Chapter 41

# Guide to United States Trade Laws

*Matthew P. Jaffe*[*]

**Research References**

*West's Key Number Digest*

Customs Duties ⚷21.5(1) to 21.5(5)

*Westlaw Databases*

Am. Jur. 2d (AMJUR)
Antidumping and Countervailing Duty Laws (ANTIDUMP)
Corpus Juris Secundum (CJS)
Laws of International Trade (INTLTRADE)
Journals and Law Reviews (JLR)

*A.L.R. Library*

West's A.L.R. Digest, Customs Duties ⚷21.5(1) to 21.5(5)

*Legal Encyclopedias*

Am. Jur. 2d, Customs Duties and Import Regulations §§ 39 to 55
C.J.S., Customs Duties §§ 135 to 152

*Treatises and Practice Aids*

Pattison, Antidumping and Countervailing Duty Laws, Chapters 1 to 15
Laws of International Trade §§ 13:2 to 13:9

**KeyCite®:** Cases and other legal materials listed in KeyCite Scope can be researched through the KeyCite service on Westlaw®. Use KeyCite to check citations for form, parallel references, prior and later history, and comprehensive citator information, including citations to other decisions and secondary materials.

## § 41:1 Checklist

☐ Antidumping Duty Law

[*]Matthew P. Jaffe is a partner at Crowell & Moring, LLP, where he practices International Trade Law.

- Initiation of an antidumping duty investigation
- Proceedings leading to a possible antidumping duty order
- Proceedings after the imposition of an antidumping duty order
- Calculation of an antidumping duty
- Calculation of export price or constructed export price
- Calculation of normal value
- Calculation of the antidumping margin

☐ Countervailing Duty Law
- Initiation of a countervailing duty investigation
- Proceedings leading to a possible countervailing duty order
- Proceedings after the imposition of a countervailing duty order
- Calculation of a countervailing duty
- Calculation of the subsidy rate
- Actionable subsidies that are not countervailable

☐ Section 337
- Object of Section 337
- Proceedings leading to a Section 337 remedy
- Remedies available under Section 337

☐ Section 301
- Section 301 investigative procedures
- "Special 301" investigative procedures
- Section 301 and "Special 301" retaliatory action and procedures

☐ Safeguard proceedings
- Safeguard investigative procedures
- Safeguard remedies

## § 41:2 In general

There are five key U.S. trade laws that may impact imports of products into the United States: the antidumping duty law; the countervailing duty law; § 337 of the Tariff Act of 1930, as amended; § 301 of the Trade Act of 1974, as amended; and global and special safeguard proceedings. These laws do not apply automatically to imports. There first must be an affirmative act by the U.S. government pursuant to a trade law before

a consequence (i.e., a remedy) associated with the law is imposed on the imported product. In the case of the antidumping and countervailing duty laws, the remedy involves payment of an additional duty on the imported product. By contrast, in the case of § 337, the remedy usually involves total exclusion of the imported product from the United States. In all situations, there will be an investigation conducted by the U.S. government to determine whether a remedy is justified where interested parties can participate in an effort to influence the final decision.

## § 41:3 Antidumping duty law

The antidumping duty law generally targets international profit discrimination by seeking to force foreign sellers to earn the same profit, or return, on export sales as on domestic sales. In the United States, the antidumping duty law permits U.S. industries to petition the U.S. government for relief from imports sold in the United States at less than fair value ("dumped"). The antidumping duty law provides that an antidumping duty shall be imposed, in addition to any other duty, if two conditions are met:

1. The U.S. Department of Commerce (DOC) determines that "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value."[1] (This determination is based on a comparison of "normal value" (i.e., the home market or third country export prices) with the "export price" (i.e., the U.S. price), each adjusted to an ex-factory basis.[2])
2. The U.S. International Trade Commission (ITC) determines that "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise."[3]

If there is a finding of dumping, but no material injury, there is no remedy from the dumping. Similarly, if there is a finding of material injury, but no dumping, there is no remedy. Both

---

**[Section 41:3]**

[1] 19 U.S.C.A. § 1673(1).

[2] 19 U.S.C.A. § 1677(a), (b).

[3] 19 U.S.C.A. § 1673(2).

elements must exist before the U.S. industry will get a remedy via the addition of an extra duty—an antidumping duty—applied at the border to imports of applicable products.[4] The antidumping duty is supposed to level the playing field; it is supposed to bring the price of the goods up from their unfair value to their fair value. An antidumping duty thus is not supposed to stop the importation of the products into the United States; it is just supposed to make sure that the imported products in question are sold at fair value.

## § 41:4 Antidumping duty law—Initiation of an antidumping duty investigation

All antidumping duties result from an initial investigation. This investigation may be self-initiated by the DOC,[1] but in almost all cases, it is initiated by a petition filed by any of the following interested parties on behalf of the effected U.S. industry: a manufacturer, producer, or wholesaler in the United States; a certified or recognized union or group of workers representative of the affected industry; a trade or business association with a majority of members producing a like product; or various relevant coalitions.[2] Petitions are filed simultaneously with both the DOC and the ITC,[3] and the DOC must decide within 20 days after the filing of a petition whether or not it is legally sufficient to commence an antidumping investigation.[4] As part of that initiation process, the petitioner must demonstrate:

1. The domestic producers or workers who support the petition account for at least 25% of the total production of the applicable like product; and
2. The domestic producers or workers who support the petition account for more than 50% of the production of the domestic like product produced by that portion of the

---

[4] 19 U.S.C.A. § 1673d(c).

**[Section 41:4]**

[1] 19 U.S.C.A. § 1673a(a).

[2] 19 U.S.C.A. § 1673a(b).

[3] 19 U.S.C.A. § 1673a(b)(2).

[4] 19 U.S.C.A. § 1673a(c)(1)(A).

industry expressing support for or opposition to the petition.[5]

If the petitioner fails to demonstrate either criteria, then the DOC will reject the petition and decline to initiate an antidumping investigation.[6]

## § 41:5 Antidumping duty law—Proceedings leading to a possible antidumping duty order

Each antidumping investigation has at least five distinct phases. An antidumping investigation generally begins when a petitioner files a petition on behalf of a U.S. industry that requests the initiation of an antidumping investigation regarding importation of such-and-such merchandise (and parts thereof) from X, Y, and Z countries.[1] Both the DOC and the ITC then spring into action. Stage 1 involves a decision by the DOC whether to initiate an antidumping investigation. Usually the DOC decides to proceed with initiation, because a petitioner has already made certain before it filed the petition that it meets the domestic industry threshold.[2] Stage 1 normally concludes 20 days after the petition is filed.

As the DOC considers the question of initiation, the ITC starts Stage 2, which is its preliminary injury investigation. It really has no choice but to begin immediately (i.e., before initiation), because the ITC must make a preliminary injury determination no later than 45 days after the petition is filed.[3] Assuming the DOC initiates the investigation and the ITC makes an affirmative preliminary injury determination, the case continues. If the DOC does not initiate the investigation, or the ITC makes a negative preliminary injury determination, the case ends.[4]

If the ITC reaches an affirmative preliminary determination, the attention shifts to the DOC to conduct first its preliminary (Stage 3), then final dumping investigation (Stage 4). Whether the DOC's preliminary dumping determination is negative or

[5] 19 U.S.C.A. § 1673a(c)(4)(A).

[6] 19 U.S.C.A. § 1673a(c)(3).

**[Section 41:5]**

[1] 19 U.S.C.A. § 1673a(b).

[2] 19 U.S.C.A. § 1673a(c)(2).

[3] 19 U.S.C.A. § 1673b(a).

[4] 19 U.S.C.A. §§ 1673a(c)(3), 1673b(a)(1).

affirmative, the investigation still proceeds to a final DOC determination.[5] Sometime after the DOC's preliminary dumping determination, the ITC begins its final injury investigation (Stage 6). The DOC makes its final determination first: if it is negative, the case ends; if it is affirmative, the case continues. The same holds true for the ITC final determination: if it is negative, the case ends; if it is affirmative, the DOC will publish an antidumping duty order.[6]

There is one large difference as to the negative/affirmative nature of a DOC versus an ITC determination. In the DOC dumping realm, determinations are company specific. It is thus possible for there to be a negative dumping determination with respect to company A and an affirmative determination with respect to company B. In this case, company A is not subject to the subsequent antidumping duty order (assuming ITC reaches an affirmative determination).[7] Company B, however, and all other companies for which there is a finding of dumping, will be subject to the antidumping duty order. In contrast, ITC's decision is country specific as opposed to company specific. If ITC votes negative, the case is over and there will be no antidumping duty order for anyone exporting from that country.[8] If ITC votes affirmative, the DOC will impose an antidumping duty order for everyone except those companies for which the DOC found no or de minimis dumping.

Assuming both the DOC and the ITC reach affirmative decisions, the DOC will publish an antidumping duty order soon after it receives official notification from the ITC of its decision. The order will set the antidumping duties that must be deposited by importers of the foreign product until such time as there may be a DOC administrative review.[9] The order will remain in place in effect until: (1) it is revoked due to a lack of interest on the part of the domestic industry (something which is extremely rare),[10] or (2) it is revoked under a five-year sunset

[5] 19 U.S.C.A. § 1673d(a)(1).

[6] 19 U.S.C.A. § 1673d(c).

[7] 19 U.S.C.A. § 1673d(a)(4).

[8] 19 U.S.C.A. § 1673d(b)(1).

[9] 19 U.S.C.A. § 1673e(a).

[10] 19 U.S.C.A. § 1675(d)(1).

review procedure.[11] Additionally, an individual company may escape the effect of an order under a process called revocation.[12]

### § 41:6 Antidumping duty law—Proceedings after the imposition of an antidumping duty order

The United States uses a retrospective assessment system under which final liability for antidumping duties is determined after merchandise is imported. As such, when both the DOC and the ITC make final affirmative determinations, the DOC will issue an antidumping duty order that instructs the U.S. customs authority to require a cash deposit of estimated antidumping duties at the rates stipulated in the DOC's final determination.[1] The issuance of an antidumping duty order ends the initial investigation but it does not end the case. To the contrary, the amount of actual antidumping duties to be eventually assessed is determined in a separate proceeding known as an administrative review.[2]

If a review is not requested (i.e., it never takes place), duties are assessed at the cash deposit rate applicable at the time the imported merchandise was entered.[3] If a review is requested, the DOC will review the entries made during the time period subject to the review to determine the rate at which the entries were dumped.[4] The key to administrative reviews is that they take place after an antidumping duty order is in place and can repeat year after year (until the antidumping duty order is terminated). While investigations get all the notoriety, reviews are where the real work gets done and where the dumping penalties get levied.

In other words, antidumping investigations determine whether dumping injures a domestic industry. If the investigation finding is affirmative, the DOC establishes an antidumping duty order, which instructs the U.S. customs authority to collect a cash deposit on entries of the merchandise subject to the antidumping duty order. The key points here are: (1) this

---

[11] 19 U.S.C.A. § 1675(d)(2).

[12] 19 C.F.R. § 351.222(b)(2).

**[Section 41:6]**

[1] 19 U.S.C.A. § 1673e(a), (b).

[2] 19 U.S.C.A. § 1675.

[3] 19 C.F.R. § 351.212(c).

[4] 19 U.S.C.A. § 1675(a)(2).

is just a cash deposit; and (2) the cash deposit is collected on entries for which a determination of dumping has not yet been made. The role of the administrative review is to look at entries for which a cash deposit has been collected, determine whether those entries have actually been dumped, collect the actual dumping for these entries (assuming they are dumped), and set a new cash deposit for future entries.

### § 41:7 Antidumping duty law—Calculation of an antidumping duty

Antidumping focuses on the calculation of two values: the export price or constructed export price[1] and the normal value.[2] The two values are then compared to determine whether the imported product is being, or is likely to be, sold at less than fair value (where the normal value stands as the "fair value" surrogate).[3]

It is at this point that the antidumping law baffles most participants because of the complexity in calculating these two values. It is simplest to think of the "export price" or "constructed export price" as the U.S. price for the imported product and the normal value as the foreign price. The object then is to compare the U.S. price and the foreign price at the same point in the chain of commerce. The point chosen by the antidumping law is right outside the factory door. If, after adjustments have been made, the ex-factory U.S. price is less than the ex-factory foreign price, then the imported product is considered to have been sold at less than its fair value (i.e., dumped) in the United States. If the ex-factory U.S. price is greater than, or equal to, the ex-factory foreign price, the imported price is considered to have been sold at fair value (i.e., not dumped).

### § 41:8 Antidumping duty law—Calculation of export price or constructed export price

The U.S. price begins with the price at which the imported product is sold to an unaffiliated purchaser. The export price essentially starts with the gross price at which the imported

---

**[Section 41:7]**

[1] 19 U.S.C.A. § 1677a.

[2] 19 U.S.C.A. § 1677b.

[3] 19 U.S.C.A. § 1677f-1(d).

product is first sold to that unaffiliated purchaser outside the United States,[1] while the constructed export price starts with the gross price at which the imported product is first sold to that unaffiliated purchaser inside the United States.[2] The distinction in the starting price for each calculation is critical, because the subsequent adjustments made to the starting prices differ dramatically. That is, the price used to establish both the export price and the constructed export price is adjusted to include packing costs "incident to placing the merchandise in condition packed ready for shipment to the United States," import duties, and countervailing duties for export subsidies and to exclude movement charges, export taxes, and reimbursed antidumping duties.[3] The price used to establish constructed export price, however, is then additionally adjusted to exclude expenses generally incurred by or for the account of the producer or exporter in the United States in selling the merchandise, any increased further manufacturing value, and the profit allocated to these expenses.[4]

## § 41:9 Antidumping duty law—Calculation of normal value

The foreign price, or what is officially termed "normal value", generally begins with the price at which a product identical or similar to the imported product is sold in the exporting country (or home market).[1] There may be circumstances in which that price is unavailable. In that case, the normal value will be calculated based on the price at which an identical or similar product is sold to a third country,[2] or constructed based on costs associated with the production of the product.[3] There may be other circumstances in which that price is inappropriate because it is sold at less than the costs of production. In that case, the normal value will be calculated based on remaining

---

**[Section 41:8]**

[1] 19 U.S.C.A. § 1677a(a).

[2] 19 U.S.C.A. § 1677a(b).

[3] 19 U.S.C.A. § 1677a(c).

[4] 19 U.S.C.A. § 1677a(d).

**[Section 41:9]**

[1] 19 U.S.C.A. § 1677b(a)(1)(B)(i).

[2] 19 U.S.C.A. § 1677b(a)(1)(B)(ii).

[3] 19 U.S.C.A. § 1677b(a)(4).

sales, or where no such sales exist, constructed based on costs associated with production.[4] As with the calculation of the export price or constructed export price, there are adjustments designed to arrive at an ex-factory "fair" value that will be compared to the U.S.-bound, ex-factory value.

There are a number of situations, however, where the foreign price calculation does not begin with the price at which a product identical or similar to the imported product is sold in the exporting country. The most well-known example involves subject merchandise manufactured in a non-market economy country,[5] where a nonmarket economy country is defined as a foreign country that the DOC "determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise."[6] Currently, the most notable nonmarket economy country is China. In this situation, the foreign price is based on the factors of production, which are then assessed values based on the price or cost of those factors in a comparable market economy country (i.e., surrogate values).[7]

## § 41:10 Antidumping duty law—Calculation of the antidumping margin

After the DOC calculates the U.S. price and the foreign price that it plans to use in its dumping calculation, it then compares these two values in one of three ways. For an antidumping investigation, the DOC normally compares the weighted average of the normal values to the weighted average of the export price (or constructed export price) for comparable merchandise.[1] The DOC also has the option of comparing the normal values of individual transactions to the export price or constructed export price of individual transactions for comparable merchandise, but it seldom does so in practice.[2] For an antidumping review, the DOC normally compares the weighted average normal values to the export price (or constructed export price)

---

[4] 19 U.S.C.A. § 1677b(b).

[5] 19 U.S.C.A. § 1677b(c).

[6] 19 U.S.C.A. § 1677(18)(a).

[7] 19 U.S.C.A. § 1677b(c).

**[Section 41:10]**

[1] 19 U.S.C.A. § 1677f-1(d)(1)(A).

[2] 19 U.S.C.A. § 1677f-1(d)(1)(B).

for comparable merchandise.[3] Each of these comparison methodology can result in a different determination so it is important for interested parties to understand which methodology is applicable when they get involved in an antidumping proceeding.

## § 41:11 Countervailing duty law

The countervailing duty law generally targets a foreign government's decision to provide preferential assistance (i.e., a subsidy) to exporters or specific industries. Although the purpose of the countervailing duty law differs from the previously discussed antidumping duty law, the two laws share a number of procedural and substantive similarities.

Specifically, both laws require an affirmative determination by the U.S. Department of Commerce (DOC) and the U.S. International Trade Commission (ITC) before a special duty will be imposed in addition to normal duties. As in the case of the antidumping duty law, it is the responsibility of the ITC to determine whether "an industry in the United States is materially injured, or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of that merchandise."[1] However, unlike the antidumping duty law, this injury requirement is limited to imports from Subsidies Agreement countries, which include member countries of the World Trade Organization (WTO), a country that has assumed obligations with respect to the United States similar to the obligations under the WTO Subsidies Agreement, or a country in which the President determines there is a certain agreement that requires unconditional most-favored-nation treatment for articles imported into the United States.[2] Imports from a country that is not a Subsidies Agreement country do not get an injury test.[3] It is otherwise the responsibility of the DOC to determine whether "the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the manufacture, production, or export of a class or kind of merchandise imported,

---

[3] 19 U.S.C.A. § 1677f-1(d)(2).

**[Section 41:11]**

[1] 19 U.S.C.A. § 1671(a)(2).

[2] 19 U.S.C.A. § 1671(b).

[3] 19 U.S.C.A. § 1671(c).

or sold (or likely to be sold) for importation into the United States."[4]

For a Subsidies Agreement country, if there is a finding of countervailable subsidies, but no material injury, there is no remedy from the net countervailable subsidies. Similarly, if there is a finding of material injury, but no net countervailable subsidies, there is no remedy. Both elements must exist before the U.S. industry will get a remedy via the addition of an extra duty—a countervailing duty—applied at the border to imports of applicable products from a Subsidies Agreement country. (By contrast, only net countervailable subsidies must be found to exist for the U.S. industry to get a countervailing duty applied to imports from a non-Subsidies Agreement country.) Like the antidumping duty, the countervailing duty is supposed to level the playing field; it is supposed to bring the price of the goods up from their net subsidized value to a nonsubsidized value. A countervailing duty thus is not supposed to stop the importation of the products into the United States; it is just supposed to make sure that the imported products in question are sold at nonsubsidized values.

## § 41:12 Countervailing duty law—Initiation of a countervailing duty investigation

All countervailing duties result from an initial investigation. This investigation may be self-initiated by the DOC,[1] but in almost all cases it is initiated by a petition filed by any of the following interested parties on behalf of the effected U.S. industry: a manufacturer, producer, or wholesaler in the United States; a certified or recognized union or group of workers representative of the affected industry; a trade or business association with a majority of members producing a like product; or various relevant coalitions.[2] Petitions are filed simultaneously with both the DOC and the ITC,[3] and the DOC must decide within 20 days after the filing of a petition whether or not it is legally sufficient to commence a countervailing investi-

[4] 19 U.S.C.A. § 1671(a)(1).

**[Section 41:12]**

[1] 19 U.S.C.A. § 1671a(a).

[2] 19 U.S.C.A. § 1671a(b).

[3] 19 U.S.C.A. § 1671a(b)(2).

gation.[4] As part of that initiation process, the petitioner must demonstrate:

1. The domestic producers or workers who support the petition account for at least 25% of the total production of the applicable like product; and
2. The domestic producers or workers who support the petition account for more than 50% of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.[5]

If the petitioner fails to demonstrate either criteria, then the DOC will reject the petition and decline to initiate a countervailing investigation.[6]

### § 41:13 Countervailing duty law—Proceedings leading to a possible countervailing duty order

Each countervailing investigation has at least five distinct phases. A countervailing investigation generally begins when a petitioner files a petition on behalf of a U.S. industry that requests the initiation of a countervailing investigation regarding importation of such-and-such merchandise (and parts thereof) from X, Y, and Z countries.[1] Both the DOC and the ITC then spring into action. Stage 1 involves a decision by the DOC of whether to initiate a countervailing investigation. Usually, the DOC decides to proceed with initiation, because a petitioner has already made certain before it filed the petition that it meets the domestic industry threshold.[2] Stage 1 normally concludes 20 days after the petition is filed.

As the DOC considers the question of initiation, the ITC starts Stage 2, which is its preliminary injury investigation. It really has no choice but to begin immediately (i.e., before initiation), because the ITC must make a preliminary injury determination no later than 45 days after the petition is filed.[3] Assuming the DOC initiates the investigation and the ITC makes

[4] 19 U.S.C.A. § 1671a(c)(1)(A).

[5] 19 U.S.C.A. § 1671a(c)(4)(A).

[6] 19 U.S.C.A. § 1671a(c)(3).

**[Section 41:13]**

[1] 19 U.S.C.A. § 1671a(b).

[2] 19 U.S.C.A. § 1671a(c)(2).

[3] 19 U.S.C.A. § 1671b(a).

an affirmative preliminary injury determination, the case continues. If the DOC does not initiate the investigation, or the ITC makes a negative preliminary injury determination, the case ends.[4]

If the ITC reaches an affirmative preliminary determination, the attention shifts to the DOC to conduct first its preliminary (Stage 3), then a final countervailing investigation (Stage 4). Whether the DOC's preliminary countervailing determination is negative or affirmative, the investigation still proceeds to a final DOC determination.[5] Sometime after the DOC's preliminary countervailing determination, the ITC begins its final injury investigation (Stage 6). The DOC makes its final determination first: if it is negative, the case ends; if it is affirmative, the case continues. The same holds true for the ITC final determination: if it is negative, the case ends; if it is affirmative, the DOC will publish a countervailing duty order.[6]

There is one large difference as to the negative/affirmative nature of a DOC versus an ITC determination. In the DOC countervailing realm, determinations are company specific. It is thus possible for there to be a negative countervailing determination with respect to company A and an affirmative determination with respect to company B. In this case, company A is not subject to the subsequent countervailing duty order (assuming ITC reaches an affirmative determination).[7] Company B, however, and all other companies for which there is a finding of countervailable subsidies, will be subject to the countervailing duty order. In contrast, ITC's decision is country-specific as opposed to company-specific. If the ITC votes negative, the case is over and there will be no countervailing duty order for anyone exporting from that country.[8] If the ITC votes affirmative, the DOC will impose a countervailing duty order for everyone except those companies for which the DOC found no or de minimis countervailable subsidies.

Assuming both the DOC and the ITC reach affirmative decisions, the DOC will publish a countervailable duty order soon after it receives official notification from the ITC of its decision. The order will set the countervailing duties that must be

[4] 19 U.S.C.A. §§ 1671a(c)(3), 1671b(a)(1).

[5] 19 U.S.C.A. § 1671d(a)(1).

[6] 19 U.S.C.A. § 1671d(c).

[7] 19 U.S.C.A. § 1671d(a)(3).

[8] 19 U.S.C.A. § 1671d(b)(1).

deposited by importers of the foreign product until such time as there may be a DOC administrative review.[9] The order will remain in place in effect until: (1) it is revoked due to a lack of interest on the part of the domestic industry (something which is extremely rare);[10] or (2) it is revoked under a five-year sunset review procedure.[11] Additionally, an individual company may escape the effect of an order under a process called revocation.[12]

### § 41:14 Countervailing duty law—Proceedings after the imposition of a countervailing duty order

The United States uses a retrospective assessment system under which final liability for countervailing duties is determined after merchandise is imported. As such, when both the DOC and the ITC make final affirmative determinations, the DOC will issue a countervailing duty order that instructs the U.S. customs authority to require a cash deposit of estimated countervailing duties at the rates stipulated in DOC's final determination.[1] The issuance of a countervailing duty order ends the initial investigation but it does not end the case. To the contrary, the amount of actual countervailing duties to be eventually assessed is determined in a separate proceeding known as an administrative review.[2]

If a review is not requested (i.e., it never takes place), duties are assessed at the cash deposit rate applicable at the time the imported merchandise was entered.[3] If a review is requested, the DOC will review the entries made during the time period subject to the review to "determine the amount of any net countervailable subsidy."[4] The key to administrative reviews is that they take place after a countervailing duty order is in place and can repeat year after year (until the countervailing duty order is terminated). While investigations get all the notoriety, reviews are where the real work gets done and where the dumping penalties get levied.

---

[9] 19 U.S.C.A. § 1671e(a), (b).

[10] 19 U.S.C.A. § 1675(d)(1).

[11] 19 U.S.C.A. § 1675(d)(2).

[12] 19 C.F.R. § 351.222(c)(3).

**[Section 41:14]**

[1] 19 U.S.C.A. § 1671e(a).

[2] 19 U.S.C.A. § 1675.

[3] 19 C.F.R. § 351.212(c).

[4] 19 U.S.C.A. § 1675(a)(1)(A).

In other words, countervailing investigations determine whether countervailable subsidies injure a domestic industry. If the investigation finding is affirmative, the DOC establishes a countervailing duty order, which instructs the U.S. customs authority to collect a cash deposit on entries of the merchandise subject to the countervailing duty order. The key points here are: (1) this is just a cash deposit; and (2) the cash deposit is collected on entries for which a determination of dumping has not yet been made. The role of the administrative review is to look at entries for which a cash deposit has been collected, determine whether those entries have actually been inappropriately subsidized, collect the amount of net countervailable subsidies for these entries (assuming they are inappropriately subsidized), and set a new cash deposit for future entries.

## § 41:15 Countervailing duty law—Calculation of a countervailing duty

For a countervailable subsidy to exist, there must be a "financial contribution" or a form of income or price support, that provides a "benefit" beyond that normally available, and exhibits "specificity" to a certain enterprise or industry or a group of enterprises or industries.[1]

## § 41:16 Countervailing duty law—Calculation of a countervailing duty—Financial contribution

The "financial contribution" element must be provided by a government or any public entity within the territory of the country from which the imports originate. A financial contribution may consist of:

(1) a government practice involving a direct transfer of funds or potential direct transfers of funds or liabilities (examples include grants, loans, loan guarantees, and equity infusions);
(2) a government revenue otherwise due but foregone or not collected (examples include tax credits);
(3) government provision of goods or services other than general infrastructure or purchases goods;
(4) a government payment to a funding mechanism; or

**[Section 41:15]**

[1] 19 U.S.C.A. § 1677(5)(A).

(5) a government directive whereby a private body carries out any of the above functions.[1]

## § 41:17 Countervailing duty law—Calculation of a countervailing duty—Benefit

The presence of a financial contribution or an income/price support does not in and of itself signal the existence of a countervailable subsidy. The financial contribution must confer a "benefit" beyond that available to the recipient via private market vehicles.[1] For example, a company that has received a loan from a government definitely has received a financial contribution, but if the amount the company pays on the loan equals what it would have paid on a comparable commercial loan it could have obtained in the marketplace, then the government loan has not conferred a benefit. A benefit exists only to the extent the government loan provides the company better terms than are available to the company for a comparable commercial loan. The benefit equals the difference between the two amounts.

## § 41:18 Countervailing duty law—Calculation of a countervailing duty—Specificity

The last element that must exist before a subsidy may be actionable under the countervailing duty law is "specificity."[1] If a financial contribution benefits a recipient, but is both generally available and widely and evenly distributed, the United States cannot take action against it. The subsidy must be specific to a certain enterprise or industry or a group of enterprises or industries.

Specificity may be present in the law that establishes the subsidy. As such, the subsidy will be found to be de jure specific, and thus potentially actionable. But even when de jure specificity is absent, and the law displays neutral and objective eligibility criteria, the subsidy nevertheless may be found specific if the facts establish that it has been awarded only to

---

**[Section 41:16]**

[1] 19 U.S.C.A. § 1677(5)(D).

**[Section 41:17]**

[1] 19 U.S.C.A. § 1677(5)(E).

**[Section 41:18]**

[1] 19 U.S.C.A. § 1677(5A).

certain enterprises. In this case, the subsidy will be found to be de facto specific, and thus potentially actionable.

A subsidy meets the specificity requirement if it is an export subsidy: the subsidy, in law or in fact, is contingent on export performance (alone or as one of more conditions).[2] A subsidy meets the specificity requirement if it is an import substitution subsidy: the subsidy, in law or in fact, is contingent on the use of domestic goods over imported goods (alone or as one of more conditions).[3] Finally, a subsidy meets the specificity requirement if it is a domestic subsidy which is specific, in law or in factor, to an enterprise or industry within the jurisdiction of the authority providing the subsidy. The following factors may be analyzed to determine whether specificity exists with respect to a domestic subsidy:

(1) the actual subsidy recipients constitute a limited number of enterprises;
(2) an enterprise or industry is a predominant user of the subsidy;
(3) an enterprise or industry receives a disproportionately large amount of the subsidy; or
(4) the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy indicates favoritism with respect to a particular enterprise or industry.[4]

The DOC examines the above factors sequentially, and if a single factor warrants a finding of specificity, no further analysis will be undertaken.[5]

## § 41:19 Countervailing duty law—Calculation of the subsidy rate

The DOC has a number of different calculation methodologies depending on whether the countervailable subsidy in question is a benefit, grant, loan, loan guarantee, equity infusion, debt forgiveness, etc. The general rules governing the measurement of countervailable subsidies can be found in the agency's regulations at 19 C.F.R. §§ 351.503 to 351.520. For example, for loans, the countervailable benefit generally equals the dif-

[2] 19 U.S.C.A. § 1677(5A)(B).

[3] 19 U.S.C.A. § 1677(5A)(C).

[4] 19 U.S.C.A. § 1677(5A)(D).

[5] 19 C.F.R. § 351.502(a).

ference the amount a firm pays on the government-provided loan versus the amount it would have paid on a comparable commercial loan.[1] For equity infusions, the countervailable benefit generally equals the amount by which the government-provided equity infusion exceeds the usual investment practice of private investors.[2]

### § 41:20 Countervailing duty law—Actionable subsidies that are not countervailable

Certain subsidies normally considered actionable under the countervailing duty law are, by definition, nonactionable even if they have adverse effects. These subsidies generally fall into three "green light" categories: industrial research and pre-competitive development subsidies; subsidies to disadvantaged regions; and subsidies to adapt existing facilities to meet new environmental restrictions.[1] Separately, there are nonactionable "green box" subsidies unique to agricultural products.[2]

A "green light" research and development subsidy must not cover more than 75% of the industrial research costs or 50% of the precompetitive development costs (or if the subsidy spans both activities, 62.5% of the costs).[3] "Industrial research" involves "planned search or critical investigation aimed at discovery of new knowledge, with the objective that such knowledge may be useful in developing new products, processes or services, or in bringing about a significant improvement to existing products, processes or services."[4] "Pre-competitive development activity" includes "the translation of industrial research findings into a plan . . . for new, modified or improved products, processes or services whether intended for sale or use, including the creation of a first prototype . . ..''[5] Finally, the subsidy must be limited to: (1) costs of personnel; (2) costs of instruments, equipment, land, and buildings used exclusively

---

**[Section 41:19]**

[1] 19 C.F.R. § 351.505(a)(1).

[2] 19 C.F.R. § 351.507(a)(1).

**[Section 41:20]**

[1] 19 U.S.C.A. § 1677(5B)(B) to (D).

[2] 19 U.S.C.A. § 1677(5B)(F).

[3] 19 U.S.C.A. § 1677(5B)(B)(i).

[4] 19 U.S.C.A. § 1677(5B)(B)(ii)(I).

[5] 19 U.S.C.A. § 1677(5B)(B)(ii)(II).

and permanently for the research activity; (3) costs of consultancy used exclusively for the research activity; (4) additional overhead cost incurred directly as a result of the research activity; or (5) other running costs incurred directly as a result of the research activity.[6]

A "green light" disadvantaged regional subsidy must benefit a "clearly designated contiguous geographical area with a definable economic and administrative identity."[7] This designation must have been based on neutral and objective criteria, including at least one of the following criteria measured over a three-year period: (1) income per capita, household income per capita, or gross domestic product per capita must not be above 85% of the average for the territory concerned; or (2) the unemployment rate must be at least 110% of the average for the territory concerned. The region's difficulties cannot arise out of temporary circumstances.[8]

A "green light" environmental subsidy must involve "the adaptation of existing facilities to new environmental requirements imposed by law . . . which result in greater constraints and financial burden on firms . . ..."[9] The subsidy must: (1) be a one time nonrecurring measure; (2) be limited to 20% of the cost of adaptation; (3) not involve the cost of replacing and operating the actual facility; (4) be "directly linked to and proportionate to a firm's planned reduction of nuisances and pollution"; and (5) be available to all firms which can adopt the new equipment or production processes.[10]

But for a narrow exception, "green light" status is awarded only if a WTO member notifies the WTO Committee on Subsidies and Countervailing Measures of the program before it is implemented.[11] Once notification is given, and its status as a "green light" subsidy accepted, the subsidy program will be considered nonactionable.

## § 41:21 Section 337

Not many people have heard of section 337 of the Tariff Act of 1930, as amended, but this relatively unknown provision

[6] 19 U.S.C.A. § 1677(5B)(B)(i)(I) to (V).

[7] 19 U.S.C.A. § 1677(5B)(C)(i).

[8] 19 U.S.C.A. § 1677(5B)(C)(ii).

[9] 19 U.S.C.A. § 1677(5B)(D)(i).

[10] 19 U.S.C.A. § 1677(5B)(D)(i)(I) to (V).

[11] 19 U.S.C.A. § 1677(5B)(E)(i).

provides a powerful remedy against unfair practices in import trade, especially in the area of U.S. intellectual property rights. The precursor of section 337 was enacted in the 1920s as a super law designed to fight all types of unfair methods of competition and unfair acts in the importation of articles into the United States. But for years it received scant attention until it grew into a vehicle by which owners of U.S. intellectual property rights could block infringing imported articles from entering the United States. This section provides a brief introduction into what section 337 is designed to do, how it works, and what types of remedies are available.

### § 41:22 Section 337—The object of section 337

When first enacted, Congress heralded the law that eventually became section 337 as "broad enough to prevent every type and form of unfair practice . . ..."[1] Perhaps one day, section 337 will match these expectations, but today, about 90% of all section 337 complaints center on imported articles that infringe a valid and enforceable U.S. patent, registered U.S. copyright, registered U.S. trademark, or registered U.S. mask work used for a semiconductor chip product. If a business can show that a U.S. industry for the above articles exist, or is in the process of being established, then it has grounds to get its complaint considered under subsections 337(a)(1)(B) to (D).[2]

In contrast, section 337 does not just address unfair acts in the importation of articles that infringe federally registered U.S. intellectual property rights. Subsection 337(a)(1)(A) also holds unlawful any:

> [u]nfair methods of competition and unfair acts in the importation of articles . . . into the United States, or in the sale of such articles by the owner, importer, or consignee, the threat or effect of which is—
>
> (i) to destroy or substantially injure an industry in the United States;
>
> (ii) to prevent the establishment of such an industry; or
>
> (iii) to restrain or monopolize trade and commerce in the United States.[3]

Because the language of subsection 337(a)(1)(A) is expansive,

---

**[Section 41:22]**

[1] S. Rep. No. 595, 67th Cong., 2d Sess. 3 (1922).

[2] 19 U.S.C.A. § 1337(a)(1)(B) to (D).

[3] 19 U.S.C.A. § 1337(a)(1)(A).

past complaints have attempted to gain relief under section 337 for matters involving gray market goods, counterfeits, price fixing, predatory pricing, passing off, false labeling, false advertising, etc. The only matters clearly out-of-bounds are unfair trade allegations that involve dumping, countervailable subsidies, and copyright infringement related to certain digital audio technology.[4]

### § 41:23 Section 337—Proceedings leading to a Section 337 remedy

Section 337 is administered by the U.S. International Trade Commission (ITC). To initiate a section 337 investigation, an aggrieved party must file a complaint with the ITC that complies with the agency's rules.[1] Upon receipt, the ITC will begin a preinstitution proceeding where it will review the complaint.[2] The ITC will then determine within 30 days whether the complaint was properly filed and whether it should institute an investigation.[3] Almost all complaints lead to an investigation, but the ITC oftentimes seeks clarifications or amendments to the complaint during the review process.

Section 337 operates based on in rem jurisdiction; that is, as long as jurisdiction over the subject imported product exists, personal jurisdiction over the foreign company that exports the subject import is unnecessary. This jurisdictional approach eliminates the need for plaintiffs to obtain personal jurisdiction over a foreign defendant and simplifies international service of process.[4] In addition, section 337 eliminates the need for multiple lawsuits in different jurisdictions to stop unfair practices by a number of importers and distributors. Under section 337, the foreign manufacturers, as well as domestic importers and sellers, can be named as defendants in the same proceeding.

After institution, the ITC will assign the investigation to an Administrative Law Judge (ALJ). It is the ALJ's job to render an Initial Determination as to whether section 337 has been

---

[4] 19 U.S.C.A. § 1337(b)(3).

**[Section 41:23]**

[1] 19 C.F.R. § 210.12.

[2] 19 C.F.R. §§ 210.8, 210.9.

[3] 19 C.F.R. § 210.10.

[4] See Sealed Air Corp. v. U. S. Intern. Trade Commission, 68 C.C.P.A. 93, 645 F.2d 976, 2 Int'l Trade Rep. (BNA) 1353, 209 U.S.P.Q. 469 (1981).

violated. The ITC also assigns an investigative attorney from its Office of Unfair Import Investigations (OUII). The OUII attorney acts as a party to the proceeding and represents the public interest.

The investigation then proceeds much like litigation before a federal court, but at a lightning quick pace. Soon after receiving responses to the complaint, the ALJ sets a target date for the ITC's completion of the investigation.[5] That target date is normally 12 to 15 months after the date of the complaint. Within that time frame, the ALJ establishes due dates for the completion of discovery,[6] a formal evidentiary hearing,[7] and the issuance of an Initial Determination.[8] For example, in a case involving just a request for permanent relief, discovery will close in about five months or less after the complaint; the hearing will take place in about nine months or less; and the ALJ will issue an Initial Determination in about 11 months or less. The timelines are even shorter when the complainant requests temporary relief; i.e., the Initial Determination regarding such a request is likely to be issued in less than four months. Finally, section 337 investigations are not bound by formal rules of evidence; hearsay may be admitted if it appears reliable.

The ITC may review and adopt, modify, or reverse the ALJ's Initial Determination.[9] The ITC may also decide not to review the Initial Determination, in which case the Initial Determination becomes the agency's Final Determination. The ITC's Final Determinations may be appealed to the U.S. Court of Appeals for the Federal Circuit.[10]

---

[5] 19 C.F.R. § 210.51(a).

[6] 19 C.F.R. § 210, subpart E.

[7] 19 C.F.R. § 210, subpart F.

[8] 19 C.F.R. § 210.42.

[9] 19 C.F.R. §§ 210.43 to 210.46.

[10] 19 U.S.C.A. § 1337(c).

## § 41:24 Section 337—Remedies available under Section 337

Section 337 offers two powerful remedies: (1) exclusion orders;[1] and (2) cease and desist orders.[2] On the other hand, section 337 does not permit a plaintiff to seek money damages to compensate for a defendant's unfair practices. This remedy scheme relates to the ITC's purpose of preventing unfair importations without regard for quantifying damages suffered as a result of an unfair practice.

An exclusion order directs the U.S. Bureau of Customs and Border Protection ("Customs") to bar unfairly traded articles from entry into the United States.[3] A general exclusion order directs Customs to bar all infringing articles regardless of source, while a limited exclusion order directs Customs to bar all infringing articles that originate from a firm that participated as a party during the investigation. It is not unusual for the ITC to first order limited exclusion, then graduate an order to general exclusion based on evidence of circumvention.

A cease and desist order commands a party to the investigation to stop its unfair act, including the sale of already imported articles out of U.S. inventory.[4] The ITC enforces its own cease and desist orders and can bring a civil action seeking a civil penalty. Any person found in violation may be required to pay "the United States a civil penalty for each day on which an importation of articles, or their sale, occurs in violation of the order of not more than the greater of $100,000 or twice the domestic value of the articles . . ..."[5]

Finally, ITC orders become effective within 60 days of issuance, unless disapproved by the President for policy reasons.[6] (The President rarely disapproves a section 337 order.)

## § 41:25 Section 301

Section 301 of the Trade Act of 1974, as amended, permits the United States to impose trade sanctions on countries that

**[Section 41:24]**

[1] 19 U.S.C.A. § 1337(d).

[2] 19 U.S.C.A. § 1337(f).

[3] 19 U.S.C.A. § 1337(d).

[4] 19 U.S.C.A. § 1337(f).

[5] 19 U.S.C.A. § 1337(f)(2).

[6] 19 U.S.C.A. § 1337(j).

maintain acts, policies, or practices that violate, or deny, U.S. rights or benefits gained pursuant to trade agreements, or are otherwise unjustifiable, unreasonable, or discriminatory, and burden or restrict U.S. commerce.[1] Section 301 thus operates as the vehicle by which the United States acts to enforce trade agreements, resolve trade disputes, and open foreign markets to U.S. goods and services. The "Special 301" provisions of this Act additionally require the U.S. Trade Representative (USTR) to identify countries that deny adequate and effective protection of intellectual property rights or fair and equitable market access to U.S. persons that rely on intellectual property protection.

## § 41:26 Section 301—Section 301 investigative procedures

A section 301 proceeding may be initiated by U.S. persons petitioning the USTR to investigate and act against potential violations,[1] or it may be self-initiated by the USTR.[2] If a petition is filed, the USTR has 45 days to decide whether to initiate an investigation.[3]

The USTR must publish its determination whether to initiate a section 301 investigation in the Federal Register.[4] If an investigation is initiated, the USTR must first request consultations with the targeted country generally within 90 days after the date of initiation.[5] If the investigation is based on a petition, the USTR must also provide an opportunity for the public to comment on the investigation (including, if requested, a public hearing).[6] Finally, if the investigation involves an alleged violation of a trade agreement, the USTR must follow the dispute settlement provisions of the agreement in question.

---

**[Section 41:25]**

[1] 19 U.S.C.A. § 2411.

**[Section 41:26]**

[1] 19 U.S.C.A. § 2412(a)(2).

[2] 19 U.S.C.A. § 2412(b).

[3] 19 U.S.C.A. § 2412(a)(2).

[4] 19 U.S.C.A. § 2412(a)(2)–(3).

[5] 19 U.S.C.A. § 2413(a)(1).

[6] 19 U.S.C.A. § 2412(a)(4).

## § 41:27 Section 301—"Special 301" investigative procedures

Under Special 301, the USTR annually identifies countries that deny adequate and effective protection for intellectual property rights (IPR) or deny fair and equitable market access for U.S. persons that rely on intellectual property protection.[1] The USTR examines the identified countries and designates "priority foreign countries" where: (1) the acts, policies, or practices in the IPR area are the most onerous or egregious with the greatest adverse impact on relevant U.S. products, and (2) good faith negotiations on the issues, or significant progress in bilateral or multilateral negotiations, does not exist with respect to the protection of intellectual property rights.[2] If a country is designated a "priority foreign country," then the USTR must launch within 30 days an investigation of that country's acts, policies, and practices, which could lead to trade sanctions, unless the USTR determines that the investigation would be detrimental to U.S. economic interests (reporting the reasons for that determination in a report to Congress).[3] If the USTR does initiate a Special 301 investigation, the investigation will proceed much like a section 301 investigation. An affirmative determination leading to either mandatory or discretionary retaliatory action.

In practice, the USTR seldom designates countries as "priority foreign countries," but instead uses the Special 301 report to pressure countries to improve questionable IPR practices by placing countries either on the "Priority Watch List," the "Watch List," or the "Section 306 Monitoring" list. The Priority Watch List includes those countries that do not provide an adequate level of protection or enforcement or market access for persons relying on intellectual property protection. The Watch List includes those countries that merit bilateral attention to address the underlying problems. Finally, the Section 306 Monitoring list includes those countries that already have bilateral agreements with the United States but merit attention because of ongoing problems related to issues previously identified.

---

**[Section 41:27]**

[1] 19 U.S.C.A. § 2242(a).

[2] 19 U.S.C.A. § 2242(b).

[3] 19 U.S.C.A. § 2412(b)(2).

## § 41:28 Section 301—Section 301 and "Special 301" retaliatory action

Where the USTR reaches an affirmative determination following a section 301 or Special 301 investigation, it is required to take mandatory retaliation whenever it finds that:

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country—

- (i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
- (ii) is unjustifiable and burdens or restricts United States commerce.[1]

Such retaliation against the foreign country may include the suspension, withdrawal, or prevention of benefits associated with trade concessions;[2] the imposition of duties or other import restrictions on goods, or fees or restrictions on services;[3] where appropriate, the withdrawal, limitation, or suspension of benefits under the General System of Preferences, the Caribbean Basin Economic Recover Act, or the Andean Trade Preference Act;[4] and the conclusion of a binding agreement that commits the foreign country to eliminate the act, policy, or practice (as well as the burden on U.S. commerce associated therewith) or provide compensation for the trade violation.[5]

There are a number of statutory exceptions, however, that permit the USTR to waive mandatory retaliation. Specifically, the USTR is not required to take mandatory retaliation whenever the dispute settlement system of the World Trade Organization finds that the rights of the United States under a trade agreement are not being denied, or the act, policy, or practice in question does not violate the rights of the United States or nullify benefits under any trade agreements.[6] The USTR is also not required to take mandatory retaliation whenever it finds that the foreign country "is taking satisfactory measures to

---

**[Section 41:28]**

[1] 19 U.S.C.A. § 2411(a)(1)(A) to (B).

[2] 19 U.S.C.A. § 2411(c)(1)(A).

[3] 19 U.S.C.A. § 2411(c)(1)(B).

[4] 19 U.S.C.A. § 2411(c)(1)(C).

[5] 19 U.S.C.A. § 2411(c)(1)(D)(i) to (iii).

[6] 19 U.S.C.A. § 2411(a)(2)(A).

grant the rights of the United States under a trade agreement,"[7] "has agreed to eliminate or phase out the act, policy, or practice,"[8] "agreed to an imminent solution" that the USTR finds satisfactory,[9] or has agreed to provide "compensatory trade benefits" that the USTR finds satisfactory.[10] Finally, the USTR is not required to take mandatory retaliation whenever it finds that retaliatory action "would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action"[11] or "would cause serious harm to the national security of the United States."[12]

Finally, the USTR has the discretion to retaliate, but is otherwise not required to do so, whenever it affirmatively finds that "an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce."[13]

### § 41:29 Section 301—Section 301 and "Special 301" retaliatory procedures

If the USTR decides to take retaliatory action, it will then prepare an estimate of the level of damage caused to U.S. industry as a result of the act, policy, or practice of a foreign country and propose a retaliation list "in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce."[1] The proposed retaliation list will be published in the Federal Register and the public will be invited to comment in writing and at a hearing.[2] Following public comment, the USTR will prepare and implement retaliatory action within 30 days after its affirmative determination.[3] For section 301 proceedings, USTR may delay retaliatory action by no more than 180 days for section

---

[7] 19 U.S.C.A. § 2411(a)(2)(B)(i).

[8] 19 U.S.C.A. § 2411(a)(2)(B)(ii)(I).

[9] 19 U.S.C.A. § 2411(a)(2)(B)(ii)(II).

[10] 19 U.S.C.A. § 2411(a)(2)(B)(iii).

[11] 19 U.S.C.A. § 2411(a)(2)(B)(iv).

[12] 19 U.S.C.A. § 2411(a)(2)(B)(v).

[13] 19 U.S.C.A. § 2411(b).

**[Section 41:29]**

[1] 19 U.S.C.A. § 2411(a)(3).

[2] 19 U.S.C.A. § 2416(c).

[3] 19 U.S.C.A. § 2415(a)(1).

301 proceedings where a delay is requested by appropriate U.S. interested parties,[4] or the USTR determines that substantial progress is being made to resolve the dispute or delay is desirable given the prospects for a satisfactory solution.[5] By contrast, for Special 301 proceedings, the USTR may delay retaliatory action by no more than 90 days.[6] Any action taken pursuant to section 301 or Special 301 terminates automatically four years later unless there is a request for continuation by the petitioner or a representative of the affected domestic industry.[7]

### § 41:30 Safeguard proceedings

Sections 201 and 474 of the Trade Act of 1974, as amended, provide a period of relief to a U.S. industry that has suffered serious injury resulting from increased competition from the liberalization of trade barriers. Unlike other trade remedies, these provisions do not require that a demonstration that the increased competition involved unfairly traded imports. Section 201 is known as the global safeguard provision.[1] Section 474 is known as the China safeguard provision, because it specifically implements the anti-surge mechanism established under the U.S.-China Bilateral Trade Agreement (which authorized permanent normal trade relations with the People's Republic of China).[2] These "safeguard" proceedings are also commonly referred to as "escape clause" proceedings and are conducted before the U.S. International Trade Commission (ITC). Finally, there exists a separate NAFTA safeguard provision under section 302 of the North American Free Trade Agreement Implementation Act, which implemented a similar mechanism pertaining to increased imports from Canada or Mexico.[3] However, section 305 of that Act provided for the termination of this relief authority for Canadian articles after

---

[4] 19 U.S.C.A. § 2415(a)(2)(A)(i).

[5] 19 U.S.C.A. § 2415(a)(2)(A)(ii).

[6] 19 U.S.C.A. § 2415(a)(2)(C).

[7] 19 U.S.C.A. § 2417(c)(1).

**[Section 41:30]**

[1] 19 U.S.C.A. § 2251.

[2] 19 U.S.C.A. § 2451.

[3] 19 U.S.C.A. § 3352.

December 31, 1998, and for most Mexican articles after December 31, 2003,[4] absent consent from those governments.[5]

### § 41:31 Safeguard proceedings—Safeguard investigative procedures

The investigative procedures for each of the safeguard mechanisms are similar. The ITC will initiate a safeguard investigation after the receipt of a petition from "an entity, including a trade association, firm, certified or recognized union, or group of workers" that is representative of a domestic industry.[1] The ITC will also initiate a global or China safeguard investigation following a request by the President or by the U.S. Trade Representative, following a resolution by the U.S. House Committee on Ways and Means or the U.S. Senate Committee on Finance, or on its own motion.[2]

Following the institution of an investigation, the ITC will hold a public hearing on the question of injury and a second public hearing on the appropriate remedy should it make an affirmative injury determination.[3] The statutory deadline for the completion of global and NAFTA safeguard investigations is generally 120 days[4] (although extensions are permitted in global safeguard cases under certain situations),[5] and for a China safeguard investigation, generally 60 days.[6] The ITC must then submit a report that includes its findings and recommendation for action to the President 60 days later for a global safeguard case (or 120 days later if the petition alleges

---

[4] 19 U.S.C.A. § 3355(a).

[5] 19 U.S.C.A. § 3352(b).

**[Section 41:31]**

[1] 19 U.S.C.A. § 2252(a) (global safeguard); 19 U.S.C.A. § 3352(a)(1) (NAFTA safeguard); 19 U.S.C.A. § 2451(b)(1) (China safeguard).

[2] 19 U.S.C.A. § 2252(b)(1)(A) (global safeguard); 19 U.S.C.A. § 2451(b)(1) (China safeguard).

[3] 19 C.F.R. § 206.5.

[4] 19 U.S.C.A. § 2252(b)(2)(A) (global safeguard); 19 U.S.C.A. § 3353(a) (NAFTA safeguard).

[5] 19 U.S.C.A. § 2252(b)(2)(B).

[6] 19 U.S.C.A. § 2451(e).

critical circumstances);[7] 30 days for a NAFTA safeguard case;[8] and 20 days later for a China safeguard case.[9]

In safeguard actions, the ITC will reach an affirmative injury determination whenever it finds:

- Global safeguard: "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."[10]
- China safeguard: "a product of the People's Republic of China is being imported into the United States in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of a like or directly competitive product."[11]
- NAFTA safeguard: "whether, as a result of the reduction or elimination of a duty provided under the Agreement, a Canadian article or a Mexican article . . . is being imported into the United States in such increased quantities (in absolute terms) and under such conditions so that imports of the article, alone, constitute a substantial cause of—
  (1) serious injury; or
  (2) except in the case of a Canadian article, a threat of serious injury;

  To the domestic industry producing an article that is like, or directly competitive with, the imported article."[12]

Finally, in global safeguard investigations, the ITC must separately determine whether imports of the articles in question from a NAFTA country (i.e., Canada or Mexico) should be excluded from a relief action.[13] Special provision is also provided for imports of articles from Singapore under the United States-Singapore Free Trade Agreement.

---

[7] 19 U.S.C.A. § 2252(f)(1).

[8] 19 U.S.C.A. § 3353(c).

[9] 19 U.S.C.A. § 2451(g).

[10] 19 U.S.C.A. § 2251(a); see 19 U.S.C.A. § 2252(c) (economic factors considered relevant to this determination).

[11] 19 U.S.C.A. § 2451(a); see 19 U.S.C.A. § 2251(c) and (d) (definition of 'market disruption' and economic factors considered relevant to this determination).

[12] 19 U.S.C.A. § 3352(b).

[13] 19 U.S.C.A. §§ 3371, 3372.

## § 41:32 Safeguard proceedings—Safeguard remedies

In global safeguard cases, if the ITC makes an affirmative injury determination, it is authorized to recommend that the President make a positive adjustment to import competition in the form of "an increase in, or the imposition of, any duty on the imported article"; "a tariff-rate quota on the article"; "a modification or imposition of any quantitative restriction on the importation of the article into the United States"; "one or more appropriate adjustment measures, including the provision of trade adjustment assistance"; or "any combination of the[se] actions."[1] The ITC may also recommend that the President initiate international negotiations or take other action "likely to facilitate positive adjustment to import competition."[2] Within 60 days of receiving the ITC's report, the President is to take "all appropriate and feasible action within his power which the President determines will facilitate efforts by the domestic industry to make a positive adjustment to import competition and provide greater economic and social benefits than costs."[3] The actions that the President may take include those that may be recommended by the ITC as well as others (for example, the auction of import licenses).[4] Action may be taken for a period of up to four years and may be extended, but the overall period of relief may not exceed eight years.[5] Finally, the President must report to Congress on the action taken.[6] If the President takes action that differs from the ITC's recommendation, or takes no action at all, Congress may direct within 90 days by enacting a joint resolution requiring the President to take the action recommended by the ITC.[7]

In China safeguard cases generally, if the ITC makes an affirmative injury determination, it is authorized to recommend that the President increase or impose "any duty or other import restrictions necessary to prevent or remedy the market

**[Section 41:32]**

[1] 19 U.S.C.A. § 2252(e)(2).

[2] 19 U.S.C.A. § 2252(e)(4).

[3] 19 U.S.C.A. § 2253(a)(1)(A).

[4] 19 U.S.C.A. § 2253(a)(3).

[5] 19 U.S.C.A. § 2253(e)(1).

[6] 19 U.S.C.A. § 2253(b).

[7] 19 U.S.C.A. § 2253(c).

disruption."[8] Within 20 days of receiving the ITC's report, the U.S. Trade Representative (USTR) will publish notice of any measure that the USTR plans to take and provide opportunity for interested parties to comment.[9] After another 35 days, and after taking into account the views expressed and evidence submitted by interested parties, the USTR "shall make a recommendation to the President concerning what action, if any, to take to prevent or remedy the market disruption."[10] The President then has another 15 days to take action, if any. The President may decide not to take action if the remedy "is not in the national interest of the United States or, in extraordinary cases, . . . would cause serious harm to the national security of the United States."[11]

In NAFTA safeguard cases, if the ITC makes an affirmative injury determination, it is authorized to recommend that the President suspend any further reduction provided under the Agreement or increase (within certain limits) the rate of duty imposed.[12] Within 30 days of receiving the ITC's report, the President is to provide relief to the extent he determines "necessary to remedy or, except in the case of imports of a Canadian article, prevent the injury found by the International Trade Commission."[13] The President is not required to take action if he determines remedy "will not provide greater economic and social benefits than costs."[14]

---

[8] 19 U.S.C.A. § 2451(f).

[9] 19 U.S.C.A. § 2451(h)(1).

[10] 19 U.S.C.A. § 2451(h)(2).

[11] 19 U.S.C.A. § 2451(k)(1).

[12] 19 U.S.C.A. § 3354(c).

[13] 19 U.S.C.A. § 3354(a).

[14] 19 U.S.C.A. § 3354(b).