Chapter 3: OTHER LAWS REGULATING IMPORTS

Authorities To Restrict Imports of Agricultural and Textile Products

SECTION 204 OF THE AGRICULTURAL ACT OF 1956, AS AMENDED

Section 204 of the Agricultural Act of 1956, as amended,[1] authorizes the President to negotiate agreements with foreign governments to limit their exports of agricultural or textile products to the United States. The President is authorized to issue regulations governing the entry of products subject to international agreements concluded under this section. Furthermore, if a multilateral agreement is concluded among countries accounting for a significant part of world trade in the articles concerned, the President may also issue regulations governing entry of those same articles from countries which are not parties to the multilateral agreement, or countries to which the United States does not apply the Agreement.

The authority provided under section 204 has been used to negotiate bilateral agreements restricting the exportation of certain meats to the United States,[2] as well as to implement an agreement with the European Communities (EC) restricting U.S. importation of certain cheeses from the EC.[3] Section 204 also provided the legal basis for the GATT Arrangement Regarding International Trade in Textiles, commonly referred to as the Multifiber Arrangement (MFA),[4] for U.S. bilateral agreements with 47[5] textile-exporting nations, and currently provides the basis for U.S. implementation of the Uruguay Round Agreement on Textiles and Clothing (ATC), which replaced the expired MFA. On January 1, 2005, the ATC and bilateral agreements with WTO members terminated, thereby removing many of the specific restrictions for textiles and clothing.

MULTIFIBER ARRANGEMENT (MFA)

The Multifiber Arrangement was a multilateral agreement negotiated under the auspices of the General Agreement on Tariffs and Trade. The MFA provided a general framework and guiding principles for the negotiation of bilateral agreements between textile importing and exporting countries, or for unilateral action by an importing country if an agreement cannot be reached. In effect since 1974, the MFA was established to deal with problems of market disruption in textile trade, while permitting developing countries to share in expanded export

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1 Public Law 84-540, ch. 327, approved May 28, 1956, 70 Stat. 200, as amended by Public Law 87-488, approved June 19, 1962, 76 Stat. 104, 7 U.S.C. 1854 and Public Law 103-465, approved Dec. 8, 1994.
2 Exec. Order No. 11539, June 30, 1970, 35 Fed. Reg. 10733, as amended by Exec. Order No. 12188, Jan. 2, 1980, 45 Fed. Reg. 989.
3 Exec. Order No. 11851, April 10, 1975, 40 Fed. Reg. 16645.
4 Arrangement Regarding International Trade in Textiles, T.I.A.S. 7840 (1973) (expired 1994).
5 In force as of January 1, 2003.

opportunities. It was superceded by the Uruguay Round Agreement on Textiles and Clothing.

Background

The first voluntary agreement to limit exports of cotton textiles to the United States was negotiated with Japan in 1957. Through the 1950's cotton textile imports, especially from Japan, continued to increase and generate pressure for import restraints. In 1956, the Congress passed the Agricultural Act of 1956 which, among other things, provided negotiating authority for agreements restricting imports of textile products. Pursuant to this authority, the United States negotiated a 5-year voluntary restraint agreement on cotton textile exports from Japan, announced in January 1957.

As textile and apparel imports from low-wage developing countries began to rise, pressure mounted for a more comprehensive approach to the import problem. On May 2, 1961, President Kennedy announced a Seven Point Textile Program, one point of which called for an international conference of textile importing and exporting countries to develop an international agreement governing textile trade. On July 17, 1961, a textile conference was convened under the auspices of the GATT. The discussions culminated in the promulgation of the Short-Term Arrangement on Cotton Textile Trade (STA) on July 21, 1961.[6] The STA covered the year October 1, 1961, to September 30, 1962, and established a GATT Cotton Textiles Committee to negotiate a long-range cotton textile agreement.

From October 1961 through February 1962, the STA signatories met in Geneva and negotiated a Long-Term Arrangement for Cotton Textile Trade (LTA), to last for 5 years beginning October 1, 1962.[7] The LTA provided for negotiation of bilateral agreements between cotton textile importing and exporting countries, and for imposition of quantitative restraints on particular categories of cotton textile products from particular countries when there was evidence of market disruption. In June of 1962, section 204 of the Agricultural Act of 1956 was amended to give the President authority to control imports from countries which did not sign the LTA.[8]

In the fall of 1965 the LTA was reviewed, and criticism within the U.S. textile industry mounted with respect to the LTA's failure to cover man-made fiber textiles. In 1967, however, the LTA was extended for 3 additional years with no additional fiber coverage. In 1970, the LTA was again extended for 3 more years.

Meanwhile, multifiber agreements limiting imports not only of cotton but also of wool and man-made fiber textiles were negotiated by the Nixon administration on a bilateral basis. On October 15, 1971, bilateral multifiber agreements were announced with Japan, Hong Kong, South Korea, and Taiwan. A multilateral

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6 T.I.A.S. 4884 (1961) (expired 1962).
7 T.I.A.S. 5240 (1962) (expired 1973).
8 Public Law 87-488, approved June 19, 1962, 76 Stat. 104.

agreement, incorporating the provisions of the bilaterals with Hong Kong, South Korea, and Taiwan, was also signed to allow the United States the authority, under section 204 of the Agricultural Act of 1956 as amended in 1962, to impose quantitative restrictions unilaterally on non-signatory countries.

The following year, in June 1972, efforts to negotiate a multifiber agreement on a broader multilateral basis led to the establishment of a GATT working party to conduct a comprehensive study of conditions of world trade in textiles. The working group submitted its study to the GATT Council early in 1973. In the fall of that year, multilateral negotiations for a multifiber agreement began after passage of a 3-month extension of the LTA. The first Multifiber Arrangement (MFA I) was concluded on December 20, 1973, and came into force January 1, 1974, supplanting the LTA.

MFA provisions

The MFA was modeled after the LTA and provided for bilateral agreements between textile importing and exporting nations under which industrial countries have negotiated quotas on imports of textiles and clothing primarily from developing countries (article 4), and for unilateral actions following a finding of market disruption (article 3).[9] Quantitative restrictions were based on past volumes of trade, with the right, within certain limits, to transfer the quota amounts between products and between years. The MFA also provided generally for a minimum annual growth rate of 6 percent.[10] Quotas already in place had to be conformed to the MFA or abolished within a year. The products covered by MFA I, II, and III included all manufactured products whose chief value is represented by cotton, wool, man-made fibers or a blend thereof. Also included were products whose chief weight is represented by cotton, wool, man-made fibers or a blend thereof. MFA IV expanded product coverage to include products made of vegetable fibers such as linen and ramie, and silk blends as well.

Overall management of the MFA was undertaken by the GATT Textiles Committee, which is made up of representatives of countries participating in the MFA and is chaired by the GATT Director General. A Textile Surveillance Body (TSB) was established to supervise the detailed implementation of the MFA.

MFA I was in effect for 4 years, until the end of 1977. During MFA renewal negotiations in July 1977, the EC succeeded in putting in the renewal protocol a

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9 Market disruption exists when domestic producers are suffering "serious damage" or the threat thereof. Factors to be considered in determining whether the domestic producers are seriously damaged include: turnover, market share, profit, export performance, employment, volume of disruptive and other imports, production, utilization of capacity, productivity, and investments. Such damage must be caused by a sharp, substantial increase of particular products from particular sources which are offered at prices substantially below those prevailing in the importing country.

10 The annual growth rate applies to overall levels of imports from a particular supplier country. Higher or lower growth rates can apply to particular products, as long as the overall growth rate with respect to that supplier country is 6 percent.

provision allowing jointly agreed "reasonable departures" from the MFA requirements in negotiating bilateral agreements. The MFA was then renewed for 4 more years.[11]

MFA II was in effect through December 1981. On December 22, 1981, a protocol was initialed extending the MFA for an additional 4½ years, and providing a further interpretation of MFA requirements in light of 1981 conditions.[12] MFA III expired on July 31, 1986. MFA IV went into effect on August 1, 1986 for a 5-year period. MFA IV was extended on July 31, 1991 for 17 months from August 1, 1991 until December 31, 1992, with the expectation that the results of the GATT Uruguay Round of Multilateral Trade Negotiations would come into force immediately thereafter. On December 10, 1992, the MFA was extended for a fifth time, until December 31, 1993, and then for a final time until December 31, 1994.

URUGUAY ROUND AGREEMENT ON TEXTILES AND CLOTHING

One aim of the Uruguay Round was to integrate the textiles and clothing sector into the GATT. The resulting Agreement on Textiles and Clothing (ATC) established a 10-year phase-out of the quotas established under the MFA, recently completed on January 1, 2005. Although the MFA expired on December 31, 1994, the bilateral agreements negotiated between individual importing and supplier governments remained in force until January 1, 2005. If the signatories to those bilateral arrangements were members of the World Trade Organization (WTO), the quota levels established under those agreements were governed by the ATC. This means that the quotas were adjusted in accordance with ATC rules.

As a general matter, the ATC was designed to generate increased opportunities for trade in the textiles and apparel sector. It liberalized the current trading rules in two ways: by increasing and then removing quotas in three phases over a 10-year transition period and by requiring all participants to provide improved access to their markets.

Thus, on January 1, 1995, each importing signatory to the WTO, including the United States, Canada, and the members of the European Union, was required to "integrate" into normal GATT rules (including GATT 1947's article XIX and the Uruguay Round's Agreement on Safeguards) textile and apparel products accounting for at least 16 percent of the trade covered by the ATC, using 1990 as the base year. Integration meant that any existing quotas on integrated products under MFA rules automatically became void and no new quotas could be imposed upon such products unless there was a determination of serious injury under GATT article XIX, the safeguards provision.

On January 1, 1998, the importing nations were required to integrate another 17 percent of trade, and on January 1, 2002, an additional 18 percent. Beginning in

11 T.I.A.S. 8939 (1977).
12 T.I.A.S. 10323 (1981).

2005, all textile and apparel trade was covered under normal GATT/WTO rules.

The U.S. Committee for the Implementation of Textile Agreements (CITA) currently was the inter-agency group responsible for administering the U.S. quota program and implementation of ATC. CITA is composed of representatives from the Departments of Commerce, State, Labor, and Treasury, and the Office of the U.S. Trade Representative. The Commerce Department official is chair of the committee and heads the Office of Textiles and Apparel (OTEXA) in the Department of Commerce which implements the terms of the agreements and decisions made by CITA. A primary function of CITA was to monitor imports and to determine when calls for consultations were to be made. The CITA announced in October 1994 which products it would integrate on January 1, 1995.[13]

Under the Uruguay Round Agreements Act (URAA), CITA decided by April 30, 1995 which products will be included in each of the next two integration "tranches," with the most sensitive products to be integrated last.[14] No changes could be made in the integration schedule, unless required by law or in order to carry out U.S. international obligations, or to correct technical errors or reclassifications. On January 1, 2005, all products were fully integrated as scheduled.

Rules of origin

The URAA also directed the U.S. Treasury Department to change by July 1, 1996, the rules of origin for textile and apparel products. Rules of origin determine which country's quotas should be charged for particular imports when manufacturing of the goods occurs in more than one country. The U.S. domestic industry sought the rules change on the ground that suppliers were purposely splitting their manufacturing operations among various countries as a means of avoiding quota restrictions.

For apparel products, the rules change means that the place of assembly will generally determine the origin of a product. Under Customs Service regulations in effect prior to July 1, 1996, the origin of apparel depended upon the complexity of the assembly operation. For garments requiring only simple assembly, such as the sewing together of four or five pieces, the country in which those pieces were cut was usually considered the country of origin. For more tailored garments, the country of assembly was the country of origin under the old rule. According to the new rule, textile products manufactured in several countries are deemed to originate where the "most important" assembly process occurred, regardless of where the product was cut. Under both the earlier rule and the rule established in 1996, the origin of knitted garments is the country in which the knit-to-shape pieces were formed.

For non-apparel products, the country in which the fabric is woven or knit

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13 59 Fed. Reg. 51942

14 60 Fed. Reg. 5625

generally is the country of origin under the new rule. Prior to the URAA changes, the country in which the fabric was printed and dyed and subject to additional "finishing operations" or in which it is cut and then sewn was often the country of origin for quota purposes.

Products covered by the United States-Israel Free Trade Area Agreement are exempt from the rules change.

BILATERAL TEXTILE AGREEMENTS

Under authority of section 204 of the Agricultural Act of 1956, as amended, and in conformity with the MFA and later the ATC, the President negotiated bilateral agreements restricting textile exports from supplier countries. There were 47 such bilateral agreements in force as of December 31, 2003, 27 of which were with members of the World Trade Organization. Provisions of bilateral agreements in effect with WTO members were carried over and remained in effect under the new ATC. Quota levels established under these agreements provided the base levels for the annual growth provisions of the ATC. Bilateral textile agreements with WTO members expired on December 31, 2004, thereby leaving trade in products under those agreements subject to general WTO rules. The United States continues to have agreements (not governed by the ATC) with eight non-WTO members.

Bilateral textile agreements apply to textile products, fiber and fabric, and apparel. Each agreement contains flexible, specific, and/or aggregate limits with respect to the type and volume of textile products that the supplier country can export to the United States. Limits are usually set in terms of square meter equivalents (SME's). They allow, under certain conditions, for carryover (from the prior year to current year within the same product category), carryforward (from the subsequent year to the current year within the same product category), and swing (from one product category to another product category within the same year) of unused portions of quotas. These provisions may be applied only with respect to specific import limits set forth in the bilateral agreement. Each agreement also provides for adjustment of import levels in accordance with specified growth rates.

Under the MFA, before CITA could request consultations with a particular country (or "issue a call") for the purpose of negotiating a quota, it had to determine that imports of a certain category of products from that country were causing—or threatening to cause—"market disruption." Thus, under the MFA, the injury determination was both product and country specific. Under the ATC, the injury had to be only product specific, and once an injury determination was made, a country could seek a quota with any supplier whose exports of that product were "increasing sharply and substantially." If consultations failed to produce an agreement on restrictive levels, and a country was able to demonstrate that such imports were causing or threatening serious damage, the country could take unilateral action to establish a quota at a level based upon trade during a recent 12-month period. Such quotas were permitted to remain in place for up to 3 years (although the quota had to be increased annually), unless the product was integrated into normal WTO rules before then. All calls were subject to review by the WTO's Textiles Monitoring Board.

TEXTILES AND APPAREL TRADE UNDER FREE TRADE AGREEMENTS

NAFTA.—NAFTA created the first of a number of special rules affecting trade in textiles and essentially serves as a model for future FTAs involving countries with significant levels of trade. The NAFTA textiles rules of origin determine which goods are "originating" and therefore eligible for preferential treatment, i.e., reduced or duty-free entry. Products of Canada or Mexico that do not meet the NAFTA origin rules, or one of the several exceptions to those rules, are not precluded from entering the United States. However, they may be subject to normal (non-preferential) duties or, for Mexican goods, to quota requirements.

A "yarn-forward" rule of origin applies to most textile products, although there are a number of exceptions. Yarn-forward means that the finished textile or apparel product must be made from fabric formed in North America from yarn spun in North America. The agreement itself does not use the term "yarn-forward," because the rule of origin is implemented through a tariff-shift method. Essentially, an annex to the agreement lists various categories of goods by reference to their tariff lines and provides the degree of shift needed for the good to be transformed sufficiently to qualify for NAFTA origination. Thus, the NAFTA rule of origin for most textile and apparel goods in HTS Chapter 61 implicitly sets a "yarn-forward" rule of origin when it states that the good must have changed from another chapter, i.e., the good before transformation must not have begun as a yarn, fabric, or apparel component, which are largely classified in the same chapter as the finished good.

NAFTA also includes "tariff preference levels" (TPLs) that permit a limited number of Canadian and Mexican textile and apparel products to enter the United States each year at the preferential NAFTA tariff rate even though the products do not meet the "yarnforward" origin rules, and therefore are not "originating" goods. These are essentially annual tariff rate quotas. Once imports reach the TPL limit, most-favored-nation (MFN) duties will be applied to any additional non-originating products entered during the rest of the year.

Most quotas on Mexican-made textile and apparel products were eliminated upon implementation of the NAFTA, but a few quotas remained. The remaining quotas applied only to products that did not meet the preferential NAFTA origin rules but were considered to be products of Mexico for other purposes. The remaining U.S. quotas on Mexican goods were removed by the year 2004.

Israel and Jordan.—Unlike NAFTA, the U.S-Jordan FTA and the U.S.-Israel FTA do not have specific textile and apparel rules of origin, largely because trade with these countries did not warrant the need for negotiating such a complex set of rules. Instead, textile and apparel goods must meet the same rule of origin as other goods: 1) the good must be wholly the growth, product, or manufacture of a party to the agreement, and 2) the party must have contributed at least 35% of the value of the product based upon contribution of materials or processing.

Chile.—The U.S.-Chile FTA uses very similar, sometimes identical, rules of origin for textiles and apparel as in NAFTA. Under Chapter 4 of the FTA, an apparel product must generally meet a tariff shift rule, which implicitly imposes a yarn-forward requirement. To qualify as an originating good imported into the United States from Chile, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Chile from yarn, or fabric made from yarn, that originates in Chile or the United States. There is a limited amount of apparel that may enter the United States duty free, subject to tariff preference level (TPL) caps if it does not meet the rule of origin.

Singapore.—The textile and apparel rule of origin in the U.S.-Singapore FTA is similar to that in the U.S.-Chile FTA. Annex 3A of the FTA states that an apparel product must generally meet a tariff shift rule, which implicitly imposes a yarn-forward requirement. To qualify as an originating good imported into the United States from Singapore, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Singapore from yarn, or fabric made from yarn, that originates in Singapore or the United States. There is a limited amount of apparel that may enter the United States duty free, subject to tariff preference level (TPL) caps, even if it does not meet the rule of origin.

Morocco.— Under the rules in Article 4.3 and Annex 4-A of the FTA, an apparel product must generally meet a tariff shift rule, which implicitly imposes a `yarn forward' requirement. To qualify as an originating good imported into the United States from Morocco, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Morocco from yarn, or fabric made from yarn, that originates in Morocco or the United States, or both. However, Article 4.3.11 provides a limited exception to this general rule allowing access for 30 million square meter equivalents of apparel that does not meet the yarn forward rule of origin in the first year of the Agreement, phasing down over a ten-year period. Section 203 also includes a de minimis exemption providing that in most cases a textile or apparel good will be considered originating if the total weight of all nonoriginating fibers or yarns is not more than 7 percent of the total weight of the good.

Australia.—The U.S.-Australia FTA follows the Chile/Singapore model. Under chapter 5.1 and Annex 4-A of the FTA, an apparel product must generally meet a tariff shift rule, which implicitly imposes a yarn-forward requirement. To qualify as an originating good imported into the United States from Australia, an apparel product must have been cut (or knit to shape) and sewn or otherwise assembled in Australia from yarn, or fabric made from yarn, that originates in Australia or the United States, or both.

SECTION 22 OF THE AGRICULTURAL ADJUSTMENT ACT OF 1933

Section 22 of the Agricultural Adjustment Act of 1933, as amended (7 U.S.C. 624), authorizes the President to impose fees or quotas on imported products that undermine any U.S. Department of Agriculture (USDA) domestic commodity program. This authority is designed to prevent imports from interfering with USDA efforts to stabilize domestic agricultural commodity prices. However, in the Uruguay Round Agreement on Agriculture, the United States agreed to convert all quotas and fees on imports from any country to which the United States applies the WTO Agreement to tariff-rate quotas. Section 22 authority is available now only for imports from countries to which the United States does not apply the WTO Agreement. As such, Section 22 is inoperable for all practical purposes.

Basic provisions

Under section 22, the Secretary of Agriculture advises the President when the Secretary has reason to believe that—

(1) imports of an article are rendering, or tending to render ineffective, or materially interfering with, any domestic, agricultural-commodity price-support program, or other agricultural program; or

(2) imports of an article are reducing substantially the amount of any product processed in the United States from any agricultural commodity or product covered by such programs.

If the President agrees that there is reason for the Secretary's belief, the President must order an ITC investigation and report. Using this report as his basis, the President must determine whether the statutory conditions warranting imposition of a section 22 quota or fee exist.

If the President makes an affirmative determination, he is required to impose, by proclamation, either import fees (which may not exceed 50 percent ad valorem) or import quotas (which may not exceed 50 percent of the quantity imported during a representative period) sufficient to prevent imports of the product concerned from harming or interfering with the relevant agricultural program.

Application

In the past, section 22 was used to impose import restrictions on 12 different commodities or food product groups: (1) wheat and wheat flour; (2) rye, rye flour, and rye meal; (3) barley, hulled or unhulled, including rolled, ground, and barley malt; (4) oats, hulled or unhulled, and unhulled ground oats; (5) cotton, certain cotton wastes, and cotton products; (6) certain dairy products; (7) shelled almonds; (8) shelled filberts; (9) peanuts and peanut oil; (10) tung nuts and tung oil; (11) flaxseed and linseed oil; and (12) sugars, syrups, and sugar-containing products. Section 22 fees and quotas have since been terminated for most of these commodities. Prior to implementation of the Uruguay Round Agreement on agriculture in late 1994, import quotas were in place to protect certain cotton, specific dairy products, peanuts, and certain sugar-containing products, such as sweetened cocoa, pancake flours, and ice-tea mixes. Import fees were in place on refined sugar.

AGRICULTURE TRADE UNDER THE URUGUAY ROUND AGREEMENTS ACT

Background

The Uruguay Round Agreement on Agriculture strengthens multilateral rules for trade in agricultural products and requires WTO members to reduce export subsidies, trade distorting domestic support programs and import protection. The Agreement establishes rules and reduction commitments over 6 years for developed countries and 10 years for developing countries on export subsidies, domestic subsidies, and market access. The Agreement is intended to be the beginning of a reform process for world trade in agriculture and provides for the initiation of a second round of negotiations concerning agriculture trade beginning in the year 2000.

Export subsidies must be reduced from 36 percent (budget outlays) and 21 percent (volume) from a 1986-1990 base period for specific products and categories. Trade distorting domestic subsidies must be bound and reduced by 20 percent from a 1986-1990 base period. Non-tariff import barriers are subject to comprehensive tariffication, and minimum or current market access commitments. The United States thus agreed to convert quotas and fees authorized under section 22 of the Agricultural Adjustment Act to tariff-rate equivalents in the form of tariff-rate quotas. In the Uruguay Round, all U.S. agriculture tariffs were bound and subject to specific reduction commitments.

The operation of these rules is linked to particular commitments by each WTO member contained in that WTO member's schedule annexed to the Marrakesh Protocol to the GATT 1994. Each WTO member's schedule sets forth the WTO members' commitments regarding the access it will provide to its market for imports of agriculture products and the maximum amount of domestic support and export subsidies it will provide to agricultural products. Under article 3 of the Agreement, the domestic support and export subsidy commitments in each WTO member's schedule are an integral part of GATT 1994.

Article 2 and annex 1 of the Agreement define agricultural products covered as those products classified in chapters 1-24 of the Harmonized Tariff Schedule (HTS) (excluding fish and fish products) and under 13 headings or subheadings in other chapters of the HTS, including cotton, wool, hides and fur skins.

The United States was obligated to implement its commitments over a 6-year period beginning in 1995. The rights and obligations in the Agriculture Agreement supplement those in GATT 1994, including the Agreements on

Subsidies and Countervailing Measures and Application of Sanitary and Phytosanitary Measures.

Basic provisions

Section 401(a)(1) of the Uruguay Round Trade Agreements Act amends section 22 of the Agricultural Adjustment Act of 1933, such that no quota or fee shall be imposed under this section with respect to any import that is the product of a country or separate customs territory to which the United States applies the WTO Agreements. Accordingly, when products of WTO members only are involved, there would be no need to conduct a section 22 investigation. Section 22 authority is retained with respect to imports from countries and separate customs territories to which the United States does not apply the WTO agreements. These amendments were effective upon entry into force of the WTO Agreement, January 1, 1995.

The conversion of U.S. quantitative import restrictions to tariff-rate quotas and staged tariff reductions was implemented by Presidential Proclamation No. 6763 issued on December 13, 1994. Effective on January 1, 1995, this proclamation amended the HTS of the United States under general authority provided to the President in the Uruguay Round Agreements Act. The President proclaimed tariff-rate quotas for the following products subject to tariffication by the United States: dairy products, sugar, sugar-containing products, peanuts, cotton and beef. In general tariff-rate quotas replaced previously applicable restrictions as of January 1, 1995. In some cases, however, the United States began implementing its increased access commitments after the entry into force of the WTO Agreement, if the quota year for those products began at a different time of year.

Section 404(a) of the Uruguay Round Agreements Act authorizes the President to take such action as may be necessary to implement the tariff-rate quotas set out in the U.S. agricultural tariff concessions in schedule XX of the Agreement and to ensure that imports of agricultural products do not disrupt the orderly marketing of commodities in the United States. Section 404(b) authorizes the President, upon the advice of the Secretary of Agriculture, to temporarily increase the in-quota quantity of an agricultural import that is subject to a tariff-rate quota when the President determines and proclaims that the supply of the same, directly competitive, or substitutable agricultural product will be inadequate because of natural disaster, disease or a major national market disruption to meet domestic demand at reasonable prices.

In administering the tariff-rate quota, the President is authorized to allocate, among supplying countries or customs areas, the in-quota quantity of a tariff-rate quota for any agricultural product, and to modify any allocation as he deems appropriate.

Section 404(e) of the Uruguay Round Agreements Act amends the Caribbean Basin Economic Recovery Act (CBERA), the Andean Trade Preference Act

(ATPA), the Generalized System of Preferences (GSP) statute, and General Note 3(a) to the HTS (relating to insular possessions) to specify that any duty preference afforded these laws will be available only for the in-quota amount of a tariff-rate quota. Over-quota imports from CBERA, ATPA, or GSP countries, or U.S. insular possessions will in all cases be subject to the higher rate of duty. Section 405(b) requires the President, if he determines that it is appropriate, to invoke either a volume-based or price-based special safeguard for agricultural goods and to determine, consistent with article 5, the amount of the additional duty to be imposed, the period during which such duty will be imposed, and any other terms and conditions applicable to the duty.

AGRICULTURE TRADE UNDER THE NORTH AMERICAN FREE TRADE AGREEMENT IMPLEMENTATION ACT

Background

NAFTA is the first free trade agreement entered into by the United States that employs the concept of "tariffication" of agricultural quantitative restrictions. Under this method, a country replaces each of its non-tariff barriers with a "tariff-equivalent," which is a tariff set at a level that will provide protection for a product equivalent to the non-tariff barrier that the tariff replaces. In the case of several agricultural goods listed in the tariff schedules of each NAFTA country, the NAFTA countries converted quantitative restrictions to tariffs or tariff-rate quotas.

Pursuant to the NAFTA, U.S. section 22 quotas and fees were converted to tariff-rate quotas, under which "qualifying" Mexican dairy products, cotton, sugar-containing products, and peanuts will enter the duty free up to a certain quantity of imports (the "in quota" quantity.) A "qualifying good" is an agricultural good that meets, based on its Mexican content alone, the NAFTA rules of origin contained in section 202 of the NAFTA Implementation Act.

To a large extent, the NAFTA agriculture agreement amounts to three bilateral agreements rather than a trilateral accord. For agriculture goods traded between United States and Canada, the NAFTA incorporates the agricultural market access provisions of chapter 7 of the United States-Canada Free-Trade Agreement (CFTA). The NAFTA sets out separate agricultural market access agreements between Mexico and the United States and between Mexico and Canada. In addition the NAFTA includes several obligations governing agriculture trade common to all three countries.

Basic provisions

Section 321(b) of the North American Free Trade Agreement Implementation Act authorizes the President, pursuant to the NAFTA, to exempt any "qualifying good" from any quantitative limitation or fee imposed under section 22 of the Agricultural Adjustment Act for as long as Mexico is a NAFTA country.

As discussed above, the United States agreed to convert its import quotas to tariff rate quotas under section 22 of the Agricultural Adjustment Act for imports from Mexico of dairy products, cotton, sugar-containing products and peanuts. Article 302(4) of the NAFTA permits the allocation of the in-quota quantity under these tariff rate quotas, provided that such measures do not have trade restrictive effects on imports in addition to those caused by the imposition of the tariff-rate quotas. Section 321(c) of the NAFTA Act directs the President to take such action as may be necessary to ensure that imports of goods subject to tariff rate quotas do not disrupt the orderly marketing of commodities in the United States.

Section 321(f) of the Act is a free-standing provision that establishes an end-use certificate requirement for imports of wheat or barley imported into the United States from any foreign country or instrumentality that requires end-use certificates on wheat or barley produced in the United States.

Section 308 of the NAFTA Act amends the CFTA Act, which implemented the tariff "snapback" provided for in article 702 of the CFTA, to provide that the President may impose a temporary duty on imports of a listed Canadian fresh fruit or vegetable if a certain import price and other conditions exist.

Section 309 establishes a price-based snapback for imports of frozen concentrated orange juice into the United States from Mexico. The tariff on imports of Mexican frozen concentrated orange juice in excess of the threshold quantity will "snapback" or revert to the lesser of the prevailing most-favored-nation rate or the rate of duty on that product in effect as of July 1, 1991, if futures prices for frozen concentrated orange juice in the United States fall below a historical average price for 5 consecutive days. This tariff snapback is automatically triggered and removed upon a determination by the Secretary of Agriculture.

AGRICULTURE TRADE UNDER OTHER FREE TRADE AGREEMENTS

Israel.—The U.S.-Israel FTA was one of the first trade agreements negotiated by the United States. Effective January 1, 1995, duties on imports from each country were eliminated. However, Article 6 (Import Restrictions on Agriculture) of the FTA provides, "Import restrictions, other than customs duties, including, but not limited to, quantitative restrictions and fees, based on agricultural policy considerations may be maintained by the Parties." The meaning of the clause continues to be an issue of dispute between Israel and the United States. Israel interprets the clause as permitting "fees" and quantitative restrictions on a variety of specialty crops, including apples, peaches, pears, and almonds. As a result, Israel maintains a system of import levies and TRQs for certain agricultural products. Some of the levies are ad valorem while others are based on weight. All are set at levels well below Israel's MFN commitments. Most of the TRQs allow a duty-free import into Israel of certain agricultural commodities above the WTO limit.

As a consequence of the disagreement, the United States and Israel concluded a five-year agreement in 1996, which provides for the treatment of U.S. and Israeli agricultural products. Under this agreement, which was extended through 2002 and later through 2008, 88% of U.S. agriculture exports to Israel are duty and quota free. That agreement does, however, continue to place restrictions on a number of specialty product exports deemed politically sensitive by the Israeli government.

Singapore.—Singapore has traditionally been a net importer of agriculture products, and the FTA locks in place Singapore's zero duty rate for U.S. farm products. The United States generally maintained or provided immediate duty-free access for most agricultural goods from Singapore with up to ten-year phase outs and/or tariff rate quotas for more sensitive products such as dairy and cotton. There is no agriculture-specific safeguard in the implementing legislation (Public Law 108-78).

Chile.—Chapter Three of the FTA provides that the Parties will work together in WTO agriculture negotiations to eliminate export subsidies. Other notable provisions on agricultural trade address rules on subsidized exports between the Parties and mutual recognition of grading, quality, or marketing measures. For sugar, the chapter provides that each Party's access to the other's market is limited to the amount of its net trade surplus. Under the FTA, Chile and the United States will gradually harmonize their wine import duties at the lowest rates in either country and then eliminate all duties on bilateral trade in wine.

Recognizing the special conditions agricultural products face, Chapter Three of the FTA, and Section 201(c) of the implementing legislation (Public Law 108-77), also set out a transitional tariff "snap-back" mechanism that allows a Party to impose a temporary duty on specified agricultural products under certain conditions. Once tariffs on a product reach zero, the Parties may no longer use the snap-back for that product. The temporary duty may not exceed normal trade relations/ most-favored-nation (NTR/MFN) rates. The safeguard is price-based, automatic, and will remain in effect throughout the 12-year transition period. Prices for imports of commodities subject to the safeguard will automatically be assessed a tariff uplift if the import value of the commodity falls below the trigger price established in the agreement.

Morocco.—The FTA includes several provisions designed to eliminate barriers to trade in agricultural products, while providing adjustment periods, TRQs, and safeguards for producers of import-sensitive agricultural products.

Under the FTA, each Party will eliminate export subsidies on agricultural goods destined for the other country. If a third country subsidizes exports to a Party, the other Party may initiate consultations with the importing Party to develop measures the importing Party may adopt to counteract such subsidies. If the importing Party agrees to such measures, the exporting Party must refrain from applying export subsidies to its exports of the good to the importing Party. The Agreement also includes safeguard procedures to aid domestic industries that are facing increased imports or imports below a price threshold of certain agricultural goods. For the United States, such goods include canned olives, dried onion and garlic, canned fruit, processed tomato products, and orange juice.

Section 202(b) of the implementing legislation (Public Law 108-302) contains provisions regarding the imposition of safeguard measures on imports of agricultural goods specified in Annex 3-A of the Agreement. Section 202(b)(1) establishes the basic authority for such safeguards. Section 202(b)(2) of the bill explains how the additional duties are to be calculated. The United States may apply the additional duties to shipments of any such good whose price is below the threshold ("trigger price") for the good set out in Annex 3-A. The rate of additional duty under the safeguard increases as the difference increases between the unit import price of a shipment and the trigger price specified in Annex 3-A.

Section 202(b)(3) of the bill implements Article 3.5.3 of the Agreement by establishing that no additional duty may be applied on a good if, at the time of entry, the good is subject to a measure under the bilateral safeguard mechanism established under Subtitle A of Title III of the bill or under the safeguard procedures set out in Chapter 1 of Title II of the Trade Act of 1974. Section 202(b)(4) of the bill provides that agricultural safeguard provisions cease to apply with respect to a good on the date on which duty-free treatment must be provided to that good under the Agreement. Section 202(b)(5) of the bill provides that if an agricultural safeguard good is subject to a tariff-rate quota, any additional agricultural safeguard duties may be applied only on over-quota imports of the good.

Australia.—The FTA includes several provisions designed to eliminate barriers to trade in agricultural products, while providing adjustment periods and safeguards for producers of import sensitive agricultural products. In addition, the United States and Australia have agreed to work together in WTO agriculture negotiations to: (1) substantially improve market access; (2) reduce, with a view to phasing out, all forms of export subsidies; (3) develop disciplines eliminating state trading enterprises' monopoly export rights; and (4) substantially reduce trade-distorting domestic support.

Key U.S. agricultural products that received immediate tariff elimination from Australia include: soybeans and oilseeds products, fruits, vegetables, nuts, pork products, and processed food products such as soups and bakery products. U.S. dairy farmers are granted immediate duty-free access to the Australian market, but access for Australian dairy farmers is capped by permanent tariff rate quotas for sensitive products. The United States provided no additional market access for sugar from Australia, and no beef product imports from Australia receive duty free treatment prior to January 1, 2023.

Under the FTA, each Party will eliminate export subsidies on agricultural goods destined for the other country. If a third country subsidizes exports to a Party, the other Party may initiate consultations with the importing Party to develop measures the importing Party may adopt to counteract such subsidies. If the importing Party agrees to such measures, the exporting Party must refrain from applying export subsidies to its exports of the good to the importing Party.

The FTA includes safeguard procedures to aid domestic industries that are facing increased imports or imports below a price threshold of certain agricultural goods. A Party may not apply a safeguard measure to a good that is already the subject of a safeguard under either Chapter Nine (Safeguards) of this Agreement or Article XIX of GATT 1994 and the WTO Safeguards Agreement. All safeguard measures must be applied and maintained in a transparent manner, and the Party applying such a measure must, upon request, consult with the other Party concerning the application of the measure.

Section 202 of the U.S.-Australia FTA Implementation Act implements the agricultural safeguard provisions of Article 3.4 and Annex 3-A of the Agreement. Article 3.4 permits the United States to impose an agricultural safeguard measure, in the form of additional duties, on imports from Australia of an agricultural good listed in the U.S. schedule to Annex 3-A of the Agreement. The U.S. schedule, in turn, provides for three different types of agricultural safeguards. The first (set out in Section A of Annex 3-A) applies to horticulture goods specified in the Annex. The second (set out in Section B of Annex 3-A) applies to certain beef goods imported into the United States above specified quantities during the period from January 1, 2013 through December 31, 2022. The third (set out in Section C of Annex 3-A) applies to the same categories of beef goods imported into the United States above specified quantities and the monthly average index price in the United States falls below the specified "trigger" price beginning January 1, 2023.

Section 202(a) of the bill provides the overall contour of the safeguard rules, including definitions of terms used in respect of the three safeguard provisions. Section 202(a)(2) defines the applicable normal trade relations/most-favored-nation ("NTR/MFN") rate of duty for the purposes of the agricultural safeguards. Under the Agreement, the sum of the duties assessed under an agricultural safeguard and the applicable rate of duty in the U.S. schedule may not exceed the general NTR/MFN rate of duty. No safeguard may be applied to a product that has received duty free treatment.

The price-based horticultural safeguard consists of a schedule of eligible horticultural goods and their respective "trigger" prices, as well as a methodology for determining the amount of an additional safeguard duty. The U.S. horticulture schedule includes goods such as dried onion and garlic, canned fruit, processed tomato products, and various juices. In years 9 through 18, the United States will impose a quantity-based safeguard measure on certain beef imports when such imports exceed an established volume "trigger." The safeguard measure will remain in force until the end of the calendar year in which the measure applies.

Starting in year 19 of the Agreement, the United States. will impose a price-based safeguard on certain beef imports when the U.S. monthly average index price for beef falls below a trigger price that is calculated at 6.5 percent less than the average of the previous 24 monthly average index prices.

MEAT IMPORT ACT OF 1979

The Meat Import Act of 1979, as amended, required the President to impose quotas on imports of beef, veal, mutton, and goat meat when the aggregate quantity of such imports on an annual basis was expected to exceed a prescribed trigger level. As a matter of practice, the import-limiting effect of the Meat Import Act was achieved, prior to the conclusion of the Uruguay Round, through the negotiation of voluntary restraint agreements with major supplier countries of the covered products. Section 403 of the Uruguay Round Act repealed the Meat Import Act of 1979 in order to conform to U.S. commitments under the Agreement on Agriculture not to maintain this type of quantitative import restriction. The Uruguay Round Act substitutes a tariff-rate quota on meat imports for the previous import restrictions.

RECIPROCAL MEAT INSPECTION REQUIREMENT

Section 4604 of the Omnibus Trade and Competitiveness Act of 1988[15] amends section 20 of the Federal Meat Inspection Act (21 U.S.C. 620) to authorize strict enforcement of all standards which are applicable to meat articles in domestic commerce, for meat articles imported into the United States. If the Secretary of Agriculture determines that a foreign country applies meat inspection standards that are not related to public health concerns about end-product quality which are substantiated by reliable analytical methods, the Secretary must consult with the U.S. Trade Representative and they shall make a recommendation to the President as to what action should be taken. The President may require that a meat article produced in a plant in such foreign country may not be permitted entry into the United States unless the Secretary determines that the meat article has met the standards applicable to meat articles in commerce within the United States. The annual report required generally under section 20 of the Federal Meat Inspection Act shall include the name of each foreign country that applies standards for the importation of meat articles from the United States that are not based on public health concerns.

Enactment of this provision resulted from congressional concern over the European Community's (EC) hormone ban, which since 1989 has effectively banned all meat exports from the United States to the EC that were produced from livestock treated with hormones, despite scientific evidence establishing the safety of U.S. production methods. At the time of enactment, bilateral consultations with the EC were underway, and Congress wanted to strengthen the Administration's

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

authority to respond to the EC action. The authority added by section 4604 was intended to be used either in addition to, or instead of, other authorities (such as section 301 of the Trade Act of 1974).

SUGAR TARIFF-RATE QUOTAS UNDER HARMONIZED TARIFF SCHEDULE AUTHORITIES

Additional U.S. note 5 to chapter 17 of the Harmonized Tariff Schedule of the United States (HTS) authorizes the Secretary of Agriculture, in consultation with other agencies, to establish, for each fiscal year, the quantity of sugars and syrups that may be entered at the lower tariff rates under two tariff-rate quotas (TRQ's). The TRQ's cover sugars and syrups described in HTS subheadings 1701.11, 1701.12, 1701.91, 1701.99, 1702.90, and 2106.90. This authority was proclaimed to implement the results of the Uruguay Round of multilateral trade negotiations as reflected in the provisions of schedule XX (United States), annexed to the Agreement Establishing the World Trade Organization.[16]

Background

The United States has always been a net importer of sugar, at times importing more than half of the nation's sugar consumption. However, sugar imports have been restricted almost continuously since 1934 in order to maintain and foster the domestic sugarcane and sugar beet industries. From the enactment of the Jones Costigan Sugar Act of 1934[17] through the expiration of the Sugar Act of 1948 on December 31, 1974,[18] sugar imports were restricted by a statutory quota. Historically, this system of import protection has maintained a U.S. price for sugar well above the world price.

Shortly before the expiration of the Sugar Act of 1948, an absolute import quota was proclaimed by President Ford, although the quota quantity was so large as to be non-restrictive.[19] The quota derived from a note that had been negotiated in the Annecy (1949) and Torquay (1951) Rounds of multilateral trade negotiations and was proclaimed as a headnote to the Tariff Schedule of the United States (TSUS) following the conclusion of the Kennedy Round (1963-1967). On May 5, 1982, President Reagan modified this headnote quota to: (1) make it restrictive; (2) allocate the quota among supplying countries in accordance with their shares of the U.S. market during the period from 1975 through 1981; and (3) authorize the Secretary of Agriculture to establish and modify the quota amount in subsequent

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

17 Public Law 73-213, ch. 263, approved May 9, 1934, 48 Stat. 670.

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

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

periods.[20]

By 1988, the quota had been reduced to the lowest ratio of imports to domestic production in the nation's history. The government of Australia challenged the legality of the sugar import quota under the provisions of the General Agreement on Tariffs and Trade (GATT), and in 1989, a GATT dispute settlement panel found the quota illegal. In 1990, President Bush issued Proclamation No. 6179[21] to convert the absolute import quota into a tariff-rate quota, thereby bringing it into conformity with the GATT TRQ panel decision. During the Uruguay Round of multilateral trade negotiations, the quota was reconverted into two TRQ's, one for imports of raw cane sugar and the other for imports of refined sugar, including syrups. The United States agreed to bind its minimum total sugar/syrups TRQ at 1,139,195 metric tons (MT). In addition, the United States agreed to reduce the second tier (over quota) tariff rates by 15 percent over 6 years.[22]

Under the tariff-rate quota system, the Secretary of Agriculture establishes the quota quantity that can be entered at the lower tier of tariff rates, and the USTR allocates this quantity among the 40 eligible sugar exporting countries. The quantities allocated to beneficiary countries under the GSP, the CBI and the ATPA receive duty-free treatment. Certificates of Quota Eligibility (CQE) are issued to the exporting countries and must be executed and returned with the shipment of sugar in order to receive quota treatment.[23] Imports of raw cane sugar are permitted in addition to the quota quantity on condition that such sugar is to be refined and used in the production of certain polyhydric alcohols or to be re-exported in refined form or in sugar-containing products.[24]

The quantity of sugar which may be imported duty free from Mexico is governed by paragraphs 13-22 of section A of annex 703.2 of the North American Free Trade Agreement (NAFTA). Since 1982, Mexico has been included within a basket category known as the "other specified countries and areas" and has been allocated a minimum quota amount, currently set at 7,258 MT raw value. The NAFTA guarantees the greater of this access or Mexico's net surplus production, but no greater than 25,000 MT during the first 6 years or 250,000 MT during the remaining 8 years of the NAFTA implementation period. Additional sugar may enter at a duty rate that is being eliminated in stages through 2008. During each of the first 14 years of the NAFTA, Mexico and the United States will jointly determine whether either has been or is projected to be a net surplus producer.[25] This formula is stated in a NAFTA side agreement between Mexico and the United States but is disputed by Mexico. Mexico claims the side agreement is invalid and significantly understates the quantity of sugar it can legally export to the United

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20 Pres. Proc. No. 4941, May 5, 1982, 47 Fed. Reg. 19661.
21 Pres. Proc. No. 6179, September 13, 1990, 55 Fed. Reg. 38293.
22 See Pres. Proc. No. 6763, December 23, 1994.
23 See 15 CFR part 2011.
24 See additional U.S. note 6 to chapter 17 of the HTS and 7 CFR part 1530
25 For purposes of the NAFTA formulas, high fructose corn syrup (HFCS) is included in determining the consumption of sugar.

States. Because the United States recognizes and adheres to the side agreement by limiting sugar imports from Mexico, Mexico has retaliated using various methods to prevent the import of U.S. high fructose corn syrup; such Mexican retaliatory methods as dumping orders and discriminatory taxes on U.S. high fructose corn syrup have been the basis of various WTO disputes brought by the United States against Mexico. All sugar imports from Mexico will enter duty free after the 14-year transition period.

As with any product subject to strict import restrictions, circumvention of the sugar TRQ is a concern for U.S. Customs officials. After one importer was found to be engineering a fake product by mixing sugar with molasses for the purpose of avoiding the sugar TRQ, Congress clarified the definition of sugar in the Trade Act of 2002. Preexisting law provided for a product to be classified as sugar in HTS 1702.90.05 if it contained no more than 6% non-sugar solids excluding foreign substances. The new sugar definition clarifies that molasses is a foreign substance that should be excluded for purposes of determining whether the product has 6% or more non-sugar solids. In addition, the Secretary of Agriculture and Commissioner of Customs are to continuously monitor certain imports of sugar and sugar-containing products for circumvention of the sugar tariff-rate quota.[26]

Import Prohibitions on Certain Agricultural Commodities Under Marketing Orders

Section 8e of the Agricultural Adjustment Act, as Amended

Section 8e of the Agricultural Adjustment Act, as amended,[27] restricts the importation of certain specified commodities which do not meet relevant grade, size, quality or maturity requirements imposed under the marketing order in effect for such commodity. The specified commodities include tomatoes, raisins, olives (other than Spanish-style green olives), prunes, avocados, mangoes, limes, grapefruit, green peppers, Irish potatoes, cucumbers, oranges, onions, walnuts, dates, filberts, table grapes, eggplants, kiwifruit, nectarines, plums, pistachios, and apples.

Any restriction under this authority may not be made effective until after the Secretary of Agriculture gives reasonable notice (of not less than 3 days) and receives the concurrence of the U.S. Trade Representative. The Secretary of Agriculture may promulgate such rules and regulations as he deems necessary, to carry out the provision of this section. Whenever the Secretary of Agriculture finds that the application of the restrictions under a marketing order to an imported commodity is not practicable because of variations in characteristics between the domestic and imported commodity, he/she must establish with respect to the

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

27 7 U.S.C. 608e-1.

imported commodity such grade, size, quality, and maturity restrictions by varieties, types, or other classification as he/she finds will be equivalent or comparable to those imposed upon the domestic commodity under such order.

Section 4603 of the Omnibus Trade and Competitiveness Act of 1988 amended section 8e to provide additional authority for the Secretary to establish an additional period of time (not to exceed 35 days) for restrictions to apply to imported commodities, if the Secretary determines that such additional period of time is necessary to effectuate the purposes of the Act and to prevent the circumvention of the requirement of a seasonal marketing order. In making this determination, the Secretary must consider: (1) the extent to which imports during the previous year were marketed during the period of the marketing order and such imports did not meet the requirements of the marketing order; (2) if the importation into the United States of such commodity did, or was likely to, circumvent the grade, size, quality or maturity standards of a seasonal marketing order; and (3) the availability and price of commodities of the variety covered by the marketing order during any additional period the marketing order requirements are to be in effect.

Section 1308 of the Food, Agriculture, Conservation, and Trade Act of 1990 (the "1990 farm bill") amended section 8e to require the Secretary to consult with the USTR prior to any import restriction or regulation being made effective. The USTR must advise the Secretary within 60 days of being notified, to ensure that the proposed grade size, quality, or maturity provisions are not inconsistent with U.S. international obligations. If the Secretary receives the concurrence of the USTR, the proposed prohibition or regulation may proceed.

Authorities to Restrict Imports Under Certain Laws

MARINE MAMMAL PROTECTION ACT OF 1972, AS AMENDED

The Marine Mammal Protection Act (MMPA), enacted in 1972,[28] places a ban on the importation of marine mammals and marine mammal products, except in limited circumstances, such as for scientific research. The MMPA also directs the Secretary of the Treasury to ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards. In carrying out the ban, the Secretary, in the case of yellowfin tuna harvested with purse seine nets in the eastern tropical Pacific Ocean, and products therefrom, to be exported to the United States, must require that the government of the exporting nation provide certain documentary evidence relating to that country's marine mammal conservation programs. The Secretary must also require the government of any intermediary nation from which yellowfin tuna or

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

tuna products will be exported to the United States to certify and provide reasonable proof that it has acted to prohibit the importation of such tuna and tuna products from any nation from which direct export to the United States of such tuna and tuna products is banned under the Act.

In 1984, the MMPA was amended to require that each nation wishing to export tuna to the United States document that it has adopted a dolphin conservation program "comparable" to that of the United States, and that the average rate of mortality of its purse seine fleet is comparable to that of the U.S. fleet. If these requirements are not met, an embargo on the import of yellowfin tuna and tuna products from that nation will be invoked. In 1988, the MMPA was further amended with respect to these "comparability" provisions by requiring that the regulatory programs of other nations in the eastern tropical Pacific tuna fishery be at least as restrictive as those of the United States. The 1988 amendments also require that the government of any intermediary nation from which yellowfin tuna or tuna products will be exported to the United States certify and provide reasonable proof that it has acted to prohibit the importation of tuna and tuna products from embargoed nations.

As a result of amendments to the MMPA made by the International Dolphin Conservation Program Act of 1997, the trade restrictions for intermediary countries were eliminated and provisions were put in place to lift the embargoes on yellowfin tuna harvested by setting purse seine nets on dolphins in the eastern Pacific Ocean. Since then, the embargoes were lifted for Ecuador and Mexico, and other countries including Peru and El Salvador have begun the process to have their embargoes lifted.

INTERNATIONAL DOLPHIN CONSERVATION PROGRAM ACT

The International Dolphin Conservation Program Act (Public Law 105-52), approved August 15, 1997, established the International Dolphin Conservation Program to implement into U.S. law the Declaration on Panama concerning tuna fishing in the Eastern Tropical Pacific Ocean.

In 1992, Eastern Tropical Pacific nations concluded the La Jolla Agreement, a non-binding international agreement establishing an International Dolphin Conservation Program under the auspices of the Inter-American Tropical Tuna Commission. The agreement established annual limits on incidental dolphin mortality, required observers on tuna vessels, established a review panel to monitor fleet compliance, and created a scientific research and education program and advisory board. The agreement established a dolphin mortality limit for each vessel, and when that limit was reached, such vessel would be required to discontinue "setting on dolphins" for the remainder of the year.

In October 1995, 12 nations signed the Declaration of Panama, including the Unites States, Belize, Colombia, Costa Rica, Ecuador, France, Honduras, Mexico, Panama, Spain, Vanuatu, and Venezuela. The Panama Declaration endorses the success of the La Jolla Agreement and adjusts the marketing policy of dolphin safe tune in recognition of this success. In exchange for modifications to U.S. law, foreign signatories agreed to modify and formalize the La Jolla Agreement as a binding agreement. Signatories agreed to adopt conservation and management measures to ensure long-term sustainability of tuna and living marine resources, assess the catch and bycatch of tuna and take steps to reduce or eliminate the bycatch, implement the binding agreement through enactment of domestic legislation, enhance mechanisms for reviewing compliance with the International Dolphin Conservation Program, and establish annual quotas for dolphin mortality limiting total annual dolphin mortality to fewer than 5,000 animals.

The International Dolphin Conservation Program Act implements the Declaration of Panama in U.S. law by changing the circumstances under which the import ban on yellowfin tune in section 101 of the MMPA would be imposed. Specifically, the bill permits importation of yellowfin tuna if the harvesting nation complies with international standards, as follows: (1) the tuna was harvested by vessels of a nation that participates in the International Dolphin Conservation Program, the harvesting nation is either a member of has initiated steps to become a member of the Inter-American Tropical Tuna Commission, and the nation has implemented its obligations under the Program and the Commission; and (2) total dolphin mortality permitted under the Program is limited.

ENDANGERED SPECIES ACT OF 1973, AS AMENDED

The Endangered Species Act[29] authorizes the Secretary of the Interior to create lists of species or subspecies which are considered endangered or threatened, and to prohibit the importation or interstate sale of these species or subspecies.

TARIFF ACT OF 1930, AS AMENDED: WILD MAMMALS OR BIRDS

Section 527 of the Tariff Act of 1930, as amended,[30] prohibits the importation of any wild mammal or bird, alive or dead, or any part of product of any wild mammal or bird, if the laws or regulations of the country where the wild mammal or birdlives restrict its "talking, killing, possession, or exportation to the United States," unless the wild mammal or bird is accompanied by a certification of the U.S. consul that it "has not been acquired or exported in violation of the laws or regulations of such country. . ."

Any mammal or bird, alive or dead, or any part of product thereof, imported into the United States in violation of the above is subject to seizure and forfeiture under the customs laws. The import prohibition in the Tariff Act of 1930 does not apply in the case of (1) articles the importation of which is prohibited by any other law;

29 Public Law 93-205, approved December 28, 1973, 16 U.S.C. 1531 et seq.
30 19 U.S.C. 1527.

(2) articles imported for scientific or educational purposes, or are migratory; or (3) certain migratory game birds.

AFRICAN ELEPHANT CONSERVATION ACT

Title II of the Endangered Species Act Amendments of 1988 (Public Law 100-478) contained the African Elephant Conservation Act,[31] requiring the Secretary of the Interior to establish a moratorium on the importation of raw and worked ivory from an ivory producing country that does not meet specific criteria, including being a party to the Convention on the International Trade in Endangered Species of Wild Fauna and Flora (CITES).

RHINOCEROS AND TIGER CONSERVATION ACT OF 1994, AS AMENDED

Section 7 of the Rhinoceros and Tiger Conservation Act of 1994,[32] as amended by the Rhino and Tiger Product Labeling Act,[33] prohibits selling, importing, or exporting, or attempting to sell, import, or export, any product, item or substance intended for human consumption containing or purporting to contain any substance derived from any species of rhinoceros or tiger.

SECTION 8 OF THE FISHERMEN'S PROTECTIVE ACT OF 1967, AS AMENDED ("PELLY AMENDMENT")

Under section 8 of the Fishermen's Protective Act of 1967, as amended (the so-called "Pelly Amendment"),[34] the President, based on certain findings by the Secretary of Commerce or the Secretary of the Interior, has the discretionary authority to impose import sanctions on any products from any country which conducts fishery practices or engages in trade which diminishes the effectiveness of international programs for fishery conservation or international programs for endangered or threatened species.

HIGH SEAS DRIFTNET FISHERIES ENFORCEMENT ACT

The High Seas Driftnet Fisheries Enforcement Act was enacted in 1992[35] to assist in the international enforcement of U.N. Resolution Number 46-215, which prohibits large-scale driftnet fishing on the high seas after December 31, 1992. The Act sets forth certain import sanctions applicable to countries whose nationals or vessels engage in driftnet fishing on the high seas on or after December 31,

31 16 U.S.C. 4201-4245.
32 15 U.S.C. 5301-5306.
33 Public Law 105-312, approved October 30, 1998.
34 Public Law 93-205, approved December 28, 1973, 22 U.S.C. 1978.
35 Public Law 102-582, approved November 2, 1992.

1992, and lays out the procedures to be followed in applying those import sanctions.

Specifically, the Act requires the Secretary of Commerce not later than December 31, 1992, and periodically thereafter, to identify each country the nationals or vessels of which conduct large-scale driftnet fishing beyond the exclusive economic zone of any country and to notify the President and that country of the identification. The President must enter into consultations within 30 days with any country so identified to obtain its agreement to effect the immediate termination of the large-scale driftnet fishing. If these consultations have not been satisfactorily concluded within 90 days, the President shall direct the Secretary of the Treasury to prohibit the importation of shellfish, fish and fish products, and sport fishing equipment from the country in question. If such country has not terminated its large-scale driftnet fishing within 6 months after its identification or has retaliated against the United States for any initial import sanctions taken against it, such country shall be subject to additional import sanctions, at the President's discretion, under the Fishermen's Protective Act of 1967, as amended.

WILD BIRD CONSERVATION ACT OF 1992

The Wild Bird Conservation Act of 1992[36] establishes various bans on the importation of exotic birds. For those birds listed on any of the three appendices on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the nature of the ban depends on how threatened is the particular species of bird. There is an immediate import ban for birds that have been identified under CITES as being under immediate threat. For all other birds listed by CITES, an import ban goes into effect 1 year after the date of enactment of the Act. During this 1 year, the Secretary of the Interior is authorized to suspend the importation of such species on an emergency basis under certain conditions. None of the import bans will apply to species of birds that are included on an approved list of species to be maintained by the Secretary. To be included on such an approved list, the species must either be regularly bred in captivity in a qualified facility or be protected under a conservation program in the country of origin that meets specifically enumerated criteria.

For exotic birds not listed under the CITES agreement, the Secretary is authorized to impose an import ban or quota on such species if he finds such action is necessary for the conservation of the species.

The Act also authorizes the Secretary to allow, through the issuance of import permits, the importation of any exotic bird upon determination that such importation is not detrimental to the species' survival and that the bird is being

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

imported for certain enumerated purposes, such as scientific research or cooperative breeding programs.

ATLANTIC TUNAS CONVENTION ACT OF 1995

In 1966, the International Convention for the Conservation of Atlantic Tunas (ICCAT) was established, and the U.S. Senate ratified ICCAT in 1967. The Atlantic Tunas Convention Act (ATCA), which authorizes U.S. involvement in ICCAT, was enacted in 1975. ATCA authorizes the Secretary of Commerce to administer and enforce ICCAT and ATCA, including the promulgation of regulations to establish open and closed seasons, fish size requirements and catch limitations, incidental catch restrictions, and observer coverage. In addition, the Secretary is authorized to prohibit the entry into the United States of any fish subject to regulations recommended by ICCAT and taken in a manner which would diminish the effectiveness of ICCAT's conservation efforts.

The Atlantic Tunas Convention Act of 1995 made certain changes to the ATCA concerning the identification and notification of countries violating the terms of ICCAT recommendation. Specifically, the legislation made no change to the ATCA authority to restrict imports of fish if fished in a manner that tends to diminish the effectiveness of a recommendation by the ICCAT, instead of imposing additional, and in some cases mandatory, standards. The Act added provisions requiring Commerce to identify, notify, and publish a list of countries whose fishing vessels are fishing or have fished during the previous year in the Convention area in a manner inconsistent with the objectives of an ICCAT recommendation. In addition, it provided that the President may enter into consultations with identified nations. The purpose of the Act was to lead to the development of an international consensus concerning multilateral management of Atlantic tunas, instead of expanding the circumstances under which unilateral sanctions are authorized.

SECTION 609 OF PUBLIC LAW 101-162: CONSERVATION OF SEA TURTLES

Section 609 of Public Law 101-162, a bill making appropriations for the Departments of Commerce, Justice, State, the Judiciary, and related agencies for fiscal year 1990,[37] called upon the Secretary of State, in consultation with the Secretary of Commerce, to initiate negotiations for the development of bilateral or multilateral agreements for the protection and conservation of sea turtles, in particular with foreign governments of such countries which are engaged in commercial fishing operations likely to affect adversely sea turtles. Section 609 further provided that shrimp harvested with technology that may adversely affect certain sea turtles may not be imported into the United States, unless the President

37 Public Law 101-162, approved November 21, 1989.

certified to Congress by May 1, 1991, and annually thereafter, that the harvesting nation has a regulatory program and an incidental rate comparable to that of the United States, or that the particular fishing environment of the harvesting nation does not pose a threat to sea turtles.

In 1991, the State Department issued guidelines for assessing the comparability of foreign regulatory programs with the U.S. program.[38] To be found comparable, a foreign nation's program had to include a commitment to require all shrimp trawl vessels to use turtle excluder devices (TEDs) at all times, or alternatively, a commitment to engage in a statistically reliable and verifiable scientific program to reduce the mortality or sea turtles associated with shrimp fishing. The 1991 guidelines also determined that the scope of section 609 was limited to the wider Caribbean/western Atlantic region and that the import restriction did not apply to aquaculture shrimp, the harvesting of which does not adversely affect sea turtles.

In 1993, the State Department issued revised guidelines providing that to receive a certification in 1993 and subsequent years, affected nations had to maintain their commitment to require TEDs on all commercial Shrimp trawl vessels by May 1, 1994.

In December 1995, the U.S. Court of International Trade (CIT) found that the 1991 and 1993 guidelines were contrary to law in limiting the geographical scope of section 609 and directed the State Department to prohibit the importation of shrimp or products of shrimp wherever harvested in the wild with commercial fishing technology that may affect adversely sea turtles by May 1, 1996.[39]

In April 1996, the State Department published revised guidelines[40] to comply with the CIT order of December 1995. The new guidelines extended section 609 to shrimp harvested from all foreign nations. The State Department further determined that as of May 1, 1996, all shipments of shrimp and shrimp products into the United States were to be accompanied by a declaration attesting that the shrimp or shrimp product in question was harvested "either under conditions that do not adversely affect sea turtles . . . or in waters subject to the jurisdiction of a nation currently certified pursuant to section 609."

In October 1996, the CIT ruled that the embargo on shrimp and shrimp products enacted by section 609 applied to all "shrimp products harvested in the wild by citizens or vessels of nations which have not be certified".[41] The Court found that the 1996 guidelines were contrary to section 609 when allowing, with a Shrimp Exporter's Declaration form, imports of shrimp from non-certified countries if the shrimp was harvested with commercial fishing technology that did not adversely affect sea turtles. The CIT also refused to postpone the worldwide enforcement of section 609.[42]

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38 56 Fed. Reg. 1051 (January 10, 1991).

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

40 61 Fed. Reg. 17342 (April 19, 1996).

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

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

In 1997, Thailand, Malaysia, Pakistan, and India filed a challenge in the World Trade Organization (WTO) to the U.S. restrictions on imports of shrimp and shrimp products harvested in a manner harmful to endangered species of sea turtles. A dispute settlement panel ruled in favor of the complainants on April 6, 1998, finding that the U.S. import restrictions were inconsistent with WTO rules. The United States appealed the decision, and on October 12, 1998, the Appellate Body of the WTO reversed the panel ruling, confirming that WTO rules allow countries to condition access to their markets on compliance with certain policies such as environmental conservation, and agreeing that the U.S. "shrimp-turtle law" was a permissible measure adopted for the purpose of sea turtle conservation. The Appellate Body, however, found fault with certain aspects of the U.S. implementation of the statute. In particular, it found that the State Department's procedures for determining whether countries meet the requirements of the law did not provide adequate due process, because exporting nations were not afforded formal opportunities to be heard and were not given formal written explanations of adverse decisions. The Appellate Body also found that the United States had unfairly discriminated between the complaining countries and Western Hemisphere nations by not exerting as great an effort to negotiate a sea turtle conservation agreement with the complaining countries and by not providing them the same opportunities to receive technical assistance.

On November 25, 1998, the United States indicated its intention not only to comply with the panel rulings but also the firm commitment of the United States to protect endangered species of sea turtles. In July 1999, the State Department revised its procedures, pursuant to the panel decision, to provide more due process to countries apply for certification under section 609. The United States also provided the complaining countries with additional technical assistance in the adoption of sea turtle conservation measures. In July 2000, the State Department completed negotiations with the countries of the Indian Ocean and Southeast Asia region on the multilateral Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia (the MOU). In July 2001, the United States and the countries of the region completed negotiations on the associated Conservation and Management Plan. The first meeting of the Signatories to the MOU was held in Bangkok, Thailand in January 2003.

On October 23, 2000, Malaysia requested that the original WTO panel examine whether the United States fully implemented the panel's recommendations, arguing that it was necessary for the United States to repeal its "shrimp-turtle law" in order to comply. The other complaining countries in the WTO panel proceedings did not join Malaysia in the request. On May 16, 2001, the panel found that the United States had complied with the original Appellate Body report, a decision that was appealed by Malaysia and upheld by the Appellate Body on October 22, 2001.

National Security Import Restrictions

SECTION 232 OF THE TRADE EXPANSION ACT OF 1962

Section 232 of the Trade Expansion Act of 1962, as amended,[43] authorizes the President to impose restrictions on imports which threaten to impair the national security. This authority has been used by the President to impose quotas and fees on imports of petroleum and petroleum products from time to time and to embargo imports of refined petroleum products from Libya. Public Law 96-223 (imposing a windfall profit tax on domestic crude oil) amended section 232 to authorize the Congress to disapprove by joint resolution an action of the President to adjust oil imports. On June 9, 1995, the President found, pursuant to section 232, that oil imports threaten to impair the national security but determined not to take action to adjust imports of petroleum because the costs of such an adjustment to the economy outweighed the benefits.[44]

On April 28, 2000, the President pursuant to section 232, concurred with the findings of the Secretary of Commence that imports of crude oil threaten to impair the national security. He also accepted the Secretary's recommendation that trade remedies not be imposed but that existing policies to enhance conservation and limit the dependence on foreign oil be continued.[45]

Section 232 as amended requires the Secretary of Commerce to conduct immediately an investigation to determine the effects on national security of imports of an article, upon the request of any U.S. government department or agency, application of an interested party, or upon his own motion. The Secretary must report the findings of his investigation and his recommendations for action or inaction to the President within 270 days after beginning the investigation. If the Secretary finds the article "is being imported * * * in such quantities or under such circumstances as to threaten to impair the national security," he must so advise the President. The President must decide within 90 days after receiving the Secretary's report whether to take action. If the President decides to take action, he must implement such action within 15 days, and take such action for such time as he deems necessary to "adjust" the imports of the article and its derivatives so imports will not threaten to impair the national security. The President must

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

44 60 Fed. Reg. 30,514 (June 9, 1995).

45 36 Weekly Comp. Pres. Doc. 945.

submit a written statement to the Congress within 30 days explaining action taken and the reasons therefor.

Upon initiation of an investigation, the Secretary of Commerce must immediately notify the Secretary of Defense, and consult with him on methodological and policy questions. Upon request of the Secretary of Commerce, the Secretary of Defense must provide an assessment of the defense requirements of any article subject to investigation.

The Secretary of Commerce must hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation if it is appropriate and after reasonable notice. The Secretary must also seek information and advice from, and consult with, other appropriate agencies. Among the factors which the Secretary and the President must consider are domestic production needs for projected national defense requirements; domestic industry capacity to meet these requirements; existing and anticipated availability of resources, supplies, and services essential to the national defense; the growth requirements of such industries, supplies, services; imports in terms of their quantities, availability, character, and use as they affect such industries and U.S. capacity to meet national security requirements; the impact of foreign competition on the economic welfare of domestic industries; and any substantial unemployment, revenue declines, loss of skills or investment, or other serious effects resulting from displacement of any domestic products by excessive imports.

SECTION 233 OF THE TRADE EXPANSION ACT OF 1962

Section 233 of the Trade Expansion Act of 1962[46] was added by section 121 of the Export Administration Amendments of 1985 (Public Law 99-64) as a means of enforcing national security export controls imposed under that Act. The provision was amended by section 2447 of the Omnibus Trade and Competitiveness Act of 1988, to conform to sanctions authority added to the Export Administration Act.

Under section 233 as amended, any person who violates any national security export control imposed under section 5 of the Export Administration Act of 1979, or any regulation, order, or license issued under that section, may be subject to controls imposed by the President on imports of goods or technology into the United States.

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46 19 U.S.C. 1864.

Balance of Payments Authority

SECTION 122 OF THE TRADE ACT OF 1974

Section 122 of the Trade Act of 1974[47] authorizes the President to increase or reduce restrictions on imports into the United States to deal with balance of payments problems. Tighter restrictions in the form of an import surcharge (not to exceed 15 percent ad valorem), import quota, or a combination of the two may be imposed for up to 150 days (unless extended by act of Congress) whenever fundamental international payments problems make such restrictions necessary to deal with large and serious U.S. balance of payments deficits, to prevent an imminent and significant depreciation of the dollar, or to cooperate with other countries in correcting an international balance of payments disequilibrium.

Existing imports restrictions may be eased for a period of up to 150 days (unless extended by act of Congress) through a reduction in the rate of duty on any article (not to exceed 5 percent ad valorem), an increase in the value or quantity of imports subject to any type of import restriction, or a suspension of any import restriction. Such restrictions may be eased whenever fundamental international payments problems require special measures to deal with large and serious balance of payments surpluses or to prevent significant appreciation of the dollar. Trade liberalizing measures must be broad and uniform as to articles covered. The President may not, however, liberalize imports of those products for which increased imports will cause or contribute to material injury to domestic firms or workers, impairment of national security, or otherwise be contrary to the national interest.

Certain conditions also are placed on the President's use of import restrictions for balance of payments purposes. Quotas may be imposed only if international agreements to which the United States is a party permit them as a balance of payments measure and only to the extent that the imbalance cannot be dealt with through an import surcharge. If the President determines that import restrictions are contrary to the national interest, he may refrain from imposing them but must inform and consult with Congress.

Section 122(d) requires that import restrictions be applied on a non-discriminatory basis; it also requires that quotas aim to distribute foreign trade with the United States in a manner that reflects existing trade patterns. If the President finds, however, that the purposes of the provision would best be served by action against one or more countries with large and persistent balance of payment surpluses, he may exempt all other countries from such action. This section also expresses the sense of Congress that the President seek modifications in international agreements to allow the use of surcharges instead of quotas for balance of payments adjustment purposes. If such international reforms are

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

achieved, the President's authority to exempt all but one or two surplus countries from import restrictions must be applied in a manner consistent with the new international rules.

Section 122(e) provides that import restrictions be of broad and uniform application as to produce coverage, unless U.S. economic needs dictate otherwise. Exceptions under this section are limited to the unavailability of domestic supply at reasonable prices, the necessary importation of raw materials and similar factors, or if uniform restrictions will be unnecessary or ineffective (i.e., if products already are subject to import restrictions, are in transit, or are subject to binding contracts). The section prohibits the use of balance of payments authority or the exceptions authority to protect domestic industries from import competition. Any quantitative restriction imposed may not be more restrictive than the level of imports entered during the most recent representative period, and must take into account any increase in domestic consumption since the most recent representative period.

The President is authorized to modify, suspend, or terminate any proclamation issued under the section, either during the initial 150-day period or during any subsequent extension by act of Congress.

Background

Anticipating that oil-consuming nations would face large balance of payments deficits in an era of rapidly increasing oil prices, and believing that neither a reduction in the price of oil nor the necessary international monetary cooperation were certain to take place, Congress considered it necessary to authorize the President to impose surcharges or other import restrictions for balance of payments purposes, even though Congress assumed that under existing circumstances such authority was not likely to be used.[48] The use of surcharges for balance of payments purposes had gained de facto acceptance among industrialized GATT member countries during the two decades preceding the 1974 Trade Act, but explicit GATT rules had never been adopted.

When it passed the Trade Act of 1974, Congress urged the President to seek changes in international agreements allowing the use of surcharges as well as (and in preference to) quotas for balance-of-payments adjustment purposes and providing rules for their use.[49] The Tokyo Round of GATT multilateral trade negotiations in 1979 adopted, as part of the so-called Framework Agreement, the Declaration on Trade Measures Taken for Balance-of-Payments Purposes,[50] which elaborated on the rules for the use of import restrictions for balance-of-payments adjustments. While this Declaration noted the wide use, for balance-of-payments adjustments, of import restrictions other than quotas (which

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48 Senate Report 93-1298 at 87-88.

49 Senate Report 93-1298 at 88.

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

alone are addressed in the GATT) and implicitly sanctioned it, it still did not fundamentally alter GATT rules in this area by explicitly allowing such other restrictions.

The balance-of-payments issue was revisited in the Omnibus Trade and Competitiveness Act of 1988, which stated as one of the principal negotiating objectives of the United States the development of "rules to address large and persistent global current account imbalances of countries."[51]

The Understanding on the Balance-of-Payments Provisions of the General Agreements on Tariffs and Trade 1994 specifically provides for (and gives preference to) "price-based measures" for balance-of-payments adjustments, including import surcharges and deposit requirements, and limits the imposition of new quantitative restrictions. The Understanding also provides that preference should be given to those measures which have the least disruptive effect on trade, and that restrictive import measures taken for balance-of-payments purposes may only be applied to control the general level of imports, may not exceed what is necessary to address the balance-of-payments situation, and must be applied in a transparent manner. Finally, the Understanding sets forth consultation procedures for the use of all restrictive import measures taken for balance-of-payments purposes. Article XII of the General Agreement on Trade in Services permits members to adopt or maintain restrictions on trade in services in the event of serious balance-of-payments and external financial difficulties.[52]

Product Standards

U.S. policy regarding the application of standards and certification procedures to imported products is based on the Uruguay Round Agreement on Technical Barriers to Trade and its U.S. implementing legislation as part of the Uruguay Round Agreements Act,[53] chapter 9 of the North American Free Trade Agreement and its U.S. implementing legislation as part of the North American Free Trade Agreement Implementation Act,[54] and the Agreement on Technical Barriers to Trade under the General Agreement on Tariffs and Trade (GATT) and its U.S. implementing legislation under title IV of the Trade Agreement Act of 1979.[55]

Differences in product standards, listing and approval procedures, and certification systems often can impede trade and can be manipulated to discriminate against imports. Imports may be tested to determine whether they conform with domestic standards under conditions more onerous than those applicable to domestic products. Certification systems, which indicate whether

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

52 The United States prevailed in a WTO change to certain import restrictions by India on more than 2,700 tariff items. The WTO found that these restrictions were no longer justified under the balance-of-payments exceptions. India agreed to remove all restrictions by April 2001.

53 Public Law 103-465, approved December 8, 1994.

54 Public Law 103-182, approved December 8, 1993.

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

products conform to standards, may limit access for imports or may discriminate by denying the right of a certification mark on imported products. Prior to the 1979 Agreement, however, there was virtually no multilateral cooperation or supervision to promote international harmonization and to discourage nationalistic discriminatory practices.

AGREEMENT ON TECHNICAL BARRIERS TO TRADE

The Agreement on Technical Barriers to Trade,[56] commonly referred to as the Standards Code, was one of the agreements on non-tariff measures concluded during the 1973-1979 Tokyo Round of GATT multilateral trade negotiations. The Code went into force on January 1, 1980. The Code does not attempt to create standards for individual products, or to set up specific testing and certification systems. Rather, it establishes, for the first time, international rules among governments regulating the procedures by which standards and certification systems are prepared, adopted and applied, and by which products are tested for conformity with standards. The Code was a major U.S. negotiating objective during the Tokyo Round, particularly given the formation of a European regional electrical certification system closed to outside suppliers.

The Standards Code seeks to eliminate national product standardization and testing practices and certification procedures as barriers to trade among the signatory countries and to encourage the use of open procedures in the adoption of standards. At the same time, it does not limit the ability of countries to reasonably protect the health, safety, security, environment, or consumer interests of their citizens. Generally, U.S. standards-setting processes have followed these basic norms, whereas other countries' standards-related activities have generally been closed to participation from foreign countries; these signatories are obliged to change their practices in order to comply with Code principles.

The Code's provisions are applicable to all products, both agricultural and industrial. They are not applicable to standards involving services, technical specifications included in government procurement contracts, or standards established by individual companies for their own use. The Code addresses governmental and non-governmental standards, both voluntary and mandatory, developed by central governments, state and local governments, and private sector organizations. Only central governments, however, are directly bound by Code obligations, whereas regional, state, local, and private organizations are subject to a second level of obligation whereby signatories "shall take such reasonable measures as may be available to them" to ensure compliance.

The Code is prospective, applying to new and revised standards-related activities. If a signatory country believes, however, that an existing regulation developed and put into effect before the Code came into force conflicts with the

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

basic tenets of the Code, then that signatory may use the Code's dispute settlement mechanism to help resolve the problem.

The Standards Code contains the following key provisions obligating signatories to follow several general principles pertaining to standards-related activities:

(1) The most important and fundamental principle obligates signatory governments not to develop, intentionally or unintentionally, product standards, technical regulations, or certification systems which create unnecessary obstacles to foreign trade. The Code recognizes nations' sovereign right to formulate standards and certification systems to protect life, health and environment, but such regulations should be as least disruptive as possible to international trade.

(2) The second fundamental principle is that national or regional certification systems are to grant access to foreign or non-member signatory suppliers under conditions no less favorable than those granted to domestic or member country suppliers, a major change in most signatory policies. Signatories can no longer refuse to give their national certification marks to imported products, provided that the imported products fully meet the technical requirements of the certification system. Also regional certification bodies must be open to suppliers from all Code signatories.

(3) Signatories must provide foreign imported products the same treatment as domestic goods with respect to standards, technical regulations, and testing and certification procedures, i.e., an extension of the national treatment provision of GATT which prohibits discrimination against imported products.

(4) When developing new or revising existing product standards or technical regulations, governments are to use existing or proposed international standards as the basis where it is appropriate. Other signatories may request an explanation if a government fails to follow this principle.

(5) Whenever appropriate, signatories are encouraged to specify technical regulations and standards in terms of performance rather than design or descriptive characteristics.

If a foreign product must be tested to determine whether it meets domestic standards before it can be imported, the Code provides a number of criteria that signatories are to follow to ensure non-discriminatory treatment. For example, foreign goods should not have to undergo costlier or more complex testing than domestic products in comparable situations. In addition, signatories are obligated to use the same methods and administrative procedures on imported as well as domestic goods. The Code does not obligate signatories to recognize test results or certification marks from another country. It does, however, encourage signatories to accept, whenever possible, test results, certifications or marks of conformity from foreign bodies, or self-certification from foreign producers even when the test methods differ from their own, provided that the importing country is satisfied that the exporting country's products meet the required standards.

Another important element of the Standards Code is the obligation of signatories to open up the process of developing or applying standards and certification procedures to each other. Governments must make available proposed mandatory or voluntary standards and certification procedures for comment during the drafting stage by other signatories before they become final regulations. Each signatory government must establish an inquiry point to respond to all reasonable questions from other signatories concerning their central, local, and state government standards and certification procedures.

Finally, the Code establishes a Committee of Signatories which meets periodically to oversee implementation and administration of the Agreement, as well as to discuss any new issues or problems which arise. The Committee may set up panels of experts or working parties as required to conduct Committee business or handle disputes.

URUGUAY ROUND AGREEMENT ON TECHNICAL BARRIERS TO TRADE

As part of the Uruguay Round, the signatories built on experience gained under the 1979 Standards Code in the Agreement on Technical Barriers to Trade (TBT Agreement). Much of the new Agreement restates, clarifies, or expands the 1979 Code.

The inclusion of the new Agreement as one of the WTO agreements means that all WTO members will be automatically bound by the Agreement, whereas a number of countries had chosen not to join the Standards Code. In addition, the Agreement will be enforceable through the WTO Dispute Settlement Understanding, unlike the 1979 Code, which contained a separate procedure limiting response to Code violations to withdrawing concessions under the Code.

The new Agreement seeks to eliminate barriers in the form of national product standardization and testing practices and conformity assessment procedures. At the same time, it permits signatories to protect the health, safety, security, environment, or consumer interests of their citizens. Like the 1979 Code, the Agreement obligates signatories to take reasonable measures to secure compliance by local government and non-governmental bodies.

With respect to technical regulations, the Agreement establishes rules covering the preparation, adoption, and application of technical regulations. The Agreement specifies that technical regulations are not to be more trade-restrictive than necessary to fulfill a legitimate objective. A complaining member must identify a specific alternative measure that is reasonably available. In addition, each government is required to review periodically its technical regulations in light of the Agreement's requirements. Each government is to use relevant international standards as a basis for technical regulations, except where they would be an ineffective or inappropriate means to fulfill the government's legitimate objectives. The Agreement recognizes the concept of equivalency between countries' technical regulations. It carries forward the procedural requirements of the Code to assure transparency. Finally, it reflects an expansion beyond the Code with respect to the issuance of technical regulations by local and non-governmental bodies. WTO members must provide notice of technical regulations issued by local bodies at the next level below central governments, and must take active measures in support of observance by local government and non-governmental bodies.

With respect to standards, central government bodies are required to comply with the terms of the Code of Good Practice for the Preparation, Adoption and Application of Standards. Other standardizing bodies are not bound by the Code of Good Practice, but each central government must take reasonable measures to ensure their compliance.

The new Agreement updates and expands disciplines regarding conformity assessment procedures. Whereas the 1979 Code applied only to testing, the new Agreement applies to all aspects of conformity assessment, including laboratory accreditation and quality system registration. Central governments are required to take reasonable measures to apply these same disciplines to local governments and non-governmental bodies.

The Agreement on the Application of Sanitary and Phytosanitary Measures (S&P Agreement) establishes a number of general requirements and procedures to ensure that a sanitary or phytosanitary measure is in fact to protect human, animal, and plant life and health from risks of plant- or animal-borne pests or diseases, or additives, contaminants, toxins, or disease-causing organisms in foods, beverages, or feedstuffs. While the TBT Agreement relies on a non-discrimination test, the S&P Agreement relies on whether a measure has a basis in science and is based on a risk assessment. Discrimination is allowed as long as it is not arbitrary or unjustifiable.

THE NORTH AMERICAN FREE TRADE AGREEMENT

Chapter 9 of the NAFTA establishes rules on standards-related measures among the United States, Mexico, and Canada. The provisions are based on the text of the then-draft Uruguay Round Agreement on Technical Barriers to Trade and the United States-Canada Free-Trade Agreement. The rules apply only to standards-related measures that may directly or indirectly affect trade in goods or services between the NAFTA countries and to measures taken by NAFTA countries concerning those standards-related measures. In addition, chapter 7 of the NAFTA covers sanitary and phytosanitary measures.

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

Congress approved the Agreement on Technical Barriers to Trade under section 2 of the Trade Agreements Act of 1979. Title IV of that Act implements the obligations of the Standards Code in U.S. law.[57] Since U.S. practices were already in conformity with the Code, title IV did not amend, repeal, or replace any existing law. It does ensure that adequate structures exist within the Federal Government to inform the U.S. private sector about the standards-related activities of other nations, facilitate the ability of the United States to comment on foreign standards-making and certifications, and process domestic complaints on foreign practices. Title IV was then amended to reflect U.S. obligations under the Uruguay Round Agreement on Technical Barriers to Trade and the NAFTA.

Section 402 of the 1979 Act requires all Federal agencies to abide by the above-described principles and provisions of the Agreement. In addition, section 403 states the "sense of Congress" that no State agency and no private person should engage in any standards-related activity, i.e., development or implementation of product standards or certification system, that creates unnecessary obstacles to foreign trade, and requires the President to "take such reasonable measures as may be available" to promote their observance of Agreement obligations.

The U.S. Trade Representative (USTR) is designated to coordinate U.S. trade policies related to standards, and discussions and negotiations with foreign countries on standards issues, and to oversee implementation of the Agreement. The Departments of Agriculture and Commerce are required to work with the USTR on agricultural and non-agricultural issues respectively and to establish technical offices to fulfill a number of functions, particularly supplying notices to interested parties of proposed foreign government standards and receiving and transmitting private sector comments. The Department of Commerce maintains the National Center for Standards and Certification within the National Bureau of Standards as the national inquiry point required under the Code.

Title IV contains provisions concerning administrative and judicial proceedings regarding standards-related activities. No private rights of action are created by title IV; private parties can petition the U.S. government to invoke provisions of the Agreement against practices of other signatories.

Subtitle E sets forth governing standards and measures under the NAFTA. Subtitle F contains provisions concerning U.S. participation in international standardsetting activities.

Government Procurement

U.S. policy on government purchases of foreign goods and services is based on the Buy American Act of 1933[58] the multilateral Agreement on Government Procurement under the 1994 WTO and General Agreement on Tariffs and Trade (GATT), and its implementing legislation under title III of the Trade Agreements

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57 19 U.S.C. 2531-2573.

58 Act of March3, 1933, ch. 212, title III, 47 Stat. 1520, 41 U.S.C. 10a-10d.

Act of 1979,[59] as amended by the Uruguay Round Agreements Act. The "Buy American Act of 1988" (title VII of the Omnibus Trade and Competitiveness Act of 1988)[60] established standards and procedures to prohibit procurement from foreign countries whose governments discriminate against U.S. products or services in awarding contracts. In addition, separate provisions in appropriation acts and other legislation apply more restrictive Buy American-type provisions on particular types of purchases.

Governments are among the world's largest purchasers of non-strategic goods. Most of this vast market has traditionally been closed to foreign producers by means of formal and informal administrative systems of national discrimination in favor of domestic producers. Although U.S. preferences for domestic suppliers are clearly set out by law and regulation, other countries usually have achieved their discrimination by highly invisible administrative practices and procedures.

BUY AMERICAN ACT

The Buy American Act of 1933, as implemented by Executive Orders 10582 and 11051, requires the U.S. government to purchase domestic goods and services unless the head of the agency or department involved determines the prices of the domestic supplies are "unreasonable" or their purchase would be inconsistent with the U.S. public interest. Executive Order 10582, issued in 1954, states that if the domestic price of a good or service is 6 percent or more above the foreign price, then it is to be considered unreasonable and the foreign product may be purchased. The order also permits agencies to use a differential above 6 percent if it would serve the national interest. The Department of Defense has been using a 50 percent differential since 1962 for its procurement, except this differential is waived on military purchases under reciprocal Memoranda of Understanding (MOUs) with NATO countries. The order also indicated that a differential could be applied in cases where a domestic bid generated employment in a labor surplus area as designated by the Secretary of Labor. No specific percentage was stated, but generally a 12 percent differential has been allowed for bids which benefit economically distressed areas. These price differentials may be waived under section 301(a) of the Trade Agreements Act of 1979 for articles covered by the GATT Agreement on Government Procurement from signatory countries.

U.S.-made products are defined by law as those manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States. By regulations, "substantially all" has been defined to mean that more than 50 percent of the component costs of a product has been incurred in the United States.

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59 Public Law 96-39, title III, approved July 26, 1979, 19 U.S.C. 2511-2518.
60 Public Law 100-418, title VII, approved August 23, 1988, 41 U.S.C. 10a note.

1979 GATT AGREEMENT ON GOVERNMENT PROCUREMENT

The first Agreement on Government Procurement, also known as the Government Procurement Code,[61] was concluded as one of the agreements on non-tariff measures during the 1975-1979 Tokyo Round of GATT multilateral trade negotiations. The Code went into effect on January 1, 1981 and remained in force until the 1994 WTO Agreement on Government Procurement went into effect on January 1, 1996.

Because not all objectives were achieved in the original Code and revisions might be necessary in light of actual experience, the signatories agreed to renegotiations beginning at the end of 1984 to broaden the coverage and improve the operation of the Code. The GATT Committee on Government Procurement completed the first phase of these renegotiations in November 1986 with agreement (1) on a Protocol of Amendments to improve the functioning of the Code, effective January 1, 1988; (2) to continue negotiations on increasing the number of entities (government agencies) and procurements covered by the Code, particularly in the sectors of telecommunications, heavy electrical and transportation equipment; and (3) to continue to work towards the coverage of service contracts under the Code. The second phase of Code renegotiations began in February 1987 and continued in the context of the Uruguay Round of GATT multilateral trade negotiations.

The 1979 Code was designed to discourage discrimination against foreign suppliers at all stages of the procurement process, from the determination of the characteristic of the product to be purchased to tendering procedures, to contract performance. The Code prescribed specific rules on the drafting of the specifications for goods to be purchased, advertising of prospective purchases, time allocated for the submission of the bids, qualification of suppliers, opening and evaluation of bids, awards of contracts, and on hearing and reviewing protests.

Signatories were to publish their procurement laws and regulations and make them consistent with the Code rules. Purchasing entities had discretion in their choice of purchasing procedures, provided they extended equitable treatment to all suppliers and allow the maximum degree of competition possible.

Each government agency covered by the Code was required to publish a notice of each proposed purchase in an appropriate publication available to the public, and to provide all suppliers with enough information to permit them to submit responsive tenders. Losing bidders were to be informed of all awards and be provided upon request with pertinent information concerning the reasons they were not selected and the name and relative advantages of the winning bidder. Signatories must also provide data on their procurements on an annual basis.

The adoption or use of technical specifications which act to create unnecessary obstacles to international trade was prohibited. The Code mandated the use, where

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

appropriate, of technical specifications based on performance rather than design, and of specifications based on recognized national or international standards. While the Code did not prohibit the granting of an offset or the requirement that technology be licensed as a condition of award, signatories recognize that offsets and requirements for licensing of technology should be limited and used in a non-discriminatory way.

The Code was largely self-policing. Rules and procedures were structured to help provide solutions to problems between potential suppliers and procuring agencies. As a next step, the Code provided for bilateral consultations between the procuring government and the government of the aggrieved supplier. As a last resort, the Code dispute settlement mechanism under the Committee of Signatories provided for conciliation or establishment of a fact-finding panel.

Coverage of the agreement

The Code applied solely to those agencies listed by each signatory in an annex on contracts valued above a specific minimum contract value expressed in terms of Special Drawing Rights (SDR). The original Code established a threshold value of 150,000 SDR; the 1988 Protocol of Amendments to the Code lowered the minimum contract value to SDR 130,000.

The benefits of the Code applied to purchases of goods originating in the territory of signatory countries. As a result of the 1988 amendments, leasing contracts were also subject to the Code. It did not apply to government services except those incidental to the purchase of goods, construction contracts, purchases by Ministries of Agriculture for farm support programs or human feeding programs such as the U.S. school lunch program. Procurements by state and local governments, including those with Federal funds such as under the Surface Transportation Act, were not subject to the Code.

For the United States, the Code dids not apply to the Department of Transportation, the Department of Energy, the Tennessee Valley Authority, the Corps of Engineers of the Department of Defense, the Bureau of Reclamation of the Department of the Interior, and the Automated Data and Telecommunications Service of the General Services Administration (GSA). In addition, government chartered corporations which are not bound by the Buy American Act, such as the U.S. Postal Service, COMSAT, AMTRAK, and CONRAIL, were not covered.

United States Code coverage also did not apply to set-aside programs reserving purchases for small and minority businesses, prison and blind-made goods, or to the requirements contained in Department of Defense and GSA Appropriations Acts that certain products (i.e., textiles, clothing, shoes, food, stainless steel flatware, certain specialty metals, buses, hand tools, ships, and major ship components) be purchased only from domestic sources.

On April 13, 1993, the United States and European Union reached an agreement in Marrakesh under the GATT Government Procurement Code to nearly double to $200 billion the bidding opportunities available on a bilateral basis.

1994 WTO AGREEMENT ON GOVERNMENT PROCUREMENT

The 1994 Government Procurement Agreement negotiated in the Uruguay Round makes important improvements in the Tokyo Round Code, which required central government agencies in member countries to observe non-discriminatory, fair, and transparent procedures in the purchase of certain goods. The new Agreement covers the procurement of both goods and services, including construction services, and applies to purchases by subcentral governments and government-owned enterprises, as well as central governments.

In addition to improvements in coverage, the Agreement also requires members to follow significantly improved procurement procedures. It prohibits the use of offsets unless a country specifically negotiates an exception to the Agreement in its schedule. The Agreement requires the establishment of a domestic bid challenge system and introduces added flexibility to accommodate advances in procurement techniques.

The Agreement allows each signatory to negotiate coverage on a reciprocal, bilateral basis with the other signatories. The United States concluded comprehensive coverage packages with several countries. The United States will apply the new Agreement to specified U.S. subcentral governments and government-owned entities only for those countries that opened their government procurement markets in sectors of high priority to the United States, although it may expand coverage with other signatories in the future.

The Agreement applies to purchases by government entities above certain special drawing right (SDR) thresholds[62]:

Central government purchases
- Goods and services: 130,000 SDRs ($175,000)
- Construction services: 5 million SDRs ($6,725,000)

Subcentral government purchases
- Goods and services: 355,000 SDRs ($477,000)
- Construction services: 5 million SDRs ($6,725,000)

Government-owned enterprise purchases
- Goods and services: 400,000 SDRs ($538,000)
- Construction services: 5 million SDRs ($6,725,000)

During the negotiations, each signatory negotiated the exclusion of certain procurement from the obligations imposed by the new Agreement. In the case of the United States, these exclusions carry forward those in the U.S. schedule to the

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62 68 Fed. Reg. 70861 (December 19, 2003). Executive Order 12260 requires the United States Trade Representative to set the U.S. dollar thresholds for application of Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2511).

1979 Code. In addition, certain states excluded specified procurement, and set-asides on behalf of small and minority businesses are also excluded. The 1994 Agreement applies to all U.S. executive branch agencies with certain exceptions, including the Federal Aviation Administration.

Signatories to the 1994 Code include the following members of the 1979 Code—Canada, European Communities, Hong Kong, China, Iceland, Israel, Japan, Korea, Liechtenstein, the Kingdom of the Netherlands with respect to Aruba, Norway, Singapore, Switzerland, and the United States. The United States terminated its participation in the 1979 Code on the entry into force of the 1994 Code on January 1, 1996.

GOVERNMENT PROCUREMENT UNDER FREE TRADE AGREEMENTS

NAFTA.—The NAFTA signatories agreed to eliminate buy national restrictions on the majority of non-defense related purchases by their Federal governments of goods and services provided by firms in North America. The Agreement marked the first time that Mexico had committed to eliminate discriminatory government procurement practices.

The Agreement applies only to purchases above a specified threshold:[63]

(1) Purchases of goods over $25,000 by U.S. Federal agencies from Canadian suppliers and vice versa;

(2) For other Federal Government procurement in the three countries, purchases of goods and services over $58,550 and purchases of construction services over $7,611,532; and

(3) For Federal Government-owned enterprises, purchases of goods and services over $292,751 and purchases of construction services over $9,368,478.

The Agreement does not apply to certain kinds of purchases by the U.S. government including purchases under small or minority business set-aside programs, certain national security, agriculture, and Agency for International Development procurements, and procurements by state and local governments.

Chile.—The Agreement obligates each Party to accord national treatment to the procurement of goods, services, and suppliers of the other Party. Above certain monetary thresholds, the Agreement applies to procurement by 20 Chilean central government and 13 Chilean regional government entities, and by 79 entities of the United States Government-including the General Services Administration, departments of the Federal Government, and independent agencies, boards, and commissions. The thresholds are:

(1) For national government procurement in the two countries, purchases of goods and services over $58,550 and purchases of construction services over $6,725,000; and

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63 68 Fed. Reg. 70861 (December 19, 2003).

(2) For government-owned enterprises, purchases of goods and services over $292,751 and purchases of construction services over $6,725,000.

The applicability of the Agreement to certain goods procured for national security purposes is restricted. The Agreement also covers procurement by 341 Chilean municipalities and 37 U.S. States, above certain monetary thresholds and subject to specified conditions. The equivalent thresholds for purchases for these "sub-central" government entities, i.e., Chilean municipalities and U.S. state government agencies, are set at $477,000 for purchases of goods and services and $6,725,000 for purchases of construction services.

Singapore.—Singapore made commitments on non-discrimination in government services procurements, based on a "negative list" approach in which U.S. firms gain nondiscriminatory access unless specifically excluded. The agreement also reinforces WTO commitments to strong and transparent disciplines on procurement procedures. Finally, monetary thresholds for government procurement disciplines are lowered, thus expanding the contracts that are subject to FTA disciplines. The thresholds are:

(1) For national government procurement in the two countries, purchases of goods and services over $58,550 and purchases of construction services over $6,725,000; and

(2) For government-owned enterprises, purchases of goods and services over $292,751 and purchases of construction services over $6,725,000.

Australia.—Chapter Fifteen of the Agreement establishes rules that certain government entities, listed in Annex 15-A of the Agreement, must follow in procuring goods and services. The Chapter's rules will apply whenever these entities undertake procurements valued above thresholds specified in Annex 15-A. The thresholds are:

(1) For national government procurement in the two countries, purchases of goods and services over $58,550 and purchases of construction services over $6,725,000; and

(2) For government-owned enterprises, purchases of goods and services over $292,751 and purchases of construction services over $6,725,000.

Australia has covered all major procuring entities such as Department of Defense, Department of Transport and Regional Services, Department of Communications, Information Technology and the Arts, and Department of Prime Minister and Cabinet. Australia has also covered 31 administrative and public bodies including important agencies such as the Reserve Bank of Australia, Australian Broadcasting Authority, and Australian Nuclear Science and Technology Organization.

In order to comply with its obligations under Chapter Fifteen, the United States must waive the application of certain federal laws, regulations, procedures and practices that ordinarily treat foreign goods and services and suppliers of such goods and services less favorably than U.S. goods, services, and suppliers. Section 301(a) of the Trade Agreements Act of 1979 (19 U.S.C. 2511(a)) authorizes the President to waive the application of such laws, regulations, procedures, and practices with respect to "eligible products" of a foreign country designated under section 301(b) of that Act.

The term "eligible product" in section 301(a) of the Trade Agreements Act is defined in section 308(4)(A) of that Act for goods and services of countries and instrumentalities that are parties to the WTO Agreement on Government Procurement and countries that are parties to NAFTA. Section 401 of the implementing bill amends the definition of "eligible product" in section 308(4)(A) of the Trade Agreements Act, providing that, for a party to a free trade agreement that entered into force for the United States after December 31, 2003, and prior to January 2, 2005, an "eligible product" means "a product or service of that country or instrumentality which is covered under the free trade agreement for procurement by the United States." This amended definition coupled with the President's exercise of his authority under section 301(a) of the Trade Agreement Act will allow procurement of products and services of Australia and other Parties to FTAs that entered into force during the specified time period.

Morocco.—The Agreement prohibits Moroccan government procurers from discriminating against U.S. firms, or favoring Moroccan firms, when purchasing more than $175,000 in goods or services or $6,725,000 in construction services. Morocco has covered 30 central government entities in its government procurement offer. The list of 30 entities includes Morocco's largest government procurers, such as the Ministries of Defense, Foreign Affairs, Interior, and the Prime Minister's Office. The Agreement covers all of Morocco's provinces and prefectures – the U.S. equivalent of states. The provisions are important because the Moroccan government is heavily involved in the Moroccan economy. The Agreement opens up 136 Moroccan administrative and public bodies to U.S. contractors, including the National Office of Electricity, the National Office of Airports, the National Office of Potable Water, the National Railroad Office, and the Office of Ports Utilization.

U.S. implementation of the Morocco FTA procurement provisions relied upon a legislative amendment in the U.S.-Australia Free Trade Agreement Implementation Act that provided for coverage for all countries with free trade agreements that entered into force by January 2005. Because Morocco delayed implementation, the agreement did not enter into force by the January 2005 deadline, and therefore, the Morocco procurement provisions are not currently effective at the time of this writing. Thus, future legislation will be needed to cover Morocco.

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

Congress approved the first Agreement on Government Procurement under section 2 of the Trade Agreements Act of 1979 and amended that statute in the Uruguay Round and NAFTA implementing bills to reflect U.S. obligations under those agreements. Title III of that Act implements the obligations of the Code in U.S. law with respect to purchases by covered government entities.[64]

Executive Order 12260, issued on December 31, 1980, requires all U.S. government agencies covered by the Code to observe its provisions. Section 301 of the 1979 Act authorizes the President to waive the application of discriminatory government procurement law, such as the Buy American Act, and labor surplus set-asides that are not for a small business. The waiver authority applies only to purchases covered by the Code and only to foreign countries designated by the President that meet one of four statutory conditions basically requiring the country to provide appropriate reciprocal, competitive government procurement opportunities to U.S. products and suppliers, unless the country is a least developed country.

Buy American Act preferences still apply to contracts below the SDR threshold, purchases by non-covered entities, and procurement from countries not eligible for a waiver regardless of contract size. Special Buy American-type restrictions under other laws (e.g., small business set asides, required domestic sourcing of particular goods) are also not affected.

Section 302 of the 1979 Act, as amended, is designed to encourage other countries to participate in the Code and provide appropriate reciprocal competitive opportunities. For this purpose, the President is required, after the date on which any waiver first takes effect, to prohibit the procurement of products otherwise covered by the Code from non-designated countries. The President may, however, (1) waive the prohibition on procurement of products by a foreign country or instrumentality that has not yet become a party to the Agreement but has agreed to apply transparent and competitive procedures to its government procurement equivalent to those in the Agreement and to maintain and enforce effective prohibitions on bribery and other corrupt practices in connection with government procurement; (2) authorize agency heads to waive prohibitions on a case-by-case basis when in the national interest; and (3) authorize the Secretary of Defense to waive the prohibition for products of any country which enters into a reciprocal procurement agreement with the Department of Defense. All such waivers are subject to interagency review and general policy guidance.

Section 303 authorizes the President to waive as of January 1, 1980, the application of the Buy American Act for purchases by any government entity of civil aircraft and related articles irrespective of value from countries party to the GATT Agreement on Trade in Civil Aircraft.

Section 304 sets forth negotiating objectives in conjunction with the renegotiation of the Code within 3 years to improve its operation and broaden the coverage. This negotiation is ongoing. The President is directed to seek more open and equitable foreign market access and the harmonization, reduction, or elimination of devices distorting government procurement trade. The President

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64 19 U.S.C. 2511-2518.

must also seek equivalent competitive opportunities in developed countries for U.S. exports in appropriate product sectors as the United States affords their products, such as in the heavy electrical, telecommunications, and transport equipment sectors. The President must report to the committees of jurisdiction during the renegotiations if he determines they are not progressing satisfactorily and are not likely to result within 12 months in expanded agreement coverage of principal developed country purchasers in appropriate product sectors. The President is also directed to indicate appropriate actions to seek sector reciprocity with such countries in government procurement, and may recommend legislation to prohibit procurement by entities not covered by the Code from such countries.

Title III of the 1979 Act, as amended, also contains a number of reporting requirements to the Congress on various aspects of the Code and its economic impact and implementation.

TITLE VII OF THE OMNIBUS TRADE AND COMPETITIVENESS ACT OF 1988, AS AMENDED

Background

Title VII of the Omnibus Trade and Competitiveness Act of 1988 ("Buy American Act of 1988")[65] as amended by the Uruguay Round Agreements Act, amended both the Buy American Act of 1933 and title III of the Trade Agreements Act of 1979 to address discrimination by foreign governments in the procurement of U.S. products or services. Title VII statutory authority ceased to be effective on April 30, 1996. On March 31, 1999, President Clinton issued Executive Order 13116, which reinstituted Title VII procedures.

Title VII prohibits U.S. government procurement of products and services from certain parties, including (1) signatories "not in good standing" to the Agreement; (2) signatories in good standing that discriminate against U.S. firms in their government procurement of products or services not covered by the Agreement; and (3) non-signatories to the Agreement whose governments discriminate against U.S. products or services in their procurement.

In the case of countries that discriminate on procurement not covered by the Agreement, prohibitions are to be imposed when a foreign government maintains a significant and persistent pattern or practice of discrimination against procurement of U.S. products or services that results in identifiable harm to U.S. business. In cases of signatories to the Agreement, Federal agencies would be prohibited from procuring only non-Agreement covered products from these countries unless that country has also been designated as a country "not in good standing."

Least developed countries are exempt from the procurement prohibition, as are

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65 41 U.S.C. 10a note.

products and services procured and used by the Federal Government outside the United States and its territories. A prohibition may also be waived, on a contract-by-contract or class of contracts basis, when in the public interest or to avoid the creation of a monopoly situation. The President or head of a Federal agency may also authorize the award of a contract or class of contracts, notwithstanding a prohibition, if insufficient competition exists to assure the procurement of products or services of requisite quality at competitive prices. Normally the Congress must be notified at least 30 days before the prohibition is waived on a contract or class of contract.

The President must submit to appropriate congressional committees, by April 30 each year, a report on the extent to which countries discriminate against U.S. products or services in making government procurements. The report must identify (1) signatories to the Agreement that are not in compliance with its requirements; (2) signatories to the Agreement whose products and services are acquired in significant amounts by the U.S. government, who are in compliance with the Agreement, but maintain a significant and persistent pattern or practice of discrimination in the government procurement of products and services not covered by the Agreement which results in identifiable harm to U.S. businesses; (3) non-signatories to the Agreement whose products or services are acquired in significant amounts by the U.S. government and who maintain in their government procurement a significant and persistent pattern or practice of discrimination which results in identifiable harm to U.S. businesses; (4) non-signatories to the Agreement, which fail to apply transparent and competitive procedures equivalent to those in the Agreement, and whose products and services are required in significant amounts by the U.S. government; and (5) non-signatories to the Agreement which fail to maintain and enforce effective prohibitions on bribery and other corrupt practices in connection with government procurement, and whose products and services are required in significant amounts by the U.S. government. The law requires the President to take into account a number of specific factors in identifying countries and to describe the practices and their impact in the annual report.

By the date the annual report is submitted, the U.S. Trade Representative (USTR) must request consultations with any identified country, unless that country was also identified in the preceding annual report. If the country is a signatory identified as not in compliance with the Agreement and does not comply within 60 days after the annual report is issued, the USTR must request formal dispute settlement proceedings under the Agreement, unless they are already underway pursuant to a previous identification. If dispute settlement is not concluded within 18 months or has concluded and the country has not taken action required as a result of the procedures to the satisfaction of the President, the country is considered "not in good standing" and the President is required to revoke the waiver of Buy American restrictions granted under the Trade Agreements Act of 1979, as amended. The President will not limit procurement from the foreign country if, before the end of 18 months following initiation of dispute settlement, the country has complied with the Agreement, has taken action recommended as a result of the procedures to the satisfaction of the President, or the procedures result in a determination requiring no action by the country. The President may also terminate the sanctions and reinstate a waiver at any time under such circumstances.

Within 60 days after the annual report is issued, the President must impose the procurement prohibition on any country identified as discriminating on procurements not covered by the Agreement and which has not eliminated its discriminatory procurement practices. The President may terminate the sanctions at such time as he determines the country has eliminated the discrimination.

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

The President also cannot impose sanctions if it would (1) limit U.S. government procurement to, or create a preference for, products or services of a single supplier; or (2) create a situation where there could be or are an insufficient number of actual or potential bidders to assure U.S. government procurement of goods or services of requisite quality at competitive prices.

By April 30 of each year, the President must submit to the Congress a general report on actions taken under title VII, including an evaluation of the adequacy and effectiveness of such actions as a means toward eliminating foreign discriminatory government procurement practices against U.S. businesses and, if appropriate, legislative recommendations for enhancing the usefulness of title VII or any other measures to eliminate or respond to foreign discriminatory foreign procurement practices.