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Dale E. McNiel[†]

I. Introduction

Increasing imports of agricultural commodities and processed food products can cause considerable financial harm to domestic producers and processing industries. For instance, a 162% increase in imports of wheat gluten since 1993 has left the domestic wheat gluten industry reeling.[1] On January 22, 1997, the U.S. Wheat Gluten Industry Council filed a petition with the United States Trade Representative (USTR), pursuant to section 301 of the Trade Act of 1974, complaining about the depressed prices of wheat gluten in the domestic market resulting from various practices of the European Communities (EC). The USTR commenced an investigation to determine whether EC subsidies hinder the importation of U.S. modified starches into the EC, but politely invited the petitioners to seek import relief elsewhere.[2] The industry then filed a petition under section 201 of the Trade Act of 1974 with the International Trade Commission (ITC).[3] On

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[1] *See Wheat Gluten Industry Files Section 201 Complaint Against EU*, THE FOOD AND FIBER LETTER (Sparks Cos., McLean, Va.), Oct. 6, 1997, at 3.

[2] *See* Certain Subsidies Affecting Access to the European Communities' Market for Modified Starch, 62 Fed. Reg. 12,264-65 (U.S. Trade Rep. 1997) (initiation of § 302 investigation). The investigation was subsequently terminated without resort to dispute settlement. *See* Certain Subsidies Affecting Access to the European Communities' Market for Modified Starch, 62 Fed. Reg. 32,398 (U.S. Trade Rep. 1997) (termination of § 302 investigation).

[3] *See* Wheat Gluten Industry Council, 62 Fed. Reg. 51,488 (U.S. Int'l Trade

January 15, 1998, the ITC found that the increased imports of wheat gluten caused serious injury to the U.S. wheat gluten industry.[4]

The experience of the U.S. Wheat Gluten Industry Council illustrates the increasing difficulty agricultural and other industries may experience when seeking relief from import competition. The agreements reached under the Uruguay Round of multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade 1994 (GATT 1994)[5] have changed many avenues of protection for farmers and processors from imports of agricultural products.[6] This Article will survey the principal governmental measures available to producers and processors to cope with import competition and discuss the impact that the Uruguay Round Agreement on Agriculture has had on these measures.

Section II of this Article will examine the effect of the GATT on seeking a modification of tariff bindings on agricultural imports. Section III will discuss import quotas and the effect of the GATT-imposed tarriffication on this form of protection. Section IV will consider the effect of the GATT on the imposition

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Comm'n 1997) (institution of § 202 investigation).

[4] *See* ITC Says Increased Imports of Wheat Gluten Injure U.S. Industry, ITC News Rel. No. 98-002 (Jan. 15, 1998); *ITC Finds Gluten Imports Harm U.S. Industry*, THE FOOD AND FIBER LETTER (Sparks Cos., Mc Lean, Va.), Feb. 2, 1998, at 3.

[5] The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations was signed on April 15, 1995, at Marrakesh, Morocco. It has three components, the main one being the Marrakesh Agreement Establishing the World Trade Organization and its four annexes. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 1 (1994), 33 I.L.M. 1143 (1994). Annex 1A to the Marrakesh Agreement Establishing the World Trade Organization contains multilateral agreements on trade in goods—which make up the "GATT 1994"—as well as a number of side agreements. *See* Marrakesh Agreement Establishing the World Trade Organization, THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS: THE LEGAL TEXTS 20 (1994), 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement]. The GATT 1994 has five components, including the General Agreement on Tariffs and Trade 1947 (GATT 1947) as amended through the years, instruments adopted under GATT 1947, and the Understandings contained in Annex 1A of the WTO Agreement. *See* PHILIP RAWORTH & LINDA C. REIF, THE LAW OF THE WTO 15-16 (1995).

[6] *See* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, *supra* note 5, Annex 1A [hereinafter GATT 1994].

of antidumping duties, and Section V will examine the GATT's effect on the law of countervailing duties. Section VI will discuss the availability of escape clause proceedings as an avenue of relief from agricultural import competition. Section VII will turn to intellectual property protection for agricultural industries. Finally, Section VIII will discuss the use of section 301 proceedings to challenge unfair import practices.

II. Tariffs

The oldest form of import protection is the tariff or import customs duty. The U.S. Constitution gives Congress the authority to lay and collect customs duties, provided that they are uniform throughout the United States.[7] However, since 1934, most changes in tariffs, generally reductions, have been proclaimed by the President under authority delegated by Congress.[8] This authority is generally invoked to implement the results of multilateral trade negotiations under the auspices of the GATT in which agreements have been reached to reduce tariffs.[9]

A. GATT Tariff Rights and Obligations

During various rounds of multilateral trade negotiations, all tariff rates for imports of agricultural products have been subject to tariff concessions or "bindings"[10] under the original General Agreement on Tariffs and Trade.[11] Under these provisions, World

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[7] *See* U.S. CONST. art. I, § 8, cl. 2. The States are prohibited from laying duties on imports or exports without the consent of Congress. *See id.* art. I, § 10, cl. 2.

[8] *See, e.g.*, Trade Expansion Act of 1962 § 201(a)(2), 19 U.S.C. § 1821(a)(2) (1994); Trade Act of 1974 § 101(a)(2), 19 U.S.C. § 2111(a)(2) (1994); Omnibus Trade and Competitiveness Act of 1988 § 1102(a)(1)(B), 19 U.S.C. § 2902(a)(1)(B) (1994).

[9] *See, e.g.*, Proclamation No. 6763, 60 Fed. Reg. 1007 (1995) (implementing the trade agreements resulting from the Uruguay Round of multilateral trade negotiations).

[10] During the Uruguay Round, all unbound tariff rates for imports of agricultural products were expected to be bound pursuant section L, Part B, paragraph 7 of the Draft Final Act issued by Arthur Dunkel, then chairman of the Uruguay Round Trade Negotiation Committee. *See* GATT Secretariat, *Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA/L.19 (Dec. 20, 1991). These bindings are reflected in the Schedules of Concessions of the various parties. Many U.S. tariff rates for agricultural imports had been bound in previous rounds of negotiations.

[11] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55

Trade Organization (WTO) Members, including the United States, cannot impose any duty higher than that bound in their Schedule of Concessions on agricultural products imported from other countries that are Members of the WTO. Also, WTO Members cannot take any other actions to nullify or impair the benefits of such tariff concessions.[12] In addition, the United States, as a WTO Member, must accord most-favored-nation (MFN) treatment to imports from all other WTO Members.[13] Therefore, it is unlikely that Congress could be persuaded to increase the tariff for any agricultural product above the bound rate.

However, GATT tariff bindings can be modified or withdrawn under the provisions of Article XXVIII of the GATT. Article XXVIII provides three circumstances under which a WTO

U.N.T.S. 194 [hereinafter GATT]. The GATT 1994 incorporates the original GATT by reference. *See* GATT 1994, *supra* note 6, para. 1. Article II of the GATT provides as follows:

> The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.

GATT, *supra*, art. II, para. 1(b). For good discussions of the GATT legal framework for tariff concessions, see KENNETH W. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 30-31 (1970); JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 201-17 (1969).

[12] For pending WTO disputes regarding nullification or impairment of tariff concessions, see *Japan—Measures Affecting Imports of Pork*, WT/DS66 (1997) (file regarding complaint by the European Communities); *European Communities—Measures Affecting Butter Products*, WT/DS72 (1997-1998) (file regarding complaint by New Zealand); *European Communities—Duties on Imports of Grains*, WT/DS13 (1995-1997) (file regarding complaint by the United States); *United States—Tariff Increases on Products from the European Communities*, WT/DS39 (1996) (file regarding complaint by European Communities). A searchable database of WTO documents is currently available via the World Wide Web at <http://www.wto.org/wto/online/ddf.htm>.

[13] *See, e.g., European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R/USA (May 22, 1997) (panel report). *See also European Communities—Duties on Imports of Rice*, WT/DS17/1 (Oct. 11, 1995) (request for consultations by Thailand).

Member has a right to withdraw or modify a tariff binding: (1) "open season" renegotiations, which apply to the withdrawal or modification of concessions to take effect on the first day of each 3-year period since January 1, 1958;[14] (2) "special circumstances" (or "out-of-season") renegotiations may be authorized by the WTO General Council "at any time, in special circumstances";[15] or (3) "reserved" renegotiations may occur, without prior authorization, if the Member initiating them notified the General Council during the previous 3-year period that it was reserving the right to modify its Schedule for the duration of the following three-year period.[16]

If any type of Article XXVIII renegotiations occurs, the "applicant" WTO Member[17] is required to negotiate with any other Member with which the concession(s) being modified or withdrawn was initially negotiated (i.e., the party holding "initial negotiating rights" or "INRs")[18] and any other Member determined

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[14] *See* GATT, *supra* note 11, art. XXVIII, para. 1. "Open Season" renegotiations may not be initiated earlier than six months, or later than three months, prior to the end of a three-year period; thus, the next period for initiating open season renegotiations is July 1 through September 30, 1999. *See id.* Ad art. XXVIII, para. 1, n.3. The "Ad" articles of GATT are interpretative notes that accompany GATT and are found in Annex 1 to GATT. Pursuant to Article XXXIV, "[t]he annexes to this Agreement are hereby made an integral part of this Agreement." *Id.* art. XXXIV. Thus, the Interpretative Notes have the same legal value as the provisions of the Agreement. *See* GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 953 (6th ed. 1994).

[15] GATT, *supra* note 11, art. XXVIII, para. 4. Normally, special-circumstances renegotiations involving a single item or a very small group of items should be concluded within 60 days. *See id.* Ad art. XXVIII, para. 4, n.3. Since special-circumstances renegotiations require authorization, a request can be blocked by a lack of consensus, or the WTO may be called upon to mediate a settlement. *See id.* art. XXVIII, paras. 4(c)-(d).

[16] *See id.* art. XXVIII, para. 5. Such a reservation applies to the party's entire schedule rather than to selected items. *See* Schedules and Customs Administration, Feb. 26, 1955, GATT B.I.S.D. (3d Supp.) at 218 (1955).

[17] The WTO Member initiating the Article XXVIII negotiations must transmit a notification to the WTO Secretariat for secret transmission to all other Members. *See* Procedures for Negotiations Under Article XXVIII, Nov. 10, 1980, GATT B.I.S.D. (27th Supp.) at 26 (1981). The notification should include the items which will be modified or withdrawn, the proposed modification, the compensation that the party is prepared to offer, and statistics on imports for the last three years in which data are available. *See id.* at 26-27.

[18] Parties have INRs if they requested the relevant concession(s) in rounds of request/offer negotiations or if they are deemed to have INRs, due to having current principal supplier status, for purposes of rounds of linear concessions, such as the

to have a "principal supplying interest" in the concession.[19] The applicant is also required to *consult* with any Member determined to have a "substantial interest"[20] in the concession.[21] The negotiations must "endeavor to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that provided for . . . prior to such negotiations."[22] If agreement on compensation cannot be reached with the Members having negotiating rights, the applicant is nevertheless free to modify its schedule. In the event of such

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Kennedy, Tokyo, and Uruguay Rounds.

[19] Normally, the Council should determine that a party has a principal supplying interest only if that party "has had, over a reasonable period of time prior to the negotiations, a larger share in the market of the applicant contracting party than a contracting party with which the concession was initially negotiated . . . ." *See* GATT, *supra* note 11, Ad art. XXVIII, para. 1 n.4. Special rules apply if the applicant has maintained discriminatory quantitative restrictions or if the concession involves "a major part of the total exports" of a contracting party. *Id.* Ad art. XXVIII, para. 1 n.5. Normally, there is, at most, one party with principal supplier rights. *See id.* Ad art. XXVIII, para. 1 n.4. However, two parties may be determined to have principal supplier status if they have equal shares (both greater than that of the party with INRs) or if the concession involves the "major share of total exports" of a party which does not have the largest share of imports. In addition, the Understanding on the Interpretation of Article XXVIII reached during the Uruguay Round provides that a Member having the highest ratio of its total exports to the Member modifying a concession that will be affected by the modification shall also be deemed to have a principal supplier interest. *See* Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, para. 1, WTO Agreement, *supra* note 5, Annex 1A [hereinafter Understanding on the Interpretation of Article XXVIII].

[20] It has been said that "substantial interest is not capable of a precise definition" but is intended to cover those contracting parties which have "a significant share" in the market of the applicant. GATT, *supra* note 11, Ad art. XXVIII, para. 1, n.7. The Committee on Tariff Concessions, in July 1985, noted "that the '10 per cent share' rule had been generally applied for the definition of 'substantial supplier.'" GATT, ANALYTICAL INDEX: GUIDE TO GATT LAW AND PRACTICE 869 (6th ed. 1994).

[21] *See* GATT, *supra* note 11, art. XXVIII, para. 1.

[22] *Id.* art. XXVIII, para. 2. The Uruguay Round Understanding on the Interpretation of Article XXVIII provides that if an ordinary tariff is converted to a tariff-rate quota, future trade prospects should be included in the compensation. Paragraph 6 of the Understanding provides that

> future trade prospects should be based on the greater of (1) the average annual trade in the most recent representative 3-year period, increased by the average annual growth rate of imports in that same period, or by ten per cent, whichever is greater; or (2) trade in the most recent year increased by ten per cent.

Understanding on the Interpretation of Article XXVIII, *supra* note 19, para. 6.

unilateral action, the Members having negotiating rights and all Members having substantial supplier interests are entitled to retaliate by withdrawing substantially equivalent concessions for the following six months.[23]

There is no explicit, general legal authority for the President to enter into Article XXVIII negotiations. However, section 125(c) of the Trade Act of 1974 authorizes limited tariff increases which could be used to implement an Article XXVIII renegotiation of certain tariff bindings made in the Kennedy or Tokyo Rounds or previously.[24] This authority, however, cannot be used to modify the tariff bindings made during the Uruguay Round, when concessions were made for all tariffs on imported agricultural products.

Congress can provide the authority to enter into Article XXVIII negotiations through special legislation. For example, in the Uruguay Round Agreements Act, Congress authorized a renegotiation of tariff bindings on imports of tobacco,[25] as a response to the adverse findings of a GATT panel on the domestic content legislation for tobacco.[26] Following negotiations with a number of countries, the tariff bindings for imported tobacco were modified to create a tariff-rate quota.[27]

The United States has no GATT obligation with respect to tariff rates applied to imports originating in countries that are not Members of the WTO. Generally, whether such countries receive MFN treatment depends on whether there is a bilateral trade

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[23] *See* GATT, *supra* note 11, art. XXVIII, para. 3(a). If agreement is reached with the contracting parties having negotiating rights, all parties having substantial supplier interests, if not satisfied, are entitled, for the following 6 months, to retaliate by withdrawing substantially equivalent concessions. *See id.* art. XXVIII, para. 3(b).

[24] *See* 19 U.S.C. § 2135(c) (1994) (giving the President authority to modify import duties and other restrictions, in effect on Jan. 1, 1975, as deemed necessary).

[25] *See* Uruguay Round Agreements Act § 421, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

[26] *See United States—Measures Affecting the Importation, Internal Sale and Use of Tobacco*, DS44/R (Aug. 12, 1994) (panel report adopted on Oct. 4, 1994), *available in* 1994 WL 910938 (G.A.T.T.). The domestic content legislation was popularly known as the Ford Amendment.

[27] *See* Proclamation No. 6821, 3 C.F.R. 71 (1995) (to establish a tariff-rate quota on certain tobacco, eliminate tariffs on certain other tobacco, and for other purposes).

agreement between the United States and the non-Member country. Some countries, however, are denied MFN status under the provisions of the Jackson-Vanik amendment[28] unless they are found to provide certain human rights to their citizens or are granted a waiver by the President. Although the Jackson-Vanik amendment generally is not designed to afford import relief, it does have a provision authorizing the increase or imposition of import duties to prevent market disruption with respect to an article produced by a domestic industry.[29] This provision could be used to provide relief from imports of agricultural products originating in China or any other communist country.

B. The WTO Special Safeguards

As a result of the Uruguay Round, non-tariff barriers to imports of agricultural products were subject to "tariffication" or the conversion to tariff equivalents, usually tariff-rate quotas. The Agreement on Agriculture provides for the imposition of special safeguards[30] with respect to imports of agricultural products that were the subject of tariffication.[31] A special safeguard may be invoked if (1) the volume of imports[32] of a product during any year

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[28] Trade Act of 1974, subchapter IV, 19 U.S.C. §§ 2431-41 (1994) (governing trade relations with countries not currently receiving nondiscriminatory treatment).

[29] *See* 19 U.S.C. § 2436 (1994). "Market disruption" is defined as existing within a domestic industry "whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry." *Id.* § 2436(e)(2)(A).

[30] *See* Agreement on Agriculture, Apr. 15, 1994, art. 5, para. 1, WTO Agreement, *supra* note 5, Annex 1A [hereinafter Agreement on Agriculture]. Where a special safeguard is invoked, a WTO Member may not simultaneously invoke the escape clause provisions of paragraphs 1(a) and 3 of Article XIX of the GATT 1994 or the safeguard under paragraph 2 of Article 8 of the Agreement on Safeguards. *See id.* art. 5, para. 8. For a current dispute involving the Agreement on Safeguards, see *United States—Safeguard Measure Against Imports of Broom Corn Brooms*, WT/DS78 (1997) (file regarding complaint by Colombia).

[31] *See* Agreement on Agriculture, *supra* note 30, art. 5, para. 1. The products subject to the special safeguard provisions must be identified in a Member's Schedule of Concessions with the note "SSG." *See id.*

[32] Imports under current and minimum access commitments established as part of a tariff concession can be counted toward the volume of imports required for invoking the quantity-based safeguard, but imports under such commitments cannot be assessed any

exceeds a trigger level,[33] or (2) "the price at which imports of that product [] enter the customs territory of the Member [invoking the safeguard], as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price[34] for the product concerned."[35]

The safeguard provisions are quite complex and provide the

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additional duty. *See id.* art. 5, para. 4.

[33] *See id.* The trigger level is based on market access opportunities (defined as imports as a percentage of the corresponding domestic consumption during the three preceding years for which data are available). Article 5 specifies trigger levels for the quantity-based safeguard as follows:

> Any additional duty imposed under sub-paragraph 1(a) [Article 5(1)] shall only be maintained until the end of the year in which it has been imposed, and may only be levied at a level which shall not exceed one-third of the level of the ordinary customs duty in effect in the year in which the action is taken. The trigger level shall be set according to the following schedule based on market access opportunities defined as imports as a percentage of the corresponding domestic consumption during the three preceding years for which data are available:
>
> (a) where such market access opportunities for a product are less than or equal to 10 per cent, the base trigger level shall equal 125 per cent;
>
> (b) where such market access opportunities for a product are greater than 10 per cent but less than or equal to 30 per cent, the base trigger level shall equal 110 per cent;
>
> (c) where such market access opportunities for a product are greater than 30 per cent, the base trigger level shall equal 105 per cent.
>
> In all cases the additional duty may be imposed in any year where the absolute volume of imports of the product concerned entering the customs territory of the Member granting the concession exceeds the sum of (x) the base trigger level set out above multiplied by the average quantity of imports during the three preceding years for which data are available and (y) the absolute volume change in domestic consumption of the product concerned in the most recent year for which data are available compared to the preceding year, provided that the trigger level shall not be less than 105 per cent of the average quantity of imports in (x) above.

Id. art. 5, para. 4.

[34] "The reference price used to invoke the provisions of this [safeguard are], in general, the average c.i.f. unit value of the product concerned, or otherwise . . . an appropriate price in terms of the quality of the product and its stage of processing." *Id.* art. 5, para. 1 n.2. The safeguard must be publicly specified and available to allow other WTO Members to assess the additional duty that may be levied. *See id.*

[35] *Id.* art. 5, para. 1(b).

option of a quantity-based safeguard or a price-based safeguard.[36] A quantity-based safeguard may only be maintained "until the end of the year in which it has been imposed, and may only be levied at a level which [does] not exceed one-third of the level of the ordinary customs duty in effect in the year in which the action is taken."[37] The level of a price-based safeguard must be set according to a complex schedule.[38] The Agreement on Agriculture

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[36] Pursuant to Article 5(1) a Member may take recourse to a safeguard if:

(a) the volume of imports of that product entering the customs territory of the Member granting the concession during any year exceeds a trigger level which relates to the existing market access opportunity as set out in [Article 5(4)]; or, but not concurrently:

(b) the price at which imports of that product may enter the customs territory of the Member granting the concession, as determined on the basis of the c.i.f. import price of the shipment concerned expressed in terms of its domestic currency, falls below a trigger price equal to the average 1986 to 1988 reference price for the product concerned.

Id. art. 5, para. 1.

[37] *Id.* art. 5, para. 4.

[38] The schedule is as follows:

(a) if the difference between the c.i.f. import price of the shipment expressed in terms of the domestic currency (hereinafter referred to as the "import price") and the trigger price as defined under that sub-paragraph is less than or equal to 10 per cent of the trigger price, no additional duty shall be imposed;

(b) if the difference between the import price and the trigger price (hereinafter referred to as the "difference") is greater than 10 per cent but less than or equal to 40 per cent of the trigger price, the additional duty shall equal 30 per cent of the amount by which the difference exceeds 10 per cent;

(c) if the difference is greater than 40 per cent but less than or equal to 60 per cent of the trigger price, the additional duty shall equal 50 per cent of the amount by which the difference exceeds 40 per cent, plus the additional duty allowed under (b);

(d) if the difference is greater than 60 per cent but less than or equal to 75 per cent, the additional duty shall equal 70 per cent of the amount by which the difference exceeds 60 per cent of the trigger price, plus the additional duties allowed under (b) and (c);

(e) if the difference is greater than 75 per cent of the trigger price, the additional duty shall equal 90 per cent of the amount by which the difference exceeds 75 per cent, plus the additional duties allowed under (b), (c) and (d).

Id. art. 5, para. 5.

honors contract sanctity[39] and allows differential treatment for perishable and seasonal products.[40] Heading 9904 of chapter 99 of the Harmonized Tariff Schedules of the United States (HTS) identifies the price-based special safeguards in detail and publishes the rate of additional duty for quantity-based safeguards, which must be announced by the Secretary of Agriculture.[41]

C. Free Trade Areas

The North American Free Trade Agreement (NAFTA)[42] established annual tariff reductions that were supposed to completely eliminate tariffs on imports from Canada by January 1, 1998. NAFTA also established a similar elimination of all tariffs on imports from Mexico by January 1, 2008.[43] There is no formal procedure in the NAFTA for the modification or withdrawal of these tariff commitments. However, the NAFTA provides for a temporary duty snapback for imports of certain fresh fruits or vegetables from Canada.[44] The snapback is administered by the

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[39] Article 5(3) provides:

> Any supplies of the product in question which were *en route* on the basis of a contract settled before the additional duty is imposed . . . shall be exempted from any such additional duty, provided that they may be counted in the volume of imports of the product in question during the following year for the purposes of triggering [the quantity-based safeguard] in that year.

Id. art. 5, para. 3.

[40] *See id.* art. 5, para. 6 (applying the conditions of Article 5(5) "in such a manner as to take account of the specific characteristics of such products").

[41] *See* U.S. INT'L TRADE COMM'N, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES 1997, USITC Publication 3001, ch. 99, heading 9904 (1997) [hereinafter HTS].

[42] North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289, 32 I.L.M. 605 (1993) [hereinafter NAFTA].

[43] *See* NAFTA, *supra* note 42, art. 302 & annex 302.2 The decision of the NAFTA Panel on Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products will permit Canada to permanently continue the imposition of tariff-rate quotas on imports of U.S.-origin dairy products, poultry, eggs, margarine and barley and related products. *See* NAFTA Secretariat, *Tariffs Applied by Canada to Certain U.S.-Origin Agricultural Products*, at 62, CDA-95-2008-01 (Dec. 2, 1996) (final report of the panel). Under the Panel's reasoning, the United States should be similarly entitled to continue to apply tariff-rate quotas to imports of Canadian-origin dairy products, peanuts, cotton, sugar and sugar containing products.

[44] *See* NAFTA, *supra* note 42, art. 702, annex 702.1, para. 1 (incorporating, *inter alia*, Article 702 of the United States-Canada Free Trade Agreement (FTA)). The fruits

Foreign Agricultural Service (FAS).[45] The NAFTA has an additional special safeguard for specified products imported from Canada or Mexico.[46] The special safeguard must be in the form of a tariff-rate quota and the over-quota tariff rate may not exceed the lesser of the MFN rate as of July 1, 1991 or the current MFN.[47] The U.S. products covered are seasonal imports of certain tomatoes (except cherry tomatoes), certain onions and shallots, eggplants, chili peppers, squash, and watermelons.[48]

The United States and Israel are also parties to a free trade agreement which provides for the elimination of all customs duties.[49] Under this agreement, imports of certain perishable products are subject to a snapback duty administered by the FAS.[50]

D. Tariff Preferences

The United States grants duty-free treatment to imports under three preferential tariff regimes: the Generalized System of Preferences (GSP), the Caribbean Basin Initiative (CBI), and the Andean Trade Preferences Act (ATPA). In various circumstances, the President can withdraw or limit duty-free treatment under these agreements. This gives agricultural industries an additional avenue of relief when unfair or harmful import competition is coming from a country which is a beneficiary of one of these three regimes.

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and vegetables covered under the FTA snapback provision include certain potatoes, tomatoes, onions, shallots, leeks, garlic, cabbages, cauliflower, kohlrabi, kale, lettuce, chicory, carrots, salad beets, salsify, celeriac, radishes, cucumbers, grapes, pears, quinces, apricots, cherries, peaches, plums, and various other products. *See* United States-Canada Free Trade Agreement, Dec. 12, 1987-Jan. 2, 1988, art. 702, para. 7, 27 I.L.M. 281, 318 (1993).

[45] *See* 7 C.F.R. pt. 1560 (1997).

[46] *See* NAFTA, *supra* note 42, art. 703, para. 3.

[47] *See id.* The MFN rate is the tariff rate applicable to imports from WTO Members, except those benefiting from preferential treatment. *See generally* GATT, *supra* note 11, art. I.

[48] *See* NAFTA, *supra* note 42, annex 703.3, § C.

[49] *See* U.S.-Israel Free Trade Area Agreement, Apr. 22, 1985, U.S.-Israel, art. 1, 24 I.L.M. 653, 657 (1985).

[50] *See* 7 C.F.R. pt. 1540, subpart B (1997).

1. The Generalized System of Preferences (GSP)

The Generalized System of Preferences (GSP) is a preferential tariff arrangement intended to promote the export earnings and economic development of less-developed countries. Participating developed countries attempt to achieve these goals by giving imports from these less-developed nations an exemption from the ordinary (MFN) customs duties.[51] Under the GSP, the President may provide duty-free treatment for "any eligible article from any beneficiary developing country."[52] Subject to specified procedures, criteria, and exceptions, the President is authorized to designate "eligible articles" and "beneficiary developing countries."[53]

The President may withdraw, suspend, or limit the application of the duty-free treatment accorded with respect to any article or with respect to any country.[54] However, the President may not impose a rate of duty other than that which would apply without GSP treatment.[55] In taking such action, the President is required to consider a number of statutory factors which include "the anticipated impact of [duty-free treatment] on United States producers of like or directly competitive products."[56] The President is authorized to withdraw an agricultural product from the list of eligible articles and to withdraw duty-free treatment from a specific article from a particular country.[57] The USTR has

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[51] *See* Generalized System of Preferences, June 25, 1971, GATT B.I.S.D. (18th Supp.) at 24 (1972). The GSP was introduced at the Second United Nations Conference on Trade and Development (UNCTAD). On June 5, 1971, the contracting parties of the GATT granted a waiver from the MFN obligations of Article I to permit developed contracting parties to accord preferential tariff treatment to products originating in developing countries and territories on a "generalized, non-discriminatory, and non-reciprocal" basis. *Id.* at 25.

[52] 19 U.S.C. § 2461 (1994). In the United States, the GSP was established by Title V of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 2066 (codified as amended at 19 U.S.C. §§ 2461-2466 (1994)).

[53] *See* 19 U.S.C. § 2462 (1994).

[54] *See* Trade Act of 1974 § 504(a), 19 U.S.C. § 2464(a)(1) (1994).

[55] *See id.*

[56] *Id.* § 2461(3).

[57] *See* Florsheim Shoe Co. v. United States, 744 F.2d 787, 792 (Fed. Cir. 1984); Sunburst Farms, Inc. v. United States, 797 F.2d 973 (Fed. Cir. 1986) (following

administrative responsibility for the GSP.[58]

2. The Caribbean Basin Initiative (CBI)

The Caribbean Basin Economic Recovery Act (CBERA) was enacted to promote economic revitalization and facilitate expansion of economic opportunities in the Caribbean Basin region.[59] Among other things, the CBERA authorizes the President to proclaim duty-free treatment for all eligible articles from any beneficiary country. Subject to specified criteria and exceptions, the President is authorized to designate beneficiary countries from a list of eligible countries.[60] By contrast, unless excluded by statute from eligibility,[61] duty-free treatment applies to "any article which is the growth, product, or manufacture of a beneficiary country" if the article is "imported directly from a beneficiary country into the customs territory of the United States" and the sum of "the cost or value of the materials produced in a beneficiary country" or countries plus "the direct costs of processing operations performed in a beneficiary country or countries is not less than 35 per centum of the appraised value of [the] article at the time it is entered" for customs clearance.[62]

Under the CBERA, the President generally may withdraw or suspend the designation of a beneficiary country or withdraw, suspend, or limit the application of duty-free treatment for any

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Florsheim). The court in *Florsheim* also concluded that the President is at liberty to consider factors other than those specified in the Act and noted that the President could limit preferential treatment by setting a quota for the number of articles which will be permitted to enter the United States duty-free. *See Florsheim*, 744 F.2d at 795.

[58] Any interested party can request that additional articles be designated eligible or that duty-free treatment eligibility be withdrawn from currently eligible articles. *See* 15 C.F.R. § 2007.0(a) (1997).

[59] *See* Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, 97 Stat. 384 (codified as amended at 19 U.S.C. §§ 2701-2707 (1994)).

[60] *See* 19 U.S.C. § 2701 (1994). The countries currently designated are Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago, and the British Virgin Islands. *See* HTS, *supra* note 41, General Note 7(a).

[61] *See id.* General Note 7(d). Excluded products include certain beef or veal, sugars, sirups or molasses, textile, and apparel articles. *See id.*

[62] *Id.* General Note 7(b)(i).

article of a country only if he or she determines that as a result of changed circumstances the country would be barred from designation under the statutory criteria.[63] The President has no general authority under the CBERA to remove specific articles from eligibility for duty-free treatment,[64] but if a petition is filed with the ITC for escape clause relief with respect to a perishable product,[65] the President may, upon the recommendation of the Secretary of Agriculture,[66] suspend duty-free treatment on an emergency basis pending the ITC's final action.[67]

3. *The Andean Trade Preference Act (ATPA)*

The ATPA is very similar to the CBERA in that articles originating in designated beneficiary countries[68] are entitled to duty-free treatment.[69] Like the CBERA, there is no procedure short of amending the legislation that could permanently withdraw duty-free treatment for a specific commodity or product.[70] However, ATPA is also like the CBERA in that when a petition is filed with the ITC for escape clause relief with respect to imports of a perishable product, the President, upon the recommendation of the Secretary of Agriculture,[71] may suspend duty-free treatment on an emergency basis.[72]

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[63] *See* 19 U.S.C. § 2702(e) (1994).

[64] Duty-free treatment of imports from CBI countries can be withdrawn in connection with "escape clause" actions under § 201 of the Trade Act of 1974, 19 U.S.C. §§ 2251-54 (1994), or national security safeguards under § 232 of the Trade Expansion Act of 1962, 19 U.S.C. §§ 1862-64 (1994).

[65] Perishable products include certain live plants, fresh or chilled vegetables, fresh mushrooms, fresh fruits, fresh cut flowers and concentrated citrus fruit juice. *See* 19 U.S.C. § 3203(e)(5) (1994).

[66] *See* 7 C.F.R. pt. 1540, subpart A (1997).

[67] *See* 19 U.S.C. § 2703(f) (1994).

[68] The countries are Bolivia, Columbia, Ecuador and Peru. *See id.* § 3202(b)(1).

[69] *See id.* § 3201.

[70] Duty-free treatment is limited to 10 years from December 4, 1991. *See id.* § 3206.

[71] *See* 7 C.F.R. pt. 1540, subpart C (1997).

[72] *See* 19 U.S.C. § 3203(e) (1994) (authorizing emergency relief with respect to perishable products).

III. Import Quotas

Prior to the Uruguay Round, the United States maintained import quotas on a variety of agricultural products. Quotas on imports of certain dairy products, sugar-containing products, peanuts and cotton had been imposed pursuant to the provisions of section 22 of the Agricultural Adjustment Act of 1933.[73] Section 22 provided for the imposition of fees or quantitative restrictions on imported articles whenever the President[74] found that such articles were being imported, or were practically certain to be imported into the United States, under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, certain United States Department of Agriculture programs or operations with respect to any agricultural commodity or product, or as to reduce substantially the amount of any product processed in the United States from a commodity or product included in such programs or operations.[75] The United States obtained a waiver for such measures under the provisions of the GATT 1947.[76] During the Uruguay Round, the United States

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[73] *See* Act of May 12, 1933, ch. 25, § 22, as added Aug. 24, 1935, ch. 641, 49 Stat. 773 (codified as amended at 7 U.S.C. § 624 (1994)).

[74] The President is instructed to act on the advice of the Secretary of Agriculture and after an investigation by the United States International Trade Commission. *See* 7 U.S.C. § 624 (1994).

[75] *See id.* § 624(b). Whenever a condition existed requiring emergency treatment, the President was authorized immediately to take temporary action without awaiting the recommendation of the International Trade Commission. *See* Act of May 12, 1933, ch. 25, § 22, as added Aug. 24, 1935, ch. 641, 49 Stat. 773 (codified as amended at 7 U.S.C. § 624 (1994)). Currently, under 7 U.S.C. § 624, the President has the authority to set quotas in order to encourage the exportation and domestic consumption of designated agricultural products, pursuant to 19 U.S.C. § 612c (1994), or for products that interfere with the Soil Conservation and Domestic Allotment Act, 16 U.S.C. §§ 590a-590q (1994). *See* 7 U.S.C. § 624 (1994).

[76] *See* Waiver Granted to the United States in Connection with Import Restrictions Imposed Under Section 22 of the United States Agricultural Adjustment Act (of 1933), as amended, Mar. 5, 1955, GATT B.I.S.D. (3rd Supp.) at 32 (1955); *see also* United States—Restrictions on the Importation of Sugar and Sugar-Containing Products Applied Under the 1955 Waiver and Under the Headnote to the Schedule of Tariff Concessions, Nov. 7, 1990, GATT B.I.S.D. (37th Supp.) at 228 (1990) (regarding EEC complaint about U.S. sugar quotas). For a discussion of the waiver, see DAM, *supra* note 11, at 260. For a general discussion of waivers under Article XXV of the GATT 1947, see JACKSON, *supra* note 11, at 541-52.

agreed to convert these quotas to tariff-rate quotas and agreed to the termination of the section 22 waiver. Congress amended section 22 to preclude its application to products of WTO Members.[77]

Imports of raw and refined sugar also had been subject to an absolute quota pursuant to a "headnote" in the Tariff Schedules of the United States (TSUS) which was based on identical notes in the United States' GATT Schedule.[78] In 1989, a GATT dispute settlement panel determined that the sugar quota was inconsistent with the GATT's general ban on quantitative restrictions.[79] President Bush responded to this decision by converting the sugar quota into a tariff-rate quota in order to bring the United States into conformity with its GATT obligations.[80] The tariff-rate quota was re-tariffied during the Uruguay Round, producing slightly different tariff rates, a commitment on a minimum quota amount, and separate tariff-rate quotas for raw sugar and refined sugar.[81]

Another example of tarriffication involved the Meat Import Act, which formerly provided for the imposition of quotas on imports of beef.[82] The quotas, which were seldom imposed, were converted to tariff-rate quotas[83] during the Uruguay Round negotiations, and the statute was repealed.[84]

Article 4.2 of the Uruguay Round Agreement on Agriculture prohibits WTO Members from maintaining, resorting to or reverting to any of the kinds of non-tariff measures which were

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[77] *See* Uruguay Round Agreements Act § 401, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

[78] *See* U.S. Cane Sugar Refiners' Assoc. v. Block, 683 F.2d 399, 402-03 (C.C.P.A. 1982).

[79] *See* United States—Restrictions on Imports of Sugar, June 22, 1989, GATT B.I.S.D. (36th Supp.) at 331 (1990).

[80] *See* Proclamation No. 6139, 55 Fed. Reg. 38,293 (1990).

[81] *See* HTS, *supra* note 41, ch. 17, Additional U.S. Note 5(a)(i), as modified by Proclamation No. 6763, 60 Fed. Reg. 1007 (1995).

[82] *See* An Act to Provide for the Free Importation of Certain Wild Animals, and to Provide for the Imposition of Quotas on Certain Meat and Meat Products, Pub. L. No. 88-842, 78 Stat. 594 (1964).

[83] *See* HTS, *supra* note 41, ch. 2, Additional U.S. Note 3.

[84] *See* Uruguay Round Agreements Act § 403, Pub. L. No. 103-465, 108 Stat. 4959 (1994).

required to be converted into tariffs during the tariffication process.[85] A footnote to the provision lists the prohibited measures as follows:

> These measures include quantitative import restrictions, variable import levies, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and similar border measures other than ordinary customs duties, whether or not the measures are maintained under country-specific derogations from the provisions of the GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of the GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the MTO.[86]

The list is a comprehensive list of non-tariff barriers. Because of this provision, it is unlikely that Congress or the President could be persuaded to resort to a listed non-tariff barrier to restrict harmful imports of an agricultural product.

As the preceding discussion illustrates, directly seeking a tariff modification or a non-tariff barrier is a difficult endeavor. GATT and the recent Uruguay Round have imposed substantial barriers to these avenues of protection. Thus, an agricultural industry being injured by import competition should consider other avenues of protection, including antidumping duties and countervailing duties.

IV. Antidumping Duties

The antidumping duty law[87] has been the trade law most frequently invoked to curb "unfair" imports and perhaps the most controversial.[88] Originally enacted in 1916 to curb predatory pricing,[89] the law has been supplemented and revised many times.[90]

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[85] *See* Agreement on Agriculture, *supra* note 30, art. 4, para. 2.

[86] Agreement on Agriculture, *supra* note 30, art. 4, n.1.

[87] *See* 19 U.S.C. §§ 1673-1673h, 1675, 1677, 1677a-1677n (1994).

[88] *See, e.g.*, Greg Mastel, *Dumping Safeguards: A New Look*, J. COM., Sept. 24, 1997, at 6A (discussing the importance of antidumping law and the improvements made in this area of law during the Uruguay Round).

[89] *See* Revenue Act of 1916 § 801, ch. 463, 39 Stat. 756, 798 (1916).

Dumping has two elements: (1) a class or kind of foreign merchandise is being, or is likely to be, "dumped" or sold in the United States "at less than fair value,"[91] and (2) a domestic industry has suffered material injury, or been threatened with material injury, as a result of the dumped imports.[92] If dumping is found to have caused or threatened to cause material injury, antidumping duties equal to the dumping margin are imposed on imports in addition to the normal customs duties.[93]

Dumping cases are generally initiated by the petition of domestic producers.[94] In order for antidumping duties to be imposed, the International Trade Administration (ITA) in the Department of Commerce must first find that dumping has occurred. The ITC then must determine that the dumped imports have caused, or threatened to cause, material injury to a competing domestic industry.[95] Both agencies make preliminary

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[90] *See* Antidumping Act of 1921, ch. 14, 42 Stat. 9, 11 (1921); Trade Act of 1974 § 1, 19 U.S.C. § 2101 (1994); Trade Agreements Act of 1979 § 101, Pub. L. No. 96-39, 93 Stat. 150, 162 (codified as amended at 19 U.S.C. § 1673 (1994)); Uruguay Round Agreements Act tit. II, Pub. L. No. 103-465, 108 Stat. 4809, 4842 (1994).

[91] 19 U.S.C. § 1673b(b)(1)(A) (1994). Normally, a sale "at less than fair value," consists of a sale for export to the United States at a price less than the comparable price in the home country market, but there are circumstances where the appropriate comparison is to sales in a third country market or the cost of production of the goods. *See id.*

[92] *See id.* § 1673b(a)(1). The causation element is expressed in the statute in terms of the injury occurring "by reason of" the imports. *Id.* § 1673b(a)(1)(B).

[93] *See id.* § 1673. Because dumping can vary from company to company, antidumping duties are imposed on a company-specific basis. *See* 19 C.F.R. § 353.20(a)(2)(ii) (1997) (requiring calculation of a weighted-average dumping margin for each person investigated). The International Trade Administration (ITA) must calculate the dumping margin on each particular entry. *See* HARVEY KAYE ET AL., 1 INTERNATIONAL TRADE PRACTICE § 21.02, at 21-2 (1987). Periodically, the ITA conducts administrative reviews of antidumping duties. *See* Patrick F.J. Macrory, *Administration of the U.S. Antidumping Law by the Department of Congress*, *in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT: UNDERSTANDING THE FUNDAMENTAL CHANGES 9, 27-31 (Harvey M. Applebaum & Lyn M. Schlitt eds., 1995) [hereinafter THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT]. *See also, e.g.*, Fresh Garlic From the People's Republic of China, 62 Fed. Reg. 51,082 (Int'l Trade Admin. 1997) (final results of antidumping duty administrative review and partial termination of administrative review).

[94] *See* 19 U.S.C. § 1673a(b) (1994) (setting petition requirements).

[95] *See* Tariff Act of 1930 § 731, 19 U.S.C. § 1673 (1994). Usually, dumping consists of selling for export at a price less than the home market price of comparable

determinations.[96] Whether or not the preliminary findings are positive, the agencies issue final determinations after completing their investigations. If the final determination of either the ITA or the ITC is negative, the entire investigation is terminated.[97]

The GATT condemns

> dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products . . . if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry.[98]

Article VI:1 also provides a definition of dumping as follows:

> A product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
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> (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
>
> (b) in the absence of such domestic price, is less than either
>
> (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or
>
> (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.
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> Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.[99]

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goods, but other tests are also used. *See* 19 C.F.R. §§ 353.41-353.60 (1997).

[96] Normally, the ITC has 45 days to determine whether there is a "reasonable indication" of material injury, and the ITA must issue its preliminary determination of dumping within 140 days. *See* Macrory, *supra* note 93, at 18-20.

[97] *See* 19 U.S.C. § 1673d(c)(2) (1994).

[98] GATT, *supra* note 11, art. VI, para. 1. For a detailed discussion of the GATT provisions on antidumping duties, see DAM, *supra* note 11, at 167-77; JACKSON, *supra* note 11, at 401-24.

[99] GATT, *supra* note 11, art. VI, para. 1. For applications of Article VI:1, see Swedish Antidumping Duties, Feb. 23, 1955, GATT B.I.S.D. (3d Supp.) at 81 (1955); Exports of Potatoes to Canada, Nov. 16, 1962, GATT B.I.S.D. (11th Supp.) at 88 (1963).

The GATT authorizes the imposition of an antidumping duty "not greater in amount than the margin of dumping" on dumped products.[100] It also prohibits imposing antidumping duties on products exempted from, or receiving rebates of, duties or taxes borne by the like domestic product destined for domestic consumption.[101] Subjecting an imported product to both antidumping and countervailing duties to compensate for the same situation of dumping or export subsidization is prohibited.[102] Finally, a contracting party may not impose an antidumping duty "unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry."[103]

An antidumping code adopted in 1967 purported to interpret the antidumping provisions of the GATT.[104] These provisions were only applicable to the trade of the signatories. During the Uruguay Round, another international agreement on antidumping measures was reached.[105] Congress amended the antidumping duty law to implement the antidumping agreement reached during the Uruguay Round.[106] The amendments relate to minimum standing requirements,[107] higher de minimis thresholds,[108] and sunset of

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[100] GATT, *supra* note 11, art. VI, para. 2.

[101] *See id.* art. VI, para. 4.

[102] *See id.* art. VI, para. 5.

[103] *Id.* art. VI, para. 6.

[104] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, L/2812 (1967), *reprinted in* JACKSON, *supra* note 11, at 426-38.

[105] *See* Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, WTO Agreement, *supra* note 5, Annex 1A [hereinafter Agreement on Implementation of Article VI].

[106] *See* Uruguay Round Agreements Act, Pub. L. No. 103-465, 108 Stat. 4809 (1994).

[107] *See* 19 U.S.C. § 1673a(c) (1994) (setting time limits on filings and specifying who can file). In order for a petition to be deemed to have been filed by or on behalf of the industry, the U.S. petitioners must represent at least 25% of domestic production of the relevant product, and the U.S. producers or workers supporting the petition must account for "more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition." *Id.* § 1673a(c)(4)(A).

[108] *See id.* § 1673b(b)(3). Dumping margins of less than two percent ad valorem are

antidumping orders.[109] However, the Uruguay Round is not viewed as having caused a substantial change in U.S. antidumping law or practice.[110]

V. Countervailing Duties

The U.S. countervailing duty law[111] is very similar to the antidumping duty law in that it provides for import duties to prevent imports at unfairly low prices. Countervailing duties are additional duties imposed to offset the benefits of a subsidy received by an imported product that has caused or threatened to cause material injury to the domestic producers of a like product. The countervailing duty law attempts to create a level playing field by counteracting foreign government export and domestic subsidies. The United States uses countervailing duties far more frequently than any other country.[112]

The genesis of the countervailing duty law is found in the McKinley Tariff Act of 1890.[113] In return for the tariff rate for imported raw sugar being dropped to zero, the sugar beet producers were given a 2¢ per pound "bounty" to counteract

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not subject to antidumping duties. *See id.* In addition, if it is preliminarily determined that imports are negligible, the investigation must be terminated. *See id.* § 1673b(a). Generally, the imports under investigation are considered negligible if they represent less than three percent of the volume of all imports of the product in the previous 12 months. *See id.* § 1677 (24)(A)(i).

[109] *See id.* § 1675(c). The ITA and ITC must conduct sunset reviews within five years of the imposition of an antidumping duty to assess the impact of its revocation. *See, e.g.*, Fresh Garlic From the People's Republic of China, 62 Fed. Reg. 51,082 (Int'l Trade Admin. 1997) (final results of antidumping duty administrative review and partial termination of administrative review).

[110] *See* Lyn M. Schlitt, *Uruguay Round Agreements Act Amendments to the Injury Provisions of the Antidumping and Countervailing Duty Laws, in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT, *supra* note 93, at 403, 405; Paul C. Rosenthal & Kathleen W. Cannon, *Changes to the Injury Provisions of the U.S. Trade Laws Under the Uruguay Round Agreements Act, in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT, *supra* note 93, at 415, 417.

[111] *See* 19 U.S.C. §§ 1671-1671h, 1675, 1677 to 1677-2, 1677c-1677f, 1677g-1677h, 1677j (1994).

[112] *See* BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM: FROM GATT TO WTO 184-87 (1995) (discussing countervailing duties generally).

[113] McKinley Tariff Act § 1, ch. 1244, sched. E, 26 Stat. 567, 583-85 (1890) (schedule regarding sugar).

foreign sugar subsidies plus a 1/10¢ per pound "additional" import duty on refined sugar imported from countries paying bounties on sugar exports.[114] The Tariff Act of 1897 made countervailing duties applicable to all subsidized imports that were subject to U.S. tariffs.[115]

The material injury criterion was not adopted until the conclusion of the Tokyo Round of multilateral trade negotiations in 1979,[116] and then it only applied with respect to imports from countries that were signatories to the Tokyo Round "Subsidies Code."[117] The Uruguay Round "Subsidies Agreement"[118] made the material injury test applicable to imports from all countries that are Members of the WTO.[119]

The ITA and the ITC perform comparable functions to their roles in antidumping duty cases, with the ITA making preliminary and final determinations on the issue of whether the imports benefited from a subsidy and the ITC determining whether the relevant domestic industry has suffered material injury.[120] Countervailing duties are in effect for live swine from Canada,[121] sugar from the EC,[122] and certain pasta from Turkey.[123]

Article VI of the GATT provides some discipline on the imposition of countervailing duties.[124] Article VI:3 provides as

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[114] *See* KAYE ET AL., *supra* note 93, § 13.04, at 13-17.

[115] *See id.* § 13.06, at 13-10.

[116] Trade Agreements Act of 1979 § 101, Pub. L. No. 96-39, 93 Stat. 150, 162 (codified as amended at 19 U.S.C. § 1673 (1994)).

[117] *See* Agreement on Implementation of Article VI, art. 3, THE TEXTS OF THE TOKYO ROUND AGREEMENTS 127, 129-31 (1986).

[118] *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, *supra* note 5, Annex 1A.

[119] *See id.* art. 15.

[120] *See* Tariff Act of 1930 §§ 701-06, 19 U.S.C. §§ 1671, 1671a-1671e (1994).

[121] *See* Live Swine from Canada, 62 Fed. Reg. 18,087 (Int'l Trade Admin. 1997) (final results of countervailing duty administrative review).

[122] *See* Sugar from the European Community, 43 Fed. Reg. 33,237 (U.S. Treas. Dep't 1978) (final countervailing duty determination).

[123] *See* Certain Pasta from Turkey, 61 Fed. Reg. 38,546 (Int'l Trade Admin. 1996) (notice of countervailing duty order).

[124] *See generally* DAM, *supra* note 11, at 177-79; JACKSON, *supra* note 11, at 424-26.

follows:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party in excess of an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.[125]

Article VI:4 also exempts border tax adjustments from countervailing duties as well as antidumping duties.[126] Article VI:6 generally requires, subject to grandfathering and some complex exceptions, that WTO Members refrain from imposing countervailing duties if the subsidized imports are not resulting in material injury.[127]

Part V of the WTO Agreement on Subsidies and Countervailing Measures (the "Subsidies Agreement")[128] provides some detailed limitations on the use of countervailing duties. The Subsidies Agreement includes rules regarding the initiation of investigations and rules of evidence,[129] calculation of the subsidy,[130] determination of injury and definition of domestic industry,[131] and a new sunset provision which calls for the termination of

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[125] GATT, *supra* note 11, art. VI, para. 3; *see also* United States—Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, July 11, 1991, GATT B.I.S.D. (38th Supp.) at 45 (1991) (finding that U.S. countervailing duties on pork levied against Canada were inconsistent with Article VI:3 of GATT).

[126] *See* GATT, *supra* note 11, art. VI, para. 4.

[127] *See id.* art. VI, para. 6(a).

[128] *See* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, WTO Agreement, *supra* note 5, Annex 1A [hereinafter Subsidies Agreement]. For a good discussion of the negotiation of the agreement, see JOHN CROOME, RESHAPING THE WORLD TRADING SYSTEM: A HISTORY OF THE URUGUAY ROUND 70-76, 200-07, 301-04 (1995).

[129] *See* Subsidies Agreement, *supra* note 128, arts. 11 & 12.

[130] *See id.* art. 14.

[131] *See id.* arts. 15 & 16.

countervailing duties after five years unless they are found to be needed to prevent a continuation or recurrence of subsidization and injury.[132]

Under the Uruguay Round Agreement on Agriculture, certain non-trade distorting domestic subsidies (i.e., those permitted policies in the so-called "green box") are non-actionable subsidies for purposes of countervailing duties.[133] For example, in its administrative review of the countervailing duty on live swine imported from Canada, the ITA considered whether certain domestic support measures by Quebec were entitled to the "green box" exemption.[134] In addition, the Agreement on Agriculture's so-called "peace clause" calls for "due restraint" to be exercised in initiating countervailing duty actions against imports benefiting from domestic subsidies or export subsidies so long as the WTO Member providing the subsidy is within the Member's reduction commitments.[135]

The Uruguay Round Agreements Act amended the countervailing duty law to make the material injury test applicable to imports from all WTO Members,[136] and to implement the procedural changes previously discussed with respect to

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[132] *See id.* art. 21.

[133] *See* Agreement on Agriculture, *supra* note 30, para. 13(a)(i).

[134] *See* Live Swine from Canada, 62 Fed. Reg. 47,460, 47,461-62 (Int'l Trade Admin. 1996) (preliminary results of countervailing duty administrative review).

[135] *See* Agreement on Agriculture, *supra* note 30, art. 13, paras. b(i) & c(i). The peace clause also exempts agricultural export subsidies from the ban on such subsidies in the Subsidies Code and exempts domestic subsidies from certain challenges under the Subsidies Code if the domestic support for the specific commodity does not exceed that provided during the 1992 marketing year. *See id.* art. 13, paras. b(ii) & c(ii).

[136] Prior to the Tokyo Round, U.S. countervailing duty law did not contain a material injury element. In 1979, Congress added a new countervailing duty law with an injury test, but the law only applied to imports from countries that were signatories to the Tokyo Round Subsidies Code, unless the country entered into a bilateral agreement with the United States that provided substantially equivalent obligations or that required unconditional most-favored-nation treatment. *See* 19 U.S.C. § 1671(a)-(b) (1994); Mark D. Herlach & David A. Codevilla, *Major Changes in U.S. Countervailing Duty Law: A Guide to the Basics*, *in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT, *supra* note 93, at 53, 73-76; Terrence P. Stewart, *The Countervailing Duty Law and the Subsidies Code: A Domestic Counsel's Perspective*, *in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT, *supra* note 93, at 263, 265.

antidumping duty cases.[137]

VI. The "Escape Clause"

The imposition of an antidumping duty or a countervailing duty requires that the ITA find that dumping or a subsidy exists. In situations where harmful import competition is not the result of dumping or a subsidy, an agricultural industry may consider pursuing "escape clause" proceedings which require only a showing of serious injury. The purpose of an escape clause is to allow a country to temporarily retreat from negotiated tariff concessions which have resulted in serious harm to its domestic industry.[138] Section 201 of the Trade Act of 1974, the U.S. escape clause, authorizes the President to increase existing duties, impose additional duties or a tariff-rate quota, or to take other actions[139] whenever an article is being imported in such increased quantities[140] as to be a substantial cause,[141] or a threat thereof, of serious injury[142] to the domestic industry[143] producing an article like or directly competitive with the imported article.[144] The statute authorizes provisional relief in the case of imports of a perishable agricultural product[145] or citrus product.[146] The escape

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[137] *See* Schlitt, *supra* note 110; Rosenthal & Cannon, *supra* note 110.

[138] *See* Harvey M. Applebaum & David R. Grace, *Section 201 of the Trade Act of 1974*, *in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT, *supra* note 93, at 519, 521.

[139] *See* 19 U.S.C. § 2253(a)(3). The statute authorizes the imposition of quantitative import restrictions and voluntary export restraints, but these would violate U.S. obligations under Article 4.2 of the Uruguay Round Agreement on Agriculture.

[140] An increase can be in terms of actual volumes or relative to domestic production. *See id.* § 2252(c)(1)(C).

[141] "Substantial cause" is defined as "a cause which is important and not less than any other cause." *Id.* § 2252(b)(1)(B).

[142] "Serious injury" is defined as "a significant overall impairment in the position of a domestic industry." *Id.* § 2252(c)(6)(C).

[143] Domestic industry is defined as "the producers as a whole of the like or directly competitive article or those producers whose collective production of the like or directly competitive article constitutes a major proportion of the total domestic production of such article." *Id.* § 2252(c)(6)(A)(i).

[144] *See id.* §§ 2252-54 (setting out methods for investigating claims, making determinations, defining response options, and monitoring the offender).

[145] *See id.* § 2252(d)(1)(B). A "perishable agricultural product" is defined as:

clause is administered by the USTR and the ITC.[147] Petitioners are expected to present an adjustment plan to facilitate positive adjustment to import competition.[148]

The escape clause is rarely invoked and even then is often not successful, generally because of the difficulty in proving that imports have caused the domestic industry's decline. In March 1995, Florida tomato growers requested provisional escape clause relief from imports of fresh winter tomatoes from Mexico. After intensive negotiations with the government of Mexico and the Mexican tomato industry, the petition was withdrawn and the investigation was terminated without any relief being imposed.[149] One recent case, however, illustrates that the escape clause can be successfully invoked. In September 1997, the U.S. wheat gluten industry filed a section 201 petition for increased import duties on wheat gluten from the European Union.[150] The ITC has found serious injury in this case and will recommend relief for the U.S. wheat gluten industry.[151]

The use of an escape clause is permitted by Article XIX of the GATT.[152] During the Uruguay Round, a Safeguards Agreement

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any agricultural article, including livestock, regarding which the Trade Representative considers action under this section to be appropriate after taking into account (i) whether the article has (I) a short shelf life, (II) a short growing season, or (III) a short marketing period, (ii) whether the article is treated as a perishable product under any other Federal law or regulation; and (iii) any other factor considered appropriate by the Trade Representative.

Id.

[146] *See id.* § 2252(d). "Citrus product" is defined as "any processed oranges or grapefruit, or any orange juice or grapefruit juice, including concentrate." *Id.* § 2252(d)(5)(A).

[147] *See* 19 C.F.R. pt. 206, subpart B (1997).

[148] *See* Applebaum & Grace, *supra* note 138, at 523. Such positive adjustment plans are not mandatory. *See id.*

[149] *See* Fresh Winter Tomatoes, 60 Fed. Reg. 25,248 (Int'l Trade Comm'n 1995) (termination of investigation).

[150] *See U.S. Wheat Gluten Producers File Section 201 Complaint Against EU*, 14 Int'l Trade Rep. (BNA) at 1630 (Sept. 24, 1997). For a discussion of the history of this case, see *supra* notes 1-4 and accompanying text.

[151] *See* ITC Says Increased Imports of Wheat Gluten Injure U.S. Industry, ITC News Rel. No. 98-002 (Jan. 15, 1998); *ITC Finds Gluten Imports Harm U.S. Industry*, THE FOOD AND FIBER LETTER (Sparks Cos., Mc Lean, Va.), Feb. 2, 1998, at 3.

[152] *See* GATT, *supra* note 11, art. XIX. Unlike the U.S. escape clause, Article

was reached which imposes limitations on the use of the escape clause.[153] The most important change is the creation of an obligation to negotiate trade compensation with WTO Members affected by the imposition of a safeguard.[154] If the Member imposing the safeguard fails to meet this obligation, it risks retaliation by affected WTO Members.[155] Although this obligation to negotiate does not arise until the import relief has been in place for three years,[156] the threat of retaliation makes successful use of the U.S. escape clause even less likely in the future.

VII. Intellectual Property Protection

A firm in an agricultural industry facing harmful import competition may have still another avenue of relief depending on the nature of its product. It is not uncommon for agricultural products to be the subject of intellectual property protection including biotechnology patents and trademarks. If a domestic firm's product has these protections, it should consider pursuing relief under section 337.[157] Section 337 authorizes the President to ban the importation of articles which infringe U.S. intellectual property rights, such as trademarks and trade names, patents, and copyrights, or which are marketed using unfair practices.[158] This law is administered by the ITC through investigations and exclusion orders, which apply to all imports of the infringing article regardless of the country of origin.[159]

In 1990, a GATT Panel found section 337 to be in violation of GATT Article III:4, which requires that imported products be given treatment no less favorable than like domestic products.[160]

XIX:1(a) further requires that the surge in imports result from unforeseen developments and from obligations incurred under the GATT such as tariff concessions. *See id.* art. XIX, para. 1(a).

[153] *See* Agreement on Safeguards, Apr. 15, 1994, WTO Agreement, *supra* note 10, Annex 1A.

[154] *See id.* art. 8, para. 1.

[155] *See id.* art. 8, para. 2.

[156] *See id.* art. 8, para. 3.

[157] Tariff Act of 1930 § 337, 19 U.S.C. § 1337 (1994).

[158] *See id.*

[159] *See* 19 C.F.R. pt. 210 (1997).

[160] *See* United States—Section 337 of the Tariff Act of 1930, Nov. 7, 1989, GATT

The statute was subsequently amended to bring it into conformity with the GATT.[161] The amendments should not reduce the effectiveness of section 337 in protecting U.S. intellectual property rights and should remove the international stigma caused by the panel ruling.[162] Therefore, this may be an effective avenue of relief for an agricultural industry facing harmful import competition.

VIII. Section 301 of the Trade Act of 1974

A final avenue of relief is available to a domestic industry when harmful competition is the result of a foreign *government's* policies. Section 301 provides an administrative means for a domestic industry to challenge the laws and practices of foreign countries that the industry believes are in violation of trade agreements or are otherwise unjustifiable and burden or restrict U.S. commerce.[163] It is generally used as a "crowbar" to challenge foreign market access restrictions and open foreign markets,[164] but it could be employed to challenge an unfair foreign practice, such as an export subsidy exceeding a Member's reduction commitments, that results in a surge of imports into the United States.[165] Section 301 is administered by the USTR[166] and usually

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B.I.S.D. (36th Supp.) at 345 (1990).

[161] *See* Uruguay Round Agreements Act, § 321, Pub. L. 103-465, 108 Stat. 4943 (1994).

[162] *See* Tom M. Schaumberg, *A Revitalized Section 337 to Prohibit Unfairly Traded Imports*, *in* THE GATT, THE WTO AND THE URUGUAY ROUND AGREEMENTS ACT, *supra* note 93, at 485, 498.

[163] *See* 19 U.S.C. §§ 2411-19 (1994).

[164] *See* Korean Agricultural Market Access Restrictions, 59 Fed. Reg. 61,006 (U.S. Trade Rep. 1994) (initiation of § 302 investigation which was refiled on July 20, 1995, 60 Fed. Reg. 42,925 (1995)); European Community Banana Import Regime, 59 Fed. Reg. 53,495 (U.S. Trade Rep. 1994) (initiation of § 302 investigation which was subsequently terminated, 60 Fed. Reg. 52,027 (1995)); Japanese Varietal Testing and Quarantine Requirements, 62 Fed. Reg. 53,378 (U.S. Trade Rep. 1997) (notification that United States has requested establishment of a dispute settlement panel under the WTO Agreement).

[165] For example, on September 5, 1997, the National Milk Producers Federation, the United States Dairy Export Council and the International Dairy Foods Association filed a petition challenging the Canadian dairy price-pooling system as an export subsidy circumventing Canada's WTO commitments. *See* Canadian Export Subsidies and Market Access for Dairy Products, 62 Fed. Reg. 53,851 (U.S. Trade Rep. 1997) (initiation of § 302 investigation).

results in a dispute settlement case being taken to a panel under the provisions of the WTO Understanding on Dispute Settlement.[167] If the panel concludes that the foreign practice violates a provision of a WTO agreement, the United States can retaliate against imports from that country by imposing additional import duties.[168]

IX. Conclusion

The Uruguay Round Agreement on Agriculture sharply reduced the ability of the federal government to provide import protection to domestic farmers and processors of agricultural commodities. All tariffs for imports have been bound in the U.S. GATT Schedule of Concessions, import quotas and other non-tariff barriers have been prohibited, and the use of countervailing duties to counter foreign domestic subsidies that are exempted from reductions has been limited. The primary protectionist measures—tariffs and quotas—have been circumscribed to the point of rendering them almost unavailable to limit imports from WTO Members.

Nonetheless, the United States retains the right to modify tariff bindings, withdraw tariff preferences, impose antidumping and countervailing duties, and protect patents on agricultural products. Furthermore, the United States has gained the ability to apply special price-based or quantity-based safeguards on imports of agricultural products and has gained greatly improved means of challenging foreign export subsidies and other practices in WTO dispute settlement proceedings. These measures should be demanded more frequently as other protectionist measures are banned.

On the whole, protectionism has been limited and the potential for using the remaining means of protection for political purposes has been curtailed. This was, of course, the intention of both the negotiators of the Agreement on Agriculture and of Congress when it approved the Uruguay Round agreements. Agricultural

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[166] *See* 15 C.F.R. pt. 2006 (1997).

[167] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, WTO Agreement, *supra* note 10, Annex 2.

[168] *See id.* art. 22. Article 22 refers to retaliation as the "suspension of concessions." *Id. See also* 19 U.S.C. § 2411(c) (1994) (granting USTR authority to retaliate).

industries hoping to gain relief from imports will be forced to focus their efforts on the available means and to marshal resources effectively to secure favorable government actions.