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National Security and
International Affairs Division

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Congressional Requesters

Subject: Assistance Available to U.S. Agricultural Producers Under U.S. Trade Law

Your September 22, 1997, letter to us expressed concern that many Florida fruit and vegetable producers believe that existing import relief provisions of U.S. law do not adequately address the problems they have experienced since the North American Free Trade Agreement (NAFTA) was implemented. As agreed with your offices, we have outlined (1) the tariff reductions negotiated and provisions for creation of a private dispute settlement mechanism for these products under NAFTA, (2) safeguard provisions available to U.S. producers, and (3) U.S. antidumping and countervailing duty remedies available to combat other countries' unfair trade practices. We also discuss assistance available to workers and communities under two NAFTA-related programs: the NAFTA Transitional Adjustment Assistance (NAFTA-TAA) program and the U.S. Community Adjustment and Investment Program under the North American Development Bank.

SUMMARY

U.S. trade law provides extended tariff phaseout periods for U.S. producers of certain winter fruits and vegetables; and two means of assistance for these producers who are injured by imports, depending on the product, the volume of the imports, whether the imports are the result of an unfair trade practice, and other factors. The two types of assistance are NAFTA's temporary relief from imports by government imposition of "safeguards," and redress from "dumped" or improperly subsidized products through increased duties on imports.

NAFTA's tariff reduction schedules build in an extended tariff phaseout period for some products (such as fresh tomatoes) that are deemed especially import sensitive. These extended tariff phaseout periods provide additional time to allow farmers to adjust to international competition.

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U.S. producers of agricultural products injured by imports may petition the government for relief in the form of safeguards. Safeguards may be applied globally, consistent with provisions of the General Agreement on Tariffs and Trade (GATT), or within NAFTA under either general or special agricultural safeguards. In a safeguard action, the International Trade Commission (ITC) determines whether a U.S. industry has been seriously injured by increased imports and, if so, may recommend that the President temporarily increase duties or impose quotas on those products. Expedited relief is available for perishable agricultural products. In addition, under NAFTA, a more limited bilateral safeguard may be applied under certain circumstances. A NAFTA country imposing a bilateral safeguard on another NAFTA country must compensate that country sufficient to redress the injury and help the industry adjust to competition. Finally, a special safeguard, in the form of a tariff-rate quota, applies to some specific, highly sensitive agricultural commodities, including two seasons of tomatoes.[1]

Second, a U.S. industry can obtain relief from the effects of imports if the government finds that the imports are being sold below fair market value ("dumped") or benefit from improper subsidies and materially injure the U.S. industry. ITC determines whether the injury has occurred, and the U.S. Commerce Department determines whether and how much relief, in the form of increased duties on the imports, is warranted.

In addition, NAFTA created two programs to help workers or communities that might be adversely affected. NAFTA-TAA provides employment and other services to workers who lost their jobs due to an increase in imports from Mexico or Canada, or a shift in production to either country. However, NAFTA-TAA does not require that NAFTA has caused the job losses. Another program, the U.S. Community Adjustment and Investment Program under the North American Development Bank, helps communities with job losses associated with NAFTA by providing loans and loan guarantees to businesses seeking to locate or expand existing operations in those areas.

NAFTA'S AGRICULTURE PROVISIONS

Under NAFTA, tariffs on some especially sensitive agricultural goods–including fresh tomatoes–will be eliminated over a 5-, 10-, or 15-year transition period. In addition, there are plans to develop a NAFTA private dispute resolution system for problems arising in the fresh fruit and vegetable trade. However, the plans have yet to be implemented.

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[1]A NAFTA tariff-rate quota allows a certain quantity of product to enter duty free, while anything over this amount will be subject to an over-quota tariff. There are provisions for growth in this duty-free amount, and the over-quota tariff declines to zero over a 10- or 15-year period.

Agricultural Goods Tariff Schedule

NAFTA contains provisions for eliminating tariffs and nontariff barriers for all agricultural products, including import-sensitive commodities. Under NAFTA, the United States and Mexico negotiated a series of bilateral provisions[2] to phase out all tariffs and convert nontariff barriers to tariffs or tariff-rate quotas. Tariffs were either phased out upon NAFTA's implementation on January 1, 1994, or will be over 5-, 10-, or 15-year transition periods. These transition periods were agreed upon after U.S. negotiators obtained input from interested parties on the import sensitivity of various commodities. Those deemed especially import sensitive were granted extended phaseout periods, providing additional time to allow farmers to adjust to international competition.

The negotiated tariff schedules for some agricultural commodities to some extent reflected seasonal production to coincide with the marketing period for domestic U.S. production. For example, prior to NAFTA, there were four separate seasonal tariff periods for fresh tomatoes, with two different tariff rates.[3] According to Department of Agriculture officials, U.S. negotiators took steps to ensure that the longest phase out period would apply to the most sensitive season.

Dispute Resolution Provisions

Consistent with its objective of facilitating trade, NAFTA includes provisions designed to avoid commercial disputes or prevent them from escalating. For agricultural goods, NAFTA created an Advisory Committee on Private Commercial Disputes Regarding Agricultural Goods. The advisory committee's mission is to recommend a system for resolving private commercial disputes that arise in connection with agricultural transactions. The benefit of such a system would be to avoid delays and other difficulties associated with the adjudication of international commercial transactions by domestic courts–particularly significant to U.S. exporters of perishable commodities.

The advisory committee's initial efforts to develop an alternative dispute resolution system have focused on the fresh fruit and vegetable trade. At its first meeting in February 1997, the advisory committee identified the basic elements necessary for a dispute resolution system and identified possible system designs. At a second meeting scheduled for late October 1997, the

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[2]Agricultural trade between Canada and the United States continues to be governed by the provisions of the 1989 U.S.-Canada Free Trade Agreement.

[3]The NAFTA baseline U.S. tariff rate for fresh tomatoes imported during the periods March 1-July 14 and September 1-November 14 was 4.6 cents per kilogram, while the rate for the periods July 15-August 31 and November 15-February 28 was 3.3 cents.

advisory committee plans to finalize its recommendations. These will be presented to the NAFTA Committee on Agricultural Trade for action at some future date, according to Department of Agriculture officials. The advisory committee may be reconstituted to address other commodity interests once it has made recommendations for the development of a private dispute resolution system for the fresh fruit and vegetable trade, these officials said.

SAFEGUARD AND EMERGENCY ACTION PROCEDURES

A second type of assistance available to U.S. agricultural producers is to get temporary relief from injurious imports through a "safeguard" action, which may result in an increase in tariffs. When an industry petitions the federal government for safeguard relief, ITC investigates the matter, and then the President may grant the relief based on ITC's recommendation. Under a special NAFTA safeguard provision, U.S. producers of certain highly sensitive fruits and vegetables are provided relief for a period of time by limits on the amount of imports that enter the United States subject to the lowest NAFTA tariff.

General Safeguards

The safeguard clause in article XIX of the GATT allows GATT members to obtain relief when increased imports of a product are found to cause or threaten to cause serious injury to domestic producers of like or competitive products. The World Trade Organization (WTO) Agreement on Safeguards, negotiated during the Uruguay Round negotiations, establishes special rules for the application of safeguard measures. Under U.S. implementing legislation, ITC conducts these investigations, generally on the basis of a petition filed by a U.S. industry.

In making its determination, ITC is required to take into account all relevant economic factors.[4] For example, in determining serious injury, ITC must consider whether (1) productive facilities in the industry have been significantly idled, (2) a significant number of firms have been unable to operate at a reasonable level of profit, and (3) significant unemployment or underemployment has occurred within the industry. In determining the threat of serious injury, ITC must consider, among other specified factors, whether there is a decline in sales or market share; a higher and growing inventory of the product; and a downward trend in production, profits, wages, productivity, or employment in the industry. ITC is required to consider the condition of the domestic industry over the course of the relevant business cycle and to examine factors other than imports that may be the cause of the serious injury or the threat of serious injury to the domestic industry. There is no requirement that the increase in imports or serious injury be attributable to an unfair trade practice.

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[4]19 U.S.C. 2252(c)

If ITC makes an affirmative injury determination, it is required to recommend the action that would address the serious injury or threat to the domestic industry and that would be most effective in facilitating industry efforts to make a positive adjustment to import competition.[5] ITC is authorized to recommend to the President relief in the form of new or increased tariffs, quotas, trade adjustment assistance to workers, or a combination of these measures. The President may then take action consistent with the ITC recommendation or other action deemed appropriate.[6] The President, after taking into account certain factors that he must consider, may then take action consistent with the ITC recommendation, other action deemed appropriate, or no action. The President must report to Congress on the action he has taken. If he takes action that differs from that recommended by ITC or pursues no action at all, Congress may, through a joint resolution, direct the President to proclaim the action recommended by ITC.

In two types of situations, a U.S. industry may obtain preliminary relief from imports pending completion of the ITC investigative or presidential review process. An industry producing a perishable agricultural product may request such "provisional" relief if ITC has had in place a monitoring investigation under section 332 of the Tariff Act of 1930, as amended, with respect to that product for at least 90 days prior to the filing of the request. If this monitoring has been underway for the requisite period and the industry requests provisional relief in its petition, ITC has 21 days to make a provisional relief determination. If the ITC determination is affirmative, the President has 7 days to decide what, if any, action to take. In the second situation, provisional relief may also be provided when critical circumstances are found to exist.[7] If an industry alleges critical circumstances, ITC has 60 days to determine whether the critical circumstances exist and, if so, to make a recommendation to the President. The President has 30 days to decide what, if any, action to take. Requests based on critical circumstances are not restricted to perishable agricultural products.

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[5]19 U.S.C. 2252(e).

[6]In addition to these recommendations, ITC may also recommend that (1) the President initiate international negotiations to address the underlying cause of the increase in imports of the article or otherwise to alleviate the injury or threat or (2) the President implement any other action authorized under law that is likely to facilitate positive adjustment to import competition. (19 U.S.C. 2252(e)(4).)

[7]Critical circumstances exist if a substantial increase in imports (either actual or relative to domestic production) over a relatively short period has led to circumstances in which a delay in taking action would cause harm that would significantly impair the effectiveness of such action. (19 U.S.C. 2252(b)(3)(B).)

These safeguards are global safeguards; that is, generally they must be applied to products from all sources without discriminating against any particular country. NAFTA countries retain their rights under GATT article XIX to use global safeguards, although NAFTA limits the ability of a NAFTA country to apply a global safeguard to another NAFTA country. A NAFTA country that wishes to apply a global safeguard to another NAFTA country must find that the imports from the NAFTA country account for a substantial share of worldwide imports of the product in question. It must also find that the NAFTA country's imports contribute importantly to the serious injury or threat to domestic industry caused by the imports in question.

NAFTA Bilateral Emergency Action Procedures

NAFTA provides for a separate bilateral safeguard action in case of injury due to the reduction or elimination of duties under NAFTA.[8] Under U.S. NAFTA implementing legislation, the process for seeking relief is similar procedurally to that for global safeguard investigations. An industry petitions ITC for relief, and ITC conducts the investigations. If ITC finds that, as a result of reduction or elimination of a duty provided for under NAFTA, a product from Canada or Mexico is being imported into the United States in such increased quantities and under such conditions that imports of the product, alone, constitute a substantial cause of serious injury, or the threat of serious injury, to the domestic industry producing a like or directly comparable product, it makes a recommendation to the President. The President is responsible for making the final decision on whether to grant relief; available relief is limited to an increase in duty to the lesser of the pre-NAFTA rate or the current most-favored-nation (MFN) rate. Unlike the global safeguard provision under GATT, NAFTA requires that a party taking such action provide mutually agreed compensation in the form of concessions having substantially equivalent trade effects or the equivalent value of the additional duties expected to result from the relief action. Provisional relief is available under these bilateral emergency action procedures.

NAFTA's Special Provisions for Certain Agricultural Products

In addition to NAFTA's bilateral emergency action safeguards, which are not product specific, NAFTA provides for a "special safeguard" in the form of a tariff-rate quota on specific, highly sensitive commodities. These commodities include two seasons of tomatoes, eggplant, onions and shallots, chili peppers, squash, and watermelon. During the NAFTA tariff phaseout period, the United States is to allow a certain amount of these imports (quotas generally based upon recent import levels) to enter under preferential tariffs, while the amounts

[8]As a general rule, these bilateral actions may be taken only during NAFTA's transitional period (that is, the 10-15 year period during which duties are being phased out).

imported in excess of the quotas will be assessed the lowest of the prevailing MFN tariff rate or the MFN tariff rate as of July 1, 1991. The tariff rate quota level, which will gradually increase, does not restrict trade under normal circumstances but is in place to cushion the impact of a sudden surge in imports. NAFTA prohibits NAFTA countries from simultaneously applying both an over-quota tariff under this special agricultural safeguard provision and any other safeguard (that is, a global or NAFTA bilateral safeguard).

The U.S.-Canada Free Trade Agreement provides conditional, temporary tariffs to protect importing countries against surges in low-priced fruits and vegetables ("snapback" tariffs). An essential difference between the NAFTA safeguard and U.S.-Canada Free Trade Agreement snapback mechanisms is that the former is triggered on the basis of import volume, while the latter is triggered by import price and crop acreage. One of the reasons negotiators decided to base NAFTA's special agricultural safeguard provision trigger on import volume was because Mexico does not have adequate data collecting processes in place for monitoring prices and acreage.[9]

Section 316 Monitoring Requirements

Under NAFTA's implementing legislation, ITC is required to monitor imports of certain perishable agricultural products in order to make provisional relief determinations within statutory deadlines. Under section 316 of the NAFTA Implementation Act, ITC must monitor U.S. imports of fresh or chilled tomatoes and fresh or chilled chili peppers.[10] This monitoring requirement, which will continue until January 1, 2009, avoids the need for tomato and bell pepper growers seeking provisional relief to formally request monitoring and also avoids the 2-year statutory sunset provision related to ITC monitoring investigations. If ITC requests, the Secretary of Agriculture and the Commissioner of Customs are required to provide information to ITC relevant to this monitoring effort.

U.S. ANTIDUMPING AND COUNTERVAILING DUTY LAWS

U.S. trade law also allows U.S. industry, including agricultural goods producers, to petition the government to impose additional duties on imports that the government determines are either dumped or that benefit from improper foreign government subsidies and that injure the U.S. industry.

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[9]Some U.S. agriculture industry representatives, however, pressed for continuance of the import price strategy because of concerns that the safeguard will not protect U.S. fruit and vegetable producers from downward price pressures resulting from the lowering of tariffs.

[10]19 U.S.C. 3381.

Antidumping Investigations

Dumping is generally defined as the sale of an exported product at a price lower than that charged for the same or a similar product in the "home" market of the exporter or at a price below cost. U.S. antidumping law seeks to redress dumping as a form of unfair price discrimination.

The most common antidumping process is under title VII of the Tariff Act of 1930, as amended.[11] Under this provision, private parties can petition the Department of Commerce and ITC on behalf of a U.S. industry to determine whether a class or kind of merchandise is being sold in the United States at dumped prices and whether those imports are injurious. Commerce is to determine whether sales are at "less than fair value" by calculating the difference between the normal value of the product (for example, the price in the home market) and the export price (for example, the price in the United States). In a parallel investigation, ITC determines whether a U.S. industry is materially injured or threatened with material injury or whether establishment of an industry in the United States is materially retarded by reason of the imports determined by Commerce to have been dumped, using criteria specified in the act.[12] If the agencies find that both dumping and the requisite injury exist, Commerce then calculates the amount of duties imposed on each importer to offset the price difference between the U.S. price and the normal value of the imported merchandise.

Some aspects of U.S. antidumping law have recently been modified as a result of the Uruguay Round antidumping agreement, which applies to all NAFTA countries. The Uruguay Round antidumping agreement required greater transparency for antidumping actions and established new methodological and procedural rules to govern dumping investigations by national governments. Important changes involve both the method of calculating the export price of the product under investigation and the method of determining the normal value to which that export price is compared. The new rules also provide a standard of review that WTO panels must apply when reviewing challenges to a member's antidumping measures under the WTO's dispute settlement procedures.

Countervailing Duty Investigations

Subsidies provided by a government or public body may confer benefits on the recipient that provide an unfair advantage in international trade, such as allowing a producer to sell his or her products at a lower price than that of the

[11]19 U.S.C. 1673 et seq.

[12]19 U.S.C. 1677.

competition. U.S. countervailing duty laws seek to redress the adverse effects to a U.S. industry that seeks such relief.

The Tariff Act of 1930, as amended, provides for the imposition of countervailing duties whenever certain prohibited subsidies are bestowed by a foreign government or public entity within a foreign country upon the manufacture, production, or export of any article that is subsequently imported into the United States causing injury.[13] Subtitle A of title VII of the Tariff Act of 1930, as amended, applies to imports from WTO member countries or from countries that have assumed obligations substantially equivalent to those of the Uruguay Round Subsidies Agreement.[14]

The process for countervailing duty investigations is similar to that for dumping. Commerce must determine whether a country is providing certain prohibited subsidies to its industry or group of industries, either directly or indirectly. If Commerce finds that a prohibited subsidy exists and ITC determines that a U.S. industry is materially injured or threatened with material injury or whether the establishment of an industry in the United States is materially retarded by reason of the subsidized product, Commerce then calculates the amount of duties to be imposed on each importer to offset the subsidies provided for the manufacture, production, or export of that product.

Like antidumping law, U.S. countervailing duty law and procedures have recently changed as a result of the Uruguay Round subsidies agreement, which all NAFTA countries have signed. The subsidies agreement set forth the definition of a subsidy and the conditions that must exist in order for action to be taken. The agreement created three categories of subsidies: (1) prohibited subsidies; (2) actionable subsidies, for example, permissible subsidies against which remedies can be sought if they are shown to cause adverse trade effects; and (3) nonactionable subsidies, such as those for research and development. Countervailing duties may only be imposed with respect to prohibited or actionable subsidies as defined in the subsidies agreement.

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[13]19 U.S.C. 1671.

[14]19 U.S.C. 1671 et seq.

NAFTA'S JOB DISLOCATION PROGRAMS

NAFTA's implementing legislation created two programs to help U.S. workers dislocated by trade with or investment in Mexico or Canada.[15] The NAFTA-TAA program was designed to assist workers in companies affected by U.S. imports from Mexico or Canada or by shifts in U.S. production to either of these countries. NAFTA-TAA benefits include basic readjustment services such as employment services; training; job search allowances; relocation allowances; and--the feature that most distinguishes the program from basic unemployment insurance--income support for up to 52 weeks after exhaustion of unemployment insurance when enrolled in training. NAFTA-TAA is authorized to continue until September 30, 1998.

The responsibility for investigating and making a determination on a NAFTA-TAA petition is coordinated by the Governor of the state where the workers' company is located and the U.S. Department of Labor in Washington, D.C. NAFTA-TAA petitions, which can be filed by a group of three or more workers, are first reviewed by the Governor of the state where the workers' company is located. The Department of Labor makes the final determination to approve or deny these petitions and issues certifications for approved petitions. As of September 4, 1997, NAFTA-TAA certifications had been issued for 1,206 worker groups located in 48 states. The three states with the most NAFTA-TAA certifications were Texas (12,797), Pennsylvania (12,788), and North Carolina (12,001).

Under the NAFTA-TAA program, workers may be certified based in part upon a determination that an increase in imports from Mexico or Canada contributed importantly to the workers' separation or threat of separation. Alternatively, workers may be certified if they become separated or are threatened to become separated and there has been a shift in production by the workers' firm or subdivision to Mexico or Canada of like or directly competitive items. In either case, there is no requirement that the separation or threatened separation be caused by NAFTA.

A second program to deal with NAFTA's job dislocation effects established by the NAFTA implementing legislation is the U.S. Community Adjustment and Investment Program under the North American Development Bank. The program was designed to provide loans and loan guarantees (up to $22.5 million, according to the authorizing legislation) to businesses seeking to locate

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[15]We have work ongoing regarding NAFTA-TAA worker certification for the Senate Committee on Commerce, Science, and Transportation, and work on broader NAFTA-TAA issues for Representative Evans and Lipinski. In addition, NAFTA-TAA was discussed in more detail in recent testimony. See North American Free Trade Agreement: Impacts and Implementation (GAO/T-NSIAD-97-256, Sept. 11, 1997).

or expand existing operations in communities with job losses caused by NAFTA. It was to be implemented by a program office in Los Angeles, two advisory committees, and an ombudsman appointed by the President.[16]

SCOPE AND METHODOLOGY

To develop this report, we reviewed relevant laws; interviewed officials at ITC and the Commerce and Agriculture Departments; and relied on past GAO work on NAFTA, the Uruguay Round WTO Agreements, and U.S. trade remedy laws.

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We have agreed to meet with your staff regarding additional support we can provide you on this issue. Please contact me at (202) 512-8984 if you or your staff have any questions concerning this letter. Major contributors to this letter were Elizabeth Sirois, Anthony Moran, David Genser, Kay Halpern, Richard Burkard, and Maureen Murphy.

JayEtta Z. Hecker, Associate Director
International Relations and Trade Issues

[16]The Treasury Department issued its first designation of qualifying communities on August 1, 1997. That announcement declared 35 communities in 19 states eligible for business loans and loan guarantees. However, during the first 3-1/2 years of NAFTA, no loans were approved under the program.

LIST OF REQUESTERS

The Honorable Bob Graham
The Honorable Connie Mack
United States Senate

The Honorable Michael Bilirakis
The Honorable Allen Boyd
The Honorable Corrine Brown
The Honorable Charles Canady
The Honorable Jim Davis
The Honorable Peter Deutsch
The Honorable Mark Foley
The Honorable Tillie K. Fowler
The Honorable Porter J. Goss
The Honorable Carrie P. Meek
The Honorable Ileana Ros-Lehtinen
The Honorable Joe Scarborough
The Honorable E. Clay Shaw, Jr.
The Honorable Karen L. Thurman
The Honorable Dave Weldon
The Honorable Robert Wexler
House of Representatives

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