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Trade Remedy Law Reform in the 107th Congress

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Summary

Trade remedies are government measures to minimize the adverse impact of imports on domestic industries. Antidumping duties are used to counter the effects of imports sold at unfairly low prices on the domestic market. Countervailing duties are used to counter the price effects of imports that benefit from government subsidies in the exporting countries. Safeguard remedies (also called Section 201 and escape clause remedies) are used to reduce the injurious impact of surges in fairly trade imports.

The intense interest in the issue led the 106th Congress to introduce a number of bills to revise U.S. trade remedy statutes. A similar level of interest has led to the introduction of legislation in 107th Congress. The legislation is in response to steel industry concerns that current U.S. trade remedy laws are inadequate to counter the effects of import surges. Some of the bills would revise safeguard remedies. Others would change antidumping and countervailing-duty remedies. The congressional proposals follow different approaches to the same goal—to ease the procedural burden in obtaining relief and improve the chances that U.S. industries would obtain relief. In so doing, the legislation would make it less likely that industries would press Congress to directly restrict imports through protectionist legislation. On October 28, 2000, President Clinton signed P.L. 106-387, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 which contains a provision, the so-called Byrd Amendment, requiring antidumping and countervailing duties be distributed to the domestic industries originally affected by the dumping or subsidy actions.

Trade remedy legislation is largely supported by those industries, such as steel, that are most sensitive to foreign competition. The legislation is generally opposed by those industries and groups that use imports as inputs or consume them as final products. Increased trade relief would likely result in higher prices to these latter groups. This report will be revised as congressional action warrants.

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Trade Remedy Law Reform in the 107th Congress

Trade remedies are government measures to minimize the adverse impact of imports on domestic industries. The remedies might be applied to counter the effects of unfair foreign trade practices, such as foreign government subsidies or dumping, that is, selling an import below its fair market value. Remedies might also be applied to reduce the impact of surges in fairly-traded imports. While having some antecedents in earlier U.S. law, trade remedies largely came into use when the United States and other economically developed countries engaged in bilateral and multilateral negotiations to reduce tariff and nontariff trade barriers. Policymakers consider trade remedies a tool to cushion the adverse impact of trade liberalization on import-sensitive industries and in so doing to build a political consensus for trade agreements and open trade.

The Constitution assigns primary responsibility for regulating trade to the Congress, but the Congress over time has delegated— for specified periods of time— much of the authority to the executive branch but continues to shape U.S. trade policy by passing new trade laws or amending old ones. At times, Congress has responded to import crises by proposing, and sometimes enacting, changes in the trade remedy laws.

In 1998, U.S. imports of steel products soared.¹ In response to steel industry concerns, the House passed, on March 18, 1999, (289-141) H.R. 975 (Visclosky et. al.) which would have required the President to restrict steel imports to levels equal to the monthly average of imports during the 36 months prior to July 1997 and would have circumvented standard U.S. trade remedies. On June 22, 1999, the Senate voted to withdraw consideration of the bill. In the 107th Congress, H.R. 808 (Visclosky et al) was introduced that would establish quotas on steel imports as would S. 957 (Wellstone). On June 5, 2001, the Bush Administration announced its intention to, among other things, initiate a section 201 action against imports of various steel products.

On October 28, 2000, President Clinton signed P.L. 106-387, the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act, 2001 which contained a provision, the so-called Byrd Amendment, that requires antidumping and countervailing duties be distributed to the domestic industries originally affected by the dumping or subsidy actions. The report examines U.S. trade remedy programs and analyzes the legislative proposals and their potential implications.

¹For more information see *Steel Industry and Trade Issues*. CRS Report RL31107.

What are Trade Remedies and How do They Work?

U.S. law provides for a range of administrative measures to reduce the adverse effects of foreign trade policies and practices on U.S. industries. Three forms of relief—safeguards, antidumping, and countervailing duty remedies—have been the subjects of recent legislation.²

Trade Remedies Overview

Safeguard (also referred to as escape clause and Section 201) relief provides for temporary duties, quotas, or other restrictions on imports that are traded fairly but cause or threaten to cause serious injury to a domestic industry. The relief is intended to give the domestic industry the opportunity to adjust to the new competition and remain competitive. The authority for the safeguard relief is found in sections 201-204 of the Trade Act of 1974, as amended.³

Antidumping (AD) is relief to remedy the adverse price impact of imports sold on the U.S. market at unfairly low prices. The relief is in the form of extra duties on the dumped imports. The authority for AD relief is found in sections 731-739 of the Tariff Act of 1930, as amended.⁴

Countervailing duty (CVD) is relief from the adverse price impact of imports that receive foreign government subsidies. The relief is in the form of extra duties on those imports. The authority for CVD relief is found in sections 701-709 of the Tariff Act of 1930, as amended.⁵

²U.S. law provides for other trade remedies as well. The Department of Labor administers a trade adjustment assistance program for workers who can show that they have lost their jobs because of imports and administers a separate program for workers who have lost their jobs because of imports coming into the United States as a result of the North American Free Trade Agreement (NAFTA). The Department of Commerce operates a trade adjustment assistance program for firms. Section 337 of the Tariff Act of 1930, as amended, gives authority to the U.S. International Trade Commission to issue an exclusion order and/or a cease-and-desist order against imports that it has determined are sold in the United States through unlawful methods of competition or sale or the products of intellectual property rights infringements. Section 406 of the Trade Act of 1974 provides for remedies against imports from Communist countries that cause market disruption. It is a provision that is similar to but more restrictive than the safeguard remedies. Sections 301-310 of the Trade Act of 1974 as amended (often more simply called section 301) give authority to the United States Trade Representative to act against foreign unfair trade practices. It is most used against practices that violate U.S. rights under trade agreements or inhibit U.S. exports and foreign investments.

³19 U.S.C. 2251-2254.

⁴19 U.S.C. 1673-1673h.

⁵19 U.S.C. 1671-1671h.

Objectives of Trade Remedies

The three programs are designed to “level the playing field,” for adversely affected industries in the face of unfair foreign competition or rapidly increasing fair foreign competition. Specifically, AD and CVD relief eliminates the price advantages that foreign competitors attain through unfair trade practices. The rationale underlying safeguard relief is that while the benefits of trade liberalization are distributed throughout a national economy, the adverse effects—loss of profits, worker layoffs, firm and plant closures—are concentrated in specific, import-sensitive industries. Safeguard relief is designed to give the injured industry the opportunity to adjust, minimizing the destabilizing effects of trade.

In addition to these “economic” arguments, many trade specialists have argued that trade remedies are means by which the United States has been able to respond to the concerns of the adversely affected sectors of the economy and achieve a domestic political consensus on trade liberalization. Without these remedies, they argue, the Congress would not have approved major agreements, such as the General Agreement on Tariffs and Trade (GATT) and the World Trade Organization (WTO) that became the foundation for the post-war international trading system.⁶

Economics of Trade Remedies

Many economists assert, on the other hand, that while trade remedies may assist injured industries they do so at a cost to the economy as a whole. They argue that, whether imposed to mitigate the negative effects of unfair trade or fair trade, trade remedies lead to higher costs to consumers. From this perspective, higher costs reduce the real income and, therefore, the standard of living of American consumers.

Trade remedies can also adversely affect U.S. domestic industries, especially those that rely on imports as inputs in production. In 1991, for example, major U.S. computer manufacturers objected when a U.S. manufacturer of flat-panel screen displays won an AD case against Japanese display manufacturers. Japanese-made computer displays dominated the U.S. market. The U.S. computer manufacturers argued that the higher production costs resulting from the AD duties made it unprofitable for them to manufacture in the United States and forced them to move production abroad.⁷

⁶See for example, Lawrence, Robert Z. and Robert E. Litan. *Saving Free Trade: A Pragmatic Approach*. The Brookings Institution. Washington. 1986. p. 25.

⁷Destler. I.M. *American Trade Politics. Institute for International Economics and The Twentieth Century Fund*. Second Edition. June 1992. p. 172.

Eligibility Criteria and Procedures for AD and CVD⁸

U.S. trade remedy statutes and obligations under the World Trade Organization Agreement require that an investigation be conducted of the relevant circumstances surrounding the trade remedy petitions. For the investigation, the petitioning industry must provide information and undertake certain measures. The government must adhere to specific criteria and procedures. For AD cases and *most* CVD cases, industries must go through a multi-stage investigation conducted by the Department of Commerce (DOC) and the U.S. International Trade Commission. (ITC).

The process begins when an industry, a union or other representative group of the industry files relevant petitions with the Office of Import Administration of the DOC and with the ITC. The DOC may also initiate an investigation. Successful completion of the process is contingent on four affirmative decisions. The ITC makes a preliminary determination whether there is a “reasonable indication” that imports in question are causing or threaten to cause “material” injury to the industry.⁹ An affirmative decision allows the investigation to continue. A negative decision terminates the investigation.

The DOC then must make a preliminary determination whether dumping or subsidies have taken place and, if so, make a preliminary calculation of what the dumping or subsidy margin would be. Regardless of whether the DOC’s determination is positive or negative, the DOC continues the investigation and makes a final determination of dumping or subsidies and a final calculation of duty margins. The investigation is terminated if DOC makes a negative final determination. If the DOC makes an affirmative final determination, then the ITC continues its investigation and renders a final determination of material injury or threat thereof. A negative ITC determination terminates the investigation. If the two final determinations are affirmative, then extra duties are placed on imports to be paid by the importer. The determinations are subject to judicial review.

Both the DOC and the ITC must take into account a number of criteria in making their respective determinations. In CVD cases, the DOC must consider evidence of direct subsidies or upstream subsidies (subsidies provided to inputs the benefits of which are passed on to the final producer) and, if found, what would be the net countervailable subsidy. In AD cases the DOC must first determine the “normal value” of the import (based on the price in the exporting country’s home market, on the price of the export of the product to a third country market, or on a “constructed” price, depending on the availability of data). The DOC must compare

⁸For the sake of brevity, this description provides the highlights of the complex process. For more information see United States International Trade Commission. Summary of Statutory Provisions related to Import Relief. USITC Publication 2944. January 1996.

⁹In CVD cases the injury test and, therefore, ITC participation, is required only if the country against which the U.S. industry is bringing a petition is a member of the WTO (which includes most trading partners), or is a nonmember country, which is entitled to MFN treatment under an agreement or has assumed equivalent obligations. Otherwise, only a final determination by the DOC of the existence of a subsidy is required for the assessment of the countervailing duty.

the “normal value” with the actual price of the import in question to determine whether dumping is taking place and, if so, what the dumping margin is. In either procedure, the ITC must make two determinations: (1) Is the domestic industry being materially injured or facing a threat of material injury? (2) Are the imports in question a cause of the material injury. U.S. law establishes timeframes within which the respective agencies must make their determinations.

Eligibility Criteria and Procedures for Safeguard Relief

The process for safeguard relief begins when ITC receives a petition from representatives of an industry (firms, association, unions, etc) alleging that imports of a like product as produced by the industry have surged at such a rate as to be a “substantial cause” of “serious injury” or the threat thereof. The ITC may also initiate an investigation on its own accord or as a result of a request from the President, the United States Trade Representative (USTR), the Senate Finance Committee or the House Ways and Means Committee.

In the meantime, U.S. law encourages the domestic industry to submit a plan stipulating how it would use the relief, if granted, to make adjustments to become more competitive. In conducting its investigation, the ITC must consider the state of the domestic industry including a number of factors listed in the statute. If the ITC determines in the affirmative, it recommends appropriate remedial measures which must be an increase in tariffs on that product, a tariff-rate quota, a quantitative restriction, trade adjustment assistance, or a combination thereof.

The ITC submits its recommendation to the President who must decide whether to take the recommended action, an alternative action, or no action at all. In making his decision, the President must consider a number of factors, including the industry’s adjustment plan if submitted, the probable effectiveness of remedial action to promote adjustment, the national economic interest and the national security interest. U.S. law requires the ITC to make its respective determinations within specified timeframes.

The President must report to Congress on the action he will take. If he decides to take action other than that recommended by the ITC, or to take no action, the Congress may direct him to implement the remedy recommended by the ITC by enacting a joint resolution of disapproval of his proposed action.

Comparison of Injury Thresholds and Procedures

Procedures and injury thresholds applied in safeguard determinations are higher and stricter than in the those applied in AD and CVD cases. The former require that the imports be a “substantial” cause or threat of “serious injury.” “Substantial cause” is defined in law as “a cause which is important and not less than any other cause.” Serious injury is one that is a significant, overall impairment to the position of the domestic industry. AD and CVD statutes require the determination of “material injury” defined as injury which is “not inconsequential, immaterial, or unimportant.” And AD and CVD statutes require that the injury occur “by reason of” the dumped

or subsidized imports, a less precise and lower causation threshold than under the safeguard statute.¹⁰

In addition to stricter causation and injury standards, safeguard relief requires that final decisions be made at a higher policy level—the President—than in the AD and CVD. In addition, the President has wide discretion as to which safeguard relief to implement, including taking no action. On the other hand, no discretion exists in CVD and AD cases—relief as determined by the DOC is implemented by a DOC antidumping or countervailing duty order without Presidential involvement.

The higher injury thresholds and more demanding procedures for safeguard relief reflect the fact the procedures involve *fairly* traded imports from *all* sources. In addition, the impact on overall U.S. national interests would likely be greater than in the case of AD and CVD determinations.

The stricter standards and procedures are probably a significant reason why U.S. industries have used and received relief much more often from AD and CVD programs than safeguard. Between 1984 and 1999, 322 AD cases and 106 CVD cases resulted in relief.¹¹ Whereas during the same period, only five safeguard cases resulted in relief.¹² But the higher standards have also led to criticisms that U.S. safeguard relief does not meet the needs of U.S. import-sensitive industries and, therefore, must be reformed.

Changes in Trade Remedy Laws

The Congress has amended U.S. trade remedy statutes over the years largely in response to industry concerns that the remedy procedures were not adequately meeting their needs. In general, Congress has amended criteria for determining injury which made it more likely that determinations would be made in favor of the petitioning industry and has shortened the timeframes for agencies to make determinations.¹³ The Congress has comprehensively amended trade remedy laws most recently with legislation to implement the Uruguay Round agreements under the General Agreement on Tariffs and Trade.¹⁴ Specifically, the amendments brought U.S. laws into conformity with the multilateral WTO agreements on antidumping, subsidies/countervailing, and safeguard procedures.

¹⁰Bhala, Raj and Kevin Kennedy. *World Trade Law*. Lexis Law Publishing. Charlottesville, VA. 1998. p. 882-883.

¹¹Figures derived from data compiled by U.S. Department of Commerce. International Trade Administration.

¹²Mastel, Greg. *Section 201: Revitalizing the Forgotten Trade Law*. Center for National Policy. Washington. November 1999. p. 7.

¹³Destler, I.M. *American Trade Politics*. Institute for International Economics. Washington. p. 165-169.

¹⁴The Uruguay Round Agreements Act of 1994 (P.L. 103-465).

U.S. International Obligations

AD, CVD and safeguard remedies reflect and are subject to U.S. international rules established under the World Trade Organization (WTO) and under the North American Free Trade Agreement (NAFTA). The United States and other WTO members must adhere to the Uruguay Round Agreement on Subsidies and Countervailing Measures, which delineates definitions, procedures, and other criteria for member CVD programs.¹⁵ For example, the Subsidies Agreement requires that a determination of material injury (or threat thereof) to a domestic industry must be made before a subsidy is countervailable (when the subsidized imports are from another WTO member-country). The agreement also prohibits certain subsidies and allows others and defines subsidies that are countervailable. In addition, the agreement provides for adjudication of CVD disputes between WTO members. Similarly, the United States and other WTO members must adhere to the Uruguay Round Antidumping Agreement which establishes procedures for implementing national antidumping programs, including determinations of dumping, and material injury or the threat thereof.¹⁶

Article XIX of the General Agreement on Tariffs and Trade (1994) lays out the basic conditions under which a WTO member can apply safeguards remedies. The Uruguay Round negotiations resulted in an expansion of Article XIX by stipulating, among other things, sunset requirements for member safeguard actions already in effect, time limits on new safeguard actions, and criteria for determining “serious injury.” Before the enactment of the Uruguay Round Agreements, member countries that were the targets of safeguard actions could seek compensation from the country taking the action. Under the Safeguards Agreement such compensation is delayed for three years.

The United States also has obligations regarding trade remedies *vis-a-vis* Canada and Mexico under the NAFTA. Chapter Eight of the NAFTA provides, among other things, that escape clause measures against NAFTA members generally last no more than three years. Chapter 19 allows that CVD and AD final determinations involving another member’s goods to be reviewed by a binational panel instead of in a domestic court.

A number of trading partners, including Japan, Korea, Chile, and Brazil, have criticized U.S. use of its trade remedy laws, especially AD, as not fully in line with WTO rules. They argued that a review of member-country trade remedy practices and policies should be on the agenda of the forthcoming WTO round of negotiations. The United States resisted this demand and many Members of Congress opposed it.

¹⁵The Uruguay Round Agreement on Subsidies and Countervailing Measures, which went into effect on January 1, 1995, replaced the Subsidies Code under the General Agreement on Tariffs and Trade (GATT) which was negotiated during the Tokyo Round negotiations and went into effect in 1979.

¹⁶The Uruguay Round Antidumping Agreement (agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994), which went into effect on January 1, 1995, replaced the GATT Antidumping Code, which was negotiated during the Tokyo Round negotiations and went into effect in 1979.

However, in November 2001, at the WTO Ministerial Meeting in Doha, Qatar, the 142 WTO members agreed to include trade remedy laws on the agenda.¹⁷

Trade Remedy Reform Proposals in the 106th and 107th Congresses

A range of bills were introduced in the 106th Congress and similar ones have been introduced in the 107th Congress to amend U.S. trade remedy laws. Some would have revise safeguard remedies. Others would change antidumping and countervailing remedies. They all share the objective of increasing the possibility that responsible U.S. authorities will make determinations in favor of domestic industries in trade remedy investigations and of accelerating the investigation process to make it more responsive to industry concerns. The 106th Congress did pass one change to U.S. trade remedy law.

Safeguard Reform Proposals

In the 106th Congress, S. 1254, H.R. 1120, S. 1008, S. 261, H.R. 412, H.R. 1505, S. 1724 and S. 1741 would have made a number of changes to U.S. safeguard statutes. The most significant proposed change pertains to the causal linkage that must be established between a surge in imports and serious injury. U.S. import-sensitive industries and other critics of trade remedy laws have argued that the “significant cause” linkage to injury, that domestic industries must establish, is too difficult and diminishes its utility. These bills would have lowered the causal threshold to require that import surges be only “a cause” of injury to U.S. domestic industry. Supporters have asserted the changes would bring the U.S. the causation threshold in line with that required by the WTO, although such a conclusion would likely be subject to legal interpretation of WTO rules. In practical terms, the new threshold would have meant that an investigation would have to find only that imports have contributed to injury, not that they are “a cause which is important and not less than any other cause.” H.R. 518 (Regula, et al), introduced in the 107th Congress (identical to H.R. 412, 106th Congress) and H.R. 1988 (English) (similar to H.R. 1505, 106th Congress) and S. 979 (Durbin) would make these changes as well.

In addition, under current U.S. safeguard statutes, the ITC must consider a number of factors when determining whether an industry faces serious injury or the threat of serious injury. Regarding serious injury, the ITC must examine whether there has been a significant idling of productive facilities in the industry, there has been a significant number of firms to operate at a reasonable profit, and there has been a significant level of unemployment or underemployment in the industry. These bills would have required additional factors be considered, including changes in the level of sales and production, changes in productivity, changes in capacity utilization, changes in profits and losses, and changes in employment levels.

¹⁷ For more information see, *The WTO Doha Ministerial: Results and Agenda for a New Round of Negotiations*. CRS Report RL31206. p. 9-12.

Furthermore, under current law, the ITC must consider a number of factors in determining whether a surge in imports has been the cause of serious injury, including whether imports have increased either absolutely or relative to domestic production and whether the share of the domestic market supplied by domestic producers has declined. These bills would have required the ITC to consider, in addition, the rate and timing of the increase in imports, especially if the increase has been over a short period of time.

Some legislation would have also broadened the range of cases in which relief could be expedited in “critical circumstances.” Current law permits that provisional relief be provided under “critical circumstances,” that is when failure to take expedited action would do irreparable injury to an industry. The law now allows “critical circumstances” determinations only when the cases have resulted from petitions filed by a domestic industry. S. 1254, H.R. 1120, and S. 1008 would have provided that such relief be considered in cases where the President or Congress has initiated investigation. The bills also would have shortened the deadline by which the ITC must determine that “critical circumstances” exist. H.R. 1988 and S. 979 in the 107th Congress contain these provisions.

“The Byrd Amendment”

On October 28, 2000, President Clinton signed the Agriculture, Rural Development, Food and Drug Administration, and Related Agencies Appropriations Act 2001 (P.L. 106-387). Section 1003 of the Act contained a provision, the “Continued Dumping and Subsidy Offset,” sometimes called the Byrd Amendment after its chief sponsor, Sen. Robert Byrd.

The provision amended U.S. antidumping and countervailing duty laws by requiring that antidumping and countervailing duties be re-distributed to the domestic industries that have been injured by the imports that are subject to the AD and CVD orders. The provision requires the Customs Bureau to deposit the duties into a special account rather than into the general treasury. It then must distribute the funds to eligible firms, farmers, or other producers that were petitioners in the original AD or CVD cases to offset certain expenses that they incurred as a result of the dumped or subsidized imports. The provision was originally contained in S. 61. (DeWine, et.al), and other bills.

The “Byrd Amendment” is controversial because it was inserted into the legislation during conference and had not received committee consideration in either house. In addition, the amendment has raised concerns about whether it conforms to WTO rules under the relevant WTO agreements. Eleven members of the WTO— the European Union, Australia, Brazil, Canada, Chile, India, Indonesia, Japan, Mexico, South Korea, and Thailand, filed a complaint with the WTO charging that the amendment violates WTO obligations. Two rounds of hearings have taken place with a final ruling from the WTO’s Dispute Settlement Panel expected sometime in

June 2002.¹⁸ The Customs Bureau reported that it had distributed around \$206 million in offsets to claimants.¹⁹

Potential Implications of Trade Remedy Reform and Alternative Options

At this time, it is difficult to determine what impact the “Byrd Amendment” will have although it has already proved controversial. Trade remedy legislation generally ignites a debate over the direction of U.S. trade policy. Trade remedy legislation is largely supported by those industries, such as steel, that are most sensitive to foreign competition. The legislation is often opposed by those industries and groups that are users of imports as inputs or consumers of final products. Increased trade relief would likely result in higher prices to these groups.

Changes in trade remedy laws could have an impact on U.S. relations with its major trade partners, who might challenge the legality of some changes in U.S. trade remedy laws under the WTO. Along with their challenge of the “Byrd Amendment,” the European Union and Japan are challenging other U.S. antidumping laws and practices in the WTO. In 1999, the two trading partners filed disputes regarding the U.S. Antidumping Act of 1916, a law which allows U.S. firms to sue foreign companies in U.S. court over dumping of imports and to collect damages if dumping is found. They claimed it violates the WTO Antidumping Agreement. The WTO upheld their claim.

With the United States in mind, the European Union and Japan are advocating a review of the antidumping practices of WTO members as part of the agenda for a new round of WTO negotiations. The United States opposes this position.

Amending U.S. trade remedy statutes is one option available to Congress to cushion the impact of import competition on American industries. Some trade specialists have suggested, for example, that the federally funded trade adjustment assistance (TAA) programs could be reformed and made more effective. TAA programs are available for workers (through the Department of Labor) and for firms (through the Department of Commerce). They provide funds for training and other adjustment measures to those who can demonstrate an adverse impact from imports. Many economists prefer this option over trade restrictive remedies because it directs assistance to those most affected and does so without distorting prices. But TAA programs as currently designed and administered have been criticized by labor advocacy groups as ineffective in responding to workers’ needs in a globalizing economy.

The Congress might also require the President to halt or quantitatively restrict imports. Such a measure would resolve the immediate problem of adverse effects on the import-sensitive workers and firms and have been proposed and in some cases enacted in the past. But they would very likely be challenged by other WTO

¹⁸ *International Trade Reporter*. March 7, 2002. p. 424.

¹⁹ [<http://www.customs.gov>].

members as violating WTO rules. They would also reduce competitive pressures on a U.S. industry(ies) which might encourage inefficiency, higher costs and a decline in the general economic welfare.