Chapter 2: TRADE REMEDY LAWS

The Antidumping and Countervailing Duty Laws

Two important trade remedy laws are the antidumping (AD) and countervailing duty (CVD) laws. Although these laws are aimed at different forms of unfair trade, they have many procedural and substantive similarities.

CVD LAW: SUBSIDY DETERMINATION

The purpose of the CVD law is to offset any unfair competitive advantage that foreign manufacturers or exporters might enjoy over U.S. producers as a result of foreign countervailable subsidies. Countervailing duties equal to the net amount of the countervailable subsidies are imposed upon importation of the subsidized goods into the United States.

Subtitle A of title VII of the Tariff Act of 1930, as amended,[1] provides that a countervailing duty shall be imposed, in addition to any other duty, equal to the amount of net countervailable subsidy, if two conditions are met. First, the Department of Commerce (DOC) must determine that a countervailable subsidy is being provided, directly or indirectly, "with respect to the manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) into the United States" and must determine the amount of the net countervailable subsidy. Second, the U.S. International Trade Commission (ITC) must determine that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise or by reason of sales (or the likelihood of sales) of that merchandise for importation." The law applies to imports from (1) World Trade Organization (WTO) member countries, (2) countries which have assumed obligations equivalent to those of the Agreement on Subsidies and Countervailing Measures, commonly referred to as the Subsidies Agreement, or (3) countries with whom the United States has a treaty requiring unconditional most-favored-nation treatment with respect to articles imported into the United States. Imports from countries which do not fall into one of these three categories are generally not afforded an injury test by the ITC in CVD cases.

Historical Background: Prior to the General Agreement on Tariffs and Trade (GATT) rules

The first U.S. statute dealing with foreign unfair trade practices was a CVD law passed in 1897. The provisions of the 1897 statute remained substantially the same until 1979, when the U.S. CVD law was changed to conform with the agreement

---

[1] 19 U.S.C. 1671.

reached in the Tokyo Round of multilateral trade negotiations.

The law prior to 1979 required the Secretary of the Treasury to assess countervailing duties on imported dutiable merchandise benefiting from the payment or bestowal of a "bounty or grant." The 1897 law authorized countervailing duties against any bounty or grant on the export of foreign articles. In 1922, Congress amended the provision to cover bounties or grants on the manufacture or production of merchandise as well as on its export. The amount of the countervailing duty was to equal the net amount of the "bounty or grant." Prior to the amendments made by the Trade Act of 1974, the CVD law applied only to dutiable merchandise and afforded no injury test.

The Trade Act of 1974 made two important changes to the CVD law, although the substantive requirements of the CVD law remained virtually the same. First, it extended the application of the CVD law for the first time to duty-free imports, subject to a finding of injury as required by the international obligations of the United States (i.e., duty-free imports from GATT members).

Second, the Trade Act of 1974 made extensive changes in many procedural aspects of the law, which had the effect of limiting executive branch discretion in administering the CVD statute. The responsibilities for CVD investigations were also split, with the Department of Treasury being responsible for subsidy determinations and the ITC being responsible for injury determinations. In 1979, under President Carter's Reorganization Plan No. 3, the responsibility for administering the subsidy portions of the CVD statute was transferred from the Department of the Treasury to the DOC.[2]

Tokyo Round Subsidies Code

During the Tokyo Round of trade negotiations in the 1970's, a multilateral agreement governing the use of subsidies and countervailing measures was concluded and signed by the United States and 23 other countries ("Subsidies Code"). In order to enforce obligations with regard to the use of subsidies, the Subsidies Code provided for improved international procedures for notification, consultation and dispute settlement and, where a breach of an obligation concerning the use of subsidies is found to exist or a right to relief exists, countermeasures are contemplated. In addition to the availability of either remedial measures or countermeasures through the dispute settlement process, countries could also take traditional countervailing duty action to offset subsidies upon a showing of material injury to a domestic industry by reason of subsidized imports. The Subsidies Code set out criteria for material injury determinations.

The key provisions of the Subsidies Code were as follows: (1) prohibition of export subsidies on non-primary products as well as primary mineral products; (2) description of export subsidies which superseded the requirement that an export

[2] Exec. Order No. 12188, January 4, 1980, 44 Fed. Reg. 69273.

subsidy must result in export prices lower than prices for domestic sales, and inclusion of an updated illustrative list of subsidy practices; (3) recognition of the harmful trade effects of domestic subsidies and therefore, the permissibility of relief (including countermeasures) where such subsidies injure domestic producers and nullify or impair benefits of concessions under the GATT (including tariff bindings), or cause serious prejudice to the other signatories; (4) commitment by signatories to "take into account" conditions of world trade and production (e.g., prices, capacity, etc.) in fashioning their subsidy practices; (5) improved discipline on the use of export subsidies for agriculture; (6) provisions governing the use and phase-out of export subsidies by developing countries; (7) tight dispute settlement process; (8) greater transparency regarding subsidy practices including provisions for GATT notification of practices of other countries; (9) an injury and causation test designed to afford relief where subsidized imports (whether an export or domestic subsidy is involved) impact U.S. producers either through volume or through effect on prices; and (10) greater transparency in the administration of CVD laws and regulations.

Congress approved the Subsidies Code under section 2(a) of the Trade Agreements Act of 1979. Section 101 of the 1979 Act added a new title VII to the Tariff Act of 1930, containing the new provisions of the CVD law to conform to U.S. obligations under the Subsidies Code. One of the most fundamental changes made by the 1979 Act was the requirement of an injury test in all CVD cases involving imports from "countries under the Agreement"—countries which either are signatories to the Subsidies Code or have assumed substantially equivalent obligations to those under the Code. For countries that were not "countries under the Agreement," a special section of the CVD statute applied. Specifically, section 303 of the Tariff Act of 1930, as amended, permitted countervailing duties to be imposed without an injury test for such countries. In addition, section 303 applied a different definition of subsidy. Other changes made by the 1979 Act included the grant of provisional relief for the first time, reduction of the time periods for investigation, and greater opportunities for participation by interested parties.

Uruguay Round Subsidies Agreement

The Uruguay Round Agreement on Subsidies and Countervailing Measures ("Subsidies Agreement") went beyond the Tokyo Round Subsidies Code by: (1) providing definitions of key terms such as "subsidy" and "serious prejudice" for the first time in any GATT agreement; (2) prohibiting export subsidies and subsidies based on the use of domestic instead of imported goods; (3) creating a special presumption of serious prejudice for egregious subsidies; (4) defining and significantly strengthening the procedures for showing when serious prejudice exists in foreign markets; (5) creating a "green light" category (which lapsed January 1, 2000) of government assistance that is non-actionable and non-countervailable; (6) requiring most developing countries to phase out export subsidies and import substitution subsidies; and (7) applying the WTO dispute settlement mechanism, which ended the ability of the subsidizing government to block adoption of unfavorable panel reports. Unlike the Subsidies Code (in which only 24 countries joined), all countries that become WTO members are bound by the Subsidies Agreement.

In 1994, Congress implemented the Agreement on Subsidies and Countervailing Measures of the Uruguay Round Multilateral Trade Negotiations (Subsidies Agreement) under title II of the Uruguay Round Trade Agreements Act (URAA).[3] The URAA provides for the application of an injury test to all members of the WTO. The definition of a subsidy applicable to non-WTO members was incorporated in section 701 of the Tariff Act of 1930. Accordingly, section 303 was repealed because it was no longer necessary.

Highlights of the Uruguay Round Subsidies Agreement and CVD Statute

Definition of a subsidy.—Section 251 of the URAA provides that a subsidy is determined to exist if there is a financial contribution by a government or any public body, or any form of income or price support, which confers a benefit. Examples of financial contribution include a direct transfer of funds (e.g., grants, loans, equity infusions), a potential direct transfer (e.g., loan guarantees), the foregoing of revenue otherwise due (e.g., tax credits), the provision of goods or services for less than adequate remuneration (other than general infrastructure), or the purchase of goods. This may also include cases where a government entrusts or directs a private body to carry out these functions. The URAA also provides guidelines for determining when there is a "benefit to the recipient" in the case of an equity infusion, a loan, a loan guarantee, or provision of goods or services.

Specificity.— In order for a subsidy to be countervailable, the Subsidies Agreement requires that it be "specific." The URAA provides that a subsidy will be deemed to be specific if it is provided in law or in fact to a specific enterprise or industry, or group of enterprises or industries. Export subsidies (i.e., those contingent upon export performance), import substitution subsidies (i.e., those contingent on the use of domestic over imported goods), and certain domestic subsidies, if provided to a specific enterprise or industry or group of enterprises or industries, are included. A subsidy limited to certain enterprises within a designated geographical region may also be considered specific.

Prohibited "red light" subsidies.—The Subsidies Agreement identifies two types of subsidies that are prohibited under all circumstances: (1) subsidies based on export performance and (2) subsidies based on the use of domestic rather than imported goods. Article III includes those covered in the illustrative list of export subsidies provided in annex I to the Agreement such as more favorable transport and freight terms for exports, special tax deductions based on export, and export

---

[3] Public Law 103-465, 19 U.S.C. 3572.

credit guarantees or insurance programs providing rates that are inadequate to cover long-term operating costs. The URAA establishes procedures for investigating prohibited subsidies; if Commerce has reason to believe that foreign goods are benefiting from a prohibited subsidy, the United States Trade Representative (USTR) will then determine whether to initiate a section 301 investigation.

Non-actionable "green light" subsidies.—Article 8 of the Subsidies Agreement identifies three types of non-countervailable or "green light" subsidies: (1) certain research subsidies (excluding those provided to the aircraft industry); (2) subsidies to disadvantaged regions; and (3) subsidies for adaptation of existing facilities to new environmental requirements. The URAA provides expressly that the "green light" provisions on research and pre-competitive development activity do not apply to civil aircraft products.

The Subsidies Agreement stipulates that the provisions on non-actionable subsidies apply for 5 years, unless extended or modified. Because the Subsidies Committee of the WTO was unable to reach a consensus on extending the application of these provisions in their existing or modified form, the "green light" provisions automatically lapsed as of January 1, 2000. Accordingly, with the exception of non-specific subsidies, which remain non-actionable and non-countervailable, subsidies formerly qualifying as non-actionable "green light" subsidies now fall within the actionable category.

Enforcement of U.S. rights.—Sections 281 and 282 of the URAA set forth a mechanism for enforcing U.S. rights under the Subsidies Agreement, reviewing the operation of provisions in the Agreement relating to green light subsidies, and ensuring prompt and effective implementation of successful WTO dispute settlement proceedings.

Section 282 of the URAA provides for an ongoing review of the Subsidies Agreement and establishes objectives for that review. Footnote 25 of the Subsidies Agreement required the Subsidies Committee to review the operation of the green light category of research subsidies within 18 months from the date of entry into force: January 1, 1995. Under section 282, the Administration was required to include all green light subsidies in its review.

Section 282(c) provides that subparagraphs B, C, D, and E of section 771 of the Tariff Act of 1930, which established the non-countervailable status of "green light" subsides under U.S. law, expire 66 months after the date of entry into force of the WTO unless extended by Congress. Because the Subsidies Committee of the WTO was unable to reach a consensus on extending the "green light" subsidies provisions by December 31, 1999, subparagraphs B, C, D, and E of section 771 of the Tariff act of 1930 expired on July 1, 2000.

Rules for developing countries.—The URAA provides different treatment for developing country subsidies. The Subsidies Agreement provided an 8 to 10 year window for developing countries with annual GNP per capita at or above $1,000 to phase out all export subsidies (or 2 years for competitive products). An exception to this transition period, which has ended, was granted by the WTO Members in

2002 for certain types of export subsidies provided by countries whose share of global trade was very small. For least developed countries and countries with GNP per capita below $1,000, the phase out period for export subsidies for competitive products is 8 years. Otherwise, these countries may continue to provide export subsidies. Developing countries were allowed a 5-year phase out period, and the least developed countries an 8-year period, to eliminate prohibited import substitution subsidies. The transition period for import substitution subsidies has ended.

Subsidy Determinations

As noted above, section 701 of the Tariff Act of 1930, as amended,[4] provides for the imposition of additional duties whenever a countervailable subsidy is bestowed by a foreign country upon the manufacture or production for export of any article which is subsequently imported into the United States. Reference to the sale of merchandise includes the entering into of any leasing arrangement regarding the merchandise that is equivalent to the sale of the merchandise. The countervailing duty will apply whether the merchandise is imported directly or from third countries, and whether or not in the same condition as when exported.

Again, as noted above, section 701(c) applies to a country which is not a "Subsidies Agreement country." Under section 701(c), a country which is not a "Subsidies Agreement country" is not entitled to an injury test. In addition, certain provisions pertaining to suspension agreements, special rules for regional industries, critical circumstances, and the 5-year review of countervailing duty orders do not apply to such a country.

Countervailing duties are imposed in the amount of the net countervailable subsidy as determined by the DOC. To determine the amount of net countervailable subsidy on which the CVD will be based, the DOC may subtract from gross countervailable subsidy the amount of:

(1) any application fee, deposit, or similar payment paid to qualify for or receive the subsidy;

(2) any loss in the countervailable subsidy value resulting from deferred receipt mandated by government order; and

(3) export taxes, duties, or other charges levied on the exports to the United States specifically intended to offset the countervailable subsidy.

Upstream Subsidies

The Trade and Tariff Act of 1984 modified the application of the CVD law to "upstream subsidies"—subsidies bestowed on inputs which are then incorporated into the manufacture of a final product which is exported to the United States.

---

[4] 19 U.S.C. 1671.

Section 268 of URAA further modified the law by establishing criteria for determining the existence of an upstream subsidy.

Section 771(A) of the Tariff Act of 1930, as amended, provides the criteria for identifying upstream subsidies. The potential for an upstream subsidy exists only when a sector-specific benefit meeting all the other criteria of being a countervailable subsidy is provided to the input producer. A determination that the subsidy is also bestowing a "competitive benefit" on the merchandise is also required. The provision is also limited to countervailable subsidies paid or bestowed by the country in which the final product is manufactured.

With regard to the "competitive benefit" criterion, the DOC must decide that a competitive benefit has been bestowed when the price for the input used in manufacture or production of the merchandise subject to investigation is lower than the price the manufacturer or producer would otherwise pay for the input from another seller in an arm's length transaction. Whenever the DOC has reasonable grounds to believe or suspect an upstream subsidy is being paid or bestowed, the DOC must investigate whether it is in fact and, if so, include the amount of any competitive benefit, not to exceed the amount of upstream subsidy, in the amount of any CVD imposed on the merchandise under investigation.

Agricultural Subsidies

Section 771(5B) of the Tariff Act of 1930, as amended, implements Article 13(a) of the WTO Agreement on Agriculture and provides a separate, special rule for the calculation of countervailable subsidies on certain processed agricultural products.

AD LAW: LESS-THAN-FAIR-VALUE (LTFV) DETERMINATION

Dumping generally refers to a form of international price discrimination, whereby goods are sold in one export market (such as the United States) at prices lower than the prices at which comparable goods are sold in the home market of the exporter, or in its other export markets.

Two provisions of U.S. law address different types of dumping practices. Title VII of the Tariff Act of 1930, as amended, provides for the assessment and collection of AD duties by the U.S. government after an administrative determination that foreign merchandise is being sold in the U.S. market at less than fair value and that such imports are materially injuring the U.S. industry. Section 1317 of the Omnibus Trade and Competitiveness Act of 1988 establishes procedures for the USTR to request a foreign government to take action against third-country dumping that is injuring a U.S. industry, and section 232 of the URAA permits a third country to request that an order be issued against dumped imports from another country that are materially injuring an industry in a third country.

Historical Background

In 1916, the Congress enacted the Antidumping Act of 1916, providing a civil cause of action in Federal court for private damages as well as for criminal penalties against parties who dump foreign merchandise in the United States.[5] After a successful WTO challenge by the European Union and Japan of the Antidumping Act of 1916, Congress repealed the law in P.L. 108-429, effective December 3, 2004. Litigation commencing prior to the effective date of repeal was not affected. In 1921, the Antidumping Act of 1921 was passed, which provided the statutory basis until 1979 for an administrative investigation by the Department of the Treasury of alleged dumping practices and for imposition of AD duties.[6] In 1954, the administration of the AD law was split, and the function of determining injury was transferred from the Treasury Department to the U.S. Tariff Commission (now the ITC). The function of determining sales at less than fair value was left with the Treasury Department until 1979.

During the post-World War II negotiations to establish an International Trade Organization, the United States proposed a draft article on dumping, based on the Antidumping Act of 1921. This draft became the basis for article VI of the GATT, which is the international framework governing national AD laws.

During the 1960s, AD actions and their potential for abuse, rather than the dumping practice itself, became a source of great concern to many nations. As a result, during the Kennedy Round of multilateral trade negotiations, the GATT Antidumping Code of 1967 was established. The 1967 Code had three main functions: (1) to clarify and elaborate on the broad concepts of article VI of the GATT; (2) to supplement article VI by establishing appropriate procedural requirements for AD investigations; and (3) to bring all GATT signatory countries into conformity with article VI. The GATT Antidumping Code entered into force on July 1, 1968, and provided for the establishment of a GATT Committee on Antidumping Practices whose function was to review annually the operation of national antidumping laws.

During the Tokyo Round of multilateral trade negotiations in the 1970s, the GATT Antidumping Code was amended to conform to the newly negotiated Agreement Relating to Subsidies and Countervailing Measures, also negotiated at that time and involving changes in article VI of the GATT. The GATT Agreement on Implementation of article VI of the GATT, Relating to Antidumping Measures, came into force on January 1, 1980.[7]

The Congress approved the revised GATT Antidumping Code under section 2(a) of the Trade Agreements Act of 1979.[8] Title I of the 1979 Act repealed the

---

[5] Act of September 8, 1916, ch. 463, sec. 801, 39 Stat. 798, 15 U.S.C. 72.

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

[7] Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade, MTN/NTM/W/232, reprinted in House Doc. No. 96-153, pt. I at 311.

[8] Public Law 96-39, approved July 26, 1979.

Antidumping Act of 1921 and added a new title VII to the Tariff Act of 1930 implementing the provisions of the Agreement in a new U.S. antidumping law. In addition to the substantive and procedural changes made by the 1979 Act, the responsibility for making dumping determinations was transferred from the Department of the Treasury to the DOC in 1979.[9]

Finally, during the Uruguay Round negotiations, provisions related to antidumping were further amended through the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Antidumping Agreement"). Article VI of the original GATT remained unchanged in the Antidumping Agreement.

Effective January 1, 1995, the Congress implemented the Antidumping Agreement under title II of the URAA. The Act made considerable substantive and procedural changes to the U.S. AD statute.

Basic Provisions

Section 731 of the Tariff Act of 1930, as amended, provides that an AD duty shall be imposed, in addition to any other duty, if two conditions are met. First, the DOC must determine that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." The determination of whether LTFV sales exist, and what is the margin of dumping, is based on a comparison of "normal value" with the "export price" of each import sale made during the relevant time period under investigation. Second, the ITC must determine that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise." If the DOC determines that LTFV sales exist and the ITC determines that material injury exists, an AD order is issued imposing AD duties equal to the amount by which normal value (i.e., the price in the foreign market) exceeds the export price (i.e., U.S. price) for the merchandise (the dumping margin).

Section 732 of the Tariff Act of 1930, as amended, includes a procedure in AD investigations by which the DOC may monitor imports from additional supplier countries for up to 1 year in order to determine whether persistent dumping exists with respect to that product and self-initiation of additional dumping cases is warranted.

Basis of Comparison: Normal Value

Normal value is determined by one of three methods, in order of preference: home market sales, third-country sales, or constructed value. If a foreign like

---

[9] Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (Dec. 3, 1979); and Exec. Order No. 12188, January 2, 1980, 45 Fed. Reg. 989.

product is sold in the market of the exporting country for home consumption, then normal value is to be based on such sales. If home market sales do not exist, or are so few as to form an inadequate basis for comparison, then the price at which the foreign like product is sold for exportation to countries other than the United States becomes the basis for normal value. If neither home market sales nor third-country sales form an adequate basis for comparison, then normal value is the constructed value of the imported merchandise. Constructed value is determined by a formula set forth in the statute, which is the sum of costs of production, plus the actual amount of profit and selling, general and administrative expenses. If actual data is not available, then a surrogate for profit and such expenses may be used, as specified in the statute.

Normal value based on home market or third-country sales is a single price, in U.S. dollars, which represents the weighted average of prices in the home market or third-country market during the period under investigation. Sales made at less than the cost of production may be disregarded in the determination of normal value under certain circumstances. Adjustments are made for differences in merchandise, quantities sold, circumstances of sale, and differences in level of trade to provide for comparability of normal value with export price. Section 223(a)(7) of the URAA and the accompanying Statement of Administrative Action (SAA) changed the requirements for making level of trade adjustments to provide that the DOC is to make a level of trade adjustment (i.e., deduct the price difference between the two levels of trade) if sales are made at different levels of trade and the appropriate adjustment can be established. The level of trade adjustment was intended to provide the normal value counterpart to the related party profit deduction in constructed export price sales (described below) so that the effect is to compare a U.S. sale to a sale in the home market at the same point in the commercial transaction. Finally, averaging or sampling techniques may be used in the determination of normal value whenever a significant volume of sales is involved or a significant number of price adjustments is required.

If the exporting country is a non-market economy, the normal value is constructed by valuing the non-market economy producer's "factors of production" in a market economy country which is a significant producer of comparable merchandise and which is at a level of economic development comparable to the non-market economy, and adding amounts for general expenses, profit, and packing. The "factors of production" include labor, raw materials, energy and other utilities, and representative capital costs.

In determining whether a country is a non-market economy, the DOC considers: the convertibility of the country's currency, whether wages are determined through free bargaining between labor and management, whether foreign investment is permitted, the extent of government ownership, and the extent of government control over the allocation of resources and the pricing and output decisions of enterprises. The DOC's determination of whether a country is a non-market economy is not subject to judicial review.

Export Price

The margin of dumping, and the amount of antidumping duty to be imposed, is determined by comparing the normal value with the export price of each entry into the United States of foreign merchandise subject to the investigation. Export price in general refers to either "export price" or the "constructed export price" of the merchandise, whichever is appropriate. "Export price" is the price at which merchandise is purchased or agreed to be purchased prior to date of importation to the United States. It is typically used where the purchaser is unrelated to the foreign manufacturer and is based on the price agreed to before importation into the United States. However, it may be used if the purchaser and foreign manufacturer are related but the purchaser is merely the processor of sales-related documentation and does not set the price to the first unrelated customer. "Constructed export price" is the price at which merchandise is sold or agreed to be sold in the United States before or after importation, by or for the account of the producer or exporter to the first unrelated purchaser. Typically, it is used if the purchaser and exporter are related.

Export price is adjusted to derive an ex-factory price, including the subtraction of certain delivery expenses and U.S. import duties. Additional subtractions are made from constructed export price, including selling commissions, indirect selling expenses, and expenses and profit for further manufacturing in the United States. In addition, the URAA provides for the deduction of an amount for related party profit, if any, earned in a sale through a related distributor to an end-user in the United States.

Third Country Dumping

Section 1318 of the Omnibus Trade and Competitiveness Act of 1988 was enacted in response to concern over the injurious effects of foreign dumping in third country markets. Section 1318 establishes procedures for domestic industries to petition the USTR to pursue U.S. rights under article 12 of the GATT Antidumping Code. A domestic industry that produces a product like or directly competitive with merchandise produced by a foreign country may submit a petition to USTR if it has reason to believe that such merchandise is being dumped in a third country market and such dumping is injuring the U.S. industry.

If USTR determines there is a reasonable basis for the allegations in the petition, USTR shall submit to the appropriate authority of the foreign government an application requesting that antidumping action be taken on behalf of the United States. Article 12 of the GATT Antidumping Code requires that such an application "be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned" (paragraph 2, article 12). Accordingly, at the request of the USTR, the appropriate officers of the DOC and the ITC are to assist USTR in preparing any such application.

After submitting an application to the foreign government, USTR must seek consultations with its representatives regarding the requested action. If the foreign government refuses to take any AD action, USTR must consult with the domestic industry on whether action under any other U.S. law is appropriate.

The Uruguay Round Antidumping Agreement added a provision providing authority to issue an order upon the request of a third country, under certain circumstances. The URAA provides that the government of a WTO member may file with USTR a petition requesting that an investigation be conducted to determine if imports from another country are being dumped in the United States, causing material injury to an industry in the petitioning country. USTR, after consultation with the DOC and the ITC, and after obtaining the approval of the WTO Council for Trade in Goods, is to determine whether to initiate an investigation. If the DOC determines that imports are dumped and the ITC determines that an industry in the petitioning country is materially injured by such imports, the DOC is to issue an AD order.

AD AND CVD LAWS: MATERIAL INJURY DETERMINATION

Prior to issuance of an AD or CVD order, the ITC must determine that the domestic industry is being materially injured, or threatened with material injury, or the establishment of a domestic industry is materially retarded, by reason of dumped or subsidized imports. The standard of injury under the AD and CVD laws is "material injury," defined by section 771(7) of the Tariff Act of 1930 as harm which is not inconsequential, immaterial, or unimportant.

The ITC determination of injury involves a two-prong inquiry: first, with respect to the fact of material injury, and second, with respect to the causation of such material injury (i.e., that dumping caused the injury, and not other factors). The ITC is required to analyze the volume of imports, the effect of imports on U.S. prices of like merchandise, and the effects that imports have on U.S. producers of like products, taking into account many factors, including lost sales, market share, profits, productivity, return on investment, and utilization of production capacity. Also relevant are the effects on employment, inventories, wages, the ability to raise capital, and negative effects on the development and production activities of the U.S. industry. Finally, in AD investigations, the ITC is to consider the magnitude of the dumping margin.

Section 222(b)(2) of the URAA (19 U.S.C. 1677(7)(C)(iv)) states that, in determining market share and the factors affecting financial performance, the ITC is to focus primarily on the merchant market for the domestic like product if domestic producers internally transfer significant production of the domestic like product for the production of a downstream article (i.e., captive production not for sale on the merchant market). The SAA accompanying the implementing legislation makes clear that captively produced imports are not to be included in the import penetration ratio for the merchant market if they do not compete with merchant market production.[10]

Section 771(7) of the Tariff Act of 1930, as amended, requires the ITC to cumulatively assess the volume and effect of like imports from two or more countries subject to investigation if the imports compete with each other and with like products of the domestic industry in the U.S. market, as long as the relevant petitions were filed on the same day or investigations were initiated on the same day (for cases which were self-initiated). However, the ITC is to immediately terminate an investigation with respect to a country (and, hence, may not cumulate imports from that country) if imports from that country are "negligible." Section 222(d) of the URAA amended the negligibility standard so that imports from a country are to be considered negligible if they account for less than 3 percent of the volume of all imports of such merchandise and if imports from all countries accounting for less than 3 percent do not exceed 7 percent of imports.

There are two exceptions to the general rule of cumulation. First, the ITC may not cumulate imports from Israel with imports from other countries for purposes of determining material injury, unless the ITC separately determines that Israeli imports are causing material injury alone. Second, section 224 of the Caribbean Basin Economic Recovery Expansion Act of 1990 (P.L. 101-382) created an exception to the general cumulation rule for imports from Caribbean Basin (CBI) beneficiary countries. If imports from a CBI country are under investigation in an AD or countervailing duty case, imports from that country may not be aggregated with imports from non-CBI countries under investigation for purposes of determining whether the imports from the CBI country are causing, or threatening to cause, material injury to a U.S. industry. They may be aggregated with imports from other CBI countries under investigation. Imports from CBI countries continue to be cumulated with imports from non-CBI countries for purposes of determining material injury in investigations of imports from non-CBI countries.

ISSUES COMMON TO AD AND CVD INVESTIGATIONS

Initiation of Investigation

AD and CVD investigations may be self-initiated by the DOC or may be initiated as a result of a petition filed by an interested party. Petitions may be filed by any of the following, on behalf of the affected industry: (1) a manufacturer, producer, or wholesaler in the United States of a like product; (2) a certified or recognized union or group of workers which is representative of the affected industry; (3) a trade or business association with a majority of members producing a like product; (4) a coalition of firms, unions, or trade associations that have individual standing; or (5)

[10] The URAA Statement of Administrative Action at 853.

a coalition or trade association representative of processors, or processor and growers, in cases involving processed agricultural products. The DOC provides technical assistance to small businesses to enable them to prepare and file petitions.

Petitions are to be filed simultaneously with both the DOC and ITC. Within 20 days after the filing of a petition, the DOC must decide whether or not the petition is legally sufficient to commence an investigation. If so, an investigation is initiated with respect to imports of a particular product from a particular country.

Because of new standing provisions in the Uruguay Round Agreements, section 212 of the URAA requires DOC to determine, as part of its initiation determination, whether the petition has been filed by or on behalf of the industry. A petitioner has standing if: (1) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the like product; and (2) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition. The SAA accompanying the Act specifies that if the management of a firm expresses a position in direct opposition to the views of the workers in that firm, DOC will treat the production of that firm as representing neither support for nor opposition to the petition.[11] The DOC is to poll the industry if the petition does not meet the second test set forth above. In such circumstances, the DOC is permitted 40 days in which to determine whether it will initiate an investigation. Standing of the industry may not be challenged to the agency after an investigation is initiated but may be challenged later in court.

Preliminary ITC Injury Determination

The ITC must determine whether there is a "reasonable indication" of material injury, based on the information available to it at the time. The petitioner bears the burden of proof with respect to this issue. If the ITC preliminary determination is negative, the investigation is terminated. If it is positive, the investigation continues. The ITC is to make this determination within 45 days of the date of filing of the petition or self-initiation, or within 25 days after the date on which the ITC receives notice of initiation if the DOC has extended the period for initiation in order to poll the industry to determine standing.

Preliminary DOC Determination

If the ITC makes an affirmative preliminary injury determination, then the DOC must determine whether dumping or subsidization is occurring.

In AD cases, the DOC must determine whether there is a "reasonable basis to believe or suspect that the merchandise is being sold, or is likely to be sold, at less

---

[11] URAA Statement of Administrative Action at 862.

than fair value," within 140 days after initiation. The preliminary determination is based on the information available to the DOC at the time. If affirmative, the preliminary determination must include an estimated average amount by which the normal value exceeds the export price. An expedited preliminary determination within 90 days of initiation of the investigation may be made based on information received during the first 60 days if such information is sufficient and the parties provide a written waiver of verification and an agreement to have an expedited preliminary determination. A preliminary determination may also be expedited for cases involving short life cycle merchandise, if the foreign producer has been subject to prior affirmative dumping determinations on similar products. On the other hand, the preliminary determination may be postponed until 190 days after initiation by the DOC, at the petitioner's request or in cases which the DOC determines are extraordinarily complicated.

In subsidy cases, the DOC must determine whether there is a "reasonable basis to believe or suspect that a countervailable subsidy is being provided," within 65 days after initiation of the investigation. In cases involving upstream subsidies, the time period may be extended to 250 days. If affirmative, the preliminary determination must include an estimated amount of the net countervailable subsidy. An expedited preliminary determination may be made based on information received during the first 50 days if such information is sufficient and the parties provide a written waiver of verification and agree to an expedited preliminary determination. On the other hand, the preliminary determination may be postponed until 130 days after initiation at the petitioner's request or in cases which the DOC determines are extraordinarily complicated.

The effect of an affirmative DOC preliminary determination is that the DOC orders the suspension of liquidation of all entries of foreign merchandise subject to the determination from the date of publication of the preliminary determination. The DOC must also order the posting of a cash deposit, bond, or other appropriate security for each subsequent entry of the merchandise equal to the estimated margin of dumping or the amount of the net countervailable subsidy. If the DOC preliminary determination is negative, no suspension of liquidation occurs, and the ITC and DOC investigations simply continue into the final stage. If the DOC final determination is negative, then the entire investigation is terminated (including the ITC final injury investigation).

In AD investigations in which the petitioner alleges critical circumstances, the DOC must determine, on the basis of information available at the time, whether (1) there is a history of dumping and material injury in the United States or elsewhere of the subject merchandise, or the importer knew or should have known that the merchandise was being sold at less than fair value and that there was likely to be material injury by reason of such sales; and (2) there have been massive imports of the merchandise over a relatively short period.

In CVD investigations involving "countries under the Agreement" in which the petitioner alleges critical circumstances, the DOC must determine, on the basis of information available at the time, whether (1) the alleged countervailable subsidy is inconsistent with the GATT Subsidies Agreement; and (2) there have been massive imports of the merchandise over a relatively short period.

In both AD and CVD investigations, this critical circumstances determination may be made prior to a preliminary determination. If the DOC determines critical circumstances exist, then any suspension of liquidation ordered retroactively applies to unliquidated entries of merchandise entered up to 90 days prior to the date suspension of liquidation was ordered.

Final DOC Determination

In AD investigations, the DOC must issue its final LTFV determination within 75 days after the date of its preliminary determination, unless a timely request for extension is granted, in which case the final determination must be made within 135 days. In CVD investigations, the DOC must issue a final subsidy determination within 75 days after the date of its preliminary determination, unless the investigation involves upstream subsidies, in which case special extended time limits apply. If there are simultaneous investigations under the AD and CVD laws involving imports of the same merchandise, the final CVD determination may be postponed until the date of the final determination in the AD investigation at the request of a petitioner.

In both LTFV and subsidy investigations, the investigation is terminated if the final determination is negative, including any suspension of liquidation which may be in effect, and all estimated duties are refunded and all appropriate bonds or other security are released. If the final determination is affirmative, the DOC orders the suspension of liquidation and posting of a cash deposit, bond, or other security (if such actions have not already been taken as a result of the preliminary determination), and awaits notice of the ITC final injury determination.

Final ITC Injury Determination

Within 120 days of a DOC affirmative preliminary determination or 45 days of a DOC affirmative final determination, whichever is longer, the ITC must make a final determination of material injury. If the DOC preliminary determination is negative, and the DOC final determination is affirmative, the ITC has until 75 days after the final affirmative determination to make its injury determination.

Termination or Suspension of Investigation

Either the DOC or ITC may terminate an AD or CVD investigation upon withdrawal of the petition by petitioner, or by the DOC if the investigation was self-initiated. The DOC may also suspend an investigation on the basis of a suspension agreement limiting U.S. imports of the merchandise subject to investigation if the DOC is satisfied that termination on the basis of such agreement is in the public interest, and effective monitoring of the agreement is practicable.

The DOC may suspend a CVD investigation on the basis of one of three types of agreements entered into with the foreign government or with exporters who account for substantially all of the imports under investigation. The three types of agreements are: (1) an agreement to eliminate the subsidy completely or to offset completely the amount of the net countervailable subsidy within 6 months after suspension of the investigation; (2) an agreement to cease exports of the subsidized merchandise to the United States within 6 months of suspension of the investigation; and (3) an agreement to eliminate completely the injurious effect of subsidized exports to the United States (which, unlike under the AD law, may be based on quantitative restrictions).

The DOC may suspend an AD investigation on the basis of one of three types of agreements entered into with exporters who account for substantially all of the imports under investigation: (1) an agreement to cease exports of the merchandise to the United States within 6 months of suspension of the investigation; (2) an agreement to revise prices to eliminate completely any sales at less than fair value; and (3) an agreement to revise prices to eliminate completely the injurious effect of exports of such merchandise to the United States. Unlike CVD cases, AD investigations cannot generally be suspended on the basis of quantitative restriction agreements. The one exception is where the AD investigation involves imports from a non-market economy country.

Prior to actual suspension of an investigation, the DOC must provide notice of its intent to suspend and an opportunity for comment by interested parties. When the DOC decides to suspend the investigation, it must publish notice of the suspension, and issue an affirmative preliminary LTFV or subsidy determination (unless previously issued). The ITC also suspends its investigation. Any suspension of liquidation ordered as a result of the affirmative preliminary LTFV determination, however, is to be terminated, and all deposits of estimated duties or bonds posted are to be refunded or released.

If, within 20 days after notice of suspension is published, the DOC receives a request for continuation of the investigation from a domestic interested party or from exporters accounting for a significant proportion of exports of the merchandise, then both the DOC and ITC must continue their investigations.

If the DOC determines not to accept a suspension agreement, it is to provide to the exporters who would have been subject to the agreement both the reasons for not accepting the agreement and an opportunity to submit comments, where practicable.

The DOC has responsibility for overseeing compliance with any suspension agreement. Intentional violations of suspension agreements are subject to civil penalties.

AD or CVD Order

An AD or CVD order may be issued only if both the DOC and ITC issue affirmative final determinations, in both title VII AD and CVD investigations and in section 303 CVD investigations requiring an injury test.

A DOC final LTFV determination must include its determinations of normal value and export price. Within 7 days of notice of an affirmative final ITC determination, the DOC must issue an AD duty order which (1) directs the Customs Service to assess AD duties equal to the amount by which normal value exceeds the export price, i.e., the dumping margin; (2) describes the merchandise to which the AD duty applies; and (3) requires the deposit of estimated AD duties pending liquidation of entries, at the same time as estimated normal customs duties are deposited. The DOC must publish notice of its final determination, which shall be the basis for assessment of AD duties on the entries subject to investigation and for deposit of estimated AD duties on future entries.

For CVD investigations, the DOC must issue a CVD order within 7 days of notice of an affirmative final ITC determination, which (1) directs the Customs Service to assess countervailing duties equal to the amount of the net countervailable subsidy; (2) describes the merchandise to which the countervailing duty applies; and (3) requires the deposit of estimated countervailing duties pending liquidation of entries, at the same time as estimated normal customs duties are deposited. The DOC must publish notice of its determination of net countervailable subsidy which shall be the basis for assessment of countervailing duties on the entries subject to investigation and for deposit of estimated countervailing duties on future entries.

Differences Between Estimated and Final Duties

If a cash deposit or bond collected as security for estimated AD or countervailing duties pursuant to an affirmative preliminary or final LTFV or CVD determination is greater than the amount of duty assessed pursuant to an AD or CVD order, then the difference between the deposit and the amount of final duty will be refunded for entries *prior* to notice of the final injury determination. Sections 707 and 737 of the Tariff Act of 1930, as amended, provide that if the cash deposit or bond is lower than the final duty under the order, then the difference is disregarded. No interest accrues in either case.

If estimated AD or countervailing duties deposited for entries *after* notice of the final injury determination are greater than the amount of final AD or countervailing duties determined under an AD or CVD order, then the difference will be refunded, together with interest on the amount of overpayment. If estimated duties are less than the amount of final duties, then the difference will be collected together with interest on the amount of such underpayment.

Administrative Review

The DOC is required, upon request, to conduct an annual review of outstanding AD and CVD orders and suspension agreements. For all entries of merchandise subject to an AD review, the DOC must determine the normal value, export price, and the amount of dumping margin. For all entries of merchandise subject to a CVD review, the DOC must review and determine the amount of any net countervailable subsidies. These determinations provide the basis for assessment of AD and countervailing duties on all entries subject to the review, and for deposits of estimated duties on entries subsequent to the period of review.

The results of its annual review must be published together with a notice of any AD or countervailing duty to be assessed, estimated duty to be deposited, or investigation to be resumed. Under the URAA, time limits were added to the administrative review process so that final determinations are due in 1 year (with extensions up to an additional 6 months available).

Changed Circumstances Review

Under section 751(b) of the Tariff Act of 1930, as amended, a review of a final determination or of a suspension agreement is to be conducted by the DOC or ITC whenever it receives information or a request showing changed circumstances sufficient to warrant such review. Without good cause shown, however, no final determination or suspension agreement can be reviewed within 24 months of its notice. The party seeking revocation of an order has the burden of persuasion as to whether there are changed circumstances sufficient to warrant revocation.

Sunset Review

The Uruguay Round Agreements provide for the termination, or sunset, of AD and CVD orders and suspension agreements after 5 years unless the authorities determine that such expiry would be likely to lead to the continuation or recurrence of dumping, subsidization and material injury. Accordingly, section 751(d) of the Tariff Act of 1930, as amended, provides that orders may be revoked and suspension agreements terminated after 5 years if the terms are met. The DOC publishes a notice of initiation of a sunset review not later than 30 days before the fifth anniversary of the order. A party interested in maintaining the order must respond to the notice by providing information to the DOC and ITC concerning the likely effects of revocation. The DOC is to conclude its investigation within 240 days of initiation, and the ITC within 360 days of initiation. These deadlines may be extended if the investigation is extraordinarily complicated.

In AD cases, the DOC determines whether revocation of an order or termination of a suspension agreement would be likely to lead to continuation or recurrence of dumping. In making this determination, the DOC considers the weighted average dumping margins determined in the investigation and subsequent reviews and the volume of imports of the subject merchandise for the period before and the period after the issuance of the order or acceptance of the suspension agreement. The DOC may consider other enumerated factors, upon good cause shown. In addition, the DOC provides to the ITC the magnitude of the margin of dumping that is likely to prevail if the order is revoked or the suspended investigation terminated.

In CVD cases, the DOC determines whether revocation of an order or termination of a suspension agreement would be likely to lead to continuation or recurrence of a countervailable subsidy. In making this determination, the DOC considers the net countervailable subsidy determined in the investigation and subsequent reviews and whether any change in the program which gave rise to the net countervailable subsidy has occurred that is likely to be of effect. The DOC may consider other enumerated factors, upon good cause shown. In addition, the DOC provides to the ITC the amount of the net countervailable subsidy that is likely to prevail if the order is revoked or the suspended investigation terminated.

In both AD and CVD cases, the ITC determines whether revocation would be likely to lead to the likelihood of continuation or recurrence of material injury within a reasonably foreseeable period of time. In making this determination, the ITC considers the likely volume, price effect, and impact of subject imports on the industry if the order is revoked or the suspension agreement terminated. The ITC takes into account its prior injury determinations, whether any improvement in the state of the industry is related to the order or the suspension agreement, and whether the industry is vulnerable to material injury if the order is revoked or the suspension agreement terminated.

In AD sunset reviews, the ITC may also consider the magnitude of the dumping margin. In CVD sunset reviews, the ITC may also consider the magnitude of the net countervailable subsidy. The nature of the countervailable subsidy as well as whether the subsidy is covered by Article 3 (export subsidies or subsidies contingent on the use of domestic over imported goods) or Article 6.1 (subsidies causing serious prejudice) of the WTO Subsidies Agreement must be considered.

The ITC may cumulatively assess the volume and effect of imports of the subject merchandise from all countries subject to sunset reviews if such imports are likely to compete with each other and with domestic like products in the U.S. market. However, the ITC is not to cumulate imports from a country if those imports are not likely to have a discernible adverse impact on the domestic industry.

Section 751(a)(4), as amended, specifies that 2 years or 4 years after the issuance of an order in which the subject merchandise is sold in the United States by an importer related to the exporter, and where the DOC determines that there is a reasonable basis to believe or suspect that duty absorption is occurring, the DOC is to examine in AD reviews whether duties have been absorbed by a foreign producer or exporter subject to the order. The ITC is to take such findings into account in its sunset injury review. The URAA SAA provides, however, that the provision is not to apply as a duty as cost provision, in which AD duties are deducted from export price if the related importer is being reimbursed for duties by the manufacturer, effectively doubling AD duties.[12]

Expedited Reviews with Security in Lieu of Deposits

In AD cases only, the DOC may permit, for not more than 90 days after publication of an order, the posting of a bond or other security in lieu of the deposit of estimated AD duties if certain conditions exist. The DOC must be satisfied that it will be able to determine, within such 90-day period, the normal value and the export price for all merchandise entered on or after an affirmative LTFV determination (either preliminary or final, whichever is the first affirmative determination) and before publication of an affirmative final injury determination. Also, in order for the DOC to undertake this expedited review, the preliminary determination in the investigation must not have been extended because the case was "extraordinarily complicated," the final determination must not have been extended, the DOC must receive information indicating that the revised margin would be significantly less than the dumping margin specified in the AD order, and there must be adequate sales to the United States since the preliminary (or final) determination to form a basis for comparison. The determination of such new dumping margin will then provide the basis for assessment of AD duties on the entries for which the posting of bond or other security has been permitted, and will also provide the basis for deposits of estimated AD duties on future entries.

Anticircumvention Authority

Under section 781 of the Tariff Act of 1930, as amended, the DOC is authorized to take action to prevent or address attempts to circumvent an outstanding AD or CVD order. The authority addresses four particular types of circumvention: assembly of merchandise in the United States, assembly of merchandise in a third country, minor alterations of merchandise, and later-developed merchandise. Under certain circumstances and after considering certain specified factors, the DOC may extend the scope of the AD or CVD order to include parts and components (in cases involving U.S. assembly), third country merchandise (in cases involving third country assembly), altered merchandise, or later-developed merchandise.

As part of the Uruguay Round negotiations on AD, the United States sought the inclusion of an anticircumvention provision in the Antidumping Agreement. The negotiators, however, were unable to agree on a text concerning anticircumvention and referred the matter to the Committee on Antidumping Practices for resolution. Accordingly, the Agreement is silent concerning anticircumvention authority.

---

[12] URAA Statement of Administrative Action at 885.

Facts Available/Best Information Available

In order to promote transparency, the Uruguay Round signatories agreed to detailed guidelines concerning the use of "best information available." In seeking to implement those guidelines, section 776 of the Tariff Act of 1930, as amended, allows the DOC and ITC to use "facts otherwise available" to reach their determinations. Section 776(b) allows the agencies to rely on adverse inferences upon a finding that the party has failed to cooperate by not acting to the best of its ability to comply with a request for information. At the same time, however, section 782 of the Tariff Act of 1930, as amended, contains limitations on the use of facts available, many of which are designed to assist small companies in providing information. For example, the agency is to consider the ability of an interested party to submit the information in the requested form and manner, and may modify the requirements upon a reasoned and timely explanation by that party. In addition, if the agency determines that a response does not comply with the request, the agency must, to the extent practicable, provide an opportunity to remedy the deficiency.

The WTO Antidumping Agreement provides that the authorities are not justified in disregarding less than ideal information if the party acted to the best of its ability. Section 782(e) of the Tariff Act of 1930, as amended, provides that the agencies are not to decline to consider information that is timely submitted, verifiable, and not so incomplete that it cannot serve as a reliable basis for the determination, if the submitting party acted to the best of its ability to meet the requirements, and if the information can be used without undue difficulties.

Section 776(c) of the Tariff Act of 1930, as amended, further provides that if an agency relies on secondary information rather than on information submitted by a respondent, it must, to the extent practicable, corroborate that information from independent sources reasonably at its disposal.

Judicial Review

An interested party dissatisfied with a final AD or CVD determination or review may file an action in the U.S. Court of International Trade (CIT) for judicial review. To obtain judicial review of the administrative action, a summons and complaint must be filed concurrently within 30 days of publication of the final determination. As set forth in section 516A of the Tariff Act of 1930, as amended, the standard of review used by the Court is whether the determination is supported by "substantial evidence on the record" or "otherwise not in accordance with law." Appeal of negative preliminary determinations is based on whether the determination is "arbitrary, capricious, an abuse of discretion, or [is] otherwise not in accordance with law." Decisions of the CIT are subject to appeal to the U.S. Court of Appeals for the Federal Circuit.

As a result of provisions in the North American Free Trade Agreement (NAFTA) and its implementing legislation, final determinations in AD or CVD proceedings involving products of Canada and Mexico are reviewed by a NAFTA panel instead of by the CIT, if so requested. The panel will apply U.S. law and U.S. standards of judicial review to decide whether U.S. law was applied correctly by the DOC and the ITC.

WTO Panel Review

As part of the Uruguay Round Agreements, the parties agreed to a strengthened dispute resolution process under the WTO, in which parties are permitted to bring their disputes to a review body for resolution. The URAA contains provisions relating to the adoption of panel reports in AD and CVD cases.

Section 129(a) of the URAA provides that if a dispute settlement panel or appellate body finds that an action by the ITC is not in conformity with U.S. obligations, USTR may request that the ITC issue an advisory report on whether the statute permits it to take steps that would render its determination not inconsistent with those findings. If the ITC issues an affirmative report, USTR may request that it issue a determination not inconsistent with the findings of the panel or appellate body. If, by virtue of that determination, an AD or CVD order is no longer supported by an affirmative determination, USTR, after consultation with Congress, may direct the ITC to revoke the order. However, the President may, again after consultation with Congress, reduce, modify, or terminate the agency action.

If a dispute settlement panel or appellate body finds that an action by the DOC is not in conformity with U.S. obligations, under section 129(b), USTR may request that the DOC issue a determination that would render its determination not inconsistent with those findings, after consultation with Congress. USTR may further request that the DOC implement that determination.

Any ITC and DOC action implemented as a result of dispute settlement is to apply to liquidated entries of the subject merchandise entered on or after the date on which USTR directs the ITC to revoke an order or the DOC to implement a determination.

Continued Dumping and Subsidy Offset Act

Title X of the Agriculture and Related Agencies Appropriations Act for Fiscal Year 2001 contained the Continued Dumping and Subsidy Offset Act of 2000,[13] commonly referred to as the Byrd Amendment, which provides for the annual distribution of AD and countervailing duties assessed pursuant to a CVD order, an AD order, or a finding under the Antidumping Act of 1921 to the affected domestic producers for qualifying expenditures. The provision amends title VII of the Tariff Act of 1930 by inserting a new section 754. The amendments made by the new section apply to all AD and CVD assessments made on or after October 1, 2000

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

with respect to orders in effect from January 1, 1999.

Under section 754, the term "affected domestic producer" is defined as a manufacturer, producer, farmer, rancher, or worker representative (including associations of such persons) that: (1) was a petitioner or interested party in support of the petition with respect to which an AD order, a finding under the Antidumping Act of 1921, or a CVD order has been entered; and (2) remains in operation. Companies, businesses, or persons that have ceased the production of the product covered by the order or finding, or who have been acquired by a company or business that is related to a company that opposed the investigation, shall not be considered an "affected domestic producer."

Section 754(d)(1) requires the ITC to forward a list to the Commissioner of Customs of petitioners and persons with respect to each order or finding, and a list of persons who indicated support of a petition by letter or through questionnaire response. The ITC is required to submit such lists within 60 days after the date an AD or CVD order or finding is issued. In those cases where an injury determination was not required or the ITC's records do not permit identification of petition supporters, the ITC is to consult with the DOC to determine the identity of the petitioner and those domestic parties who have entered appearances during administrative reviews.

Customs published the final rule on procedures to distribute Byrd Amendment funds on September 21, 2001 (66 FR 48546). Distribution is to be made not later than 60 days after the first day of a fiscal year from duties assessed during the preceding fiscal year. At least 30 days prior to a distribution, the Commissioner is required to publish in the Federal Register a notice of intention to distribute and the list of affected domestic producers potentially eligible for the distribution based on the list obtained from the ITC. The Commissioner is to request certifications from each potentially eligible affected domestic producer indicating: (1) that the producer desires to receive a distribution; (2) that the producer is eligible to receive the distribution as an affected domestic producer; and (3) the qualifying expenditures incurred by the producer since the issuance of the order or finding for which distribution has not previously been made.

The Commissioner distributes all funds (including all interest earned on the funds) from assessed duties received in the preceding fiscal year to affected domestic industries based on the certifications received. The distributions are made on a pro rata basis based on new and remaining qualifying expenditures. A "qualifying expenditure" is defined as an expenditure incurred after the issuance of the AD finding or order or CVD order in any of the following categories: (1) manufacturing facilities; (2) equipment; (3) research and development; (4) personnel training; (5) acquisition of technology; (6) health care benefits to employees paid for by the employer; (7) pension benefits to employees paid by the employer; (8) environmental equipment, training, or technology; (9) acquisition of raw materials and other inputs; and (10) working capital or other funds needed to maintain production.

The Commissioner of Customs is required to establish a special account in the U.S. Treasury with respect to each order or finding within 14 days after the date of that an AD order or finding or CVD order takes effect. The Commissioner is responsible for depositing all AD or countervailing duties (including interest earned on such duties) that are assessed into the special account appropriate for each AD order or finding or CVD order.

The Commissioner is to prescribe the time and manner in which distribution of the funds in a special account shall be made.

A special account is to terminate after: (1) the order or finding with respect to which the account was established has terminated; (2) all entries relating to the order or finding are liquidated and duties assessed collected; (3) the Commissioner has provided notice and a final opportunity to obtain distribution; and (4) 90 days has elapsed from the date of notice and final opportunity to obtain distribution.

In December 2000, Australia, Brazil, Chile, the European Union, India, Indonesia, Japan, Korea, and Thailand requested consultations with the United States in the World Trade Organization (WTO) regarding the Continued Dumping and Subsidy Offset Act of 2000. In May 2001, Canada and Mexico also requested consultations on the same matter. All complaints were subsequently consolidated into one panel and in September 2002, the panel ruled that the Byrd Amendment is inconsistent with WTO obligations and recommended that it be repealed. The United States appealed the panel's ruling, and the WTO Appellate Body largely upheld the panel's decision.

In late 2004, the WTO authorized eight complainants (Brazil, Canada, Chile, the European Union, India, Japan, Korea and Mexico) to retaliate against the United States for its failure to comply with the WTO rulings. Under the retaliation formula established by the WTO, complainants may retaliate in an amount equal to 72% of annual Byrd Amendment disbursements related to that country's products. The total retaliation level for 2004 disbursements is estimated to be $134 million. The United States reached separate agreements with Australia, Indonesia, and Thailand to postpone their requests for authorization to retaliate.

Enforcement of U.S. Rights Under Trade Agreements and Response to Certain Foreign Practices: Sections 301-310 of the Trade Act of 1974, as amended

INTERNATIONAL CONSULTATIONS AND DISPUTE SETTLEMENT

Article XII and XIII of the General Agreement on Tariffs and Trade (GATT), as elaborated upon by the Texts Concerning a Framework for the Conduct of World Trade concluded in the Tokyo Round of multilateral trade negotiations (Tokyo Round),[14] provided the general consultation and dispute settlement procedures

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

applicable to GATT rights and obligations. In addition, the GATT agreements concluded in the Tokyo Round on specific non-tariff barriers each contained procedures for consultation and resolution of disputes among signatories concerning practices covered by each agreement.

As part of the Uruguay Round, the parties agreed to the Understanding on Rules and Procedures Governing the Settlement of Disputes which establishes a single, integrated Dispute Settlement Body dealing with disputes arising under any of the WTO agreements. One of the most marked changes in this new dispute resolution mechanism is that all of the key decisions in the dispute settlement process, including the establishment of panels, adoption of panel and Appellate Body reports, and the authorization to retaliate will be automatic unless there is a unanimous vote against the action. Accordingly, parties may no longer block panel reports adverse to them. In addition, timetables are established for each phase of the dispute resolution process. Moreover, an Appellate Body is established to examine issues of law covered in a panel report and legal interpretations developed by the panel. Retaliation, in the form of suspended concessions or obligations, is to be limited to the sector that is at issue in the proceeding, unless it is not practicable or effective. Issues related to the level of retaliation may be submitted to binding arbitration.

In 1998, the European Union (EU) initiated a dispute settlement case against the United States challenging the WTO consistency of section 301. Specifically, the EU claimed that section 301 violated the Dispute Settlement Understanding (DSU) because certain statutory deadlines could require the USTR to take action before WTO panel proceedings were finished. The EU complaint was not based on U.S. actions in a particular section 301 case.

On December 22, 1999, a WTO panel rejected the EU's complaint. The panel found that section 301 provides the USTR with adequate discretion to comply with the DSU rules in all cases, and that the USTR had in fact exercised that discretion in accordance with U.S. WTO obligations in every section 301 determination involving an alleged violation of U.S. WTO rights. The EU did not appeal the panel decision. The decision was adopted by the WTO Dispute Settlement Body on January 27, 2000.

Carousel Retaliation

Section 407 of the Trade and Development Act of 2000 (P.L. 106-200) addresses effective operation of the WTO dispute settlement mechanism and lack of compliance with WTO panel decisions, particularly in cases brought by the United States in disputes with the EU involving bananas and beef. Section 407 amended sections 301-310 of the Trade Act of 1974 to require the USTR to make periodic revisions of retaliation lists 120 days from the date the retaliation list is made and every 180 days thereafter. The purpose of this provision is to facilitate efforts by the USTR to enforce rights of the United States if another WTO member fails to comply with the results of a dispute settlement proceeding.

ENFORCEMENT AUTHORITY AND PROCEDURES (SECTION 301)

Chapter 1 of title III (sections 301-310) of the Trade Act of 1974, as amended,[15] (commonly referred to as "Section 301") provides the authority and procedures to enforce U.S. rights under international trade agreements and to respond to certain unfair foreign practices. Section 301 is the principal statutory authority under which the United States may impose trade sanctions on foreign countries that either violate trade agreements or otherwise maintain laws or practices that are unjustifiable and restrict U.S. commerce. When a section 301 investigation involves an alleged violation of a trade agreement (such as the WTO Agreement or the North American Free Trade Agreement (NAFTA)), USTR must follow the consultation and dispute settlement procedures set out in that agreement.

The Omnibus Trade and Competitiveness Act of 1988 modified the Trade Act of 1974 to create additional authorities commonly known as "Super 301"[16] to deal with priority practices and priority countries and "Special 301" to deal with priority intellectual property rights (IPR) practices.

Sections 301-309 of the Trade Act of 1974, as amended, provide the domestic counterpart to the WTO consultation and dispute settlement procedures. They contain the authority under U.S. domestic law to take retaliatory action, including import restrictions if necessary, to enforce U.S. rights against violations of trade agreements by foreign countries, or unjustifiable, unreasonable, or discriminatory foreign trade practices which burden or restrict U.S. commerce. Section 301 authority applies to practices and policies of countries whether or not the measures are covered by, or the countries are members of the WTO or other trade agreements. The USTR administers the statutory procedures through an interagency committee.

Basis and Form of Authority

Under section 301, if the USTR determines that a foreign act, policy, or practice *violates or is inconsistent with a trade agreement, or is unjustifiable and burdens or restricts U.S. commerce*, then action by the USTR to enforce the trade agreement rights or to obtain the elimination of the act, policy, or practice is *mandatory*, subject to the specific direction, if any, of the President. The USTR is not required to act, however, if (1) a WTO panel has reported, or a dispute settlement ruling

---

[15] 19 U.S.C. 2411--2420.

[16] The Statutory authority for Super 301 expired in 1990. Since then, the President has chosen to renew Super 301 authorities three times by Executive Order. The last time was on March 31, 1999, when the President issued Executive Order 13116 (64 Fed. Reg. 16333), which renewed Super 301 authorities through 2001. The authority has not been renewed since.

under a trade agreement finds, that U.S. trade agreement rights have not been denied or violated; (2) the USTR finds that the foreign country is taking satisfactory measures to grant U.S. trade agreement rights, or has agreed to (a) eliminate or phase out the practice, (b) an imminent solution to the burden or restriction on U.S. commerce, or (c) provide satisfactory compensatory trade benefits; or (3) the USTR finds, in extraordinary cases, that action would have an adverse impact on the U.S. economy substantially out of proportion to the benefits of action, or finds that action would cause serious harm to the U.S. national security. Any action taken must affect goods or services of the foreign country in an amount equivalent in value to the burden or restriction being imposed by that country on U.S. commerce.

If the USTR determines that the act, policy, or practice is *unreasonable or discriminatory and burdens or restricts U.S. commerce* and action by the United States is appropriate, then the USTR has *discretionary* authority to take all appropriate and feasible action, subject to the specific direction, if any, of the President, to obtain the elimination of the act, policy, or practice.

With respect to the form of action, the USTR is authorized to (1) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to carry out a trade agreement with the foreign country involved; (2) impose duties or other import restrictions on the goods of, and notwithstanding any other provision of law, fees or restrictions on the services of, the foreign country for such time as the USTR deems appropriate; (3) withdraw or suspend preferential duty treatment under the Generalized System of Preferences (GSP), the Caribbean Basin Initiative, or the Andean Trade Preferences Act; or (4) enter into binding agreements that commit the foreign country to (a) eliminate or phase out the act, policy, or practice, (b) eliminate any burden or restriction on U.S. commerce resulting from the act, policy, or practice, or (c) provide the United States with compensatory trade benefits that are satisfactory to the USTR. The USTR may also take all other appropriate and feasible action within the power of the President that the President may direct the USTR to take.

With respect to services, the USTR may also restrict the terms and conditions or deny the issuance of any access authorization (e.g., license, permit, order) to the U.S. market issued under Federal law, notwithstanding any other law governing the authorization. Such action can apply only prospectively to authorizations granted or applications pending on or after the date a section 301 petition is filed or the USTR initiates an investigation. Before imposing fees or other restrictions on services subject to Federal or state regulation, the USTR must consult as appropriate with the Federal or state agency concerned.

Under section 301, action may be taken on a non-discriminatory basis or solely against the products or services of the country involved and with respect to any goods or sector regardless of whether they were involved in the particular act, policy, or practice. The statute does not require that action taken under section 301 be consistent with U.S. obligations under international agreements, but the dispute-settlement provisions of such agreement could be utilized.

If the USTR determines that action is to be in the form of import restrictions, it must give preference to tariffs over other forms of import restrictions and consider substituting on an incremental basis an equivalent duty for any other form of import restriction imposed. Any action with respect to export targeting must reflect, to the extent possible, the full benefit level of the targeting over the period during which the action taken has an effect.

Coverage of Authority

The term "unjustifiable" refers to acts, policies, or practices which violate or are inconsistent with U.S. international legal rights, such as denial of national treatment or normal trade relations (NTR) treatment, right of establishment, or protection of intellectual property rights (IPR).

The term "unreasonable" refers to acts, policies, or practices which are not necessarily in violation of, or inconsistent with, U.S. international legal rights, but are otherwise unfair and inequitable. In determining whether an act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms must be taken into account, to the extent appropriate. Unreasonable measures include, but are not limited to, acts, policies, or practices which (1) deny fair and equitable (a) opportunities for the establishment of an enterprise, (b) provision of adequate and effective IPR protection, notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), (c) non-discriminatory market access opportunities for U.S. persons that rely upon IPR protection, or (d) market opportunities, including foreign government toleration of systematic anticompetitive activities by or among enterprises in the foreign country that have the effect of restricting, on a basis inconsistent with commercial considerations, access of U.S. goods or services to a foreign market; (2) constitute export targeting; or (3) constitute a persistent pattern of conduct denying internationally-recognized worker rights, unless the USTR determines the foreign country has taken or is taking actions that demonstrate a significant and tangible overall advancement in providing those rights and standards throughout the country or such acts, policies, or practices are not inconsistent with the level of economic development of the country.

The term "export targeting" refers to any government plan or scheme consisting of a combination of coordinated actions bestowed on a specific enterprise, industry, or group thereof, which has the effect of assisting that entity to become more competitive in the export of a class or kind of merchandise.

The term "discriminatory" includes, where appropriate, any act, policy, or practice which denies national treatment or NTR treatment to U.S. goods, services, or investment.

The term "commerce" includes, but is not limited to, services (including transfers of information) associated with international trade, whether or not such services are related to specific goods, and foreign direct investment by U.S. persons with implications for trade in goods or services.

Petitions and Investigations

Any interested person may file a petition under section 302 with the USTR requesting that action be taken under section 301 and setting forth the allegations in support of the request. The USTR reviews the allegations and must determine within 45 days after receipt of the petition whether to initiate an investigation. The USTR may also self-initiate an investigation after consulting with appropriate private sector advisory committees. Public notice of determinations is required, and in the case of decisions to initiate, publication of a summary of the petition and an opportunity for the presentation of views, including a public hearing if timely requested by the petitioner or any interested person.

In determining whether to initiate an investigation of any act, policy, or practice specifically enumerated as actionable under section 301, the USTR has the discretion to determine whether action under section 301 would be effective in addressing that act, policy, or practice.

Section 303 requires the use of international procedures for resolving the issues to proceed in parallel with the domestic investigation. The USTR must, on the same day as the determination is made, initiate an investigation and request consultations with the foreign country concerned regarding the issues involved. The USTR may delay the request for up to 90 days in order to verify or improve the petition to ensure an adequate basis for consultation.

If the issues are covered by a trade agreement and are not resolved during the consultation period specified in the agreement, if any, then the USTR must promptly request formal dispute settlement under the agreement before the earlier of the close of that consultation period or 150 days after the consultations began. The USTR must seek information and advice from the petitioner, if any, and from appropriate private sector advisory committees in preparing presentations for consultations and dispute settlement proceedings.

USTR Determinations and Implementation

Section 304 sets forth specific time limits within which the USTR must make determinations of whether an act, policy, or practice meets the unfairness criteria of section 301 and, if affirmative, what action, if any, should be taken. These determinations are based on the investigation under section 302 and, if a trade agreement is involved, on the international consultations and, if applicable, on the results of the dispute settlement proceedings under the agreement.

The USTR must make these *determinations*:

(1) within 18 months after the date the investigation is initiated or 30 days after the date the dispute settlement procedure is concluded, whichever is

earlier, in all cases involving a trade agreement;

(2) within 12 months after the date the investigation is initiated in cases not involving trade agreements;

(3) for cases involving TRIPs rights, not later than 30 days after the date that WTO dispute settlement is concluded; or

(4) within 6 months after the date the investigation is initiated in cases involving IPR priority countries if the USTR does not consider that a trade agreement, including TRIPs, is involved, or within 9 months if the USTR determines such cases (1) involve complex or complicated issues that require additional time, (2) the foreign country is making substantial progress on legislative or administrative measures that will provide adequate and effective protection, or (3) the foreign country is undertaking enforcement measures to provide adequate and effective protection.

Before making the determinations, the USTR must provide an opportunity for the presentation of views, including a public hearing if requested by an interested person, and obtain advice from the appropriate private sector advisory committees. If expeditious action is required, the USTR must comply with these requirements after making the determinations. The USTR may also request the views of the International Trade Commission on the probable impact on the U.S. economy of taking the action. Any determinations must be published in the Federal Register.

Section 305 requires the USTR to *implement* any section 301 actions within 30 days after the date of the determination to take action. The USTR may delay implementation by not more than 180 days if (1) the petitioner or, in the case of a self-initiated investigation, a majority of the domestic industry, requests a delay; or (2) the USTR determines that substantial progress is being made, or that a delay is necessary or desirable to obtain U.S. rights or a satisfactory solution. In cases involving IPR priority countries (see discussion below), implementation of actions may be delayed by not more than 90 days beyond the 30 days and only if extraordinary circumstances apply.

Under section 305(b), if the USTR determines to take no action in a case involving an affirmative determination of export targeting, the USTR must take alternative action in the form of establishing an advisory panel to recommend measures to promote the competitiveness of the affected domestic industry. The panel must submit a report on its recommendations to the USTR and the Congress within 6 months. On the basis of this report and subject to the specific direction, if any, of the President, the USTR may take administrative actions authorized under any other law and propose legislation to implement any other actions that would restore or improve the international competitiveness of the domestic industry. USTR must submit a report to the Congress within 30 days after the panel report is submitted on the actions taken and proposals made.

Monitoring of Foreign Compliance; Modification and Termination of Actions

Section 306 requires the USTR to monitor the implementation of each measure undertaken or settlement agreement entered into by a foreign country under section 301. If the USTR considers that a foreign country is not satisfactorily implementing a measure or agreement, the USTR must determine what further action will be taken under section 301. Such foreign non-compliance is treated as a violation of a trade agreement subject to mandatory section 301 action, subject to the same time limits and procedures for implementation as other action determinations. If the USTR considers that the foreign country has failed to implement a recommendation made pursuant to dispute settlement proceedings under the WTO, the USTR must make this determination no later than 30 days after the expiration of the reasonable period of time provided for such implementation in the DSU. Before making the determination on further action, the USTR must consult with the petitioner, if any, and with representatives of the domestic industry concerned, and provide interested persons an opportunity to present views.

Section 307 authorizes the USTR to modify or terminate a section 301 action, subject to the specific direction, if any, of the President, if (1) any of the exceptions to mandatory section 301 action in the case of trade agreement violations or unjustifiable acts, policies, or practices applies; (2) the burden or restriction on U.S. commerce of the unfair practice has increased or decreased; or (3) discretionary section 301 action is no longer appropriate. Before modifying or terminating any section 301 action, the USTR must consult with the petitioner, if any, and with representatives of the domestic industry concerned, and provide an opportunity for other interested persons to present views.

Any section 301 action terminates automatically if it has been in effect for 4 years and neither the petitioner nor any representative of the domestic industry which benefits from the action has submitted to the USTR in the final 60 days of that 4-year period a written request for continuation. The USTR must give the petitioner and representatives of the domestic industry at least 60 days advance notice by mail of termination. If a request for continuation is submitted, the USTR must conduct a review of the effectiveness of section 301 or other actions in achieving the objectives and the effects of actions on the U.S. economy, including consumers.

Information Requests; Reporting Requirements

Under section 308, the USTR is to make available information (other than confidential) upon receipt of a written request by any person concerning (1) the nature and extent of a specific trade policy or practice of a foreign country with respect to particular goods, services, investment, or IPR to the extent such information is available in the Federal Government; (2) U.S. rights under any trade agreement and the remedies which may be available under that agreement and U.S. laws; and (3) past and present domestic and international proceedings or actions with respect to the policy or practice. If the information is not available, within 30 days after receipt of the request, the USTR must request the information from the foreign government or decline to request the information and inform the person in writing of the reasons.

The USTR must submit a semiannual report to the Congress describing petitions filed and determinations made, developments in and the status of investigations and proceedings, actions taken or the reasons for no action under section 301, and the commercial effects of section 301 actions taken. The USTR must also keep petitioners regularly informed of all determinations and developments regarding section 301 investigations.

IDENTIFICATION OF INTELLECTUAL PROPERTY RIGHTS PRIORITY COUNTRIES (SPECIAL 301)

Section 182 of the Trade Act of 1974, added by section 1303 of the Omnibus Trade and Competitiveness Act of 1988, requires the USTR to identify, within 30 days after submission of the annual National Trade Estimates (foreign trade barriers) report to the Congress required by section 181 the 1974 Act (i.e., by April 30) those foreign countries that (1) deny adequate and effective protection of IPR or fair and equitable market access to U.S. persons that rely upon IPR protection; and (2) those countries under paragraph (1) determined by the USTR to be "priority foreign countries." The USTR is to identify as priority countries only those that have the most onerous or egregious acts, policies, or practices with the greatest adverse impact on the relevant U.S. products, and that are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective IPR protection. In identifying foreign countries, the USTR is to take into account the history of IPR laws and practices of the foreign country as well as efforts of the United States, and the response of the foreign country, to achieve adequate and effective protection and enforcement of IPR. A country may be identified notwithstanding the fact that it may be in compliance with the specific obligations of the TRIPs Agreement. The USTR at any time may revoke or make an identification of a priority country, but must include in the semiannual section 301 report to the Congress a detailed explanation of the reasons for a revocation.

In addition, as a matter of administrative practice, the USTR has established a "priority watch list" of countries whose acts, policies, and practices meet some, but not all, of the criteria for priority foreign country identification. The problems of these countries warrant active work for resolution and close monitoring to determine whether further Special 301 action is needed. Also, the USTR maintains a "watch list" of countries that warrant special attention because they maintain IPR practices or barriers to market access that are of particular concern.

Section 302(b) requires the USTR to initiate a section 301 investigation within 30 days after identification of a priority country with respect to any act, policy, or practice of that country that was the basis of the identification, unless the USTR determines initiation of an investigation would be detrimental to U.S. economic interests and reports the reasons in detail to the Congress. The procedural and other requirements of section 301 authority generally apply to these cases, except that investigations must be concluded and determinations made on whether the measures are actionable and an appropriate response within a tighter time limit of 6 months, which may be extended to 9 months if certain statutory criteria are met.

IDENTIFICATION OF TRADE LIBERALIZATION PRIORITIES (SUPER 301)

Section 310 of the Trade Act of 1974, as amended by section 1302 of the Omnibus Trade and Competitiveness Act of 1988, required USTR, within 30 days after the National Trade Estimates (foreign trade barriers) report to the Congress in 1989 and 1990, to identify U.S. trade liberalization priorities.

This identification included priority practices as well as priority foreign countries and estimates of the amount by which U.S. exports would be increased if the barrier did not exist. USTR was required to initiate section 301 investigations on all priority practices identified for each of the priority countries within 21 days after submitting the report to the House Ways and Means and Senate Finance Committees. In its consultations with the foreign country, USTR was required to seek to negotiate an agreement which provided for the elimination of, or compensation for, the priority practices within 3 years after the initiation of the investigation. This authority, however, expired in 1990.

On March 3, 1994, President Clinton issued Executive Order 12901 requiring USTR, within 6 months of the submission of the National Trade Estimates report for 1994 and 1995, to review U.S. trade expansion priorities and identify priority foreign country practices, the elimination of which would likely have the most significant potential to increase U.S. exports. On September 27, 1995, President Clinton issued Executive Order 12973, which extended the terms of Executive Order 12901 to 1996 and 1997. The order required USTR to submit to the House Ways and Means and Senate Finance Committees and to publish in the Federal Register a report on the priority foreign country practices identified. The report was not submitted in 1998 because the authority expired in 1997. The authority was renewed March 31, 1999, pursuant to Executive Order 13116, through 2001. The authority was not renewed again.

Under the terms of the executive order, USTR was required to initiate section 301 investigations within 21 days of the submission of the report with respect to all priority foreign country practices identified. The normal section 301 authorities, procedures, time limits, and other requirements generally applied to these investigations. In consultations requested with the foreign country under section 303, USTR was required to seek to negotiate an agreement providing for the elimination of the practices as quickly as possible or, if that was not feasible, compensatory trade benefits. USTR monitored any agreements pursuant to section

306. The semiannual report under section 309 included the status of any investigation and, where appropriate, the extent to which it led to increased U.S. export opportunities.

Section 314(f) of the URAA codified the terms of the executive order for the year 1995 as an amendment to section 310 of the Trade Act of 1974.

FOREIGN DIRECT INVESTMENT

Section 307(b) of the Trade and Tariff Act of 1984 requires the USTR to seek the reduction and elimination of foreign export performance requirements through consultations and negotiations with the country concerned if USTR determines, with interagency advice, that U.S. action is appropriate to respond to such requirements that adversely affect U.S. economic interests. In addition, USTR may impose duties or other import restrictions on the products or services of the country involved, including exclusion from entry into the United States of products subject to these requirements. USTR may provide compensation for such action subject to the provisions of section 123 of the Trade Act of 1974 if necessary or appropriate to meet U.S. international obligations.

Section 307(b) authority does not apply to any foreign direct investment, or to any written commitment relating to foreign direct investment that is binding, made directly or indirectly by any U.S. person prior to October 30, 1984 (date of enactment of the 1984 Act).

FOREIGN ANTICOMPETITIVE PRACTICES

Section 311 of the URAA provides for including an identification of foreign anticompetitive practices, the toleration of which by foreign governments is adversely affecting exports of U.S. goods or services, as part of the National Trade Estimate report to be submitted each year. USTR is to consult with the Attorney General in preparing this section of the report.

Unfair Practices in Import Trade

SECTION 337 OF THE TARIFF ACT OF 1930, AS AMENDED

Section 337 of the Tariff Act of 1930[17] declares unlawful unfair methods of competition and unfair acts in the importation or sale of articles (other than articles relating to certain intellectual property rights), the threat or effect of which is to (1) destroy or substantially injure an industry in the United States; (2) prevent the establishment of such an industry; or (3) restrain or monopolize trade and commerce in the United States. Section 337 also declares unlawful the importation

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

or sale of articles that (1) infringe a valid and enforceable U.S. patent or registered copyright; or are made, produced, processed, or mined under a process covered by a valid and enforceable U.S. patent; (2) infringe a valid and enforceable U.S.-registered trademark; (3) infringe a registered mask work of a semiconductor chip product; or infringe exclusive rights in a protected design. For this separate class of intellectual property rights, the importation or sale of infringing articles is unlawful only if an industry in the United States producing the articles protected by the patent, copyright, trademark, mask work, or design exists or is in the process of being established. It is not necessary to establish that the industry is injured by reason of such imports, as is the case with non-intellectual property rights violations. A U.S. industry is considered to exist if there is (1) significant investment in plant and equipment; (2) significant employment of labor or capital; or (3) substantial investment in the exploitation of the patent, copyright, trademark, mask work, or design, including engineering, research and development, or licensing.

The ITC is responsible for investigating alleged violations of section 337. Upon finding a violation, the ITC may issue an exclusion order and/or a cease and desist order, subject to presidential disapproval.

Section 337 is unique among the trade remedy laws in that it is the only one subject to the provisions of the Administrative Procedure Act (APA).[18] All ITC investigations and determinations under section 337 must be conducted on the record after publication of notice and opportunity for hearing in conformity with the APA.[19]

The language of section 337 closely parallels that of section 5 of the Federal Trade Commission Act,[20] and therefore the scope of section 337 has been compared to that of the antitrust and unfair competition statutes. The ITC has significant discretion in determining what practices are "unfair" under section 337. In practice, however, the overwhelming majority of cases dealt with under section 337 has been in the area of patent infringement. Among the few non-patent cases have been cases involving group boycotts, price fixing, predatory pricing, false labeling, false advertising, and trademark infringement.

Whenever, in the course of a section 337 investigation, the ITC has reason to believe that the matter before it involves dumping or subsidization of imports within the purview of the antidumping or countervailing duty laws, it must notify the administering authority of those laws for appropriate action.[21] If the alleged violation of section 337 is based solely on such dumping or subsidization practices, the ITC must terminate (or not initiate) the section 337 investigation. If it is based in part on such practices, and in part on other alleged practices, then the ITC may continue (or initiate) an investigation under section 337. This provision is designed

---

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

[19] 19 U.S.C. 1337(c).

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

[21] 19 U.S.C. 1337(b)(3).

to avoid duplication and conflicts in the administration of the trade remedy laws.

The Audio Home Recording Act of 1992[22] prohibited action under section 337 against alleged copyright infringement based on the manufacture, importation, or distribution of a digital audio recording device, a digital audio recording medium, an analog recording device, or an analog recording medium, or based on the noncommercial use by a consumer of such a device or medium for making digital musical recordings or analog musical recordings.

Procedure

The ITC is required to investigate any alleged violation of section 337 on complaint under oath or upon its own initiative. The ITC must, within 45 days of initiation, set a target date and conclude its investigation at the earliest practicable time.

In the course of each investigation, the ITC is required to consult with and seek advice and information from the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and other appropriate departments and agencies.

In deciding whether an article has infringed a valid U.S. patent, the ITC applies the same statutory and decisional domestic patent law as would a district court. U.S. patent holders may file parallel actions in Federal district court and the Commission. Respondents sued in both fora under the same underlying cause of action may obtain a stay of district court proceedings until the ITC determination becomes final.

The URAA added a provision permitting respondents to raise counterclaims in section 337 investigations. Such claims, however, would be immediately removed to district court and cannot be litigated at the ITC.

Although damages are not an available remedy at the ITC as they are in district court, the ITC is empowered to issue limited exclusion orders, general exclusion orders, and cease and desist orders, which provide relief at the border. Specifically, if a violation of section 337 is found, the ITC must direct that the foreign articles be excluded from entry into the United States, unless it determines that such articles should not be excluded in consideration of the effect of exclusion on:

(1) the public health and welfare;

(2) competitive conditions in the U.S. economy;

(3) the production of like or directly competitive articles in the United States; and

(4) U.S. consumers.

The URAA added a provision establishing that the ITC is not permitted to issue a general exclusion order (i.e., an exclusion order that affects all shipments of the merchandise under investigation, as opposed to an order that affects merchandise

---

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

from only those persons determined to be violating section 337) unless: (1) such a general order is necessary to prevent circumvention of specific orders, (2) there is a pattern of violation, and (3) identifying those persons responsible for the infringement is difficult.

In appropriate circumstances, the ITC may issue temporary exclusion orders during the course of an investigation if it determines that there is reason to believe that there is a violation of section 337. In the event of a temporary exclusion order, entry is to be permitted only under bond. If petitioned by a complainant for issuance of a temporary exclusion order, the ITC must determine whether or not to issue such an order within 90 days after initiation of an investigation, with a possible extension of 60 days in more complicated cases. In such circumstances, the ITC may require the complainant to post a bond as a prerequisite for issuing an order. If the ITC later determines that the respondent has not violated these provisions, the bond may be forfeited to the respondent.

In addition to or in lieu of issuing an exclusion order, the ITC may issue an appropriate cease and desist order to be served on the violating party or parties, unless it finds that such order should not be issued in consideration of the effect of such order on the same public interest factors listed above.

The ITC may at any time, upon such notice and in such manner as it deems proper, modify or revoke any cease and desist order, and issue an exclusion order in its place. If a temporary cease and desist order is issued, the ITC may require the complainant to post a bond, which may be forfeited to the respondent if the ITC later determines that the respondent has not violated these provisions.

Any person who violates a cease and desist order issued under this section shall be subject to a civil penalty of up to the greater of $100,000 per day or twice the domestic value of the articles entered or sold on such day in violation of the order.

In the event that a person has been served with notice of proceedings and fails to appear to answer the complaint in cases where the complainant seeks relief limited solely to that person, the ITC must presume the facts alleged by the complainant to be true. If requested by the complainant, the ITC must issue an exclusion order and/or a cease and desist order against the person in default, unless it finds that such order should not be issued for the same public interest reasons listed above. Similarly, if no person appears to contest the investigation and violation is established, the ITC may issue a general exclusion order.

The ITC may order seizure and forfeiture of goods subject to an exclusion order if an attempt has been made to import the goods and the owner or importer has been notified that a further attempt to import the goods would lead to seizure and forfeiture.

Presidential and Judicial Review

Following an ITC determination of a violation of section 337, the President may, within 60 days after receiving notification, disapprove the ITC determination for "policy reasons." The statute does not specify what types of policy reasons may provide the basis for disapproval. Upon presidential disapproval, actions taken by the ITC cease to have effect. If the President does not disapprove the ITC determination, or if he approves it, then the ITC determination becomes final. Any person adversely affected by a final ITC determination under section 337 may appeal the determination to the U.S. Court of Appeals for the Federal Circuit.

Import Relief (Safeguard) Authorities

SECTIONS 201-204 OF THE TRADE ACT OF 1974, AS AMENDED

Background

Chapter 1 of title II (sections 201-204) of the Trade Act of 1974,[23] as amended, sets forth the authority and procedures for the President to take action, including import relief, to facilitate efforts by a domestic industry which has been seriously injured by imports to make a positive adjustment to import competition.

From the outset of the trade agreements program in 1934, U.S. policy of seeking liberalization of trade barriers has been accompanied by recognition that difficult economic adjustment problems could result for particular sectors of the economy and, if serious injury results from increased competition by not necessarily unfairly traded imports, then domestic industries should be provided a period of relief to allow them to adjust to new conditions of trade. Beginning with bilateral trade agreements in the early 1940s, U.S. trade agreements, and eventually U.S. domestic law, have provided for a so-called "escape clause" or "safeguard" mechanism for import relief. This mechanism, while amended over the years, has provided authority for the President to withdraw or modify concessions and impose duties or other restrictions for a limited period of time on imports of any article which causes or threatens serious injury to the domestic industry producing a like or directly competitive article, following an investigation and determination by the U.S. International Trade Commission (ITC).

Under this basic trade agreements authority in section 350 of the Tariff Act of 1930, the President issued three executive orders setting forth procedures and criteria for escape-clause relief, which governed from 1947 to 1951. Section 7 of the Trade Agreement Extension Act of 1951 contained the first statutory procedure and criteria for escape-clause action, which governed from 1951 until replaced by sections 301, 351 and 352 of the Trade Expansion Act of 1962. The 1962 provisions, which also introduced the concept of trade adjustment assistance (see separate section), were repealed and replaced by sections 201-203 of the Trade Act of 1974. In 1988, the 1974 provisions were rewritten to place a greater emphasis on the responsibility of domestic industry to use the relief period to undertake positive adjustment.

---

[23] 19 U.S.C. 2251-2254.

Primarily at U.S. insistence, an escape clause (safeguard) provision modeled after language in the 1947 executive order was included in article XIX of the original General Agreement on Tariffs and Trade (GATT 1947). As a result of the GATT Uruguay Round of multilateral trade negotiations, which resulted in the Agreement Establishing the World Trade Organization, GATT 1947 was replaced by GATT 1994. Article XIX was not changed in GATT 1994.[24] In the course of the negotiations, GATT members negotiated a new Agreement on Safeguards which provides rules for the application of article XIX of GATT 1994. The rules provide for, among other things, greater transparency in procedures and limitations on the duration of relief measures. However, in a departure from GATT 1947 article XIX, which authorized retaliation by members adversely affected by the measure when appropriate compensation was not forthcoming, the Agreement provides that a member country may not exercise its right to take retaliatory action during the first 3 years that a safeguard measure is in effect, provided that the safeguard measure resulted from an absolute increase in imports and otherwise conforms to the Agreement on Safeguards.

World Trade Organization (WTO) Panel Determinations

The United States has imposed safeguard measures on, among others, wheat gluten from the European Union, lamb meat from Australia and New Zealand, line pipe from Korea, and certain steel imports. The causation analysis performed by the ITC in all of these safeguard actions has been successfully challenged in the WTO. In particular, WTO panels and the Appellate Body have found that U.S. law as applied is inconsistent with the Safeguards Agreement because the ITC's causation analysis does not ensure that injury caused by other factors was not attributed to imports. In other words, the panels and the Appellate Body interpret the Safeguards Agreement to require the ITC to separate other sources of injury.

Petitions and Investigations

An entity representative of an industry (including a trade association, firm, union or group of workers) may file a petition under section 202 of the Trade Act of 1974 with the ITC. The petition must include a statement describing the specific purposes for which action is being sought, which may include facilitating the orderly transfer of resources to more productive pursuits, enhancing competitiveness, or other means of adjustment to new conditions of competition. Alternatively, the President,

---

[24] The language of GATT article XIX is as follows: "If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this agreement, including tariff concessions, any product imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product and to the extent and for such time as may be necessary to prevent such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession."

U.S. Trade Representative, or the House Committee on Ways and Means or Senate Committee on Finance may request an investigation.

Upon petition, request, or on its own motion, the ITC conducts an investigation "to determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article." Substantial cause is defined as "a cause which is important and not less than any other cause."

In making its determination, the ITC must take into account all relevant economic factors, including certain factors specified in the statute,[25] and must consider the condition of the domestic industry over the course of the relevant business cycle. The ITC may determine to treat as the domestic industry: (1) only the portion or subdivision producing the like or directly competitive article of a producer of more than one article; and (2) only production concentrated in a major geographic area under certain circumstances. The ITC is required, to the extent information is available, in the case of a domestic producer which also imports, to treat as part of the domestic industry only the domestic production of such producer.

A public hearing is required during the course of the investigation. Whenever during the investigation the ITC has reason to believe increased imports are attributable in part to unfair trade practices, then it must promptly notify the agency administering the appropriate remedial law.

Normally the ITC must make its injury determination within 120 days of receipt of the petition or request. However, if the ITC determines that the investigation is extraordinarily complicated, it may take up to 30 additional days to make an injury determination. If the petition alleges that critical circumstances exist, the ITC must first determine, within 60 days of receipt of a petition containing such an allegation, whether critical circumstances exist. The ITC begins the injury phase of its investigation only after it has made its determination with respect to critical circumstances. If the ITC makes an affirmative injury finding, then it must recommend the action that would address the injury and be the most effective in facilitating efforts by the domestic industry to make a positive adjustment; such

[25] These factors include: with respect to serious injury, the significant idling of productive facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry; with respect to threat of serious injury, a decline in sales or market share, a higher and growing inventory (whether maintained by domestic producers, importers, wholesalers, or retailers), and a downward trend in production, profits, wages, productivity or employment (or increasing underemployment) in the domestic industry concerned; the extent to which firms in the domestic industry are unable to generate adequate capital to finance the modernization of their domestic plants and equipment, or are unable to maintain existing levels of expenditures for research and development, the extent to which the U.S. market is the focal point for the diversion of exports of the article concerned by reason of restraints on exports of such article to, or on imports of such article into, third country markets; and with respect to substantial cause, an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic producers. The presence or absence of any factor is not necessarily dispositive.

recommended action must be either a tariff, tariff-rate quota, quantitative restriction, adjustment measures, or a combination thereof.

The ITC's remedy recommendation and report must be submitted to the President within 180 days of the petition (within 240 days if critical circumstances are alleged). The report must also be made available to the public, and a summary of the report must be published in the Federal Register.

Adjustment Plans and Commitments

Under title II, as amended, petitioners are encouraged to submit, at any time prior to the ITC injury determination, a plan to promote positive adjustment to import competition. The law provides that positive adjustment occurs when (1) the domestic industry is able to compete successfully with imports after actions taken under section 204 terminate, or the domestic industry experiences an orderly transfer of resources to other productive pursuits; and (2) dislocated workers in the industry experience an orderly transition to productive pursuits.

The domestic industry may be considered to have made a positive adjustment to import competition even though the industry is not of the same size and composition as the industry at the time the investigation was initiated.

Before submitting an adjustment plan, the petitioner and other members of the domestic industry that wish to participate may consult with the USTR and other Federal Government officials for purposes of evaluating the adequacy of the proposals being considered for inclusion in the plan.

In addition, during the ITC investigation, the ITC is required to seek information (on a confidential basis to the extent appropriate) on actions being taken, or planned to be taken, or both, by firms and workers in the industry to make a positive adjustment to import competition. Any party may individually submit to the ITC commitments regarding actions such party intends to take to facilitate positive adjustment to import competition.

Provisional Relief

Under section 202(d) of the Trade Act of 1974, the President may provide provisional relief in the case of imports of a perishable agricultural product, provided that the imported product has been the subject of ITC monitoring for at least 90 days prior to the filing of the petition with the ITC and the ITC has made an affirmative preliminary determination. The ITC has 21 days from the date on which the petition is filed to make its determination and report any finding with respect to provisional relief, and the President has 7 days after receiving an ITC report containing an affirmative determination to determine what, if any, action to take.

Under section 202(d)(2), if critical circumstances are alleged in the petition, the ITC must, within 60 days of receipt of a petition containing such an allegation, determine whether critical circumstances exist and, if so, recommend an appropriate remedy to the President. The ITC would find critical circumstances to exist when it determines, on the basis of available information, that there is "clear evidence" that increased imports of an article are a substantial cause of serious injury, or the threat thereof, to the domestic industry, and "delay in taking action . . . would cause damage to that industry that would be difficult to repair." After receiving a report containing an affirmative ITC determination, the President has 30 days in which to determine what, if any, action to take.

Provisional relief is to take the form of an increase in, or imposition of, a duty on imports, if such form of relief is feasible and would prevent or remedy the serious injury. Such actions generally remain in effect pending completion of the full ITC investigation and transmission of the ITC's report. However, no provisional relief action may remain in effect for more than 200 days.

Presidential Action

Within 60 days of receiving an affirmative ITC determination and report, the President shall take all appropriate and feasible action within his power which he determines will facilitate efforts by the domestic industry to make a positive adjustment and will provide greater economic and social benefits than costs. Any import relief provided may not exceed the amount necessary to prevent or remedy the serious injury.

In determining what action is appropriate, the President is required to consider a number of factors, including the adjustment plan (if any), individual commitments, probable effectiveness of action to promote positive adjustment, other factors related to the national economic interest, and the national security interest.

The actions authorized to be taken by the President include an increase in or imposition of a duty, imposition of a tariff-rate quota system, a modification or imposition of a quantitative restriction, implementation of one or more adjustment measures (including trade adjustment assistance), negotiation of agreements with foreign countries limiting the export from foreign countries and the import into the United States of an article, and any other action within his power.

The President may take action under this title for an initial period of up to 4 years, and may extend such action, at a level not to exceed that previously in effect, one or more times. However, the total period of relief, including any extensions, may not exceed 8 years.

As provided in section 311 of the North American Free Trade Agreement Implementation Act,[26] a relief action is not to apply to imports of an article when imported from Canada or Mexico unless imports of such article from such country account for a substantial share of imports of such article and contribute importantly to the serious injury or threat thereof. In addition, in accordance with the implementing legislation for the U.S. free trade agreements with Jordan (section

[26] P.L. 103-182, approved December 8, 1993, 19 U.S.C. 3371.

221 of P.L. 107-43), Singapore (section 331 of P.L. 108-78), and Australia (section 331 of P.L. 108-286), the President may exclude from action imports from the FTA partner if such imports are not a substantial cause of serious injury or threat thereof.[27]

The Trade Policy Committee, chaired by the USTR, is required to make a recommendation to the President as to what action the President should take. On the day the President takes action under this title, he must submit to Congress a document describing the action and the reasons for taking the action. If the action taken by the President differs from the action recommended by the ITC, the President shall state in detail the reasons for the difference. If the President decides that there is no appropriate and feasible action to take with respect to a domestic industry, the President is required to transmit to Congress on the day of such decision a document that sets forth in detail the reasons for the decision.

Congress may adopt a joint resolution of disapproval within 90 legislative days under the expedited procedures of section 152 of the Trade Act if the President takes action which is different from that recommended by the ITC or if the President declines to take any action. Under these procedures, resolutions are referred to the House Committee on Ways and Means and the Senate Committee on Finance, which are subject to a motion to discharge if the resolution has not been reported within 30 legislative days. No amendments to the motion or to the resolution are in order. Within 30 days after enactment of such a resolution, the President must proclaim the relief recommended by the Commission.

Monitoring, Modification, and Termination of Action

If presidential action is taken, the ITC is required to monitor developments in the industry, including efforts by the domestic industry to adjust and, if the initial period or an extension of the action exceeds 3 years, submit a report on the results of such monitoring at the midpoint of the initial period or extension, as appropriate. The Commission is required to hold a public hearing in the course of preparing such report.

After receiving an ITC report on the results of such monitoring, the President may reduce, modify, or terminate action if either (1) the domestic industry requests it on the basis that it has made a positive adjustment, or (2) the President determines that changed circumstances warrant such reduction, modification, or termination. Upon request of the President, the ITC must advise the President as to the probable economic effects on the domestic industry of any proposed reduction, modification, or termination of action.

Prior to the termination of relief, the ITC is required, at the request of the President or upon petition of the concerned industry, to conduct an investigation to

---

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

determine whether the relief action continues to be necessary to prevent or remedy serious injury and whether there is evidence that the industry is making a positive adjustment to import competition. The ITC must hold a public hearing in the course of each such investigation and transmit its report to the President no later than 60 days before termination of the relief action, unless the President specifies a different date.

After any action taken under this title has terminated, the ITC must evaluate the effectiveness of the action in facilitating positive adjustment by the domestic industry to import competition, and submit a report to the President and to the Congress within 180 days of the termination of the action.

Subsequent Relief Actions

If relief was provided, no new relief action may be taken with respect to the same subject matter for a period of time equal to the period of import relief granted, or for 2 years, whichever is greater.

However, in the case of an action that is in effect for 180 days or less, the President may take a new action with respect to the same subject matter if at least 1 year has elapsed since the previous action went into effect and an action has not been taken more than twice in the 5-year period preceding the effective date of the new action.

SECTION 406 OF THE TRADE ACT OF 1974: MARKET DISRUPTION BY IMPORTS FROM COMMUNIST COUNTRIES

Section 406 of the Trade Act of 1974[28] was established to provide a remedy against market disruption caused by imports from Communist countries. The provision applies to imports from any Communist country, irrespective of whether it has received or currently receives non-discriminatory normal trade relations treatment. Enactment of section 406 resulted from concern that traditional remedies for unfair trade practices, such as the antidumping and countervailing duty laws, may be insufficient to deal with a sudden and rapid influx of substantial imports that can result from Communist country control of their pricing levels and distribution process.

The provisions of section 406 of the Trade Act of 1974, as amended, are in many ways similar to those under sections 201-203 of the Trade Act, except that section 406 provides a lower standard of injury causation and a faster relief procedure, and the investigation focuses on imports from a specific country.

Under section 406(a), the ITC conducts investigations to determine whether imports of an article produced in a Communist country (any country dominated or controlled by communism) are causing market disruption with respect to a

---

[28] 19 U.S.C. 2436.

domestically produced article. Market disruption exists whenever imports of an article, like or directly competitive with an article produced by a domestic industry, are increasing rapidly so as to be a significant cause of material injury, or threat thereof, to such domestic industry. Imports are increasing rapidly if there has been a significant increase in imports, either actual or relative to domestic production, during a recent period of time. In making a determination of market disruption, the ITC is required to consider, among other factors, the volume of imports, the effect of imports on prices, the impact of imports on domestic producers, and evidence of disruptive pricing practices or other efforts to unfairly manage trade patterns.

The ITC conducts such investigations at the request of the President or the USTR, upon resolution of either the House Committee on Ways and Means or the Senate Committee on Finance, on its own motion, or upon the filing of a petition by an entity (including a trade association, firm, union, or a group of workers) which is representative of an industry. The Commission must complete its investigation within 3 months, including a public hearing.

If the ITC finds that market disruption exists, it must also recommend to the President relief in the form of rates of duty or quantitative restrictions that will prevent or remedy such market disruption. The President then has 60 days to advise Congress as to what, if any, relief he will proclaim. Any import relief must be proclaimed within 15 days after the determination to provide it, except that the President has an additional 60 days to negotiate an orderly marketing agreement if he decides to provide relief in that form. Relief applies only to imports from the subject Communist country. Relief is limited to a maximum 5-year period subject to one renewal of up to 3 years.

Section 406(c) authorizes the President, prior to an ITC determination, to take temporary emergency action with respect to imports from a Communist country whenever he finds that there are reasonable grounds to believe there is market disruption. When taking such action, the President must also request the Commission to conduct an investigation under section 406(a). Any emergency relief ceases to apply on the day the Commission makes a negative finding or on the effective date of action by the President following an affirmative ITC finding.

SECTIONS 421-423 OF THE TRADE ACT OF 1974, AS AMENDED: MARKET DISRUPTION BY IMPORTS FROM THE PEOPLE'S REPUBLIC OF CHINA

Section 103 of Public Law 106-286, approved October 10, 2000, authorizing the extension of permanent normal trade relations to the People's Republic of China created a new chapter of title IV of the Trade Act of 1974 to implement the anti-surge mechanism established under the U.S. – China Bilateral Trade Agreement (U.S. – China Agreement), concluded on November 15, 1999. This provision replaces section 406 of the Trade Act of 1974, which has not applied to China since China joined the WTO in December 2001.

Section 421 permits the provision of relief to U.S. domestic industries and workers where products of Chinese origin are being imported in such increased quantities and under such conditions as to cause or threaten to cause market disruption to the domestic producers as a whole of like or directly competitive products. Relief is imposed only to the extent and for such period as the President considers necessary to prevent or remedy the market disruption. Procedures are modeled after Section 406, with certain modifications to conform to language of the U.S. – China Agreement. U.S. industries or workers claiming injury due to import surges from China may file a petition with the ITC, or the ITC can initiate an investigation at the request of the President or on motion of the House Ways and Means Committee or the Senate Finance Committee. According to the U.S. – China Agreement and under the legislation, market disruption occurs when subject imports "are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury or threat of material injury to the domestic industry."

In determining whether market disruption exists, the ITC considers objective factors, including: (1) the volume of imports of the product subject to the investigation; (2) the effect of imports of such product on prices in the United States of like or directly competitive articles, and (3) the effect of imports of such product on the domestic industry producing like or directly competitive articles. The presence or absence of any factor listed above is not necessarily dispositive of whether market disruption exists.

Within 60 days after receipt of the petition, request or motion (90 days, where the petitioner alleges critical circumstances), the ITC is to make a determination as to whether the subject imports are causing or threatening market disruption. Not later than 20 days after the ITC makes an affirmative determination with respect to market disruption, the ITC must issue a report to the President and to the USTR setting forth the reasons for its determination and recommendation(s) of actions necessary to prevent or remedy market disruption. Within 20 days, the USTR publishes a notice of proposed action in the Federal Register, seeking views and evidence on the appropriateness of the proposed action and whether it would be in the public interest. The USTR is also required to hold a hearing on the proposed action.

If the ITC's determination is affirmative with respect to market disruption, the President is required to request consultations with the Chinese to remedy the market disruption. If the United States and China are unable to reach agreement within the 60 day consultation period established in the bilateral agreement and under section 421, then the President is required to decide what action, if any, to take within 25 days after the end of consultations. Any relief proclaimed becomes effective in 15 days. If the President determines that an agreement with China concluded under this section is not preventing or remedying the market disruption at issue, then the President is to initiate new consultations and proceedings under section 421. However, if China is not complying with the terms of the agreement entered into under the U.S. -- China Agreement, then the President is required to provide prompt relief consistent with the terms of the agreement.

The entire period from petition to proclamation of relief is 150 days, which is identical to the duration under section 406 of the Trade Act of 1974.

Section 421 also establishes standards for the application of Presidential discretion in providing relief to injured industries and workers. If the ITC makes an affirmative determination on market disruption, there is a presumption in favor of providing relief. That presumption can be overcome if the President finds that providing relief would have an adverse impact on the U.S. economy clearly greater than the benefits of such action, or, in extraordinary cases, that such action would cause serious harm to the national security of the United States.

The provision also sets forth authority to the President to modify, reduce or terminate relief, as well an opportunity for the President to request a report from the ITC on the probable effects of such action. In addition, section 421 allows for extension of relief under certain circumstances.

The President is authorized to provide a provisional safeguard in cases where "delay would cause damage which it would be difficult to repair," as permitted under the U.S.-China Bilateral Agreement. If such circumstances are alleged, the ITC is required to make a determination on critical circumstances and a preliminary determination on market disruption within 45 days of receipt of the petition, request, or motion. If those determinations are affirmative, the President is required to determine whether to provide such provisional relief within 20 days.

Finally, section 422 implements a provision in the U.S.-China Bilateral Agreement concerning trade diversion. That provision addresses circumstances in which a safeguard applied by a third country with respect to Chinese goods "causes or threatens to cause significant diversions of trade" into the United States. If, on the basis of the monitoring results provided by the Customs Service and other reasonably available relevant evidence, the ITC determines that an action by another WTO Member threatens or causes significant trade diversion, the USTR is required to request consultations with China and/or the Member imposing the safeguard. If, as provided in the U.S.-China Bilateral Agreement, consultations fail to lead to an agreement to address the trade diversion within 60 days, the President is required to determine, within 40 days after consultations end, what action, if any, to take to prevent or remedy the trade diversion. The total time from petition to relief under the trade diversion provision is 150 days. Section 422 also requires the ITC to examine changes in imports into the United States from China since the time that the WTO Member commenced the investigation that led to a request for consultations.

The product-specific safeguard is available for 12 years after China's accession to the WTO, or until December 2013.

SECTION 1102 OF THE TRADE AGREEMENTS ACT OF 1979: PUBLIC AUCTION OF IMPORT LICENSES

Section 1102 of the Trade Agreements Act of 1979 authorizes the President to sell import licenses by public auction, under such terms and conditions as the President deems appropriate. Any regulations prescribed under this authority must, to the extent practicable and consistent with efficient and fair administration, ensure against inequitable sharing of imports by a relatively small number of the larger importers.

Import licenses which are potentially subject to this auction authority are identified in section 1102 by the law authorizing the import restriction. For example, import licenses used to administer a quantitative restriction under the escape clause (section 203 of the Trade Act of 1974), the market disruption clause (section 406 of the Trade Act of 1974) or section 301 of the Trade Act of 1974 may be sold by public auction. Any quantitative import restriction imposed under the International Emergency Economic Powers Act or the Trading With the Enemy Act may also be administered by an auctioned import license. Certain agricultural import quotas, however (such as certain meat quotas, cheese quotas, and dairy quotas) are exempt from the auction authority and therefore may not be administered by means of auctioned licenses.

Trade Adjustment Assistance

CHAPTERS 2, 3, AND 5 OF TITLE II OF THE TRADE ACT OF 1974, AS AMENDED

The trade adjustment assistance (TAA) programs were first established under the Trade Expansion Act of 1962 for the purpose of assisting in the special adjustment problems of workers and firms dislocated as a result of a Federal policy of reducing barriers to foreign trade. As a result of limited eligibility and usage of the programs, criteria and benefits were expanded under title II of the Trade Act of 1974 (Public Law 93-618). The Omnibus Budget Reconciliation Act of 1981 (OBRA) (Public Law 97-35) reformed the program for workers. The amendments, particularly in program eligibility and benefits, were intended to reduce program cost significantly and to shift the focus of TAA from income compensation for temporary layoffs to return-to-work through training and other adjustment measures for the long-term or permanently unemployed.

Sections 2671-2673 of the Deficit Reduction Act of 1984 (Public Law 98-369) amended the program for workers to increase the availability of worker training allowances and the level of job search and relocation benefits, and amended the program for firms to increase the availability of industry-wide technical assistance.

Sections 1421-1430 of the Omnibus Trade and Competitiveness Act of 1988 (OTCA) (Public Law 100-418), enacted on August 23, 1988, made significant amendments in the worker TAA program, particularly concerning the eligibility criteria for cash benefits, funding, and administration. A training requirement as a condition for income support to encourage and enable workers to obtain early reemployment became effective as of November 21, 1988. This replaced a 1986 amendment that instituted a job-search requirement as a condition for receiving cash benefits. The amendments also expanded TAA eligibility coverage of workers and firms, contingent upon the imposition of an import fee to fund program costs. The OTCA extended TAA program authorization for an additional 2 years until September 30, 1993.

Sections 501-506 of the North American Free Trade Agreement (NAFTA) Implementation Act, Public Law 103-182, approved December 8, 1993, set forth the "NAFTA Worker Security Act," establishing the NAFTA transitional adjustment assistance program. The Trade Adjustment Assistance Reform Act of 2002 eliminated the NAFTA-TAA program as a separate program and consolidated it with the regular TAA program.

TAA PROGRAM FOR WORKERS

TAA for workers under sections 221 through 250 of the Trade Act of 1974, as amended, consists of trade readjustment allowances (TRAs), employment services, training and additional TRAs allowances while in training, and job search and relocation allowances for certified and otherwise qualified workers. The program is administered by the Employment and Training Administration (ETA) of the Department of Labor through state agencies under cooperative agreements between each state and the Secretary of Labor. ETA processes petitions and issues certifications or denials of petitions by groups of workers for eligibility to apply for TAA. The state agencies act as Federal agents in providing program information, processing applications, determining individual worker eligibility for benefits, issuing payments, and providing reemployment services and training opportunities.

Certification requirements

A two-step process is involved in the determination of whether an individual worker will receive TAA: (1) certification by the Secretary of Labor of a petitioning group of workers in a particular firm as eligible to apply; and (2) approval by the state agency administering the program of the application for benefits of an individual worker covered by a certification.

The process begins by a group of three or more workers, their union, or authorized representative filing a petition with the ETA for certification of group eligibility. To certify a petitioning group of workers as eligible to apply for adjustment assistance, the Secretary must determine that three conditions are met:

(1) a significant number or proportion of the workers in the firm or subdivision of the firm have been or are threatened to be totally or partially laid off;

(2) sales and/or production of the firm or subdivision have decreased absolutely; and

(3) increased imports of articles like or directly competitive with articles produced by the firm or subdivision of the firm have "contributed importantly"

to both the layoffs and the decline in sales and/or production. Such firms are now referred to informally as "directly affected" or "primary" firms.

The OTCA amendments expanded the potential eligibility coverage to include workers in any firm or subdivision of a firm that engages in exploration or drilling for oil or natural gas.

The Trade Adjustment Assistance Reform Act of 2002 enlarged the class of workers eligible for TAA benefits to include those who work for firms that have closed in order to shift production to a country that either has a free trade agreement with the United States (e.g., Mexico or Canada) or is a beneficiary country under the Andean Trade Preference Act, African Growth and Opportunity Act, or the Caribbean Basin Economic Recovery Act. Under the old NAFTA-TAA program, workers in firms that had shifted production to Mexico or Canada had been automatically eligible, and thus the TAA Reform Act changes maintain this provision while expanding its scope as described above and consolidating it into a single program.

The Trade Adjustment Assistance Reform Act of 2002 enlarged the class of workers eligible for TAA benefits to include certain adversely affected secondary workers. A secondary worker is one who works for either 1) a downstream producer that performs value-added production processes such as final assembly or finishing on an article that was the basis for certification for a primary eligible firm, or 2) a supplier that supplies components parts directly to a primary eligible firm for an article that was the basis for certification of the primary eligible firm. To certify a petitioning group of workers in a secondary firm as eligible to apply for adjustment assistance, the Secretary must determine that three conditions are met:

(1) a significant number or proportion of the workers in the firm or subdivision of the firm has become totally or partially separated, or is threatened to become totally or partially separated;

(2) the workers' firm or subdivision is a supplier or downstream producer to a firm or subdivision that employed a group of workers who received a certification of eligibility for a primary firm, and such supply or production is related to the article that was the basis for such certification; and

(3) either—

(A) the workers' firm is a supplier and the component parts it supplied to the firm or subdivision accounted for at least 20 percent of the production or sales of the workers' firm; or

(B) a loss of business by the workers' firm with the firm or subdivision contributed importantly to the workers' separation or threat of separation.

With respect to all applicants, the Secretary is required to make the eligibility determination within 40 days after a petition is filed. A certification of eligibility to apply for TAA covers workers who meet the requirements and whose last total or partial separation from the firm or subdivision before applying for benefits occurred within 1 year prior to the filing of the petition.

State agencies must give written notice by mail to each worker to apply for TAA where it is believed the worker is covered by a certification of eligibility and also must publish notice of each certification in newspapers of general circulation in areas where certified workers reside. State agencies must also advise each adversely affected worker, at the time that worker applies for UI, of TAA program benefits as well as the procedures, deadlines, and qualifying requirements for applying. State agencies must advise each such worker to apply for training before or at the same time the worker applies for TRA benefits, and promptly interview each certified worker and review suitable training opportunities available.

Qualifying requirements for trade readjustment allowances

To receive entitlement to payment of a TAA for any week of unemployment, an individual must be an adversely affected worker or secondary worker covered by a certification, file an application with the State agency, and meet the following qualifying requirements:

(1) The worker's first qualifying separation from adversely affected employment occurred within the period of the certification applicable to that worker, i.e, on or after the "impact date" in the certification (the date on which total or partial layoffs in the firm or subdivision thereof began or threatened to begin, but never more than 1 year prior to the date of the petition), within 2 years after the date the Secretary of Labor issued the certification covering the worker, and before the termination date (if any) of the certification.

(2) The worker was employed during the 52-week period preceding the week of the first qualifying separation at least 26 weeks at wages of $30 or more per week in adversely affected employment with a single firm or subdivision of a firm. A week of unemployment includes the week in which layoff occurs and up to 7 weeks of employer-authorized vacation, sickness, injury, maternity, or military leave, or service as a full-time union representative. Weeks of disability covered by workmen's compensation and, as amended in 1992, weeks of active duty in a military reserve status may also count toward the 26-week minimum.

(3) The worker was entitled to unemployment insurance (UI), has exhausted all rights to any UI entitlement (except for additional compensation that is funded by a state and is not reimbursed from any Federal funds), including any extended benefits (EB) or Federal supplemental compensation (FSC) (if in existence), and does not have an unexpected waiting period for any UI.

(4) The worker must not be disqualified with respect to the particular week of unemployment for EB by reason of the work acceptance and job search requirements under section 202(a)(3) of the Federal-State Extended Unemployment Compensation Act of 1970. All TRA claimants in all states are subject to the provisions of the EB "suitable work" test under that Act (i.e., must accept any offer of suitable work, actively engage in seeking work, and register for work) after the end of their regular UI benefit period as a

precondition for receiving any weeks of TRA payments. The EB work test does not apply to workers enrolled or participating in a TAA-approved training program; the test does apply to workers for whom TAA-approved training is certified as not feasible or appropriate.

(5) The worker must timely be enrolled in, or have completed following separation from adversely affected employment within the certification period, a training program approved by the Secretary of Labor in order to receive basic TAA payments.

The training requirement may be waived by the Secretary for the following reasons: 1) the worker has been or will be recalled by the firm, 2) the worker possesses marketable skills, 3) the worker is within 2 years of retirement, 4) the worker is unable to participate in training for health reasons, 5) the first available enrollment date for training is within 60 days of the determination or there are extenuating circumstances for longer delay, or 6) training is not reasonably available to the worker.

This training requirement to encourage and enable workers to obtain early reemployment became effective under the OTCA amendments as of November 21, 1988; this 1988 amendment replaced a 1986 amendment that instituted a job search requirement as a condition for receiving cash benefits.

Cash benefit levels and duration

A worker is entitled to TRA payments for weeks of unemployment beginning the later of (a) the first week beginning more than 60 days after the filing date of the petition that resulted in the certification under which the worker is covered (i.e., weeks following the statutory deadline for certification), or (b) the first week after the worker's first total qualifying separation.

The TRA cash benefit amount payable to a worker for a week of total unemployment is equal to, and a continuation of, the most recent weekly benefit amount of UI payable to that worker preceding that worker's first exhaustion of UI following the worker's first total qualifying separation under the certification, reduced by any Federal training allowance and disqualifying income deductible under UI law.

The maximum amount of basic TRA benefits payable to a worker for the period covered by any certification is 52 times the TRA payable for a week of total unemployment minus the total amount of UI benefits to which the worker was entitled in the benefit period in which the first qualifying separation occurred (e.g., a worker receiving 39 weeks of UI regular and extended benefits could receive a maximum 13 weeks of basic TRA benefits). UI and TRA payments combined are limited to a maximum 52 weeks in all cases involving extended compensation benefits (i.e., a worker who received 52 or more weeks of unemployment benefits would not be entitled to basic TRA). TRA benefits are not payable to workers participating in on-the-job training.

The eligibility period for collecting basic TRA is the 104-week period that immediately follows the week in which a total qualifying separation occurs. If the worker has a subsequent total qualifying separation under the same certification, the eligibility period for basic TRA moves from the prior eligibility period to 104 weeks after the week in which the subsequent total qualifying separation occurs. An adversely affected worker may also be eligible for an additional 26 weeks of benefits in order to complete a program of remedial education, thus increasing the eligibility period to 130 weeks.

A worker may receive up to 52 additional weeks of TRA benefits after collecting basic benefits (up to a total maximum of 104 weeks) if that worker is participating in approved training. To receive the additional benefits, the worker must apply for the training program within 210 days after certification or first qualifying separation, whichever date is later. Additional benefits may be paid only during the 52-week period that follows the last week of entitlement to basic TRA, or that begins with the first week of training if the training begins after the exhaustion of basic TRA.

A worker participating in approved training continues to receive basic and additional TRA payments during breaks in such training if the break does not exceed 30 days, if the worker was participating in the training before the beginning of the break, resumes participation in the training after the break ends, and the break is provided for in the training schedule. Weeks when TRA is not payable because of this break provision count against the eligibility periods for both basic and additional TRA.

Training and other employment services, job research and relocation allowances

Training and other employment services and job search and relocation allowances are available through state agencies to certified workers whether or not they have exhausted UI benefits and become eligible for TRA payments.

Employment services consist of counseling, vocational testing, job search and placement, and other supportive services, provided for under any other Federal law.

Training, preferably on-the-job, shall be approved for a worker if the following six conditions are met:

(1) there is no suitable employment available;

(2) the worker would benefit from appropriate training;

(3) there is a reasonable expectation of employment following training completion;

(4) approved training is reasonably available from government agencies or private sources;

(5) the worker is qualified to undertake and complete such training; and

(6) such training is suitable for the worker and available at a reasonable cost.

If training is approved, the worker is entitled to payment of the costs from the Secretary directly or through a voucher system, unless they have been paid or are reimbursable under another Federal law. On-the-job training costs are payable only if such training is not at the expense of currently employed workers. The 1988 amendments added remedial education as a separate and distinct approvable training program.

The OTCA amendments converted training from an entitlement to the extent appropriated funds were available, to an entitlement without regard to the availability of funds to pay the training costs. Approved training is an entitlement in any case where the six criteria for approval are reasonably met, up to an $220 million statutory ceiling on annual fiscal year training costs (including job search and relocation allowances and subsistence payments) payable from TAA funds. Up to this limit workers are entitled to have the costs of approved training paid on their behalf. If the Secretary foresees that the $220 million ceiling would be exceeded in any fiscal year, the Secretary will decide how remaining TAA funds shall be apportioned among the states for the balance of that year.

As a result of the OTCA amendments, costs of approved TAA training may be paid solely from TAA funds, solely from other Federal or state programs or private funds, or from a mix of TAA and public or private funds, except if the worker in the case of a non-governmental program would be required to reimburse any portion of the costs from TAA funds. Duplicate payment of training costs is prohibited, and workers are not entitled to payment of training costs from TAA funds to the extent these costs are paid or shared from other sources. Training may still be approved if the fiscal year TAA funding entitlement limit is reached, provided the training costs are paid from outside sources.

Supplemental assistance is available to defray reasonable transportation and subsistence expenses for separate maintenance when training is not within the worker's commuting distance, equal to the lesser of actual per diem expenses or 50 percent of the prevailing Federal per diem rate for subsistence and prevailing mileage rates under Federal regulations for travel expenses.

Job search allowances are available to certified workers who cannot obtain suitable employment within their commuting area, are totally laid off, and who apply within 1 year after certification or last total layoff, whichever is later, or within 6 months after concluding training. The allowance for reimbursement is equal to 90 percent of necessary job search expenses, based on the same increased supplemental assistance rates described above, up to a maximum amount of $1250. The Secretary of Labor is required to reimburse workers for necessary expenses incurred to participate in an approved job search program.

Relocation allowances are available to certified workers totally laid off at the time of relocation who have been able to obtain an offer of or actual suitable employment only outside their commuting area, who apply within 14 months after certification or last total layoff, whichever is later, or within 6 months after concluding training, and whose relocation takes place within 6 months after application of completion of training. As amended in 1981 and 1984, the allowance is equal to 90 percent of reasonable and necessary expenses for transporting the worker, family, and household effects, based on the same increased supplemental assistance rates described above, plus a lump sum payment of three times the worker's average weekly wage up to a maximum amount of $1250.

Health coverage tax credit

The Trade Act of 2002 created a Federal tax credit which subsidizes private health insurance coverage for displaced workers certified to receive TAA benefits. The tax credit covers 65 percent of the premiums paid by the worker for qualified health insurance. This credit is referred to as the Health Coverage Tax Credit (HCTC), and the Internal Revenue Service is responsible for its administration. The HCTC is advanceable, meaning that workers can receive the credit when purchasing insurance rather than receiving it after filing their tax returns. The HCTC is also refundable; eligible workers can receive the credit even if they have zero tax liability for the year. To be eligible for the HCTC, a worker must be (1) a recipient of a TRA; (2) an individual certified for TAA benefits who is not yet eligible to receive a TRA because she or he has not exhausted all rights to UC; or (3) a participant receiving benefits under the new Alternative Trade Adjustment Assistance program described in the next section.

The HCTC can be used for limited types of health insurance. It can be applied towards premiums paid to continue employer-sponsored health insurance under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA). The HCTC also can be used to purchase an individual health insurance policy (if the worker was covered by an individual policy at least 30 days before becoming unemployed) or to purchase a group policy offered through a spouse's employer. An eligible worker can use the credit to purchase various types of State-based insurance coverage, such as coverage through a State-sponsored high-risk pool, coverage through a health insurance program offered to State employees, and coverage through an arrangement between private entities and the State. State-based coverage must be guaranteed issue (i.e., a plan must be offered to all who apply), cannot limit coverage due to pre-existing conditions, cannot charge higher premiums than those charged to individuals who do not receive the HCTC, and must offer the same benefits as those provided to individuals who do not receive the HCTC.

Funding

Federal funds, as an appropriated entitlement from general revenues under the Federal Unemployment Benefit Account (FUBA) in the Department of Labor, cover the portion of the worker's total entitlement represented by the continuation of UI benefit levels in the form of TRA payments, as well as payments for training and job search and relocation allowances, and state-related administrative expenses. Funds made available under grants to states defray expenses of any employment services and other administrative expenses. For fiscal year 2005, $1.057 billion has been appropriated for trade readjustment allowances and related administrative expenses. Funding for training, job search and relocation allowances, and related expenses is an annual appropriated entitlement under the Training and Employment Services account of the Department of Labor.

The states are reimbursed from Treasury general revenues for benefit payments and other costs incurred under the program. A penalty under section 239 of the Trade Act of 1974 provides for reduction by 15 percent of the credits for state unemployment taxes which employers are allowed against their liability for Federal unemployment tax if a state has not entered into or has not fulfilled its commitments under a cooperative agreement.

NAFTA WORKER SECURITY ACT REPEALED

The NAFTA Trade Adjustment Assistance program was repealed by the Trade Adjustment Assistance Reform Act of 2002 enacted as part of the Trade Act of 2002 on August 6, 2002. The NAFTA program was consolidated into a single, unified, and expanded TAA program. Workers who were receiving benefits under the NAFTA-TAA program continue to receive benefits and services as before the repeal.

DEMONSTRATION PROJECT FOR ALTERNATIVE TRADE ADJUSTMENT ASSISTANCE FOR OLDER WORKERS

The Trade Adjustment Assistance Reform Act of 2002 directed the Secretary of Labor to create an alternative TAA program for older workers. Workers eligible for the program must be at least 50 years of age, obtain full-time reemployment from a different firm within 26 weeks of separation from a certified, adversely affected firm, and earn not more than $50,000 per year in the reemployed position.

The Act directs the Secretary to create criteria for a firm's eligibility based upon whether a significant number of workers in the firm are 50 years of age or older, whether the workers possess skills that are not easily transferable, and the competitive conditions of the workers' industry. Benefits to workers under this alternative program are 50 percent of the difference between the wages received by the worker from the new employment and the wages received at the time of separation from the adversely affected firm. Eligible workers may receive assistance up to $10,000 during a two-year period. The program terminates within 5 years of enactment.

TAA PROGRAM FOR FIRMS

Sections 251 through 264 of the Trade Act of 1974, as amended, contain the procedures, eligibility requirements, benefits and their terms and conditions, and administrative provisions of the TAA program for firms adversely impacted by increased import competition. The program is administered by the Economic Development Administration within the Department of Commerce. Amendments in 1986 under the COBRA eliminated financial assistance (direct loan or loan guarantee) benefits, increased government participation in technical assistance, and expanded the criteria for firm certification.

Program benefits consist exclusively of technical assistance for petitioning firms which qualify under a two-step procedure: (1) certification by the Secretary of Commerce that the petitioning firm is eligible to apply, and (2) approval by the Secretary of Commerce of the application by a certified firm for benefits, including the firm's proposal for economic adjustment.

To certify a firm as eligible to apply for adjustment assistance, the Secretary must determine that three conditions are met:

(1) a significant number or proportion of the workers in the firm have been or are threatened to be totally or partially laid off;

(2) sales and/or production of the firm have decreased absolutely, or sales and/or production that accounted for at least 25 percent of total production or sales of the firm during the 12 months preceding the most recent 12-month period for which data are available have decreased absolutely; and

(3) increased imports of articles like or directly competitive with articles produced by the firm have "contributed importantly" to both the layoffs and the decline in sales and/or production.

The 1988 amendments expanded potential eligibility coverage of the program to include firms that engage in exploration or drilling for oil or natural gas. Unlike the worker program, this extension applies only prospectively after August 23, 1988.

A certified firm may file an application with the Secretary of Commerce for trade adjustment assistance benefits at any time within 2 years after the date of the certification of eligibility. The application must include a proposal by the firm for its economic adjustment. The Secretary may furnish technical assistance to the firm in preparing its petition for certification and/or in developing a viable economic adjustment proposal.

The Secretary approves the firm's application for assistance only if he determines that its adjustment proposal (a) is reasonably calculated to make a material contribution to the economic adjustment of the firm; (b) gives adequate consideration to the interests of the workers in the firm; and (c) demonstrates that the firm will make all reasonable efforts to use its own resources for economic development.

Benefits

Technical assistance may be given to implement the firm's economic adjustment proposal in addition to, or in lieu of, precertification assistance or assistance in developing the proposal. It may be furnished through existing government agencies or through private individuals, firms, and institutions (including private consulting services), or by grants to intermediary organizations, including regional TAA Centers. As amended by the COBRA, the Federal Government may bear the full cost of technical assistance to a firm in preparing its petition for certification. However, the Federal share cannot exceed 75 percent of the cost of assistance furnished through private individuals, firms, or institutions for developing or implementing an economic adjustment proposal. Grants may be made to intermediate organizations to defray up to 100 percent of their administrative expenses in providing technical assistance.

The Secretary of Commerce also may provide technical assistance of up to $16 million annually per industry to establish industrywide programs for new product or process development, export development, or other uses consistent with adjustment assistance objectives. The assistance may be furnished through existing agencies, private individuals, firms, universities, and institutions, and by grants, contracts, or cooperative agreements to associations, unions, or other non-profit organizations of industries in which a substantial number of firms or workers have been certified.

Funding

Funds to cover all costs of the program are subject to annual appropriations to the EDA of the Department of Commerce from general revenues. For fiscal year 2005, $12 million was appropriated for the program.

TRADE ADJUSTMENT ASSISTANCE FOR FARMERS

The Trade Adjustment Assistance Reform Act of 2002 created a new TAA program tailored for farmers or agricultural commodity producers (including livestock producers). Unlike the regular TAA program, the Secretary of Agriculture implements the TAA for farmers program. The Secretary issued the final rule implementing the program on August 20, 2003.

The International Trade Commission (ITC) must notify the Secretary of Agriculture when the ITC begins a safeguard investigation of a particular agricultural commodity. The law also requires the Secretary of Agriculture to report to the President the extent to which the adjustment of producers of the affected agricultural commodity may be facilitated through the trade adjustment assistance for farmers program.

The Secretary of Agriculture must provide full information to producers about the benefit allowances, training, and other employment services available and about the petition and application procedures and appropriate filing dates for such benefits. The Secretary is required to provide written notice to each agricultural producer that the Secretary has reason to believe is covered by a certification and to publish notice of the benefits available to certified agricultural commodity producers in newspapers of general circulation in the areas in which such producers reside. The Secretary must also provide information concerning procedures for applying for and receiving all other Federal assistance services that may be available to workers facing economic distress. The Secretary is directed to make eligibility determinations within 40 days after a petition by a group is made. In order to receive a trade adjustment allowance under this chapter, an agricultural producer's net farm income for the most recent year must be less than the producer's net farm income for the latest year in which no adjustment assistance was received by the producer under this chapter. Also, the producer must:

(1) file an application for such allowance within 90 days after the date on which the Secretary makes a determination and issues a certification of eligibility;

(2) submit to the Secretary sufficient information to establish the amount of the agricultural commodity covered by the application that was produced by the producer in the most recent year;

(3) certify that the producer has not received any cash benefits from the regular TAA program; and

(4) certify that the producer has met with a Department of Agriculture employee or agent to obtain information and technical assistance that will assist the producer in adjusting to import competition with respect to the adversely affected agricultural commodity.

An affected agricultural commodity producer is entitled to adjustment assistance in an amount equal to one-half the difference between 80 percent of the national average price for the affected agricultural commodity for the preceding 5 marketing years and the national average price in the most recent year, multiplied by the amount of the commodity produced by the producer in the most recent year. In determining the amount of adjustment assistance to which an affected agricultural producer is entitled in subsequent years, the national average price of the commodity is determined by using the 5-marketing-year period used to determine the amount of cash benefits for the first certification. The maximum amount of cash benefits an agricultural producer may receive in any 12-month period may not exceed $10,000. An agricultural producer entitled to receive a cash benefit under this chapter is not eligible for any other cash benefit under any other trade adjustment assistance program but is entitled to employment services and training benefits under sections 239 and 240 of chapter 2. Also, the total amount of payments made to an agricultural producer under this chapter during any crop year may not exceed the limitation on counter-cyclical payments set forth in section 1001(c) of the Food Security Act of 1985. The overall spending cap on the program is $90,000,000.