either the cash deposit, or, if an administrative review is requested, the duty established by that review.[500] Generally, the final duty is determined by an administrative review.[501]

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

The process by which the United States investigates allegations of dumping—that is, allegations that a foreign manufacturer charges a price for its product that is "less than its fair value"[502]—is similar to the process discussed above for investigating allegations of countervailable subsidies. The procedures for assessing and collecting antidumping (AD) duties are prescribed in Title VII of the Tariff Act of 1930.[503] 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."[504] Like CVD

[495] *Id.* at §1671d(a)(1). *E.g.*, Final Affirmative Countervailing Countervailing Duty Determination, 75 *Federal Register* 28557 (May 21, 2010).

[496] 19 U.S.C. §1671d(b)(1).

[497] *Id.* at §1671(c). Countries who are not members of the SCM Agreement 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.*

[498] 19 U.S.C. §1671d(c). *E.g.,* Notice of Antidumping Duty Order, 75 *Federal Register* 37382 (June 29, 2010).

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

[500] *Id*. *See* 19 U.S.C. §1675. For an explanation of administrative reviews, 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 (name redacted), *WTO Dispute Settlement: Status of U.S. Compliance in Pending Cases*, by (name redacted). Although that section is looking only at antidumping duties, AD and CVD law mirror each other in this area. See also CRS Report RL32371, *Trade Remedies: A Primer*, by (name redacted).

[501] 19 C.F.R. §351.212(a). The United States is said to use a "retrospective" assessment system because, in the United States, final liability for antidumping (and countervailing) duties is determined *after* the merchandise is imported. *Id.*

[502] 19 U.S.C. §1673.

[503] *Codified by* 19 U.S.C. §1673 *et seq.* For information on the application of AD law to non-market economies, see CRS Report RL33976, *U.S. Trade Remedy Laws and Nonmarket Economies: A Legal Overview*, by (name reda cted).

[504] 19 U.S.C. §1673a.

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. If the ITC determines that there is a reasonable indication of material injury, 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 its fair value.[505] Predictably, the second round is the round in which the ITA and ITC make their final determinations on these same questions.[506]

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 United States.[507] Antidumping duties are based on the "weighted average dumping margin" as determined by the ITA under 19 U.S.C. Section 1677f-1.[508] In determining the size of a dumping margin for a particular product, the Department of Commerce has historically used a practice known as "zeroing" in its administrative reviews.[509] 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.[510]

The Department of Commerce's practice of using zeroing to calculate dumping margins generated complaints from other WTO Members. While the Court of International Trade found that Commerce's decision to use "zeroing" to calculate the dumping margin is a reasonable and permissible interpretation of the law, the WTO consistently ruled against the U.S. practice—declaring it a violation of U.S. obligations under the WTO Antidumping Agreement.[511] In February 2012, the United States announced that it had reached agreements with the European Union and Japan to end "zeroing."[512] Pursuant to those agreements, the U.S. Department of Commerce published a final rule in the Federal Register pursuant to which the Department will abandon zeroing in administrative review, new shipper review, and expedited antidumping reviews of AD orders except, perhaps, where it determines that zeroing would be appropriate.[513] Under this new rule, the Department will calculate weighted-average margins of dumping and antidumping duty assessments in a manner that provides offsets for non-dumped comparisons. The Department also adopted a timetable for modifying its practice in five-year "sunset" reviews

[505] *Id.* at §§1673b(a)(1), 1673b(b)(1).

[506] 19 U.S.C. §§1673d(a)(1), 1673d(b)(1).

[507] These cash deposits represent only an estimate of the actual duties owed; a final duty is not established unless there is an administrative review of the AD order. ANTIDUMPING MANUAL, *supra* footnote 499, at 2. *See* 19 U.S.C. §1675.

[508] 19 U.S.C. §1673d(c)(B); 19 U.S.C. §1677f-1.

[509] However, the Department of Commerce abandoned its use of zeroing in *original* AD investigations in 2007.

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

[511] *Paul Muller Indus.*, 435 F. Supp. 2d. at 1244; Brightbill, Kwon, and Fogarty, *supra* footnote 473, 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).

[512] Daniel Pruzin, *U.S. Reaches Deals with EU, Japan on Zeroing Disputes in Antidumping Cases*, INT'L TRADE DAILY (February 7, 2012).

[513] Department of Commerce, Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin and Assessment Rate in Certain Antidumping Duty Proceedings, 77 *Federal Register* 8,101 (February 14, 2012).

of AD orders so that it will no longer rely on weighted-average dumping margins that were calculated using methodology deemed WTO-inconsistent.[514]

Safeguards

Section 201

Sections 201 through 204 of the Trade Act of 1974[515] 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.[516]

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.[517] Any entity that is representative of an industry may petition the ITC to make this determination.[518] 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.[519] 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.[520] 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.[521] 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.[522] The President is required to consider certain factors before determining what action to take.[523] 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.[524]

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[514] *Id.*

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

[516] 19 U.S.C. §2241(b). Additionally, dislocated workers in the industry must experience an orderly transition to productive pursuits. *Id.*

[517] 19 U.S.C. §2251(a).

[518] *Id.* at §2252(a)(1).

[519] 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).

[520] 19 U.S.C. §2252(e)(1).

[521] *Id.* at §2252(e)(2).

[522] *Id.* at §2253(a)(1).

[523] *Id.* at §2253(a)(2).

[524] *Id.* at §2253(b)(2).

Country-Specific 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 market disruption. In advance of China's accession to the WTO, for example, the United States and China negotiated two temporary China-specific safeguards, which are scheduled to expire in 2013.[525]

The first "China safeguard," which is contained in Section 421 of the Trade Act of 1974,[526] entitles the President to temporarily increase duties or other import restrictions to remedy an import surge that threatens—or causes—market disruption of a domestic producer of a similar product. In 2009, the Obama Administration exercised this authority after determining that imports of new pneumatic car tires from China were being imported into the United States in a fashion that caused or threatened to cause market disruption to domestic car tire products.[527] Accordingly, the President proclaimed an additional duty on certain Chinese tires.[528] Although China requested WTO consultations with the United States, both the WTO panel and Appellate Body reports supported the U.S. measures.[529]

The second China-specific safeguard, Section 422 of the Trade Act of 1974,[530] is 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. To date, the President has not taken action pursuant to Section 422.

[525] *See* Summary of the U.S.-China Bilateral WTO Agreement, Prepared by the White House National Economic Council, November 15, 1999, 16 INT'L TRADE REP. 1888, 1890 (November 15, 1999); 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). *See also* World Trade Organization, Ministerial Decision of 10 November 2001, Accession of the People's Republic of China, WT/L/432, at ¶ 16 (2001).

[526] U.S.-China Relations Act of 2000, P.L. 106-268, 114 Stat. 8880, §103 (2000), *codified at* 19 U.S.C §2451.

[527] Proclamation No. 8414, 74 *Federal Register* 47861 (September 17, 2009). President Obama's determination was informed by 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. *Id.*

[528] *Id.* ("Pursuant to section 421(a) of the Trade Act (19 U.S.C. 2451(a)), I have determined to provide import relief with respect to new pneumatic tires, of rubber, from China, of a kind used on motor cars... such import relief shall take the form of an additional duty on imports of the products described ..."). In response to the additional tariffs imposed on Chinese tire imports, China filed a WTO complaint against the United States. Request for Consultations by China, *US–Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/1 (September 16, 2009). The WTO panel ruled in favor of the United States in December 2010 and China appealed the decision. For more information on the tires dispute, CRS Report R40844, *Chinese Tire Imports: Section 421 Safeguards and the World Trade Organization (WTO)*, by (name redacted).

[529] Appellate Body Report, *U.S.–Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/AB/R (October 5, 2011); Panel Report, *U.S.–Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China*, WT/DS399/R (December 13, 201).

[530] U.S.-China Relations Act of 2000, P.L. 106-268, 114 Stat. 8880, §103 (2000), *codified at* 19 U.S.C §2451a.

Domestic Tariff and Customs Law

Harmonized Tariff Schedule

The Harmonized Tariff Schedule (HTS) was enacted by the Omnibus Trade and Competitiveness Act of 1988.[531] 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.

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).[532] The GSP provides non-reciprocal, duty-free tariff treatment to certain products imported from over one hundred designated developing countries. The GSP originated in dialogues between the developed and the developing world in which the latter successfully pushed for special access to industrial markets.[533] 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.

As discussed below, the President has broad authority to withdraw, suspend, or limit the application of duty free entry under the GSP system.[534] For example, in 2012, the United States suspended Argentina's eligibility as a beneficiary of the GSP because of the country's failure to pay investor-state arbitration awards to two U.S. firms.[535]

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[531] 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. The Harmonized Tariff Schedule is available at http://hts.usitc.gov.

[532] 19 U.S.C. §§2461-2467. For more information on the GSP, see CRS Report RL33663, *Generalized System of Preferences: Background and Renewal Debate*, by (name redacted).

[533] Although this system of tariff preferences contravenes the GATT's most-favored nation principle, the so-called "Enabling Clause" authorized WTO Members to establish these systems for developing nations beginning in 1971. *See* World Trade Organization, Ministerial Decision of 28 November 1979, Different and More Favorable Treatment Reciprocity and Fuller Participation of Developing Countries, L/4903 (1979). For more on trade preference systems, see CRS Report RS22183, *Trade Preferences for Developing Countries and the World Trade Organization (WTO)*, by (name redacted).

[534] 19 U.S.C. §2463(a).

[535] Proclamation No. 8788, 77 *Federal Register* 18,899 (March 29, 2012).

Eligible Countries

A list of GSP qualified nations and territories is contained in HTS General Note 4. Certain countries and categories of countries are statutorily barred from benefitting from the GSP program. For example, Congress has identified eight countries plus the European Union member states that are ineligible for the GSP.[536] Other countries prohibited from benefiting from the GSP include, *inter alia*, communist states that meet certain criteria; 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 seriously disrupt the world economy; countries that have not taken or are not taking steps to afford internationally recognized worker rights to workers; and countries that have aided or abetted an individual or group that has committed an act of international terrorism.[537]

Outside of these bars on eligibility, the President has substantial discretion over which countries and products receive beneficiary status.[538] In determining whether a country is eligible, the Administration must evaluate, *inter alia*, if that country is upholding workers' rights, protecting intellectual property rights, extending equitable and reasonable access to its markets, reducing trade distorting investment practices (such as export performance requirements), and reducing barriers to trade in services.[539] 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.[540]

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. Moreover, the President must graduate a beneficiary country from the GSP program if the Administration determines that the nation has become a "high income" country.[541] Any country designated as a beneficiary nation under the GSP program that is subsequently disqualified or graduated must receive notice and an explanation of the decision.[542] In addition, before the President designates a country as a GSP beneficiary, graduates a country, or terminates a country's GSP beneficiary status, the President must notify Congress.[543]

Eligible Products

The President issues a list of products from each country that qualify for duty free entry. "Import sensitive" products, however, are statutorily ineligible for the GSP program.[544] These products

[536] 19 U.S.C. §2462(b)(1).

[537] *Id.* at §2462(b).

[538] *Id.* at §2462(a). 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).

[539] 19 U.S.C. §2462(c).

[540] *See id.*

[541] *Id.* at §2462(e).

[542] *Id.* at §2462(f).

[543] *Id.*

[544] 19 U.S.C. §2463(b)(1).

include most textiles and apparel goods, watches, footwear and other accessories, and certain categories of electronics, steel, and glass products.[545]

In addition to the statutory bars on an import's eligibility for duty-free treatment under the GSP program, there are two "competitive need" limitations.[546] The first competitive need limitation 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 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.[547]

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),[548] which offers substantial duty free entry to nearly all of the islands in, and many countries bordering, the Caribbean Sea.[549] A second is the Andean Trade Preference Act of 1991, under which the President is authorized to grant duty free treatment to imports of eligible articles from Colombia, Peru, Bolivia, and Ecuador.[550] A third trade preferences program is contained in the African Growth and Opportunity Act (AGOA),[551] which authorizes the President to designate Sub-Saharan African countries as beneficiary countries eligible to receive duty-free treatment for certain articles.[552]

[545] *Id.*

[546] *Id.* at §2463(c).

[547] *Id.* at §2463(d). In deciding whether to grant a waiver, the President must (1) receive advice from the ITC as to whether a U.S. domestic industry could be adversely affected by the waiver; (2) determine that the waiver is in the U.S. economic interest; and (3) publish the determination in the Federal Register. The President is also required to give "great weight" to the extent to which the beneficiary country opens its markets and resources to the United States, provides internationally recognized worker rights, and protects intellectual property rights.

[548] P.L. 98-67, 97 Stat. 369, *codified at* 19 U.S.C. §2701 *et seq.* For more on CBERA, see "The Caribbean Basic Economic Recovery Act (CBERA) of 1983" in CRS Report RL33951, *U.S. Trade Policy and the Caribbean: From Trade Preferences to Free Trade Agreements*, by (name redacted)

[549] P.L. 98-67, 97 Stat. 369, *codified at* 19 U.S.C. §2701 *et seq.* For more on CBERA, see "The Caribbean Basic Economic Recovery Act (CBERA) of 1983" in CRS Report RL33951, *U.S. Trade Policy and the Caribbean: From Trade Preferences to Free Trade Agreements*, by (name redacted).

[550] P.L. 102-182, 105 Stat. 1236, *codified at* 19 U.S.C. §3201 *et seq.* For more on ATPA, see CRS Report RS22548, *ATPA Renewal: Background and Issues*, by (name redacted).

[551] P.L. 106-200, 114 Stat. 251, *codified at* 19 U.S.C. §§2466a *et seq*. For more on AGOA, see CRS Report RL31772, *U.S. Trade and Investment Relationship with Sub-Saharan Africa: The African Growth and Opportunity Act* , by (name redacted).

[552] 19 U.S.C. §2466a(a). The preferences established under AGOA will expire in 2015, but some textile-specific preferences will expire earlier. 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 (name redacted).

Statutory Authorities for the Imposition of Trade Sanctions

Although the United States has imposed trade embargoes since the earliest days of the republic,[553] economic sanctions have become an increasingly prevalent feature of U.S. foreign policy in recent decades.[554] In general, the President imposes these sanctions by issuing an Executive Order under existing statutory authorities. However, Congress also has a history of enacting legislation that purports to impose sanctions directly or instructs the President as to what actions may or must be taken with respect to imposing sanctions on a particular country or entity.[555] Once imposed, sanctions are implemented primarily by the U.S. Department of Treasury, Office of Foreign Assets Control[556] (OFAC) and the U.S. Department of Commerce.

This section briefly discusses two of the most commonly cited sources of the President's statutory authority for country-specific economic sanctions: the Trading with the Enemy Act and the International Emergency Economic Powers Act.[557] However, sanctions, like other trade measures, must be crafted to comply with not only domestic laws but also principles of customary international law and WTO obligations.[558] When the United States imposes unilateral sanctions, it can provoke friction not only with the target country but also with countries that trade with the target country. In turn, these countries may challenge the sanctions through WTO dispute settlement proceedings or other avenues.[559]

Trading with the Enemy Act

The Trading with the Enemy Act[560] (TWEA) was intended to authorize country-specific sanctions during times of war. Congress briefly expanded TWEA to authorize sanctions during periods of declared national emergency, but, in 1977, Congress relocated the statutory authority for issuing

[553] *E.g.,* An Act to Prohibit the Importation of Certain Goods, Wares and Merchandise, 2 Stat. 379 (1806) (prohibiting the importation of products made from leather, silk, hemp, flax, tin, or brass from Great Britain or Ireland).

[554] *See* MICHAEL P. MALLOY, ECONOMIC SANCTIONS AND U.S. TRADE 4, 34 (1990).

[555] *E.g.,* Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, P.L. 111-342, 124 Stat. 1312 (2010); Sudan Peace Act of 2002, P.L. 107-245, 116 Stat. 1504 (2002); Iran Sanctions Act of 1996, P.L. 104-172, 110 Stat. 1541 (1996); Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, P.L. 111-195.

[556] 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. OFAC posts information on each of the sanctions programs it oversees at http://www.treasury.gov/resource-center/sanctions/Programs/Pages/Programs.aspx.

[557] In addition to these two statutes, the Export Administration Act of 1979 (EAA), P.L. 96-72, 93 Stat. 503, is one of the broadest sources of statutory authority under which the Executive may pursue sanctions. However, the EAA expired in 2001 and is currently operating under an Executive Order invoking the International Emergency Economic Powers Act. Exec. Order 13222, 66 *Federal Register* 44025 (August 22, 2001). For a description of the EAA, see CRS Report RL31832, *The Export Administration Act: Evolution, Provisions, and Debate*, by (name redacted).

[558] *See generally* Michael P. Malloy, *Ou est votre chapeau? Economic Sanctions and Trade Regulation*, 4 CHI. J. INT'L L. 374 (2003) (discussing commonly recurring issues with the consistency of U.S. sanctions with the customary international law and the WTO Agreements, including issues associated with "secondary boycotts," extraterritoriality, and the national security exceptions of the GATT and GATS).

[559] *See, e.g., supra* "Article XXI: National Security Exceptions to the GATT"(discussing the European Union's response to the LIBERTAD Act, which sought to dissuade other countries from investing in Cuba by strengthening the U.S. embargo against it); Military and Paramilitary Activities in and Against Nicaragua (Nicar v. U.S.), 1986 I.C.J. 14, 181 (June 27) (analyzing the consistency of a broad range of U.S. measures against Nicaragua, including the imposition of a trade embargo and the exclusion of all Nicaraguan vessels from U.S. ports, with principles of international law).

[560] 40 Stat. 411, 50 U.S.C. app. §1 *et seq*.

sanctions in national emergencies from TWEA to the International Emergency Economic Powers Act (IEEPA).

Despite these changes, the powers granted by Section 5 of TWEA[561] have remained relatively stable, and TWEA remains, at least in part, the statutory basis for some U.S. sanctions programs.[562] TWEA authorizes the President to take a wide variety of actions with respect to virtually any transaction that is conducted by a person subject to U.S. jurisdiction or that involves property subject to U.S. jurisdiction and in which the foreign country—or a national thereof—has an interest.[563] Specifically, TWEA states that the President may

> [I]vestigate, regulate, direct and compel, nullify, void, prevent, or prohibit any acquisition, holding, withholding, use, transfer, withdraw, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States.[564]

TWEA's prohibitory language is often tracked in the regulations implementing various economic sanctions programs. However, the President has also exercised his affirmative authorities under TWEA by, for example, directing and compelling certain foreign assets to be held in interest-bearing accounts.[565]

International Emergency Economic Powers Act

IEEPA[566] replaced TWEA in 1977 as the source of authority for the President to issue economic sanctions during periods of declared national emergency—as opposed to wartime.[567] Before the President may exercise his IEEPA authorities, he must declare a national emergency with respect to the threat involved.[568] In addition, the President must consult with Congress, whenever possible, before declaring a national emergency and regularly while the national emergency remains in force.[569] The question of whether a threat rises to the level of a national emergency sufficient to trigger IEEPA-based sanctions appears to be nonjusticiable.[570] However, Congress

[561] 50 U.S.C. app. §5(b)(1)(B).

[562] Malloy, *supra* footnote 554, at 35, 147. *E.g.,* Presidential Determination No. 2011-15, 76 *Federal Register* 57,623 (September 15, 2011) (continuing for one year the exercise of authorities under TWEA as implemented by the Cuban Assets Control Regulations, 31 C.F.R. Part 515).

[563] *See* 50 U.S.C. app. §5(b)(1)(B).

[564] *Id.*

[565] *See, e.g.,* 31 C.F.R. §500.205(b) (directing people holding certain property to place that property in an interest-bearing account in a domestic bank). *See also* Malloy, *supra* footnote 554, at 145-46.

[566] P.L. 95-223, *as amended*, 50 U.S.C. §§1701 *et seq*.

[567] Malloy, *supra* footnote 554, at 35.

[568] 50 U.S.C. §1701(a). *See also* National Emergencies Act, P.L. 94-412, 90 Stat. 1255.

[569] 50 U.S.C. §1703(a). Some commentators have questioned the utility of these procedural requirements, citing instances when no noticeable consultation between the President and Congress occurred and variations in the quality of the President's reports to Congress on IEEPA-based sanctions regimes. *See, e.g.,* Malloy, *supra* footnote 554, at 171 ("[O]ne must question whether the IEEPA has in fact imposed any appreciable limitations upon the actual exercise of presidential power under emergency conditions. The experience of the Iran crisis does not appear to suggest any noticeable restriction of presidential power... nor do the reports of the President, periodically submitted to the Congress under the IEEPA, appear to be particularly informative ...").

[570] *See* Beacon Prods. v. Reagan, 633 F. Supp. 1191 (D. Mass. 1986) (holding that the issue of whether a foreign country poses a sufficient threat to trigger the President's power under IEEPA is a nonjusticiable political question), (continued...)

may enact—and is required at a certain point to consider—a joint resolution terminating a Declaration of National Emergency.[571]

Although the statutory trigger is different, the powers of IEEPA are very similar to those granted by TWEA.[572] Under IEEPA, the President may "investigate, regulate, prevent, or prohibit" virtually any foreign economic transaction, from import or export of goods and currency to transfer of exchange or credit.[573] The USA Patriot Act[574] further augmented the President's IEEPA authority by vesting him with the additional power to (1) block property during the pendency of an investigation and (2) confiscate and vest property of any foreign country or foreign national that has planned, authorized, aided, or engaged in armed hostilities with or attacks against the United States.[575] IEEPA exempts very few international transactions from the President's control,[576] and it grants the President broad authority to prescribe definitions. For example, the President may define who is a "U.S. person" subject to the prohibitions and restrictions of sanctions issued under IEEPA.[577]

Over the past few decades, IEEPA has become the primary source of authority for country-specific sanctions regimes. It was first used by President Carter in response to the Iranian hostage crisis.[578] Similarly, after 9/11, President George W. Bush relied on IEEPA to block property and property interests of foreign persons who committed acts of terrorism against U.S. nationals or the U.S. economy.[579] Among the sanctions programs currently based, at least in part, on the

(...continued)

aff'd in part and dismissed on the grounds of mootness by Beacon Prods. v. Reagan, 814 F.2d 1 (1st Cir. 1987). *See also* Chang v. United States, 859 F.2d 893, 896 n. 3 (Fed. Cir. 1988) (stating that an inquiry into "the President's motives and justifications for declaring a national emergency... would likely present a nonjusticiable political question.").

[571] 50 U.S.C. §1622(a), (b). Congress must meet at least six months after a national emergency is declared to consider enacting a joint resolution terminating the Declaration of National Emergency. *Id.* at §1622(b). The President may also issue a presidential proclamation terminating the Declaration of National Emergency. *Id.* at §1622(a).

[572] *Compare* 50 U.S.C. app. §5(b)(1)(B) *with* 50 U.S.C. §1702(a)(1)(B).

[573] 50 U.S.C. §1702(a); U.S. HOUSE OF REPRESENTATIVES SUBCOMMITTEE ON TRADE, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES: PART I OF II 217 (2005 ed.). For example, the President may, under his IEEPA powers, 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. 50 U.S.C. §§1701(a), 1702(a)(1).

[574] P.L. 107-56, 115 Stat. 272.

[575] 50 U.S.C. §1701(a)(1)(B)-(C).

[576] *See* 50 U.S.C. §1702(b) (identifying personal communications not involving the transfer of anything of value, charitable donations for necessities of life to relieve human suffering, the importation to or expatriation from any country of information and informational materials not otherwise controlled by export control law or espionage, and personal transactions ordinarily incident to travel as the four exempted transactions).

[577] 50 U.S.C. §1704. For example, under Executive Order 13067, which issued IEEPA-based sanctions against Sudan, a U.S. person subject to those sanctions is broadly defined to include any U.S. citizen, permanent resident alien, entity (including a partnership, association, trust, joint venture, corporation, or other organization) organized under U.S. laws, or any person in the United States.

[578] Exec. Order 12170, 44 *Federal Register* 65,729 (November 14, 1979).

[579] Exec. Order 13224, 66 *Federal Register* 49,079 (September 25, 2001). In addition to IEEPA, President Bush relied on his authority under the United Nations Participation Act of 1945 (22 U.S.C. §287c).

President's IEEPA authority are the U.S. sanctions against Myanmar (Burma),[580] Cote d'Ivoire,[581] Iran,[582] North Korea,[583] Sudan,[584] and Syria.[585]

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[580] 31 C.F.R. Part 537. For information on U.S. sanctions against Myanmar, see CRS Report RS22737, *Burma: Economic Sanctions*, by (name redacted) and (name redacted).

[581] 31 C.F.R. Part 543.

[582] 31 C.F.R. Part 560. For information on U.S. sanctions against Iran, see CRS Report RS20871, *Iran Sanctions*, by (name redacted).

[583] 31 C.F.R. Part 510. For information on U.S. sanctions against North Korea, see CRS Report R41438, *North Korea: Legislative Basis for U.S. Economic Sanctions*, by (name redacted) and CRS Report RL31502, *Nuclear, Biological, Chemical, and Missile Proliferation Sanctions: Selected Current Law*, by (name redacted).

[584] 31 C.F.R. Part 538. For more information on U.S. sanctions against Sudan, see CRS Report RL32606, *Sudan: Economic Sanctions*, by (name redacted).

[585] 31 C.F.R. Part 542. For more information on U.S. sanctions against Syria, see CRS Report RL33487, *Unrest in Syria and U.S. Sanctions Against the Asad Regime*, by (name redacted) and (name redacted).