PART I: OVERVIEW

Chapter 1: TARIFF AND CUSTOMS LAWS

Harmonized Tariff Schedule of the United States

Historical background

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

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

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

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

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

Structure of the HTS

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

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

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

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

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

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

Harmonized Tariff Schedule of the United States (2005)

Annotated for Statistical Reporting Purposes

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

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

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

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

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

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

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

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

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

Applicable duty treatment

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

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

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

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

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

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

Special duty exemptions and preferences

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

shape, or otherwise; and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Generalized System of Preferences (GSP)

TITLE V OF THE TRADE ACT OF 1974, AS AMENDED

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

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

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

U.S. GSP basic authority

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

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

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

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

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

Designation of beneficiary developing countries

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

to afford its workers internationally-recognized worker rights.

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

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

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

Independent Countries

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

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

Non-Independent Countries and Territories

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

Associations of Countries (treated as one country)

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

Bolivia
Columbia
Ecuador
Peru
Venezuela

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

Cambodia
Indonesia
Philippines
Thailand

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

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

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

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

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

Botswana	Mauritius	Tanzania

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

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

Eligible articles

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

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

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

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

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

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

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

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

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

Treatment of sugar imports under GSP

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

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

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

Limitations on preferential treatment

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

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

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

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

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

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

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

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

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

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

Other provisions

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

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

Caribbean Basin Initiative (CBI)

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

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

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

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

CBERA Beneficiary countries or territories

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

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

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

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

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

General CBERA Designation Criteria

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

(1) is a Communist country;

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

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

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

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

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

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

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

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

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

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

CBERA Eligible Articles

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

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

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

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

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

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

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

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

CBERA Special Provisions for Dehydrated Ethanol

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

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

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

Treatment of Sugar Imports under CBERA

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

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

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

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

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

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

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

Suspensions of Duty-Free Treatment

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

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

Trade Remedy Benefits for CBERA countries

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

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

Tourist Duty-Free Allowance for CBERA countries

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

Measures for Puerto Rico and U.S. Insular Possessions

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

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

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

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

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

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

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

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

Tax Measures

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

Reporting Requirements

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

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

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

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

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

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

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

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

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

Designation Criteria and Eligibility for CBTPA Benefits

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

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

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

CBTPA Beneficiary Countries

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

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

CBTPA Temporary Benefit of Parity With NAFTA for Certain Products

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

[16] 65 FR 60236.

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

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

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

CBTPA Temporary Trade Benefits for Apparel Imports

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

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

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

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

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

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

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

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

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

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

The CBTPA establishes certain special rules relating to apparel products:

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

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

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

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

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

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

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

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

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

CBTPA Transshipment Provisions

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

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

Meetings of Caribbean Trade Ministers and USTR

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

Free Trade Agreement Negotiations

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

Andean Trade Preference Act, as amended

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

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

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

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

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

ATPA Beneficiary Countries

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

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

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

Bolivia
Colombia
Ecuador
Peru

ATPA Designation Criteria

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

(1) the country is a Communist country;

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

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

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

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

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

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

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

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

benefits:

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

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

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

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

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

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

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

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

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

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

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

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

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

Andean Trade Promotion and Drug Eradication Act

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

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

ATPDEA Designation Criteria

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

Articles (Other than Apparel) Eligible for Preferential Treatment

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

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

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

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

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

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

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

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

Eligible Apparel Articles

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

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

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

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

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

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

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

Special Origin Rule for Nylon Filament Yarn

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

Dyeing, Finishing, and Printing Requirement

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

Penalties for Transshipment

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

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

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

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

Import Safeguard Provisions

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

Import Safeguard Provisions for Perishable Products

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

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

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

Reporting Requirements

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

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

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

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

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

Petitions for Review

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

Expiration of Trade Benefits

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

Tourist Duty-Free Allowance for ATPA countries

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

African Growth and Opportunity Act

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

Background

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

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

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

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

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

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

the multilateral trading system, and promote sustainable economic development.

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

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

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

Beneficiary Countries

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

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

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

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

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

(1) a market-based economy that protects private property rights, incorporates an open rules-based trading system, and minimizes government interference in the economy through measures such as price controls, subsidies, and government ownership of economic assets;

(2) the rule of law, political pluralism, and the right to due process, a fair trial, and equal protection under the law;

(3) the elimination of barriers to U.S. trade and investment, including by:

(A) the provision of national treatment and measures to create and environment conducive to domestic and foreign investment;

(B) the protection of intellectual property; and

(C) the resolution of bilateral trade and investment disputes;

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

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

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

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

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

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

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

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

Eligible articles

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

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

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

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

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

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

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

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

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

fabrics.[24]

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

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

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

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

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

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

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

Caps on eligible articles

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

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

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

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

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

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

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

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

Recent clarifications to enhance benefits

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

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

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

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

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

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

Executive Branch determinations affecting imports

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Protections against transshipment

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

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

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

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

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

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

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

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

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

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

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

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

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

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facilitation of plant visits and contacts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Trade cooperation and capacity building

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

procedures.

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

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

Free trade agreements with sub-Saharan African countries

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

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

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

Customs Valuation

Historical background

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

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

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

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

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

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

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

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

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

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

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

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

THE GATT/WTO CUSTOMS VALUATION AGREEMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CURRENT LAW[44]

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

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

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

DEFINITIONS

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

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

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

(1) the packing costs incurred by the buyer;

(2) any selling commission incurred by the buyers;

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

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

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

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

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

Amounts to be disregarded in determining transaction value are:

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

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

As well as, *if identified separately*:

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

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

LIMITATIONS ON THE APPLICABILITY OF TRANSACTION VALUE

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

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

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

Merchandise consumed in producing the imported merchandise;

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

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

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

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

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

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

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

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

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

Any officer or director of an organization and such organization;

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

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

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

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

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

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

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

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

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

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

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

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Partners;

Employer and employee;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Computed value consists of the sum of the following items:

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

(2) profit and general expenses;

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

(4) packing costs.

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

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

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

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

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

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

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

Customs User Fees

History of Customs user fees

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

Section 13031 of the Consolidated Omnibus Budget Reconciliation Act of 1985

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

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

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

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

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

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

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

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

Revised fee structure

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

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

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

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

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

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

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

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

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

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

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

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

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

Miscellaneous refinements to the user fee laws

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

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

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

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

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

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

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

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

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

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

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

Customs fees and the Homeland Security Department

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

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

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

Other Customs Laws

COUNTRY-OF-ORIGIN MARKING

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

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

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

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

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

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

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

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

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

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

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

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

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[57] 19 CFR 134.33.

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

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

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

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

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

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

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

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

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

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

NAFTA RULES OF ORIGIN

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

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

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

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

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

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

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

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

DRAWBACK

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

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

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

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

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

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

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

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

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

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

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

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

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

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

PROTESTS AND ADMINISTRATIVE REVIEW

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

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

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

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

(1) the appraised value of merchandise;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

COPYRIGHTS AND TRADEMARK ENFORCEMENT

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

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

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

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

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

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

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

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

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

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

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

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

(3) are marketed for use in circumventing.

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

PENALTIES

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

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

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

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

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

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

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

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

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

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

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

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

provides importers this opportunity.

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

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

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

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

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

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

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

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

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

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

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

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

COMMERCIAL OPERATIONS

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Foreign Trade Zones

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

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

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

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

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

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

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

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

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

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

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

potential advantage of zone-based operations.

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

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

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

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

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

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

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

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

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