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The Foreign Trade Aspects Of The Trade Act Of 1974 Part Ii

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THE FOREIGN TRADE ASPECTS OF THE TRADE ACT OF 1974 PART II†

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TABLE OF CONTENTS

Title II—Relief from Injury Caused by Import Competition . .	639
I. Background	640
II. Principle Objectives of Title II	642
III. Principle Foreign Trade Aspects of Title II	648
Title III—Relief from Unfair Trade Practices	651
Chapter I.—Foreign Import Restrictions and Export Subsidies	652
Section 301. Responses to Certain Trade Practices of Foreign Governments	
Chapter II.—Anti-Dumping Duties	656
Chapter III.—Countervailing Duties	668
Chapter IV.—Unfair Trade Practices	674
Title IV—Trade Relations with Countries Not Presently Receiving Nondiscriminatory Treatment	679
Title V—Generalized System of Preferences	686
Title VI—General Provisions	692
Most Important New Provisions	697

Title II—Relief from Injury Caused by Import Competition

Title II represents a major portion of the Trade Act. Its elaborate and complicated provisions deal primarily with injury caused by import competition to United States workers, United States indus-

* The first part of this article appeared at 33 WASH. & LEE L. REV. 325 (1976).

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tries, United States firms, and United States communities. This injury may be caused, however, by increased imports that are entirely legal and to which the United States Government's sole ground of objection is that they injure domestic industries, firms, or workers. The thrust of this section, therefore, is primarily domestic; and any detailed analysis of this important portion of the Act is beyond the scope of this article, which is primarily concerned with the foreign trade aspects of the Trade Act.

For that reason, and because of limitations of space, comments on this title will be confined to (a) the background of the title, (b) the principal changes sought to be effected by the Trade Act amendments, and (c) the possible conflict between the provisions of this title and GATT.

I. BACKGROUND

The 1962 Act provided for adjustment assistance to firms and to workers.¹⁷⁹ No assistance to communities was provided.

The Administration Proposal recognized that the adjustment assistance provisions of the Trade Expansion Act of 1962 had not worked out well, largely because of the very restrictive tests¹⁸⁰ estab-

¹⁷⁹ See Subchapter III of the 1962 Act, 19 U.S.C. §§ 1901-91 (1970).

¹⁸⁰ Under the 1962 Act, an industry-wide petition for import relief (i.e. tariff adjustment) could be filed by a trade association, a firm, a certified or recognized union, or other representative of an *industry*. The Act provided for an investigation to be made by the Tariff Commission which was required, in effect, to determine, whether, as a result in major part of concessions granted under trade agreements, an article was being imported into the United States in such increased quantities as to cause or threaten to cause serious injury to a domestic *industry* making like or directly competitive articles. Furthermore, a petition for adjustment assistance could also be filed with the Commission by a firm or group of workers; the Commission was required to make an investigation to determine: (a) whether, as a result in major part of trade concessions granted under trade agreements, an article like or directly competing with, an article produced by the firm is being imported into the United States in such quantities as to threaten or cause serious injury to the firm; and

(b) whether, in a petition by a group of workers, as a result in major part of concessions under trade agreements, an imported article, like or directly competitive with an article made by the workers' firm, is being imported into the country in such increased quantities as to cause or threaten to cause unemployment of a significant number of workers.

The great problem in making these findings was to establish the necessary causal relationship.

Furthermore, after the Commission had made a favorable finding as to adjustment assistance, the Secretaries of Commerce and Labor were required to make additional investigations, in some respects, covering the areas already investigated by the Commission.

lished by that law for invoking import restraints and for providing adjustment assistance to workers and to firms. The Administration Proposal proposed somewhat less restrictive tests for import relief and providing adjustment assistance to workers.¹⁸¹

Before the 1962 Act, the Tariff Commission, in making a recommendation for tariff relief, was required only to find that a concession under trade agreement "in whole or in part"¹⁸² caused increased imports. Under this wording, the Commission had conclusively presumed¹⁸³ a causal relationship between the concession and the increased imports. The 1962 Act was clearly intended to make it more difficult for the Commission to find the existence of the facts necessary to justify "escape clause" relief—i.e., the imposition of tariffs or other import restrictions. To compensate U.S. industry and workers for this change, the 1962 Act for the first time provided for adjustment assistance to firms and workers seriously injured by increased imports.¹⁸⁴ The Commission stated in its opinion in the *Cotton Sheeting Workers* case¹⁸⁵ that in deciding whether to recommend tariff relief, or declare eligibility for adjustment assistance, the 1962 Act did not permit any different interpretation or application of the various causal relationships¹⁸⁶ in regard to an industry, a firm, or a group of workers. It has been strongly argued that Congress did in fact intend, in the 1962 Act, to permit a less restrictive application of the Act in the case of adjustment assistance than in the case of escape clause relief,¹⁸⁷ despite the fact that identical, or substantially identical, language was employed in describing the requirements to be met for each type of relief.

After the 1962 Act, and prior to the enactment of the Trade Act, the Commission did in fact follow the course set out in *Cotton Sheeting Workers* with the result that comparatively few firms and groups of workers were able to obtain adjustment assistance. For example, during the period 1962-74, less than thirty-five firms were certified as eligible for adjustment assistance.¹⁸⁸ Furthermore, from 1962-69, no

¹⁸¹ See Administration Proposal, at 10-11.

¹⁸² 65 Stat. 73 (1951).

¹⁸³ See S. METZGER, *TRADE AGREEMENTS AND THE KENNEDY ROUND* 45 (1965).

¹⁸⁴ *Id.* at 60. See Parts II and III of Subchapter III of the Trade Act of 1974, Pub. L. No. 93-618, §§ 101-613, 88 Stat. 1978-2077 (Codified at 19 U.S.C. §§ 2101-2487 (Supp. IV, 1975)) [hereinafter cited as Trade Act, with section numbers corresponding to the session laws].

¹⁸⁵ See July, 1963 TC Pub. 100 TEA-W-4 (1963).

¹⁸⁶ See S. METZGER, *TRADE AGREEMENTS AND THE KENNEDY ROUND* 62-63 (1965).

¹⁸⁷ S. REP. NO. 1298, 93d Cong., 2d Sess. 144 (1974), reprinted at 1974 U.S. CODE CONG. & AD. NEWS 7186 [hereinafter cited as SFC REPORT].

¹⁸⁸ *Id.* at 131.

worker was found eligible for benefits.¹⁸⁹

In addition to the difficulty of establishing eligibility for adjustment assistance because of the causal relationship requirement, the 1962 Act had another major defect; even in those few instances where the applicant was able to establish eligibility for adjustment assistance, the elaborate procedures which had to be complied with under the Act required a great deal of time—on the average, approximately two years elapsed between the filing of the application for adjustment assistance and the receipt of assistance.

II. PRINCIPAL OBJECTIVES OF AMENDMENTS DEALING WITH RELIEF FROM INJURY CAUSED BY INCREASED IMPORTS

The Trade Act has substantially amended the procedure established in the 1962 Act in an effort to accomplish the following objectives:¹⁹⁰

- (a) Liberalize eligibility requirements for import relief and for adjustment assistance;
- (b) Speed the processing of petitions;
- (c) Prefer small businesses in making loans or guaranteeing loans to firms;¹⁹¹
- (d) Make adjustment assistance available to communities,¹⁹² as well as firms and groups of workers;
- (e) Broaden the types of import relief which may be extended to an industry;
- (f) Increase adjustment assistance to workers.

(a) *Liberalization of eligibility requirements for import relief and for adjustment assistance*

It is important to realize that in Title II of the Trade Act, a sharp line of distinction is drawn between "import relief" and "adjustment assistance." "Import relief" means only the administrative relief which may be provided for an industry under Chapter 1: increases in tariff, tariff-quotas, quotas, or orderly marketing agreements. "Adjustment assistance" on the other hand, means only adjustment assistance for workers (Chapter 2), adjustment assistance for firms (Chapter 3), and adjustment assistance for communities (Chapter 4).

¹⁸⁹ H.R. REP. No. 571, 93d Cong., 1st Sess. at 44 (1973) [hereinafter cited as HWMC REPORT].

¹⁹⁰ Trade Act, § 255(d).

¹⁹¹ Trade Act, Title II, Chapter 4.

¹⁹² Trade Act, § 201(a)(1).

Adjustment assistance is applied to particular firms, groups of workers and communities, whereas import relief is applied to an industry.

(1) *Import Relief.* Since import relief is granted or withheld on an industry-wide basis, the petitioner may be a trade association, a certified labor union, a firm, or a group of workers "which is representative of an industry."¹⁹³ The petition must be filed with the Commission, and it is required to determine whether 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 domestic industry producing an article like or directly competitive with the imported article.¹⁹⁴ A "substantial" cause is defined as a cause which is important and not less than any other cause.¹⁹⁵

Three major changes are effected by this language. There now is no need to establish that the increased imports result from a tariff concession under a trade agreement. The increased imports need only be a "substantial cause" (important and not less than any other cause) of the serious injury; clearly it will be easier to establish that increased imports are a "substantial cause" than to establish that they have been "the major factor", i.e. greater than all other factors combined.¹⁹⁶ As a result of the elimination of the causal link between concessions under trade agreements and increased imports, the types of products as to which import relief can be furnished is broadened since they are no longer limited to articles as to which the U.S. has made trade concessions.

(2) *Adjustment Assistance.* Whether or not import relief is ordered by the President, adjustment assistance may also be furnished.¹⁹⁷ The following summarizes the principal aspects of adjustment assistance for workers, firms, and communities.

(A) *For workers.* Under the Trade Act an application for adjustment assistance for a group of workers at a particular firm may be filed directly with the Secretary of Labor¹⁹⁸ (rather than with the

¹⁹³ Trade Act, § 201(b)(1).

¹⁹⁴ Trade Act, § 201(b)(4).

¹⁹⁵ See HWMC REPORT at 44, *supra* note 189.

¹⁹⁶ The Department of Labor, Bureau of International Labor Affairs, has published a very helpful booklet entitled "Trade Adjustment Assistance for Workers: Questions and Answers." This booklet also contains the form of "Petition for Adjustment Assistance," OMB44R, 1598. Regulations governing trade adjustment assistance for workers are set out in 29 C.F.R. §§ 90.1-91.68 (Supp. 1975).

¹⁹⁷ See SFC REPORT, *supra* note 187, at 132.

¹⁹⁸ SFC REPORT, *supra* note 187, at 133. Congress did in fact intend to set up different eligibility standards for "import relief," on the one hand, and "adjustment assistance" on the other hand, and in order to make it quite clear that this was its

Commission as provided in the 1962 Act). To obtain adjustment assistance, there is no requirement that a petition for import relief for the industry be filed with the Commission.¹⁹⁹ Under Section 222 of the Trade Act, the Secretary of Labor is required to determine whether a significant number or proportion of workers in the firm (or a subdivision thereof) have become wholly or partially separated, or that sales or production, or both, of such firm or subdivision have decreased absolutely, and that increases of imports "have contributed importantly" to such separation or decline. The phrase "contributed importantly" is defined as a cause which is important but not necessarily more important than any other cause. The standard in regard to cause is considered to be easier to meet under this Section than under the Section relating to import relief.²⁰⁰

(B) *For Firms and Communities.* Applications for adjustment assistance for firms or communities may be filed with the Secretary of Commerce. Section 251(c) and Section 271(c), respectively, define the eligibility requirements and each such section again uses the phrase "contributes importantly." In regard to both import relief and adjustment assistance, no connection need be established between a concession under a trade agreement and any of the requirements for eligibility.

(b) *Speeding up of processing of petitions*

(1) *For import relief*—Under the Trade Expansion Act of 1962,²⁰¹ import relief, if eventually granted, might not be available until about 16 months after the petition was filed, and the delay could be even greater if an orderly marketing agreement was to be negotiated.

Under the Trade Act, the Commission still has 6 months in which to complete its initial investigations, but the subsequent time periods

intent, it used somewhat different language in the two relevant portions of the Trade Act and amplified the point in the Committee Reports.

¹⁹⁹ Under the 1962 Act, there was a very complicated timetable setting up periods within which the Commission and the President were to play their respective roles. The Trade Act has not simplified the timetable but the over-all emphasis in the Trade Act on making relief speedily available may result in earlier decisions by both the Commission and the President.

²⁰⁰ Under the Trade Act, the Secretary of Labor and the Secretary of Commerce are required, respectively, to make a determination as to whether the petitioner is eligible for adjustment assistance within 60 days after receiving the petition. 19 U.S.C. §§ 2223, 2251, 2271 (1970). From an examination of the reports published in the Federal Register, both of these Departments are making a major effort to comply precisely with the time limits established by the Act.

²⁰¹ Trade Act, § 255(d).

have been adjusted (some shortened and some extended) with the overall result that at the maximum, import relief, if granted, will become effective within about 14 months, if no orderly marketing arrangement is to be entered into. If the President announces his intention of seeking to effect an orderly marketing arrangement, action is to be expected within a maximum of about 16 months from the date of filing the petition.

(2) *For adjustment assistance*—The great change here is that applications for adjustment assistance are to be filed directly with the Secretary of Labor (in the case of adjustment assistance for workers) and with the Secretary of Commerce (in the case of adjustment assistance for firms or communities).²⁰² Under the 1962 Act the President was required to wait until he had received an affirmative report from the Commission with respect to the industry in question before he could provide that firms within the industry might request from the Secretary of Commerce certifications of eligibility for adjustment assistance, the same approach being also applicable to adjustment assistance for workers. This change will surely accelerate relief by a period of many months. Under the 1962 Act the average period between a firm filing a petition for relief and receiving relief was 25 months.

(c) *Preference in Financing to be Given to Small Businesses.* The Trade Act explicitly provides that small businesses are to be preferred in the making or guaranteeing of loans.²⁰³ In addition there are at least two other provisions of the Trade Act which tend to make its adjustment assistance provisions really attractive only to small businesses. Section 252(b)(1)(A) provides that a firm's application for adjustment assistance is to be approved *only* if the firm has no reasonable access to financing through the private capital market. No doubt a certification to this effect would be required from the firm itself. Any such statement could reasonably be expected to have a major detrimental effect on the credit standing of any large or medium sized business unless it were already perilously close to the shoals of bankruptcy. Section 255 places a limit on direct loans to any one firm of \$1,000,000 and places a limit on guarantees to any one firm of \$3,000,000.

(d) *Communities, as well as firms and workers, are eligible for adjustment assistance.* This extremely interesting Chapter (Chapter 4, Section 271-84, of the Trade Act) was written into the Act by

²⁰² 19 U.S.C. §§ 1961-63 (1970).

²⁰³ SFC REPORT, *supra* note 187, at 151.

the Senate Finance Committee. The 1962 Act was based in part upon the assumption that industrial workers in one location in the United States who were displaced by increased imports of competitive goods would relocate if adequate employment opportunities were not available at their home location, and it provided relocation benefits to help meet the costs of transfer.²⁰⁴ The Administration estimates, however, that only 0.3% of the workers certified as eligible for adjustment assistance under the 1962 Act received relocation benefits.²⁰⁵ It is probable, of course, that as a result of the provisions of the 1962 Act, the number of workers applying for relocation allowances does not represent all, or even a large proportion, of the workers who actually relocated.²⁰⁶ Nevertheless, with all these factors taken into account, the small percentage of workers receiving relocation benefits is still impressive. Furthermore, as the SFC Report properly points out,²⁰⁷ even if the displaced industrial worker himself is more or less mobile, many of the other citizens in a typical small community who rely for their livelihood on servicing, in one way or another, the employees of one or two large industrial companies, are probably not mobile.

Accordingly, the Trade Act now provides for adjustment assistance to communities. Petitions for eligibility are to be filed with the Secretary of Commerce (Section 271). The Secretary of Commerce is required to determine the eligibility of a particular community for adjustment assistance within 60 days after receipt of the petition. Public hearings are to be held by the Secretary upon request of the

²⁰⁴ Under the 1962 Act each displaced worker who moved to another location was required to file an individual application for a relocation allowance. Furthermore, the long lapse of time between unemployment and certification would also militate against any substantial number of claims being filed. 19 U.S.C. § 1961 (1970).

²⁰⁵ SFC REPORT, *supra* note 187, at 152.

²⁰⁶ These qualifications are:

(a) that a significant number of workers in the area have become or threaten to be totally or partially separated;

(b) that sales or production of firms located in the area have decreased absolutely; and

(c) that increases of imports of articles like or competitive with articles produced in the area or that the transfer of firms in the area to foreign countries have contributed importantly to (a) and (b) above. It is interesting to note that whereas Chapter IV of Title II permits *communities* to qualify for adjustment assistance if the unemployment and the decline in sales or production is caused by the transfer of firms in the area to foreign countries, Chapter II does not make any provision for adjustment assistance to *workers* in such a contingency.

²⁰⁷ The Council's responsibility is to develop a proposal for adjustment assistance plan "for the economic rejuvenation of certified communities in its trade-impacted area, and to coordinate community action under the plan, as approved by the Secretary." Trade Act, § 272(b)(A) & (B).

petitioner, or other interested persons. The qualifications which the Secretary must find to exist if the community is to be eligible for adjustment assistance are set out below.²⁰⁸

The Secretary is required to assist officials of the community in question and other residents of the community in establishing a council²⁰⁹ made up of officials and other residents of a "trade-impacted area" (including representatives of communities, industry, labor, and the general public). Benefits to be granted to the eligible communities are limited²¹⁰ to the forms of assistance, other than loan guarantees, available under the Public Works and Economic Development Act of 1965, and to the Federal loan guarantee program under the Trade Act (Section 273(d)). From the point of view of the corporate lawyer, one of the most interesting provisions of the loan guarantee program is section 273(f)²¹¹ which provides that in determining whether to guarantee a loan to a corporation, the Secretary shall give preference to a corporation which agrees to a number of requirements, a principal requirement being that 25% of the principal amount of the loan is to be made to a qualified trust under an employee stock

²⁰⁸ Trade Act, § 273.

²⁰⁹ The loan guarantee program permits the Secretary of Commerce to guarantee loans made, for certain purposes, to private borrowers in "trade-impacted areas." For a discussion of this "technique of corporate finance," see SFC REPORT, *supra* note 187, at 155-58. The requirement that the borrower contribute 25% of the proceeds of the loan to the employee trust is remotely like the requirement of some commercial banks that a portion of the loan be used as a compensatory balance in a non-interest paying account.

²¹⁰ It seems appropriate to concentrate the discussion on Article XIX since this is the "safeguard" clause in GATT which most closely approximates the objective of the United States and which could be most easily amended to achieve the "import relief" objective of Title II, i.e. tariff adjustment, tariff quotas, quotas, or orderly marketing agreements in regard to a particular domestic industry seriously injured by increased imports. There are other "escape" articles in GATT, *e.g.*, Article XII—Restrictions to Safeguard the Balance of Payments, Article XX—General Exceptions, and Article XXI—Security Exceptions. However, these articles deal with quite different situations. "Restrictions to Safeguard Balance of Payments" is generally more consistent with an "across-the-board" restriction than a restriction in regard to a particular industry. The security exception would be inapplicable to many industries (particularly those producing non-essential goods). Of the various clauses contained in Article XX of GATT (General Exceptions), only clause (H), dealing with intergovernmental commodity agreements, seems a possibility in achieving our particular goal. The negotiation of an intergovernmental agreement, though a possible solution, usually requires a substantial amount of time, and would cover only one of the four methods of import relief provided by Section 203 of the Trade Act.

²¹¹ As discussed elsewhere in this article, paragraph 3(d) of the Tokyo Declaration specifically states that the current negotiations should examine the "adequacy" of the multilateral safeguard systems, including Article XIX.

ownership plan established by the corporation in question. The trust would be obligated to invest its funds in new stock issues of the corporation, and the corporation would be required to contribute to the trust, over the life of the loan, amounts sufficient to meet the debt requirements of the loan made to the trust, without regard to any other amounts the recipient corporation is obligated under law to contribute to the plan from time to time.

III. PRINCIPAL FOREIGN TRADE ASPECTS OF TITLE II OF TRADE ACT

The principal foreign trade aspect of Title II is the possible conflict between these provisions and GATT. The conflict between GATT and the "import relief" provisions of Title II is clear. Less clear, but still existent, is the possibility of conflict between GATT and the adjustment assistance provisions of that title.

A. *Conflict between GATT and "Import Relief" Provisions.*

As mentioned in the discussion of Section 121(a)(2) of the Trade Act, Article XIX,²¹² "Emergency Actions on Imports of Particular Products," of GATT now provides that a contracting party may take certain actions if, as a result of the obligations assumed by the contracting party under a trade agreement, including tariff concessions, a product is being imported into its territory in such increased quantities as to cause serious injury to domestic producers.

Since the Trade Act now permits "import relief" without any investigation as to whether the serious injury to a domestic industry from increased imports resulted from tariff concessions under the trade agreement, we have a clear inconsistency between GATT and the Trade Act. How can the United States protect itself against retaliation by an affected foreign country? Three possible courses of action seem to be open:

(1) *GATT could be amended to eliminate the requirement that the increased imports result from tariff concessions under a trade agreement.* This surely is the course favored by Congress since it is precisely such an amendment that is described as "a principal United States negotiating objective" in Section 107 of the Trade Act.²¹³

²¹² See Campbell, *The Foreign Trade Aspects of the Trade Act of 1974*, 33 WASH. & LEE L. REV. 325, 369 (1976).

²¹³ Section 201(d) of the Trade Act provides that if the Commission finds "the serious injury or threat thereof described in Section 201(b)," the Commission is to

(A) find the amount of the increase in duty or other relief necessary to prevent the injury, or

(2) *The Administration and/or Congress could request that the Commission include in its determinations, a finding as to whether a tariff concession under a trade agreement was "in whole or in part" the cause of the increased imports.* As pointed out above, under the Trade Act, the report of the Commission will not include any statement as to whether the increased imports were a result of a tariff concession under the trade agreement. The Administration would therefore find it difficult, if not impossible, to establish that an increase in tariffs by the United States complied with the requirements of Article XIX. It is submitted, however, that the Administration, perhaps with the concurrence of the two congressional committees in question, could request the Commission to include a finding as to whether a tariff concession caused in whole or in part the increased imports, without in any way amending the provisions of the Trade Act. This finding by the Commission would not in any way affect its recommendations, or the acts of the President; the only use to which this finding might be put would be that the STR could utilize an affirmative finding in his negotiations with affected foreign countries under GATT. Furthermore, if the request to the Commission were worded in approximately the language suggested in the heading above, it could reasonably be expected that the Commission would find such a causal connection.²¹⁴

(3) *The Trade Act could be amended to require as a condition of import relief, but not of adjustment assistance, some causal connection between the trade concession and the increased imports.* Obviously, there can be no great enthusiasm, either on the part of the Congress or the Administration, to revert to the Trade Act which was considered at such length in 1973 and 1974. It is suggested as a possibility only if alternatives (1) and (2) discussed above prove not to be negotiable or are deemed unwise.

Congress seems clearly to favor the provision of adjustment assistance to industry, workers or communities, rather than import relief.²¹⁵ Furthermore, Congress has already established one somewhat tighter condition to obtaining import relief as compared to adjustment assistance.²¹⁶ A further distinction between the two would be

(B) if it determines adjustment assistance can effectively remedy the injury, recommend the provision of such assistance.

The Commission is forced to proceed either under (A) or (B), and the phrasing seems clearly to mean that (B) is to be adopted if the adjustment assistance can "effectively remedy" the injury.

²¹⁴ See note 200 *supra*.

²¹⁵ See also note 213 *supra*.

²¹⁶ Adjustment assistance to firms (and perhaps to communities) probably could

deemed advisable if the present Act results in very substantial retaliations by our trading partners. As indicated above, Section 203 of the Trade Act permits the President, if he determines to provide import relief, to proceed in a number of different ways, i.e. increase in duty, tariff quota, quota or orderly marketing agreements. Article XIX of GATT, however, limits the relief to the suspension of the concession causing the injury. The only way to reconcile this inconsistency seems to be to amend GATT.²¹⁷

B. *Possible Conflict between Adjustment Assistance Provisions and GATT.*

Article XVI of GATT deals with subsidies. Section 1 of that article provides that if any contracting party grants a subsidy which operates to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the Contracting Parties in writing of the extent and nature of the subsidization, of the estimated effect thereof, and of the circumstances making it necessary.

be classified as "production subsidies." Article III 8(b) of GATT provides in effect that national treatment of imported products "shall not prevent the payment of subsidies exclusively to domestic producers," thus seemingly approving this type of subsidy. On the other hand, a GATT Ninth Session Working Party Report has stated that it was agreed:

a contracting party which has negotiated a concession under Article II may be assumed, for the purpose of Article XXIII, to have a reasonable expectation that the value of the concession will not be nullified or impaired by . . . the subsequent introduction or increase of a domestic subsidy on the product concerned. General Agreement on Tariff and Trade (GATT), done October 30, 1947, 61 Stat. A 3 (1947), T.I.A.S. No. 1700, 55-61 U.N.T.C. (January 1, 1947).

²¹⁷ One interesting development is that the UAW union has filed a petition for worker adjustment assistance for Chrysler Corporation employees, alleging that the substantial importation into the United States of Chrysler vehicles built in Canada by Chrysler of Canada caused injury to the U.S. workers of Chrysler.

The petition was filed with Department of Labor on June 7, 1975. On August 1, 1975, the Deputy Undersecretary of Labor made the following findings:

(a) Imported vehicles in the intermediate class, 8 cylinder automobile engines, and imported soft trim such as that produced in the Lyons plant of Chrysler, contributed importantly to the separation of workers at specific Chrysler plants producing these products and to the decline in sales or production.

(b) Imports of standard, luxury and compact vehicles, of 6 cylinder engines and of certain other types of soft trim did *not* contribute importantly to the separation of workers at Chrysler plants producing these products.

If it is determined that serious prejudice to another contracting party is caused or threatened by the subsidization, the granting party shall discuss with the party prejudiced or with the Contracting Parties, the possibility of limiting the subsidization. Thus, even if Section 1 of Article XVI of GATT were held to be applicable to adjustment assistance, the consequences do not seem to be horrendous. There is, of course, the possibility of the party prejudiced seeking relief under Article XXIII (Nullification or Impairment) but if the practical consequences of the adjustment assistance are confined to the protection of the domestic market of the United States, it seems unlikely that the prejudiced party would seek such relief.²¹⁸

Section 1 of Article XVI is the only section of that Article which deals with subsidies designed to assist domestic industries in regard to the domestic market. Sections 2-5, inclusive, deal with export subsidies; for example, Section 2 provides that the contracting parties recognize that the granting by a contracting party of a subsidy "on the export of any product" may have harmful effects. In other words, the type of subsidy dealt with in Sections 2-5 is one granted specifically in respect to exports.

Finally, a major and somewhat unexpected result of the provisions of the Trade Act in regard to adjustment assistance to workers is that a large number of applications have been filed, and of these a substantial number is being approved, all within the time limits established by the Trade Act. Of course, Congress had expected that the provisions of the Trade Act would result in *some* increase in the number of applications for worker assistance that would be filed and granted, and the Senate Finance Committee, in its report, had estimated the incremental first year costs of the program at \$335 million, with 100,000 workers being assisted. By the early part of June, 1975, however, 55 petitions for worker adjustment assistance had already been filed, many more than originally estimated. The financial cost of the program seems likely to be considerably larger than originally estimated.²¹⁹

Title III—Relief from Unfair Trade Practices

In order to qualify for import relief or adjustment assistance under Title II, it is not necessary to establish that the competition from

²¹⁸ See Administration Proposal, § 301.

²¹⁹ "Unjustified" restrictions mean restrictions which are illegal under international law or inconsistent with international obligations. HWMC REPORT, *supra* note 189, at 65.

overseas is unfair, unreasonable or unjustifiable. Title III deals with relief from unfair trade practices resulting in increased imports.

Chapter I of Title III of the Trade Act deals with foreign import restrictions and export subsidies. Chapters II, III and IV deal, respectively, with antidumping duties, countervailing duties and unfair import practices.

I. FOREIGN IMPORT RESTRICTIONS AND EXPORT SUBSIDIES

Section 252 of the 1962 Act dealt with foreign countries which maintained unjustifiable or unreasonable restrictions on U.S. commerce, which maintained non-tariff trade restrictions including variable import fees or engaged in discriminatory acts or unjustifiable acts restricting U.S. commerce, or which oppressed the commerce of the United States or prevented its expansion on a mutually advantageous basis. Depending on the type of act, the President was required or authorized (1) to take all steps within his power to eliminate the acts or restrictions complained of and/or (2) to suspend the concessions of any trade agreement in respect of the products of that country and/or (3) *not* to enter into any trade agreement giving concessions to the products of the particular country. Finally, if a foreign government imposed unjustifiable import restrictions on U.S. agricultural products, the President was required to impose such duties and other import restrictions on the products of the particular foreign country as he deemed necessary to obtain the removal of these import restrictions from the U.S. agricultural products. Thus, except for the provision in respect of agricultural products, the President's authority was limited, in effect, to suspending concessions, or not entering into trade agreements, no doubt in an effort to keep the authority within the provisions of GATT.

The Administration proposed a considerable broadening of the above provision of the 1962 Act.²²⁰ Both the House Ways and Means Committee and the Senate Finance Committee agreed that these provisions of the 1962 Act should be substantially broadened, but they went somewhat further in this regard than did the Administration Proposal. Section 301 of the Trade Act (which replaces Section 252 of the 1962 Act and which is entitled "Responses to Certain Trade Practices of Foreign Governments") provides that whenever the President determines that a foreign country (1) maintains "unjustified"²²¹

²²⁰ "Unreasonable" means restrictions which are not necessarily illegal but which nullify or impair benefits accruing to the United States under trade agreements or unfairly burden U.S. commerce. HWMC REPORT, *supra* note 189, at 65. See also, e.g., note 216 *supra* and Article XXIII of GATT.

²²¹ Neither the 1962 Act nor the U.S. countervailing duty law reaches subsidies of foreign governments on goods to third markets.

or "unreasonable"²²² tariff or other import restrictions which impair the value of trade commitments to the United States or which burden or discriminate against U.S. commerce, (2) engages in discriminatory or other acts of policies which are unjustifiable or unreasonable and which burden U.S. commerce, (3) provides subsidies on its exports to the United States, or to countries to which the United States exports its products,²²³ or (4) imposes unjustifiable or unreasonable restrictions on access to food, raw materials, or manufactured or semi-manufactured products, the President:

shall take all appropriate and reasonable steps within his power to obtain the elimination of such restrictions or subsidies, and he

(A) may suspend, withdraw, or prevent the application of, or may refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement²²⁴ with such country or instrumentality; and

(B) may impose duties or other import restrictions²²⁵ on the products of such foreign country or instrumentality, and may impose fees or restrictions on the services of such foreign country or instrumentality, for such time as he deems appropriate. For purposes of this subsection, the term "commerce" includes services associated with the international trade.

Section 301(b) directs the President to take retaliatory action only against the foreign country involved, except that any such action may be taken on a non-discriminatory basis, if the Congress fails to veto this basis.

Section 301(c) provides that the President shall not take action under this section with respect to a foreign subsidy on exports to the United States unless (a) the Secretary of the Treasury has found that such country does provide subsidies or the equivalent on exports, (b) the Commission has found that the exports have the effect of sub-

²²² There seems to be a grammatical failure in this clause—the probable intent was that the President could prevent the application of trade agreement concessions and/or refrain from carrying out a trade agreement.

²²³ See § 601(2) of the Trade Act for the broad definition of "import restrictions." It does not, however, include any orderly marketing agreement.

²²⁴ The STR has issued final regulations prescribing procedures to be followed in regard to filing and handling of complaints as to unfair trade practices under Section 301. See 40 Fed. Reg. 39497 (1975).

²²⁵ Note that the authority given to the President under Section 203 to increase duties or impose import quotas is limited by the provisions of Section 203(d). No such limitation is imposed by Section 301.

stantially reducing the sale of the competitive U.S. products in the United States, and (c) the President finds that our antidumping act and countervailing duty act are inadequate to deter such practices.

Finally there is a provision for complaint by interested parties to the STR, for public hearings, and for advance presentation of views concerning the taking of action with respect to such products or services. However, the President, if there is need for expeditious action, may proceed to take action under Section 301(a) without any advance hearing or presentation of views. It should be noted that the President's authority under Section 301 is much broader than under the 1962 Act.²²⁶

Section 301 is inconsistent with GATT in several respects. Authority is given to the President to take retaliatory action against export subsidies. Section 301(c) is inconsistent with Article VI of GATT inasmuch as Article VI(3) specifically provides that any countervailing duty to be imposed shall not exceed the value of the subsidy granted. Section 301(c), however, gives the President the authority, subject to the conditions therein expressed, to impose duties, without limit or to impose other import restrictions. However, our countervailing duty statute provides for countervailing duties in an amount equal to the maximum permitted by Article VI(3) of GATT. Thus, since the provision of our present countervailing duty statute represents the maximum tariff response available under GATT, the authority given to the President by Section 301(c) to impose *additional* duties, beyond our countervailing duty statute, must be considered inconsistent with GATT. It is true that Article XVI(B) of GATT also deals with export subsidies and contains certain generally worded clauses designed to minimize their use, but it does not authorize the contracting parties to take unilateral action in imposing countervailing duties or other retaliatory action beyond that provided in Article VI(3).

The broad authority²²⁷ given to the President under clauses 301(a)(A) and (B) exceeds the retaliatory action which may be taken on a unilateral basis by any contracting party under the provisions of GATT.

It is important to note that this Section deals with the retaliatory measures which the President may take if a foreign country resorts

²²⁶ In a somewhat comparable situation between two private parties, the contract is often silent as to the remedies given to a party if the other party breaches the agreement or does not perform certain of the conditions he is expected to perform. These provisions as to remedies are often difficult to negotiate.

²²⁷ SFC REPORT, *supra* note 187, at 166.

to "unfair trade practices" in dealing with the United States. As previously noted, GATT contains a number of "escape clauses" which permit contracting parties to depart from their contractual obligations under GATT if some major economic or political problem arises (balance of payments problems, security problems, shortage of supplies). These clauses have been considered briefly in other parts of this article.

One cannot say that the other contracting party has necessarily committed a breach of GATT because the President is to have this broad power in the case of unreasonable, as well as *unjustifiable*, restrictions. It is not too surprising that there is no specific provision in GATT which delineates precisely the rights of a contracting party vis á vis another contracting party which has engaged in "unfair trade practices."²²⁸ Probably Article XXIII of GATT is the one most clearly on point. That article provides that if a contracting party considers that any benefit accruing to it under GATT is being nullified or impaired or that the attainment of any objective of GATT is being impeded (a) as the result of another contracting party breaching its obligations under GATT, or (b) as the result of another contracting party applying a measure, *whether or not it conflicts with GATT*, or the existence of any other situation. The aggrieved party may make written proposals to the other contracting party to remedy the problem.

The aggrieved contracting party is to refer the problem to the contracting parties if no satisfactory adjustment can be reached in negotiations between the aggrieved and offending contracting parties. It is entirely possible that the contracting parties would agree that the retaliatory action contemplated by the President was appropriate. However, this approach to the problem would certainly require a considerable amount of time. Although the wording of Section 301(a)(A) and (B) is in terms of authority, rather than in terms of a directive, it is clear from the wording of the SFC Report that the President is not to be deterred from taking a specific retaliatory course of action by the fact that action might be inconsistent with the obligations of the United States under GATT.²²⁹ Indeed, the Senate Finance Committee deleted from the House Bill a provision which

²²⁸ Please note also the following, perhaps-less-than-temperate, statement in the SFC REPORT, *supra* note 187, at 166: "However, the Committee felt it was necessary to make it clear that the President could act to protect U.S. economic interests whether or not such action was consistent with the articles of an outmoded international agreement initiated by the Executive 25 years ago and never approved by Congress."

²²⁹ Trade Act, § 301(a).

would have required the President to consider the relationship of the proposed retaliatory action to the international obligations of the United States.²³⁰

The Trade Act permits the President to take retaliatory action with regard to actions of foreign governments which adversely affect either products or services associated with international trade,²³¹ such as banking, insurance, and air transport, as well as products.

Finally, the authority given the President by Section 301(a)(A) and (B) is a new, discretionary authority, whereas the direction to the President in the preceding clause "to take all appropriate and reasonable steps within his power" is not intended to give any new power or authority.²³²

Chapter II—Anti-dumping duties

The Trade Act makes no single, major substantive change in the anti-dumping sections of the Customs Act, but it does make a substantial number of amendments which will probably cause important changes in the administration of the law.

A. Background

The United States Anti-Dumping Act has been in effect without major change since 1921.²³³ It provides that whenever foreign merchandise is being or is likely to be sold in the United States at less than fair value, and an industry in the United States is being injured or is being prevented from being established by reason thereof, a special duty is to be imposed equal to the difference between the foreign market value and the price paid for the product imported into the United States. The administration of the Act is dual in nature:²³⁴

²³⁰ See HWMC REPORT, *supra* note 189, at 65.

²³¹ 19 U.S.C. §§ 160 *et seq.* (1970). The present act imposes a liability for additional duties but is essentially civil in nature. A preceding criminal act was found difficult to enforce.

²³² 19 U.S.C. § 160(a) (1970).

²³³ GATT Doc. L/2812 (1967); see J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 426 (1969).

²³⁴ The provisions of the International Dumping Code are in conflict in some respects with the wording of the U.S. Anti-Dumping Act and in other respects with the administration of the Act by the Commission and the Treasury Department. The International Dumping Code is an executory administrative agreement, *i.e.*, Article XIV of the Code provides that each party "shall take all necessary steps . . . to assure the conformity of its laws, regulations and procedures with that of the Code." The Treasury Department amended its regulations in various respects to bring them closer to compliance with the Code. (33 FR 8244). Congress, however, instructed the Treasury

the Treasury Department determines whether goods are being or are likely to be sold at less than fair value, and since 1954, the Commission has had the responsibility of determining whether the information is causing injury to the United States industry or is preventing one from being established.

The United States is one of the few countries in the world which makes a serious attempt at enforcing its anti-dumping duty law. The law is, of course, essentially protective to domestic industry and is common in industrial countries, although some authorities consider it to be motivated more by anti-trust considerations than by protectionist purposes. A less developed country, with little or no industry, has no use for anti-dumping laws; the cheaper it can buy its imports, the better.

The principal trading partners of the United States have complained to the United States for many years about its anti-dumping laws, both as to their substance and administration. As a result of the Kennedy round of negotiations, an International Anti-Dumping Code²³⁵ was agreed upon. The relationship between the Code and the Anti-Dumping Act, and the reaction of the United States Congress to the Code, is described below.²³⁶

Congress has often been critical of the Treasury Department, considering that it has sometimes failed to enforce this law as strictly as it should be enforced, but it accepts the fact that in recent years, the Treasury Department has made significant efforts to improve its administration of that law.²³⁷

The United States Anti-Dumping Act is a sophisticated piece of legislation; both its substantive provisions (determination of whether products are being "dumped") and its administration are complicated. The legislation is considered by many to be defective in that there is no statutory provision setting out how the Commission is to determine what constitutes a United States industry, or "injury" to a United States industry. Neither of these alleged faults is corrected by the Trade Act.

Department and the Commission to resolve any conflict between the Code and the Anti-Dumping Act in favor of the Anti-Dumping Act and to take into account any provisions of the Code only insofar as they are consistent with the Anti-Dumping Act. 19 U.S.C. § 160(n) (1970).

²³⁵ SFC REPORT, *supra* note 187, at 169.

²³⁶ The regulations in effect when the Trade Act was enacted are set out at 37 Fed. Reg. 26298 (1972); for a discussion of the proposed new regulations, see note 260 *infra* and related text.

²³⁷ SFC REPORT, *supra* note 187, at 169; HWMC REPORT, *supra* note 189, at 68.

The primary intent of Congress in regard to these amendments is to continue, and in fact improve, the effective and vigorous enforcement of the Anti-Dumping Act. Whether in fact these amendments will have this result is not clear; the question will be discussed after an analysis of the various amendments.

B. *Analysis of the Trade Act Amendments to the Anti-Dumping Act*

The amendments made to the anti-dumping sections may be classified under two general headings:

- (1) Procedure, Hearings and Conclusions and Right to Appeal;
- (2) Determination of whether goods are being sold at less than fair market value.

Prior to the enactment of the Trade Act, the Anti-Dumping Act did not fix any timetable within which the various procedural steps were to be completed. The regulations²³⁸ promulgated by the Customs Service did, however, establish time periods for most of these steps. In general, the Trade Act adopts the timetable established by the regulations. However, as pointed out below, the Trade Act also complicates the procedure by introducing some additional administrative requirements. The timetable (after giving effect to the amendments in the Trade Act) is now as follows:

- (1) Within thirty days after receipt of a petition alleging that goods are being sold in the United States at less than fair market, and that an industry in the United States is being injured by reason thereof, the Secretary of the Treasury is required to make a determination as to whether to institute an investigation to ascertain whether such merchandise is in fact being sold at less than fair value, and if his decision is in the affirmative, a notice to that effect is published in the Federal

²³⁸ Prior to this amendment the Secretary had no responsibility in regard to injury to industry, except that the Treasury Regulations required the Anti-Dumping Investigation Notice to specify that there is some evidence on record concerning injury to industry. "Injury" lay wholly in the jurisdiction of the Commission. Article 5(b) of the Anti-Dumping Code provides that evidence of both "dumping" and "injury" should be considered simultaneously. The intent of this amendment, which was developed by the Senate Finance Committee, SFC Report, *supra* note 187, at 170-71, is in accord with the general intent of Article 5(b) of the Code, which is to arrive at a disposition of the dumping proceeding as promptly as possible.

Register. (Contained in the present Treasury Department Regulations)

(2) In addition, if the Secretary, while making his determination under (1) above as to whether to institute an investigation concludes that there is substantial doubt as to whether an industry in the United States is being injured, he is required to forward to the Commission the reasons for such substantial doubt.²³⁹

(3) If the Commission determines, within thirty days after receiving notice from the Secretary pursuant to (2) above "that there is no reasonable indication" of injury to a United States industry, it shall so advise the Secretary, and any investigation then in progress shall be terminated. (new)²⁴⁰

(4) Within six months²⁴¹ after publication of notice in the Federal Register as provided in (1) above, the Secretary is required to make a tentative finding as to whether or not the products in question are being sold at their fair value, and, if the determination is affirmative, publish a notice to that effect; (Treasury Department Regulations)

(5) Within three months after publication of a tentative finding as to dumping, the Secretary is required to make a final finding as to dumping. (new)

(6) Except as provided in paragraphs (2) and (3), the Commission only starts to consider the question of injury to industry after a *final* determination by the Treasury as to dumping is made. It is required to make a finding as to injury to industry within three months after the Secretary advises the Commission as to a final determination of dumping. (old)

The Secretary and the Commission are each required under the Trade Act, upon request, to hold hearings before making a determi-

²³⁹ In response to information received from the Secretary of the Treasury indicating that he believes there is substantial doubt whether the importation of new motor cars from Japan, Canada, and certain European countries is causing an injury to the U.S. automotive industry, the Commission instituted an investigation into this question on August 8, 1975 and published notice of a hearing to be held on this subject on August 19, 1975. 40 Fed. Reg. 34027 (1975).

²⁴⁰ This period is extendable to nine months in lengthy cases by the Secretary, but only upon publication in the Federal Register of the reasons requiring the longer period.

²⁴¹ 19 U.S.C. § 160(d)(2) (1970); "complete" is italicized here because of the emphasis given by the SFC Report, *supra* note 187, at 171, to this statement. The Committee inserted the word "complete" to make sure the importance of this statement is understood.

nation under subsection (a) of 19 U.S.C. § 160 as to dumping or injury. Such a determination is the final determination, as contrasted to the "preliminary determinations" to be made under subsections (b) and (c). These hearings are exempt from the Administrative Procedure Act. The transcript of the hearing, less confidential information, is required to be made available to all persons. The Secretary and the Commission are required²⁴² to publish in the Federal Register a *complete* statement of findings and conclusions, and the reasons or bases thereof, on all material issues of fact or law, subject to any confidential treatment granted. Foreign manufacturers and exporters and domestic manufacturers, producers, importers or wholesalers are given the right to request the hearing²⁴³ referred to above.

An American manufacturer, producer or wholesaler of merchandise of the same class or kind is given the right to appeal to the United States Customs Court if the Secretary makes a negative determination, i.e. that a product is not being sold at less than fair value.²⁴⁴

In determining whether a product is being sold at less than fair value, the Anti-Dumping Act contains two quite different formulas. The first formula applies to products imported into the United States by the foreign manufacturers or by a company related to the foreign manufacturers (here the Act uses "the exporter's sales price," i.e. the price at which the goods are sold in the first sale in the United States to an independent buyer, adjusted by certain factors.)²⁴⁵

The Trade Act corrects what is charitably described in the SFC Report, page 172, as "anomalous"—really a longstanding arithmetic error. In the definition of "purchase price," the Anti-Dumping Act had provided that export taxes, if *not included* in the purchase price, should be *added* to the amount paid. In fact, the Act should provide that export taxes, if *included* in the purchase price, should be *subtracted*. This error is corrected by the Trade Act.

²⁴² 19 U.S.C. § 160(d)(1) (1970).

²⁴³ The Treasury Department took the position in the hearings before the House Ways and Means Committee that although not explicitly provided for by law, American manufacturers and producers did have the right to appeal to the Customs Court any final determination by the Secretary of the Treasury to the effect that goods are not being sold in the United States at less than fair value. The Senate Finance Committee agreed generally with this position, but preferred to amend the act so as to provide explicitly for this appeal. SFC Report, *supra* note 187, at 178.

²⁴⁴ 19 U.S.C. § 163 (1970). Obviously, if the person importing the goods into the United States is related to the manufacturer or exporter the price paid between them may well be an illusory, unmeaningful price, and it is for this reason that the statute in this case relies on the first sale in the United States.

²⁴⁵ 19 U.S.C. § 162 (1970).

The Anti-Dumping Act had also previously provided that *all* taxes imposed by the country of exportation upon the foreign manufacturer in respect to manufacture, production or sale, which had been rebated, should be added to the price paid; in fact, as in the countervailing duty statute, this provision should be limited to taxes *directly* imposed on the goods exported, and then only to the extent these taxes are added to the purchase price when such or similar goods are sold for domestic consumption.²⁴⁶

Under the Anti-Dumping Act and the Countervailing Duty Act, as previously drawn, it was theoretically possible for anti-dumping duties, as well as countervailing duties, to be imposed upon goods as a result of the same bounty or grant. It is believed that no such double penalty has ever been imposed by the United States Government, but even the theoretical possibility of such double penalty has now been eliminated by formal amendment.²⁴⁷ This brings our anti-dumping law one step closer to agreement with GATT.

The definition of "exporter's sales price"²⁴⁸ is amended so as to require the subtraction, from the price paid by the first independent purchaser in the United States, of any value added to the product after its importation. This amendment conforms the Anti-Dumping Act to the Treasury Department regulations. This definition is further amended so as to conform the wording in regard to the treatment of export taxes exactly with the changes in the definition of purchase price described above.

Three amendments are made by the Trade Act in the definition of foreign market value.²⁴⁹ First, whenever the Secretary has rea-

²⁴⁶ The amendment in question is the addition of the last clause in §§ 203 and 204 of the Anti-Dumping Act of 1921. 19 U.S.C. §§ 162-63 (1970).

²⁴⁷ Section 204 of the Anti-Dumping Act. 19 U.S.C. § 163 (1970).

²⁴⁸ Section 205 of the Anti-Dumping Act. 19 U.S.C. § 164 (1970). This section establishes the normal base price to which the "purchase price" or the "exporter's sales price" is compared in order to determine whether or not a product is being dumped. Prior to the Trade Act amendments, if there were sales in the usual wholesale quantities of the same or similar goods for home consumption in the foreign country of manufacture, this price was to be used. If there were no such sales, the price used in sales to export markets other than the United States was to be used. This remains the general rule, but the Trade Act qualifies this general rule.

²⁴⁹ The House Ways and Means Committee was responsible for this amendment. In theory it no doubt is supportable, but in practice, the author believes that the Secretary of the Treasury will believe that in each anti-dumping complaint presented to him, the presence of this clause in the Act will force him to make an investigation to see whether this set of facts exists. This will require a nice exercise in cost accounting. It is suggested that it would have been desirable to have given the Secretary the *right* but *not* the obligation to throw out these below-cost sales.

sonable grounds to believe that sales in the home market have been made at less than the cost of production in substantial quantities and over an extended period of time and at prices which do not permit recovery of all costs within a reasonable period of time, these sales are to be disregarded in the determination of the foreign market value. If the remaining sales are determined to be "inadequate" as a basis for determining "foreign market value," the Secretary shall²⁵⁰ use "constructed value"²⁵¹ in determining whether there is dumping.

Also, where the goods under investigation are produced in a state-controlled economy, the Secretary is required to determine the foreign market value of the merchandise on the basis of the normal costs, expenses and profits as reflected by either:

- (1) the prices, as determined in Section 205(a) or Section 202 of the Anti-Dumping Act, at which such or similar merchandise of a *non-state-controlled-economy* country or countries (underscoring added) is sold either (A) for consumption in its home market or (B) to other countries, including the United States, or,
- (2) the constructed value of such or similar merchandise in a *non-state-controlled-economy* country or countries as determined under Section 206.²⁵²

The third amendment provides²⁵³ that if sales in the home market of the product being exported to the United States are non-existent or inadequate as a basis of comparison, and if the facilities used for producing the goods in question are owned by someone who also owns or controls directly or indirectly other facilities in another country²⁵⁴

²⁵⁰ See 19 U.S.C. § 165 (1970). "Constructed value" is defined as the cost of materials and of fabrication or other processing, plus an amount for general expenses not to be less than 10% of cost of materials and fabrication plus an amount for profit not to be less than 8% of the total costs.

²⁵¹ It is understood that the Treasury Department has used the approach set out in this amendment for several years in dumping cases involving Communist countries because the Communist countries will not permit the type of investigation of prices and costs which the Treasury Department normally undertakes in foreign countries in connection with anti-dumping investigation.

²⁵² 19 U.S.C. § 164(d) (1970).

²⁵³ The wording of the amendment does not make it clear whether the additional facilities are to be located in another foreign country or, possibly, in the United States. It seems probable, however, that Congress intended the wording only to cover facilities located in another foreign country and this is borne out, both by the discussion in the SFC REPORT, *supra* note 187, at 175, and by the discussion in the Conference Report, at 43.

²⁵⁴ 19 U.S.C. § 170(a)(3) (1970).

which produce the same or similar goods, and if the foreign market value of these same or similar goods is higher than the home market value, or if there is no home market value, the constructed value, of the goods or similar goods produced in the facilities located in the country of exportation, the Secretary shall determine the foreign market value of the goods in question by reference to the foreign market value of the same or similar goods produced by facilities outside of the country of exportation, making adjustments for any differences in the costs of production between the two countries if demonstrated to his satisfaction.

Under Section 212(3)(B), (D), & (F)²⁵⁵ of the Anti-Dumping Act, the Secretary was required, under certain conditions, to ascertain "dumping" by reference to sales by persons other than the foreign company producing the goods in question. Congress considered this to be inequitable in some cases and eliminated the paragraphs in question from Section 212(3).

C. Will the Amendments to the Anti-Dumping Act Improve the Effective and Vigorous Enforcement of that Act?

The question of whether the amendments discussed above will improve the effect of the Anti-Dumping Act is not an easy one to answer on an over-all basis. The reason for this is that some of the amendments, while surely intended to achieve that effect, might turn out, in fact, to be counterproductive.

In general, the amendments dealing with the procedure (i.e. the timetable) should not have any effect on the enforcement of the Act since most of these were already covered by the Treasury Department regulations. It is believed, however, that the amendment which re-

²⁵⁵ There seems to be no question but that this amendment complicates the administration of the Act because it will in effect require the Treasury Department (as well as the Commission) to investigate questions of injury. The Treasury Department's concern with injury, up to this amendment, was minimal. The amendment may increase, rather than decrease, the average length of time to dispose of a case because the Commission will be very loath to make a decision of "no injury" based on the limited independent investigation which it can make within the 30 days allowed by the amendment. This view is supported by the following factors:

- (i) such a decision of "no injury" would probably be appealable to the Customs Court since it would result in the inquiry being closed; and
- (ii) the Commission's decisions will have to be accompanied by a complete statement of its findings, and the reasons therefor on all issues of law and fact. It seems probable, though far from certain, that during the period of the Commission's investigation, the Treasury Department will tend to relax its investigation as to whether the goods are being dumped, which may have the effect of delaying the entire procedure.

quires the Secretary (before he begins any thorough investigation as to whether dumping exists) to refer the case to the Commission for a determination as to injury if the Secretary believes that injury may not exist will further complicate the administration of an already complicated act and may increase, rather than shorten, the average length of time which it takes to dispose of a complaint.²⁵⁶

It seems probable that the amendment requiring the holding of hearings and the availability to all interested parties of a transcript of the record (except as to material granted confidential treatment) may also cause some delay as compared to the more informal procedures previously used. Furthermore, the requirement that both the Commission and the Treasury Department are to issue a complete statement as to their respective conclusions, and the reasons therefor, on all material issues of law and fact, may well result in a more detailed examination by both the Commission and the Treasury Department of all of the issues, and it will almost surely result in lengthier and more detailed opinions. All of these changes seem advisable from a due process point of view, and it is believed that they will result in a fairer and more equitable review process. Clearly, the publication of both negative and affirmative determinations by the Commission and the Treasury Department and of the reasons therefor, will surely furnish much more information to all those interested in the field—practitioners, scholars, judges, and legislators.

It is possible, however, that the "hearing" requirement will make it more difficult to get foreign producers to furnish data. There was considerable concern in this regard in 1965 in connection with a change in the Treasury Department regulations, which provided that the Treasury Department would disclose information submitted to it except for information which it had agreed to treat as confidential. The further amendments in the Trade Act regarding hearings and opinions could also give rise to some additional reluctance on the part of foreign producers to make information available.

The fact that the Secretary's determination that there are no sales at less than fair value is now explicitly made subject to appeal to the Customs Court will probably have no effect on the enforcement of the Act because, as the Treasury Department views the situation, it simply confirms the existing state of the law.

The amendment relating to the definition of "foreign market value" which permits the Treasury Department, in connection with

²⁵⁶ 40 Fed. Reg. 30825 (1975); time for comments extended by 40 Fed. Reg. 43226 (1975).

anti-dumping investigations of products produced in state-controlled-economy countries, to use non-state-controlled-economy countries for purposes of computation seems desirable as legalizing a procedure already followed by the Treasury Department. At first glance, the procedure may appear arbitrary and high handed, but faced with the difficulty of obtaining cooperation from the state-economy-controlled countries, the Treasury Department's solution seems to be as good as any other.

The other two amendments to this definition (while theoretically appropriate) may turn out to be undesirable in that they may cause additional complications and delay. They seem to be directed at a few unusual cases, but the Treasury Department is required to make these complicated analyses in *all* cases, simply to make sure that the few cases will not escape.

In order to comply with all of the amendments to the Anti-Dumping Act described above, the Treasury has published new proposed regulations.²⁵⁷ These new regulations, which the Treasury Department believes are necessary in order to carry out its increased responsibilities under the Anti-Dumping Act as now amended, may have the effect of discouraging some U.S. producers from filing anti-dumping complaints, which surely was not the intent of Congress. The most important change in the proposed regulations is believed to be the change in Section 153:27—Suspected Dumping and Information to be made Available. In the present regulations (issued in 1972), Section 153:27 is a brief section which requests the informant to furnish certain rather limited information to the extent it is available to him, as detailed below.²⁵⁸ This rather informal request for

²⁵⁷ The introductory paragraph states that communications regarding suspected dumping should *to the extent feasible*, contain the information listed below. Furthermore, paragraph (f) dealing with prices and values states "*Such detailed data as are available with respect to values and prices. . . .*" Similarly the injury section is very brief and general: "Information indicating that an industry in the United States is being injured."

²⁵⁸ The introductory paragraph states that "Communications to the Commission . . . in order to be considered in acceptable form . . . shall contain the following information, in substantially the form described in paragraphs (a)(1)-(4) of this section." The pricing information specified is detailed and extensive—8 subparagraphs filling one solid column of the Federal Register, including home market price, price on export to third countries, constructed value, the export price, or with respect to transactions involving an importer related to the exporter, the price to a non-related purchaser of the merchandise, etc. In the section related to injury information, the following is requested: (i) domestic production, sales and prices for the most recent three years for the industry; (ii) profitability of petitioner, and of the industry for the most recent three-year period expressed in terms of a ratio of capital or revenue; (iii)

information may be compared to the detailed three-column provision in the proposed new regulations summarized below.²⁵⁹

It seems probable that the reaction of the Treasury Department to the revisions contained in the Trade Act is as follows:

(1) The Treasury Department considers that the net effect of all of the proposed amendments to the Anti-Dumping Act will be substantially to complicate the administration of the Act, including the processing of each complaint and increase the workload of the Treasury Department.

(2) Accordingly the Treasury Department believes that it should concentrate its efforts on the most important of these violations.

(3) The Treasury Department probably believes that any U.S. industry which is of any magnitude and is being harmed by dumping will be able to develop a large portion (if not all)²⁶⁰ of the information required by the proposed regulations.

(4) The result (if not the purpose) of requiring this very substantial amount of detailed information in the complaint may be three-fold:

(a) First, it will almost surely operate as a sort of screen to eliminate the ill-considered or hastily developed claims of dumping;

(b) Secondly, as to the claims which are submitted in a form closely complying with the new regulations, the petitioner will have supplied the Treasury Department and the Commission with a substantial portion of the

capacity utilization of the petitioner and of the industry; (iv) volume and value of *all* imports of this merchandise and the volume and value of *all* imports of the class or kind of merchandise from the country in question, over the most recent three-year period; (v) market share of alleged less-than-fair-value imports over three-year period; (vi) effect of the alleged less-than-fair-value sales on the domestic prices (depression or suppression) and the margin of underselling; (vii) unemployment by petitioner and industry; (viii) capital investment by firm and industry over five-year period; (ix) names and addresses of all U.S. producers of competitive merchandise, and trade association (if any) with indication as to which producers support the complaint.

²⁵⁹ Some of the information which is requested to be furnished on an industry basis is so sensitive that there might be some problems from a U.S. antitrust point of view in pooling the information: prices, profits, and capacity utilization, for example.

²⁶⁰ See Coudert, *The Application of the United States Anti-Dumping Law in the Light of a Liberal Trade Policy*, 65 COLUM. L. REV. 189 (1965). Coudert states that in the eleven years from 1954-65, the Commission found "injury to industry" or "likelihood of injury to industry" in only nine of the forty-three anti-dumping cases which it decided. *Id.* at 204.

information which they will have to develop in investigating the complaint and arriving at their respective determinations;

(c) Thirdly, it may also operate to prevent small U.S. producers from filing any claims of dumping because of the time, effort and expense involved in preparing the extensive and complicated information required to be furnished by the proposed new regulations.

D. *Injury to Industry*

As previously noted, the Anti-Dumping Act itself contains no definition of "injury to industry." For a number of years, the Commission found "no injury" in a large proportion of cases that it considered.²⁶¹ Starting in 1967, however, the Commission's decisions have shown a substantial departure from earlier adjudication of what must be shown to establish injury.²⁶² In the *Polish Soil Pipe* case, for instance, the Commission found "injury," Commissioner Chubb stating that a showing of any injury greater than de minimis is sufficient.²⁶³ It has been said that the Commission has not found injury in cases where the goods claimed to be dumped are sold in the United States at a price equal to or above the existing U.S. price for the product.²⁶⁴ More recent decisions of the Commission seem inconsistent with this statement.²⁶⁵ Comments in the Senate Finance Committee Report²⁶⁶ seem to support the "any injury more than de minimis is sufficient" approach, and may also support the approach that a sale of dumped goods at a price equal to or greater than the then existing price does not cause injury for purposes of the Anti-Dumping Act.²⁶⁷

²⁶¹ See Barcelo, *Anti-Dumping Laws as Barriers to Trade*, 57 CORNELL L. REV. 491, 551 (1972).

²⁶² 32 Fed. Reg. 12925 (1967).

²⁶³ See Hay, *Comparisons of Standards of Injury under the Escape Clause and the Anti-Dumping Act*, 29 U. PITT. L. REV. 435, 441 (1968).

²⁶⁴ See Barcelo, *Anti-Dumping Laws as Barriers to Trade*, 57 CORNELL L. REV. 491, 557-58 (1972).

²⁶⁵ *Id.*

²⁶⁶ SFC REPORT, *supra* note 187, at 179-80.

²⁶⁷ From the point of view of the domestic producer, it seems clear that sales of dumped goods at a price equal to the domestic price is still an "injury," no matter how our courts or the Commission may define the term. Let us assume that there are only two domestic producers of the product in question, and that before the dumper began to offer his goods in the domestic market, one of the two domestic producers had a 60% market penetration. The dumper, by aggressive sales promotion, obtains 30% of the market, and our domestic producer's market penetration falls to 45%. Let us also

Since the Trade Act did not in fact amend the section of the Anti-Dumping Act dealing with injury, do the statements in the Senate Finance Committee Report relating to "injury" constitute "legislative history"? Despite the concern discussed in footnote 267 at the concept of "injury" depending upon the price level, it is submitted that these statements should be considered legislative history because a substantial number of amendments to the "injury" portion of the Anti-Dumping Act were proposed in hearings held by the House Ways and Means Committee on this Trade Act.²⁶⁸

Chapter III—Countervailing Duties

Until the enactment of the Trade Act, the U.S. countervailing duty law consisted of a single paragraph²⁶⁹ which had remained substantially unchanged since 1897, the date of its original enactment. Prior to the Trade Act, this statute provided in effect that whenever any foreign country or person bestowed a bounty or grant upon the manufacture, production or export on any product produced or manufactured in such country, and such product was subject to payment of the normal U.S. customs duties upon importation into the United States, an additional duty equal to the net amount of the bounty or grant should be levied on the importation of the product into the United States. No finding of injury to U.S. industry was required.

The Trade Act makes major changes in this law, both of a substantive and procedural nature. The Administration Proposal²⁷⁰

assume that the size of the market does not change. From a businessman's point of view, a loss of penetration of 15 percentage points and a decline in sales volume of 25% is not only "injury"—it is a calamity. One more point—in the Trade Act itself, Section 201(b)(2) lists some of the economic factors which the Commission should take into account in deciding whether "serious injury" exists: these are (a) significant idling of productive facilities, (b) the inability to operate at a reasonable level of profit, and (c) significant unemployment. All of these factors are adverse consequences of the increase in sales of imported goods. The Commission is *not* instructed to look at the price levels at which the imported goods are sold—but to look at the adverse consequences of the sales to domestic industry. Admittedly, Title II and Title III of the Trade Act deal with quite different situations. It is submitted, however, that the three factors outlined in Title II afford a very reasonable approach to "injury" for purposes of Title III. This approach seems to be a much more logical and practical one than the price level approach. As a practical matter, the price level approach seems difficult to apply to finished manufactured goods because the imported goods, though competitive, may differ substantially from the domestic goods, thus making price comparison difficult.

²⁶⁸ HOUSE WAYS AND MEANS COMMITTEE, BRIEFING PAPER No. 8: Listing of Amendments proposed to H.R. 6767, 93d Cong., 1st Sess., 20-21 (Comm. Print 1973).

²⁶⁹ 19 U.S.C. § 1303 (1970).

²⁷⁰ See Administration Proposal, at 90-92.

recommended a number of these changes, but Congress and particularly the Senate Finance Committee modified to some extent the changes proposed in the Administration Proposal and added a number of changes not included there. These changes may be summarized as follows:

1. Countervailing duties may now be assessed on non-dutiable imports into the United States as well as on dutiable items.²⁷¹ Section 303(a).
2. Countervailing duties may be assessed against non-dutiable items only if injury to U.S. industry is established. (The injury requirement will continue only as long as the international obligations of the United States require it to exist.) Sections 303(b) and (c) of the Tariff Act.
3. The President is given authority not to assess countervailing duties in particular cases if the imposition of duties would prejudice international negotiations regarding the use of subsidies and the application of countervailing duties. Either House of Congress may override the President's decision. Sections 303(d) and (e) of the Tariff Act.
4. American manufacturers, producers or wholesalers are given the right to appeal to the Customs Court any negative determination by the Secretary of the Treasury as to countervailing duties. Section 516 of the Tariff Act of 1930.
5. The Secretary of the Treasury is now required (a) to make a tentative decision as to whether countervailing duties should be imposed within 6 months after a petition is filed, and (b) a final determination within 12 months after a petition is filed. Section 303(a)(4) of the Tariff Act.
6. The Secretary of the Treasury is required to publish in the Federal Register all decisions made by him or by the Commis-

²⁷¹ This change was effected by simply eliminating the phrase, "and such article or merchandise is dutiable under the provisions of this chapter." The reason for the exclusion of non-dutiable articles from the countervailing duty law as originally drawn, was that the United States originally considered that foreign governments gave subsidies to foreign manufacturers in amounts which would enable them to export goods to the United States despite the high U.S. customs duties then payable on most imports. Viewed in this light, the countervailing duty was simply an adjunct to the normal protective customs duty. As to products where the United States imposed no customs duty, it was considered probable that there was no United States industry to be protected, and therefore the adjunct countervailing duty was also not required. See Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 LAW AND POLICY IN INT'L BUS. 17, 20-21 (1969).

sion as to countervailing duties, whether affirmative or negative. Section 303(a)(6) of the Tariff Act.

Since the original enactment of the Countervailing Duty Act, there has been a marked change in thinking as to its purpose. As stated in footnote 257, the countervailing duty act was originally considered simply an adjunct to the normal customs duty, with no emphasis on unfair competition. Today, the countervailing duty is still regarded in part as a protective duty, but also as a protection for United States industry against unfair competition. In view of this changed evaluation of the purpose of the act, it seems entirely fair and reasonable to make non-dutiable goods (as well as dutiable goods) subject to the countervailing duty.²⁷²

Article VI of GATT provides that no countervailing duties may be assessed in respect of imported goods unless the effect of the subsidization is to cause or threaten to cause material injury to a domestic industry. The United States is permitted to keep its countervailing duty law as it was before GATT was signed because of a "grandfather" clause in the Protocol of Provisional Application²⁷³ of GATT. However, when the U.S. countervailing duty law is amended in any material respect *after* October 30, 1974 the amendment must be consistent with GATT; thus the extension of the act to non-dutiable items had to be conditioned on a showing of injury to United States industry in regard to these items.²⁷⁴ The Commission is to determine within three months whether or not injury to industry resulted. (Section 303(b)). Since the requirement of "injury to industry" was added only because of the obligation of the United States under GATT, the Act further provides that such a requirement should exist only as long as required by the international obligations of the United States. Thus, if the requirement of injury is stricken from GATT, the requirement of injury drops from this clause.

As noted earlier, Section 121(a) of the Trade Act requires the President to take such action as may be necessary to revise GATT in

²⁷² *Id.* at 24.

²⁷³ That Protocol provides in part that certain named governments (including the United States) undertake to apply Part II of GATT (which includes the provisions of GATT relating to countervailing and anti-dumping duties) "to the fullest extent not inconsistent with existing legislation." "Existing" legislation has been held by the Contracting Parties to mean laws existing on October 30, 1947. *See* GATT 2 BISD 35 (1952).

²⁷⁴ The Administration Proposal contained the phrase "material injury" to make the wording conform to Article VI of GATT, but the word "material" was deleted in Committee, probably because it wished to use the same wording as in the Anti-Dumping Act. Administration Proposal at 91.

various material respects; paragraph (11) of that Section provides that one of these material respects shall be to define forms of subsidies "which are consistent with an open, nondiscriminatory and fair system of international trade." The Administration Proposal requested Congress to give the President authority (without limitation as to duration) to bar application of countervailing duties in any particular case if he determines that such action would be detrimental to United States economic interests. Congress was not willing to give such broad authority to the President. However, representatives of the Administration probably argued that the assessment of countervailing duties by the United States thereby acts to counter or negate the official policy of a foreign country. Thus, the assessment of countervailing duties by the United States is, at any time, an act which tends to unsettle to some extent the conduct of foreign relations with the particular government concerned. Moreover, during the next few years the United States will be attempting to work out an international agreement as to which subsidies are acceptable internationally and which subsidies are not acceptable and may be countervailed against. The representatives of the Administration no doubt argued that if any progress was to be made in these negotiations, the Administration should have the right to suspend the application of countervailing duties in a particular case, at least during the period of these negotiations if it thought that the assessment of countervailing duties would upset the negotiations. Congress accepted this general approach,²⁷⁵ but limited the exercise of this discretion by the Secretary of the Treasury to four years after the enactment of the Trade Act and conditioned upon his determining that:

- (a) adequate steps are being taken²⁷⁶ to reduce substantially

²⁷⁵ See HWMC REPORT, *supra* note 189, at 75-76.

²⁷⁶ The question arises as to what government is to take "the adequate steps." At first glance, it might be thought that it is intended that the foreign government take "adequate steps" to modify or eliminate its form of subsidy or to reduce its effect. Another interpretation, perhaps less supportable, is that action by the United States and/or by the foreign government to reduce the adverse effects would be sufficient. This interpretation seems to be possible if Title II can be interpreted as authorizing both adjustment assistance and import relief, as defined therein, in a case where the increased imports result from action by a foreign government as enumerated in Title III, Section 301. If so, the President could institute quotas; if the Commission found import relief advisable, perhaps both quotas and adjustment assistance. Politically, quotas might be a less offensive remedy than countervailing duties. On balance, it seems inequitable to deny adjustment assistance in these cases if the increased imports represent "dumped" or "subsidized" goods. However, the first sentence of the Title III portion of the Senate Finance Committee report throws some doubt on whether Title II remedies would be available in case of a Title III violation. "Whereas Title II of the bill provides relief from injury . . . cause by 'fair' albeit, injurious competition, Title III deals with 'unfair' and/or illegal trade practices adversely affecting U.S. commerce." SFC REPORT, *supra* note 187, at 163.

- the adverse effect of the subsidy over the four year period;
- (b) there is a reasonable prospect that agreement will be reached with foreign countries for the elimination or reduction of non-tariff trade barriers; and
- (c) the imposition of the countervailing duty in question would seriously jeopardize the negotiations.²⁷⁷

However, this paragraph is not to apply to any case pending on the date of enactment of the Trade Act involving non-rubber footwear until and unless agreements which "temporize" imports of non-rubber footwear are signed. There is no explanation in the Committee or Conference reports as to this last paragraph. Possibly the "temporizing" agreement is being limited to non-rubber footwear because the American selling price method of valuation is applicable to rubber footwear. Furthermore, as previously indicated, *either* House can overturn the Secretary's decision by a majority vote. Here we have another example of Congress retaining control over the trade negotiations, despite a concurrent delegation of authority to the Administration.

In *United States v. Hammond Lead Company*,²⁷⁸ the Court of Customs and Patent Appeals held that the Customs Court had no statutory jurisdiction to review a determination by the Treasury Department that no countervailing duties should be imposed. It is not completely clear from the decisions whether courts have the authority to review the accuracy of the *amount* of countervailing duties as determined by the Secretary.²⁷⁹ It is believed that the amendment made by the Trade Act is intended to deal only with the appealability of negative determinations made by the Secretary of the Treasury,

²⁷⁷ See Discussion in SFC REPORT, *supra* note 187, at 186-87, and The Conference Report on this section.

²⁷⁸ *United States v. Hammond Lead Products, Inc.*, 440 F.2d 1024, (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971).

²⁷⁹ The Customs Court stated in *Energetic Worsted Corp. v. United States*, 224 F. Supp. 606, 615 (1963):

It has long been held that the finding of the Secretary of the Treasury as to the amount of a bounty is final and not subject to judicial review.

The holding in the Customs Court was reversed on appeal, but on other grounds, the Court of Customs and Patent Appeal holding that there was insufficient evidence to support the finding that a bounty had been given. *Energetic Worsted Corp. v. United States*, 53 C.C.P.A. 36 (1966). However, this case has also been cited as authority for the statement that the courts do in fact review the determination of the Secretary as to the amount of the bounty.

and not with the question of the appealability of the accuracy of the amount contained in an affirmative decision.²⁸⁰

The trading partners of the United States have frequently attacked the U.S. countervailing duty laws²⁸¹ claiming those laws exhibit: (1) very broad administrative authority given to the Secretary of the Treasury,²⁸² (2) a lack of procedural safeguards, (3) a lack of published data as to the complaints pending,²⁸³ and (4) a lack of published data as to the principles used by the Treasury Department in arriving at its decisions.²⁸⁴ Congress, on the other hand, has frequently been at odds with the Treasury Department because Congress claimed that the Treasury Department was not enforcing the countervailing duty law with sufficient vigor.²⁸⁵

The Secretary is required to make a *preliminary* determination, within six months after the date a petition is filed, and a final determination within twelve months after such date, as to whether countervailing duties are to be imposed.

The Secretary is also required to publish in the Federal Register²⁸⁶ notices as to:

- (a) The initiation of any formal investigation (Section 303(a)(3) of the Tariff Act of 1930);
- (b) All determinations by the Secretary (both preliminary and final) and (affirmative or negative) as to whether bounties or grants are being paid (Section 303(a)(6));
- (c) all determinations by the Commission as to injury (both affirmative or negative) (Section 303(a)(6));

²⁸⁰ SFC REPORT, *supra* note 187, at 185.

²⁸¹ For a very good discussion of the United States countervailing duty law as it existed prior to the Trade Act, see Feller, *Mutiny Against The Bounty: An Examination of Subsidies Border Tax Adjustments and the Resurgence of the Countervailing Duty Law*, 1 LAW AND POLICY IN INT'L BUS. 17 (1969).

²⁸² This procedural authority has been substantially limited by the detailed provisions of the Trade Act.

²⁸³ It was not until 1967 that the Customs Service Regulations required publication of notice that a countervailing duty investigation was in process.

²⁸⁴ Until the amendments to the Trade Act, the Treasury Department failed to publish notices as to any negative determinations. The lack of this information of course made it more difficult to determine in advance which practices would be acceptable to the Treasury Department.

²⁸⁵ See SFC REPORT, *supra* note 187, at 183.

²⁸⁶ Although the Secretary is required to publish a number of items of information which they had previously not published, it is interesting to note that this portion of the act does *not* contain any provision as to publication of a "complete statement of findings and conclusion" as is contained in the anti-dumping portion of the Act. 19 U.S.C. § 160(d)(2) (Supp. IV, 1974).

(d) the net amount of each bounty or grant (Section 303(a)(6)).

Finally, the Secretary is given authority to "make all regulations he deems necessary for the identification of articles and merchandise" subject to countervailing duties, and those regulations may provide for hearings. However, the amendments to the countervailing duty act contain no provisions similar to those contained in the amendments to the Anti-Dumping Act relative to hearings.

Prior to the Trade Act, countervailing duties became effective only 30 days after the order imposing the countervailing duties was published in the Customs Bulletin. Possibly this provision was meant to give foreign exporters to the United States sufficient notice so that they could withhold shipments after the notice was published. The Trade Act now provides that countervailing duties shall be assessed from the day on which the Secretary's order is published in the Federal Register.²⁸⁷ Presumably it is considered that this change in the Countervailing Duty Act may be adopted with equity, because the foreign exporters will probably receive sufficient notice as a result of the publication in the Federal Register of the preliminary determination by the Secretary.

Chapter IV—Unfair Trade Practices

A. Background

This Chapter makes very substantial changes in Section 337²⁸⁸ of the Tariff Act of 1930. In view of the broad language of Section 337, the background and legislative history of this Section is most important. The SFC Report comments at some length upon this Section.²⁸⁹

Section 337(a) originally declared unlawful "unfair methods of competition and unfair acts in the importation of articles into the United States . . . the effect of . . . which is to destroy or substantially injure an industry, efficiently and economically operated, or to prevent the establishment of such an industry or to restrain or monopolize trade and commerce in the United States."

By Section 337(b) the Commission was authorized to investigate any alleged violation of the section either on complaint or on its own initiative.

²⁸⁷ This change will advance the date of imposition of countervailing duties by about 6 or 7 weeks. SFC REPORT, *supra* note 187, at 185.

²⁸⁸ 19 U.S.C. § 1337 (1970).

²⁸⁹ SFC Report, *supra* note 187, at 193-200. For a detailed review of Section 337 and of the court decisions thereunder, see Kaye & Plaia, *Revitalization of Unfair Trade Causes in the Importation of Goods: An Analysis of the Amendments to Section 337*, (pts. 1-2), 57 J. PAT. OFF. SOC'Y 208, 269 (1975).

Under Section 337(c) the Commission was to make such investigation and afford such hearing as it deemed sufficient. The testimony in every such investigation was required to be reduced to writing. Its findings, if supported by evidence, were declared conclusive, except for rehearings by the Commission and except for appeals to the Court of Customs and Patent Appeals by the importer or consignee. The final findings of the Commission with the record were transmitted to the President, and whenever the President found the existence of any such unfair method or act, he was required to exclude the articles in question from entry into the United States. Furthermore, if the President "has reason to believe" but does not have information sufficient to satisfy himself as to alleged unfair methods of competition, the President may cause entry to be refused, except under bond.

Despite the broad language of this Section, its principal applications have been in connection with the importation of articles into the United States which are alleged to infringe a U.S. patent.²⁹⁰

The Court of Customs and Patent Appeals has held that Section 337 did not give the Commission the right or the duty to pass upon whether a patent was properly issued.²⁹¹ The Administration Proposal had proposed certain modifications of this Section limiting its scope to importations of products that infringe U.S. patents, stating that other unfair methods of competition were to be dealt with in a separate, companion statute. In part the Administration's recommendations dealt with revision of the procedural aspects of the Section.

As in the case of the Anti-Dumping Act and the countervailing duty provisions, Section 337 did not establish any time table within which the Commission or the President was required to dispose of a complaint under this Section.

This, then, is another example of the responsibilities of the Commission being extended, and of its authority being enhanced. The Commission (not the President) makes the final decision as to whether Section 337 is being violated. (The President is given a veto power over the Commission's decision, but for policy reasons only.) The Commission's jurisdiction is extended so that it may now rule upon all defenses raised in a Section 337 proceeding, including validity of patents for the purpose of this proceeding only. Since its hearings under this Section now must comply with the Administrative

²⁹⁰ 19 U.S.C. § 1337(a) (1970), complements § 337. It provides that the importation of a product made by means of a process covered by the claims of any valid, unexpired patent shall have the same status for purposes of Section 1337 as the importation of any product covered by the claims of any unexpired valid United States patent.

²⁹¹ *In re Orion Co.*, 71 F.2d 458 (C.C.P.A. 1934).

Procedure Act, it probably will need a separate enforcement section, increasing its head count, and generally elevating its position.

B. *Analysis of Section 337 as Amended by the Trade Act.*

Section 337(a), summarized above, was retained intact, except that it is the Commission, and not the President, who makes the final finding as to whether unfair methods of competition are being used.

The Commission is to conclude its investigation and make a determination within twelve months (eighteen months in complicated cases)²⁹² from the date a complaint is filed.²⁹³ In addition, the Commission is required to publish notice of the commencing of its investigation in the Federal Register. In reaching its decision, the Commission is required to consult with HEW, Justice and the Federal Trade Commission.²⁹⁴

Each investigation is to result in a determination by the Commission, and each determination is to be made on the record after notice and opportunity for hearing, in conformity with the provisions of the Administrative Procedure Act.²⁹⁵ All legal and equitable defenses

²⁹² In computing the 12 and 18 months' time limits, the Act provides that there shall be excluded any period of time during which such investigation is suspended because of proceedings in a court or agency of the United States involving similar questions. The SFC Report makes it clear that the suspension may result, either from the Commission itself suspending the investigation or as a result of a court order to the same effect. SFC REPORT, *supra* note 187, at 195.

²⁹³ As previously noted, Section 337 contained no time limit for determinations. Thus, investigations might continue for a very substantial period of time. The pendency of such an investigation for a long period of time is of course a non-tariff trade barrier. Though entry of the goods in question is not necessarily blocked during the period of the investigation, the pendency of the investigation will have a natural tendency to discourage the purchase of the goods in question by American importers or users.

²⁹⁴ The SFC Report states that the overriding considerations in the administration of this section must be the effect of the exclusion of the articles in question upon the public health and welfare, the competitive conditions in the United States, and the United States consumers. Hence, there is the requirement that the Commission consult the Department of Health, Education and Welfare and the Department of Justice. SFC REPORT, *supra* note 187, at 197.

²⁹⁵ 19 U.S.C. § 1337(c) (Supp. IV, 1974). This subsection will probably necessitate a major change in the Commission, with the creation of a separate enforcement or prosecution section in order to satisfy the requirements of the Administrative Procedure Act. The General Counsel for the Commission believes that the Commission will have to appoint some hearing examiners in view of the substantial increase in the workload of the Commission. The SFC Report states that the "full hearing required would be a full 'due process' hearing. . . ." SFC REPORT, *supra* note 187, at 195.

may be presented. Any person adversely affected by a determination of the Commission as to whether the articles in question are to be excluded from entry or are to be excluded from entry except under bond may appeal to the Court of Customs and Patent Appeals.²⁹⁶

If the Commission in the course of its investigation finds that the acts complained of fall within the Anti-Dumping Act or the countervailing duty section of the Tariff Act, the Commission shall promptly notify the Secretary of the Treasury.²⁹⁷

The Commission is given the choice of several remedies:

(1) If it has finally determined that unfair methods of competition are being used, it may either:

(a) order that the articles be excluded from the United States; or

(b) enter a cease and desist order.²⁹⁸

(2) If during the course of an investigation it has reason to believe (but has made no final determination) that unfair methods of competition are being used, it may either:

(a) order exclusion of the articles during the pendency of the investigation except under bond; or

(b) enter a cease and desist order.

In determining whether to employ any of these remedies, the Commission is directed to consider the various factors set out in footnote 294.²⁹⁹

If the Commission determines that there has been a violation of Section 337, or if it has reason to believe there has been a violation, the Commission is required to publish such determination in the Federal Register,³⁰⁰ and to forward to the President a copy of the determination and notice of the action proposed to be taken by the Commission, together with the record of the case. The President has

²⁹⁶ The right of appeal is now extended to complainants, as well as to owners, importers, or consignees of the articles in question. However, it is to be noted that the right of appeal apparently does *not* extend to cease and desist orders. Furthermore, the issues as to which an appeal may be filed are broadened by the Trade Act; previously an appeal could be filed only in regard to questions of law.

²⁹⁷ The SFC Report states that "[i]t is expected that the Commission's practice of not investigating matters clearly within the purview of either section 303 or the Anti-dumping Act will continue." SFC REPORT, *supra* note 187, at 195.

²⁹⁸ This alternative remedy is considered to be a milder and more flexible remedy than that of exclusion. See SFC REPORT, *supra* note 187, at 198.

²⁹⁹ 19 U.S.C. § 1337(d), (e), & (f) (Supp. IV, 1974).

³⁰⁰ 19 U.S.C. § 1337(g) (Supp. IV, 1974).

sixty days in which to approve or disapprove of the determination because of policy reasons. If he disapproves the determination and so notifies the Commission within that period, the determination by the Commission will have no effect. This subsection also deals with the status of the Commission's action during this referral period.

If the alleged unfair action is the importation of goods that violate a U.S. patent and if the goods are being imported for the use of the United States Government, no order for exclusion under any of the several remedies is to be entered. To compensate the owner of the patent, he is given the right to compensation under these circumstances, in an action before the Court of Claims, the only issue in such a suit being the amount of injury suffered.

The only reference to patents in Section 337 as amended is the one summarized in the preceding sub-paragraph relative to articles imported by the United States. As noted under the "Background" section, prior to the Trade Act, the Court of Customs and Patent Appeals held consistently that Section 337 did not give the Commission jurisdiction to pass upon the validity of a patent that is in issue.³⁰¹

Section 337(c), as now amended, provides that "All legal and equitable defenses may be presented in any case."³⁰² The lack of validity or the unenforceability of a patent would be raised as a defense by the importer in a proceeding brought under this Section by the patentee based upon importation of goods which infringe a United States patent. Accordingly, the Commission is now required and permitted, when such a defense is raised, to review and determine the validity or enforceability of a patent, but for the purposes of this Section 337 only. The Commission's findings are not to be considered as binding interpretations of U.S. patent laws "in particular factual contexts."³⁰³

³⁰¹ The Senate Finance Committee Report makes it clear that the Committee included this amendment in Section 337 as a result of "the public policy recently enunciated by the Supreme Court in the field of patent law (*cf. Lear, Inc. v. Adkins*, 395 U.S. 653 (1969))." SFC REPORT, *supra* note 187, at 196. In that case, the Supreme Court rejected the doctrine of licensee estoppel and overruled its decision in *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.*, 339 U.S. 827 (1950), the court stating that "federal law requires that all ideas in general circulation be dedicated to the common good unless they are protected by a valid patent." 395 U.S. at 668 (Harlan, J.).

³⁰² See SFC Report which goes on to say that "it seems clear that any disposition of the Commission action by a Federal Court should not have a *res judicata* or collateral estoppel effect in cases before such courts." SFC REPORT, *supra* note 187, at 196.

³⁰³ It is stated that one of the defects of § 337 prior to the present amendment was that it required both the President and the President's staff and others to become fully familiar with the issues in these § 337 cases, which, although naturally of great interest to the parties concerned, did not loom large in importance on the national scene. Under

Finally, Section 337 now requires the Commission, in its annual report to Congress, to include a list of complaints filed under Section 337, the date of filing, and the action taken on each complaint, and the status of all investigations made by the Commission.

In capsule form, the results of this full-scale revision of Section 337 are as follows:

- (1) The power of the President is somewhat reduced;³⁰⁴
- (2) The responsibilities of the Commission are broadened;
- (3) Time limits are established for handling complaints;
- (4) The authority delegated to the Commission is somewhat restricted by requirements as to hearing, right of appeal, and the record;
- (5) The Commission is required to hear and decide upon defenses of patent invalidity and unenforceability, but only for the purposes of section 337; and
- (6) Any adversely affected party now has the right to appeal the Commission's decision.

Title IV—Trade Relations with Countries Not Currently Receiving Nondiscriminatory Treatment³⁰⁵

Section 231(a) of the 1962 Act required the President to prevent the application of the reduction of any existing duty or other import restriction proclaimed in carrying out any trade agreement under that act or under Section 1351 to products of any country or area dominated by Communism. Section 231(b), however, permitted the President, in effect, to extend non-discriminatory treatment to Poland and Yugoslavia.³⁰⁶ As indicated earlier, very few of the Communist-controlled countries are members of GATT. The Administration Proposal requested that the President be authorized to enter into bilateral commercial arrangements to extend most-

Section 337 as amended, it will be necessary for the President and his staff only to become familiar with the general nature of the case and its size and importance. See Kaye & Plaia, *Revitalization of Unfair Trade Causes in the Importation of Goods: An Analysis of the Amendments to Section 337*, 57 J. PAT. OFF. SOC'Y 208, 225-29 (1975).

³⁰⁴ *Id.*

³⁰⁵ For purposes of brevity, the phrase "COMM countries" shall be used meaning countries not currently receiving nondiscriminatory treatment; these include Albania, Bulgaria, the People's Republic of China, Cuba, Czechoslovakia, East Germany, Estonia, Hungary, Indochina (any part of Cambodia, Laos, or Vietnam under Communist control or domination), North Korea, Kurile Islands, Latvia, Lithuania, Outer Mongolia, Romania, Southern Sakhalin, Tanna Tuva, Tibet and the U.S.S.R.

³⁰⁶ Products of Poland and Yugoslavia currently receive most-favored-nation treatment, despite the fact they are Communist countries.

favorable treatment to the COMM countries, subject to a Congressional veto procedure. The terms of these agreements would be three years, extendable for additional three-year periods.

The Administration Proposal was in accord with detente and the general relaxations of export controls of the United States in connection with trade with Communist countries. Congress agreed with the general approach recommended by the President,³⁰⁷ but with one major exception: Congress was unwilling to extend most-favored-nation treatment to any country that denied its citizens the right or opportunity to emigrate or imposed more than nominal charges on emigration. The Administration at first opposed any such condition (though it stressed that it was certainly opposed to any such denial of emigration rights) on the grounds that the imposition of any such restrictions constituted interference by the United States in the internal affairs of other nations.³⁰⁸ Ultimately, after extended discussions with the U.S.S.R., it was believed that a compromise solution acceptable to both the United States and the U.S.S.R. had been worked out. Portions of this compromise solution were included in Title IV of the Act, and the bill was passed by Congress. However, the U.S.S.R. later advised the Administration that the "compromise" solution was completely unacceptable to it.

Since this portion of the Act, and particularly the emigration aspect was given extensive publicity in the latter part of 1974, the summary given here of its provisions will be brief.³⁰⁹

As stated in the SFC Report,³¹⁰ the phrases "nondiscriminatory treatment" and "most-favored-nation treatment" are considered interchangeable.

Analysis of Chapter V

Section 401. Except as otherwise provided, the President is to

³⁰⁷ The SFC Report states that the United States has lagged behind other non-Communist countries in expanding its trade with Communist countries. The Report also stresses the fact that the average rate of United States customs duties paid on dutiable imports from COMM countries was 23.9% in 1972, as compared to an average rate of 8.6% for other countries. SFC REPORT, *supra* note 187, at 201.

³⁰⁸ For a full discussion of the background of this delicate matter and the nature of the compromise solution, see the exchange of letters between Secretary of State Henry Kissinger and Senator Henry Jackson in the SFC Report at pages 203-06 and the statement of Secretary Kissinger before the Senate Finance Committee set out at pages 51-56 at the Hearing Report, *infra* note 309.

³⁰⁹ Emigration Amendment to the Trade Reform Act of 1974; Hearings before the Committee on Finance, United States Senate, 93d Congress, 2d Session; December 3, 1974, 42-902-0.

³¹⁰ SFC REPORT, *supra* note 187, at 201.

deny most-favored-nation treatment to the COMM countries.

Section 402(a). Products from COMM countries are not to be eligible for most-favored-nation treatment, and such countries are not to participate in any United States Government program which extends credits or credit guarantees or investment guarantees. Also, the President is not to conclude commercial agreements with any such country, during the period that the President determines that such country:

- (1) denies its citizens the right to emigrate, or
- (2) imposes more than a nominal tax on emigration or on any citizen desiring to emigrate.

Section 402(b). If and when the President submits a report³¹¹ to Congress indicating that any such COMM country does not deny its citizens the right to export, and does not impose more than a nominal tax on emigration or on citizens desiring to emigrate,³¹² products of such country may be eligible for most-favored-nation treatment, such country may participate in credit or guarantee programs of the United States, and the President is permitted to conclude a commercial agreement with such country.³¹³

Section 402(c). During the 18-month period after the enactment of the Trade Act, the President is authorized to waive the application of Sections 402(a) and (b) if he reports to Congress that the waiver will promote the objectives of Section 402 and that he has "received assurances that the emigration practices of that country will henceforth lead substantially to the achievement" of those objectives.³¹⁴

³¹¹ The report is to include information as to the nature and implementation of emigration laws, and it is to be updated semi-annually.

³¹² Please note that under § 402(b), the President can give the report required only if he can state, in effect, that the country in question has completely eliminated any restrictions on emigration. Presumably the practices of the Communist countries were such that the Administration believed that a substantial period would elapse before such assurances could be given.

³¹³ Despite the apparently unqualified authority given to the President by this section to enter into commercial agreements with a COMM country once he has filed with Congress the report specified in § 402(b), § 405(c) provides that any such commercial agreement shall take effect only if approved by a concurrent resolution of Congress. Section 405(b) specifies in considerable detail the provisions to be included in such agreement. Section 407(c)(2) provides a "veto" procedure in regard to trade agreements already executed with communist countries, i.e. the Trade Agreement of 1972 between the United States and the U.S.S.R. See note 313 *infra*.

³¹⁴ Secretary of State Kissinger stated, page 54, "With the exchange of correspondence agreed, it became possible to work out a set of principles . . . whereby the President will be authorized to waive the provisions of the original Jackson-Vanik amendment and to proceed with the granting of MFN (most-favored-nation) and

Sections 402(c)(2) and (d) contain elaborate and detailed provisions relating to the extension of this waiver period for 12-month periods but only with the approval of Congress.

Section 403. This Section provides that if the President determines that a nonmarket economy country is not cooperating with the United States (a) to achieve a complete accounting for all United States personnel who are missing in action in Southeast Asia, (b) to repatriate such personnel who are alive, and (c) to return the remains of those who are dead, the limitations of Section 402(a) are to apply to such country and its products.

Sections 404 and 405. The President is authorized to put into effect bilateral commercial agreements with COMM countries whenever he determines that such agreements will promote the purposes of the Trade Act and are in the national interest, provided that the agreements contain clauses as summarized below³¹⁵ and that a concurrent resolution of Congress approving both the agreement and the proclamation is adopted.³¹⁶ The President is also authorized in Sec-

Eximbank facilities for a period of 18 months." Despite this statement by Secretary of State Kissinger, it is believed that a waiver by the President under Section 402(c) will only have the effect of permitting the country in question to participate in United States Government programs which extend credits or credit guarantees or investment guarantees. Section 404 and 405 seem to require the approval of Congress in the case of most-favored-nation treatment. Even in the case of granting credits, the credit authority, in regard to credits granted after the date of enactment of the Trade Act, is limited, in the case of the U.S.S.R., to \$300,000,000. This limitation does not apply to credits granted by the Commodity Credit Corporation. *See* Trade Act § 613.

³¹⁵ Some of the provisions required to be included are similar to those required in the multi-lateral agreements, but others are unique. The provisions include, for example, (a) a 3-year term, but renewable for additional 3-year periods if the President determines, in effect, that the agreement is working out well and on a reciprocally fair basis; (b) terminable for national security reasons; (c) safeguard arrangements calling for consultations whenever imports cause or threaten market disruption (defined in Section 406), and authorizing imposition of import restrictions to prevent market disruption; (d) provision for protection of industrial property rights if not already available, including patents, trademarks, copyright, and processes; (e) arrangements for settlement of commercial differences; (f) arrangements for the promotion of trade, including trade and tourist promotion offices; facilities for government commercial officers; participation in fairs and exhibits; trade missions; and entry, establishment and travel of commercial representatives. The provisions as to industrial property rights and trade promotion are not applicable to the 1972 United States-USSR Trade Agreement. That agreement, entered into on October 18, 1972, will not enter into force until the necessary authorization by Congress is granted. Its text is set out in 66 DEP'T STATE BULLETIN 898 (1972) and 66 AM. J. INT'L L. 920 (1972).

³¹⁶ The fact that the proclamation, as well as the commercial agreement itself, are required to be submitted to Congress seems to indicate that Congress is taking a very close supervisory attitude in respect of relations with COMM countries. Compare the

tion 404 to extend most-favored-nation treatment to the products of a foreign country which has entered into a settlement agreement with the United States covering lend-lease reciprocal aid and claims during any period in which such COMM country is in arrears.

The Senate Finance Committee recommended³¹⁷ that in negotiating bilateral commercial agreements contemplated by Section 405, priority be given to certain GATT members, particularly Romania and Hungary.³¹⁸ The chronology, set forth below,³¹⁹ in the case of the bilateral trade agreement with Romania shows how Section 405 operates. Normally, the Administration would proceed, concurrently, under Section 402(b) and Section 402(c), the advantage being that as a result of using the waiver permitted by Section 402(c), the Administration is in a position to permit the country in question to participate in any program of the U.S. Government relating to credits, credit guarantees or investment guarantees at a considerably earlier date; in the case of Romania, the eligibility date for these pro-

treatment of NTB agreements under Section 102; once these agreements are approved by Congress, the President seems free to issue the implementing proclamation without further Congressional approval. One interesting question arises: if a proposed agreement between the United States and a COMM country involves NTB's, does the STR need to comply with both Section 107 and Title IV?

³¹⁷ SFC REPORT, *supra* note 187, at 208.

³¹⁸ The question may be raised as to why it would be necessary for the United States to enter into bilateral agreements with Romania and Hungary since these countries are already members of GATT, which, in the general case, would entitle them to most-favored-nation treatment. The reason is that at the time of their accession to GATT (Romania—November 14, 1971 and Hungary—August 10, 1973), the United States “invoked” Article XXXV of GATT which permits a contracting party not to consent to the application of GATT in regard to another contracting party. This right can be invoked only at the time either of the two contracting parties becomes a party to GATT. See, for example, paragraph 20 of the Working Party Report on the accession of Hungary: GATT, Basic Instruments and Selected Documents, Twentieth Supplement.

³¹⁹ A bilateral trade agreement between the United States and Romania was signed on April 2, 1975. On April 24, 1975, President Ford issued an executive order waiving the application of § 402(a) and (b). On the same date, President Ford also issued a proclamation relating to the trade agreement and saying that the proclamation shall become effective upon exchange of notes between the two governments, which exchange would follow the adoption by the House of Representatives and the Senate of a concurrent resolution of approval. 40 Fed. Reg. 18389 (1975). On that same day, President Ford sent a brief message to Congress, constituting the report required by Section 402(c). See Exec. Order No. 11,854 and Message to Congress, *reprinted at* 1975 U.S. CONG. & AD. NEWS 477, 502. The General Counsel to the STR published a notice that Congress adopted the concurrent resolution of July 28, 1975 and the exchange of notes took place on August 3, 1975. 40 Fed. Reg. 34651 (1975).

grams was April 24 as against August 3 under the Section 402(b) approach.

Section 406. Market Disruptions. Upon the filing of a petition by an entity described in Section 201(a)(1), or upon request by the President, the STR, or either of the two committees responsible for the Trade Act, or on its own initiative, the Commission is required to undertake an investigation to determine, with respect to imports from Communist countries, whether "market disruption"³²⁰ exists with respect to a domestic industry.

The Commission is to report to the President whether market disruption exists, and if its decision is in the affirmative, it is to find and report the increase in duty or other import restrictions necessary to prevent or remedy market disruption. In the event of an affirmative determination, the President has the same authority he would have under Sections 202 and 203 in the case of an affirmative determination by the Commission under 201(b), but under Section 406, the President may order import relief only with respect to imports from the countries involved.³²¹ The President is also given the right to take emergency action without any report from the Commission.

The reason that the "market disruption" test is used here seems clear—the measures used by the United States to deal with subsidies and discriminatory pricing are most difficult to apply to Communist-controlled economies, so that it is desirable to set up a standard for

³²⁰ "Market disruption" exists whenever imports from a Communist country of articles, like or directly competitive with an article produced by a domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to a domestic industry.

³²¹ The Administration Proposal (§ 505) contained a very similar provision as to market disruption. It stated that it was intended that it should be easier to qualify under this procedure for market disruption than under the normal situation. See Administration Proposal, at 104. The SFC Report indicates that it also intends to make the granting of import relief easier under § 406. SFC REPORT, *supra* note 187, at 212. It states that "material injury" is intended to represent a lesser degree of injury than the term "serious injury" used in Section 201. Furthermore, "significant cause" is intended to be an easier standard to satisfy than that of "substantial cause" used in Section 201; on the other hand, "significant cause" is intended to represent a more direct causal relationship than "contribute importantly" as used in Title II in connection with adjustment assistance.

There is no express indication in the Act whether workers, firms and communities who are hurt by imports of goods from Communist countries are to have the right to adjustment assistance provided in Chapters II, III and IV of Title II. On the whole, it is believed to be reasonably clear, after examining the SFC Report, that adjustment assistance is to be made available. The whole thrust of the SFC Report is that there is a real risk that imports from "Communist countries" (which, for purposes of this section 406 only, includes any Communist country, including Poland and Yugoslavia) at most-favored-country rates will seriously disrupt the United States market.

granting import relief that is easier to meet and easier for the United States to apply.

Section 407. This Section details the procedure for Congressional approval or disapproval of extension of non-discriminatory treatment and of Presidential reports, including any Presidential report filed under Section 402(b) above.

Sections 408 and 409. These Sections deal with isolated problems—payment by Czechoslovakia of amounts owed to United States citizens and nationals and freedom to emigrate from Communist countries to join a very close relative in the United States.³²²

Section 410. This Section requires the Commission to monitor trade between the United States and nonmarket economy countries, and to coordinate this program with similar data gathering programs of the Department of Commerce. The Commission is to publish quarterly reports and transmit copies thereof to the East-West Foreign Trade Board (created by Section 411) and to Congress. The report is to include data on the effects of imports from nonmarket economy countries on production and employment in United States industries producing competitive products.

Section 411. This Section directs the President to establish an East-West Foreign Trade Board to monitor trade between “persons and agencies of the United States Government” and nonmarket economy countries “to insure that such trade is in the national interest of the United States.”

Any person who exports technology vital to the national interest of the United States to a nonmarket economy country, and any agency of the United States Government that provides credits, guarantees, or insurance to a nonmarket economy country in excess of \$5,000,000, in any calendar year, shall file a report with the East-West Board describing the nature and terms of such export of such provision.

Furthermore, if the total amount of credits, guarantees and insurance which an agency of the United States government provides to *all* nonmarket economy countries exceeds \$5,000,000 in a calendar year, the agency shall report all subsequent credits, guarantees, or insurance to the East-West Trade Board.

The East-West Trade Board is required to submit to Congress a

³²² The situation dealt with in § 409 is actually only a special case of the general situation dealt with in Section 402. The Conference Report makes it clear that the conferees do not intend to modify or change in any way the Jackson-Vanik amendment or to imply that any additional requirements are inserted by the inclusion of § 409.

quarterly report on trade between the United States and the nonmarket economy countries, including bilateral trade agreements, joint trade commissions, the resolution of economic disputes, imports causing disruption of United States markets, and recommendations for the promotion of trade. There is no comment on these Sections in either Committee report. Section 411 was added by the Conference, but there is no explanatory comment. Since the Commerce Department already has in force extensive regulations covering the export of technology, the provision relating to this subject in Section 411 seems unnecessary.³²³

Presumably Congress desires to receive a constant flow of information, both from the Commission and from the newly created East-West Foreign Trade Board, relating to U.S. trade with Communist countries. Partly this desire for information seems to result from a concern that Communist production imported at most-favored-nation rates may cause a serious disruption of U.S. industry. Other concerns probably include the granting of large credits to Communist countries for the purpose of United States agricultural products, particularly wheat and other grains, and large purchases of strategic materials from Communist countries, which could result in the traditional and dependable suppliers of these materials, both domestic and foreign, going out of business.³²⁴

Title V—Generalized System of Preferences Background

The Administration Proposal in this area authorized the President to permit duty-free importation of certain products to be designated by him (principally manufactured and semi-manufactured goods), from developing countries, also to be designated by him.³²⁵ This proposal was included in the Trade Act, without major changes in concept, but the President's authority is more limited under the Trade Act than under the Administration Proposal; and as in many

³²³ This view is shared by the East-West Foreign Trade Board. On July 2, 1975, the Chairman of the East-West Trade Board issued a regulation which states that for purposes of complying with Section 411 of the Trade Act relating to the export of technology to a nonmarket economy country, exporters of such technology will be deemed to have complied with the requirements of such section by complying with the applicable provisions of the export control regulations of the Department of Commerce. 40 Fed. Reg. 29534 (1975).

³²⁴ SFC REPORT, *supra* note 187, at 210-11.

³²⁵ See Title VI of Administration Proposal, with explanatory comment on 104-08.

other provisions of the Trade Act, the Administration is required to keep Congress very closely informed as to the actions taken under the authority of this Section and the consequences of these preferences, favorable and unfavorable.

With commendable energy, the Administration has struggled through the complicated requirements of this Title V, and in the late fall of 1975 the President signed an Executive Order which, effective January 1, 1976, eliminated all U.S. duties on 2,724 categories of imports from developing countries. The two principal purposes of the United States in developing this generalized preference system are probably as follows:

- (1) To improve the economies of the developing countries,³²⁶ whose constant complaint for many years has been that the United States and other developed countries tend to consider them (from a trade point of view) only as a source of raw materials and agricultural products, and thus to improve the welfare and security of the U.S.; and
- (2) To offset, at least in part, the preferences and reverse preferences existing between the Common Market and many developing countries, and the system of generalized trade preferences of the Common Market³²⁷ to enable the United States to continue as a principal trading partner of many developing countries.³²⁸

A "generalized trade preference" even when given to developing countries is contrary to the most-favored-nation rule of GATT. The adoption of this preference by the United States would require a "waiver" from GATT, but such a waiver should be able to be secured, particularly in view of the waivers already issued the British Commonwealth systems and the EEC arrangement with the African States. As a part of such a waiver, the United States would probably be permitted to withdraw the preference, without giving compensation to the country affected, because the granting of the preference

³²⁶ See § 601—"Purposes" of the Administration Proposal and paragraph 2 of the Declaration issued at the ministerial meeting of GATT at Tokyo, GATT/1134 (Sept. 14, 1973).

³²⁷ In addition to its system of preferences and, possibly reverse preferences with the "associates," the Common Market also has in effect a system of generalized trade preferences for other developing countries. It applies to manufactured and semi-manufactured goods, but not to agricultural products or raw materials. See CCH COMMON MARKET REP. [1973-1975 TRANSFER BINDER] ¶ 9677 (1974).

³²⁸ See SFC REPORT, *supra* note 187, at 221-22.

is a "voluntary" matter. In this connection, however, a question might be raised as to the condition imposed by Section 502(b)(3) under which any developing country which wishes to be eligible under this chapter must assure the United States that it will end the preferences extended to any other developed country by January 1, 1976 or the adverse effect thereof.

Analysis of Generalized Trade Preferences

Section 502. Beneficiary Countries

Section 502(b) of the Act lists a group of developed countries³²⁹ which are *not* eligible to be designated as beneficiaries. The SFC Report, also includes a list of 102 countries "which will be actively considered for beneficiary status."³³⁰ The Act provides that the President shall not designate as a beneficiary country any country which falls within one or more of the following groups:³³¹

³²⁹ This group is as follows: Australia, Austria, Canada, Czechoslovakia, European Economic Community member states, Finland, Germany (East), Hungary, Iceland, Japan, Monaco, New Zealand, Norway, Poland, Republic of South Africa, Sweden, Switzerland, and Union of Soviet Socialist Republics.

³³⁰ This list, as revised, is as follows: Afghanistan, Algeria (OPEC), Argentina, Bahamas, Bahrain, Bangladesh, Barbados, Central African Republic, Chad, Chile, Colombia, Congo (Braz), Costa Rica, Dahomey, Dominican Republic, Ecuador (OPEC), El Salvador, Equatorial Guinea, Ethiopia, Fiji, Gabon (OPEC), Gambia, Ghana, Guatemala, Guinea, Guyana, Haiti, Honduras, India, Indonesia (OPEC), Iran (OPEC), Iraq (OPEC), Israel, Ivory Coast, Jamaica, Jordan, Kenya, Korea (South), Kuwait (OPEC), Laos, Lesotho, Liberia, Libya (OPEC), Malagasy Republic, Malawi, Malaysia, Maldive Islands, Mali, Mauritania, Mauritius, Mexico, Morocco, Nauru, Nepal, Nicaragua, Niger, Nigeria (OPEC), Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Qatar (OPEC), Rwanda, Saudi Arabia (OPEC), Senegal, Sierra Leone, Singapore, Somalia, South Yemen, Sri Lanka (Ceylon), Sudan, Swaziland, Syria, Taiwan, Tanzania, Thailand, Togo, Tonga, Trinidad & Tobago, Tunisia, Uganda, United Arab Emirates (OPEC), Upper Volta, Uruguay, Venezuela (OPEC), Western Samoa, Yemen, Yugoslavia, Zaire, and Zambia. (As amended by Presidential Proclamation published in 40 Fed. Reg. 51251 (1975)).

³³¹ The following three conditions are also required, but the President has the right to waive any or all of them:

(a) a country which has expropriated property of a U.S. citizen or of a corporation which is 50% or more beneficially owned by U.S. citizens, or cancelled contracts or imposed taxes or other measures, the effect of which is nationalize U.S. property, without providing compensation, or undertaking good faith negotiations to provide compensation, or submitting the dispute over compensation for arbitration under the "Convention for the Settlement of Investment Disputes." This phrase is believed to refer to the "Convention on the

(1) A Communist country, unless the products of the country receive most-favored-nation treatment, is a party to GATT and a member of IMF, and is not "controlled or dominated by international communism;"³³²

(2) a member of OPEC, or a party to any other group of foreign countries, and the party participates in action pursuant to the arrangement which withholds supplies³³³ of vital commodities from international trade or which raises the prices of such commodities "to an unreasonable level"³³⁴ and disrupts the world economy;³³⁵

(3) a country affording preferential treatment to products of a developed country other than the United States, which has a significant adverse effect on United States commerce, unless the President has received assurances that action will be taken by January 1, 1976 to eliminate the preferences or the adverse effect.

When designating a beneficiary country, the President is required

Settlement of Investment Disputes between States and Nationals of Other States" which went into force on Oct. 14, 1966. The executive directors of the World Bank were responsible for the promotion of this convention. It is registered with the United Nations Treaty Series, Vol. 575, page 159. Reg. No. 8359. The United States is a party to the Convention;

(b) a country which does not cooperate with the United States in preventing narcotics produced or transported in such country from entering the United States unlawfully;

(c) a country which fails to act in good faith in enforcing arbitration awards in favor of U.S. citizens or entities 50% or more owned by U.S. citizens.

Id.

³³² The Conference Report notes that this exception is intended to be limited to Yugoslavia and Romania. Conference Report, at 52.

³³³ Please note emphasis in other sections of Trade Act seeking to assure sources of supply: Section 108, Section 121(a)(7) and (8), and Section 301(a)(4).

³³⁴ Section 502(e) permits the President to exempt from the operation of this paragraph (2) any country which is a party to, and which does not violate, a trade agreement to which the United States is a party if such agreement assures the United States of fair access at reasonable prices to supplies of goods important to the economy of the United States.

³³⁵ The pamphlet published by the Government Printing Office setting out the text of the Trade Act contains, after the first seven lines of § 502(b)(2), the following: "withhold supplies of vital commodity resources from international trade or to raise the price of such commodities to an unreasonable level which causes serious disruption of the world economy." This additional wording seems to be a misprint; it is repetitious and not included in the U.S.C. version of this section.

to take certain factors³³⁵ into account.

Imports of "eligible articles" (as defined in Section 503 below) from insular possessions of the United States would also enter the United States duty free, subject to the rules of origin set out in Section 503(b) and to certain limitations as to volume of shipments of a single article set out in Section 504(c).

Section 503. Eligible Articles

The President is required to publish and furnish to the Commission lists of articles being considered for designation as "eligible articles." The Commission is then to furnish advice to the President as to its judgment of the effect of duty-free entry on United States industries, just as in the case of articles being considered for a reduction in duties under Title I of the Trade Act.³³⁷ Similarly the President is to seek advice from various cabinet departments and is to arrange for public hearings in connection with the proposed duty-free entry of the articles in question, as under Title I of the Trade Act.

Eligible articles must be imported *directly* from a beneficiary developing country to the United States.³³⁸ Furthermore, in order to qualify as an eligible article, certain "rules of origin" must be met as to percentage of value of the article in question originating in beneficiary developing countries.³³⁹ The purpose of the source of origin rule is, of course, to prevent articles which are principally produced in developed countries and then shipped to a developing country for assembly or minor finishing processes from qualifying for duty-free entry into the United States.

The President is not permitted to designate any of the following "import-sensitive" articles as eligible articles: textiles and apparel covered by textile agreements, watches, "import-sensitive" elec-

³³⁵ These factors include the desire of the country to be so designated, the level of economic development, whether other developed countries extend generalized preferential treatment to the proposed beneficiary, and whether the proposed beneficiary provides reasonable access to the markets and to the basic commodity resources of such country. See Trade Act § 502(c).

³³⁷ The relevant sections of Title I are Trade Act §§ 131-34.

³³⁸ Accordingly, if Brazil were designated a beneficiary country, an article shipped from Brazil to Canada for further processing or assembly into a completed product and then exported to the United States would seem not to qualify as an "eligible article" because Canada is listed in Section 502(b) as a country not eligible to be designated a beneficiary developing country.

³³⁹ Since the question as to the origin of an article always is a complex problem, the rules set out in § 503(b) are complicated and should be studied carefully. Proposed procedures for duty-free entry of certain merchandise from designated countries have been published. 40 Fed. Reg. 50045 (1975).

tronic, steel or semi-manufactured or manufactured glass articles; certain footwear articles, or other articles designated by the President as "import-sensitive." The phrase "import-sensitive" is not defined by the Trade Act but it was used in President Nixon's message to Congress regarding the Trade Act, in Ambassador Eberle's letter to Senator Long of November 7, 1974, and in the SFC Report.³⁴⁰ The phrase seems to be a euphemistic one.³⁴¹ Furthermore, the President is not permitted to designate, as an eligible article, any article as to which import relief has been made available under the Trade Act, or as to which, under the 1962 Act, the President shall have taken action in order to protect the national security or grant import relief to prevent or remedy serious injury to a United States industry.³⁴²

Section 504. Limitations on Preferential Treatment

The President *may* withdraw, suspend, or limit the application of duty-free treatment under Section 501 with respect to any article or with respect to any country.³⁴³ Further, the President is *required* to withdraw or suspend the designation of any country as a developing beneficiary country if he determines that, as a result of a change in circumstances, a developing beneficiary country, after such designation, would have been barred from such designation under Section 502(b). Finally, the President shall not designate or withdraw or suspend the designation of any country as a beneficiary developing country until 60 days after he has notified both Houses of Congress of the intended designation, suspension or withdrawal, setting out the reasons for such action (Sections 502(a)(2) and 504(a)).

A beneficiary developing country is not to be treated as a beneficiary developing country in respect of a particular eligible article from and after a date, not later than 60 days after the end of any calendar year during which the beneficiary country has exported to the United States, directly or indirectly, a quantity of such eligible articles whose

³⁴⁰ See Administration Proposal, at 13. SFC REPORT, *supra* note 187, at 224-25.

³⁴¹ Perhaps the articles in question could be more bluntly described as "any article the unlimited duty-free importation of which would seriously injure or destroy a substantial United States industry."

³⁴² See Trade Act § 203 and §§ 231 and 351 of the 1962 Act; 19 U.S.C. §§ 1861 and 1881 (1970).

³⁴³ The authority to withdraw or suspend so given does *not* permit the President to establish a rate of duty other than the rate which would apply if it were not for Title V. This limitation seems clearly to result from the Customs Court decision discussed in note 126, *supra*, and the related text.

appraised value (a) either exceeds a certain amount³⁴⁴ or (b) is equal to or exceeds 50% of the appraised value of the total imports of such article into the United States in such calendar year,³⁴⁵ but the President is given authority to designate or to continue the designation of such country as a beneficiary developing country under certain conditions.³⁴⁶ Duty-free entry is limited to the 10-year period after the date of enactment of the Trade Act, and the President is required to submit to Congress at the end of 5 years a report on the operation of this title.

Title VI—General Provisions

This title contains sections dealing with the matters usually included at the end of any major piece of legislation: Definitions (Section 601), Relation to Other Laws (Section 602), Functions of the Commission (Section 603), Consequential Changes in the Tariff Schedules (Section 604), Separability (Section 605). The Section on "Relation to Other Laws" and seven other Sections of Title VI deserve further consideration.

Section 602. Relation to Other Laws.

The point of most interest here is the relation of the Trade Act to the 1962 Act. Section 602(e) maintained a number of the provisions of the 1962 Act in force for a period of ninety days after the date of enactment of the Trade Act. However, at the expiration of that ninety day period, only the following Sections of the 1962 Act remain in force:

Statement of Purposes Section 102 (19 U.S.C. § 1801)

Definitions Subsections (2) and (6) of Section 405 (19 U.S.C. § 1806)

³⁴⁴ The amount for any specific year bears the same relationship to \$25,000,000 as the gross national product of the United States for the calendar year preceding the year in question bears to the gross national product of the United States for calendar year 1974.

³⁴⁵ This limitation does not apply if a like or directly competitive article is not produced in the United States on the date of enactment of the Trade Act.

³⁴⁶ The conditions are that the country:

- (i) has a historical preferential trade relationship with the United States;
- (ii) has a commercial treaty or trade agreement with the United States; and
- (iii) does not discriminate against, or impose unreasonable barriers to, United States commerce.

Basic Authority for Trade Agreements Section 201 (19 U.S.C. § 1821)

*Safeguarding National Security*³⁴⁷ Section 232 (19 U.S.C. § 1862)

*Interagency Trade Organization*³⁴⁸ Section 242 (19 U.S.C. § 1872)

*Most-favored-nation principle*³⁴⁹ Section 251 (19 U.S.C. § 1881)

*Termination of Proclamations*³⁵⁰ Section 255(b) (19 U.S.C. § 1885(b))

Limitation on Imports Under Section 624 of Title VII Section 257(h) (19 U.S.C. § 1887)

References in Other Laws Section 258 (19 U.S.C. § 1888)

Administration of Financial Assistance Section 316 (19 U.S.C. § 1916)

Protective Provisions Section 318 (19 U.S.C. § 1918)

Penalties Section 319 (19 U.S.C. § 1919)

Suits by and Against Secretary of Commerce Section 320 (19 U.S.C. § 1920)

*General Authority*³⁵¹—Proclamation re import relief for United States industries suffering serious injury. Section 351 (with the exception of subsections (c)(2) and (d)(3)) (19 U.S.C. § 1981)

Orderly Marketing Agreements Section 352 (19 U.S.C. § 1982)

Section 606. International Drug Control.

The President is required to make an annual report to Congress listing countries in which narcotics and other controlled substances

This exception was developed for the Philippines, many of whose exports to the United States would be struck down by a strict application of the 50% rule. SFC REPORT, *supra* note 187, at 227.

³⁴⁷ Section 127(c) of the Trade Act amends this section in certain respects, 19 U.S.C. § 1863 (Supp. IV, 1974).

³⁴⁸ Trade Act § 602(b) amends this section in certain respects.

³⁴⁹ Although Section 251 is not specifically amended by the Trade Act, the provisions of Section 105 of the Trade Act which provide for bilateral trade agreements under certain circumstances and require "mutually advantageous economic benefits" to be contained therein is inconsistent to some extent with the "most-favored-nation principle."

³⁵⁰ Although § 255(b) is not formally amended by the Trade Act, the general authority contained therein is subject to the specific limitations contained in various sections of the Trade Act. See, e.g. Trade Act § 502(a)(2).

³⁵¹ Section 351(c)(1)(B) of the 1962 Act is amended by § 602(c) of the Trade Act. Presumably § 351 of the 1962 Act was retained (almost in its entirety) because § 203(h)(3) and (i)(1) of the Trade Act deals with the extension or furnishing of import relief provided under the 1962 Act.

are produced, processed, or transported for unlawful entry into the United States.³⁵²

Section 607. Voluntary limitations on export of steel to United States.

This Section provides that no persons shall be liable for damages, penalties or sanctions under the Federal Trade Commission Act or the Antitrust Acts or under any similar state law on account of his negotiating or participating in an arrangement for the voluntary limitation of steel exports to the United States if the arrangement was undertaken prior to the date of enactment of the Trade Act and ceases to be effective not later than January 1, 1975. These provisions were requested by the Department of State³⁵³ for the reasons set out below.³⁵⁴ Note that the scope of the relief is carefully limited to a specific set of arrangements. The SFC Report states that the section

³⁵² Presumably the Congress wishes this report, in part at least, because of the provisions of § 502(b)(5) of the Trade Act.

³⁵³ See SFC REPORT, *supra* note 187, at 232.

³⁵⁴ Voluntary restraint arrangements for steel were entered into by a number of Japanese and European steel producers in 1968 and renewed in 1972, expiring at the end of 1974; these arrangements stated that the producers were entering into them on the assumption that they did not violate American law. A suit was brought in federal district court by Consumers Union alleging (1) that the arrangements violated the United States antitrust laws and (2) that Department of State officials had exceeded their authority because they had not complied with §§ 301 or 352 of the Trade Expansion Act of 1962. The Administration believed that the problem created by the steel imports was short-run in nature; the State Department favored the approach of unilateral voluntary letters from the foreign producers and that approach was developed and implemented. The suit requested the court to declare the 1972 letters of intent to be in violation of the antitrust statutes. After answers had been filed, and a motion to dismiss or for summary judgment had been made by the State Department, the parties stipulated that the first claim (the antitrust claim) be dismissed with prejudice. The district court held that by reason of the stipulation of dismissal "the question of whether or not a violation of the Sherman Act is present is not for the Court to decide," but, despite the stipulation, it continued to pursue the matter stating that "the Executive has no authority to exempt from the antitrust laws the arrangements here involved," and that "such arrangements are not exempt." The district court went on to hold that the State Department defendants were not precluded from following the course they did by anything in the Constitution or in Title 19 of the United States Code.

On appeal, the Circuit Court of Appeals for the District of Columbia vacated that portion of the district court opinion which declared that "such arrangements were not exempt" from the U.S. antitrust laws and confirmed the balance of the holding. *Consumers Union of United States, Inc. v. Kissinger*, 506 F.2d 136, 140 (D.C. Cir. 1974), cert. denied, 421 U.S. 1004 (1975). The Circuit Court's opinion states that the letters to the Secretary, dated December 23, 1968, were transmitted to the respective Chairmen of the Senate Finance Committee and the House Ways and Means Committee,

"is not intended to be a precedent for the future."³⁵⁵ It seems probable that in view of the district court dictum and the noncommittal tone of the portion of the SFC Report quoted above, it will be difficult in the future for the State Department to obtain voluntary letters from foreign producers dealing with steel or with other products.

Sections 608 and 609. Statistical Data on Imports, Exports and Production.

The Secretary of the Treasury, the Secretary of Commerce and the Commission are directed to establish for statistical purposes an enumeration of articles which will be used for both imports and exports and to seek, in conjunction with statistical programs for domestic production, the establishment of comparability of such domestic production statistical programs with the enumeration of articles. Import entries and export declarations are to include a statement specifying, in terms of the detailed enumeration of articles, the kind, quantity and value of all merchandise imported and exported.³⁵⁶ The Secretary of Commerce and the Commission are directed to submit a joint report by August 1, 1975 to both Houses of Congress and the President with respect to their study of existing commodity classification systems and the principles which should be used in establishing an enumeration of articles accomplishing the comparability of statistical data referred to above. In the international field, the Commission is to undertake an investigation covering the principles underlying an international commodity code adaptable for modernized tariff nomenclature purposes and to submit a report to both Houses of Congress and the President on this subject. The Commission is to participate in the United States technical work of the Harmonized Systems Committee under the Customs Cooperation Council looking toward the development of a Harmonized Code which would recognize the needs of the United States business community.

and that the recipients issued a joint announcement welcoming the voluntary restraints and releasing the texts of the letters. 506 F.2d at 138 n.4. This participation in the matter by the Senate Finance Committee is not mentioned in the SEC Report although it does state that the voluntary arrangements were negotiated "following political concern expressed widely in the Congress. . . ." SFC REPORT, *supra* note 187, at 232.

³⁵⁵ SFC REPORT, *supra* note 187, at 232.

³⁵⁶ At the present time, the United States maintains statistical data on imports and exports on different bases. Neither of these bases is easily comparable with the statistical data developed in domestic production programs. Furthermore, the United States enumeration of articles is different from the Brussels Nomenclature which is used by many members of GATT.

The Secretary of Commerce is also directed to supply more detailed reports as to U.S. imports and exports to the House Ways and Means Committee and to the Senate Finance Committee. Presently available reports were considered to be insufficient in detail by the Senate Finance Committee because they did not show separate statistics for trade between related parties or equivalent arms-length value for transactions between related parties. The new reports are also to show separately "export subsidies" paid to all U.S. exporters by the United States Government under the Agriculture Trade Development and Assistance Act of 1954, as amended, on agricultural commodities, the total of such exports, and the value of goods exported under the Foreign Assistance Act of 1971.

Section 611. Review of Protests of Import Surcharge.

The time for denying or allowing protests under Section 514 of the Tariff Act of 1930 in respect of the imposition of an import surcharge pursuant to Presidential Proclamation 4074, dated August 15, 1971³⁵⁷ is fixed at five years from the date the protest was properly filed under section 514.³⁵⁸

Section 612. Trade Relations with Canada.

The President is authorized to undertake negotiations for a trade agreement with Canada to establish a free trade area covering the United States and Canada; additional legislation would be required to approve any such trade agreement.³⁵⁹

³⁵⁷ Pres. Proclamation No. 4074, 36 Fed. Reg. 15724, (1971) terminated by Pres. Proclamation No. 4098, 36 Fed. Reg. 24201 (1971).

³⁵⁸ The Customs Court held that the surcharge was improperly imposed because the President did not have the authority to establish a surcharge at that level. *Yoshida Int'l, Inc. v. United States*, 378 F. Supp. 1155 (Cust. Ct. 1974). The decision has been appealed. The extension in time for denying or allowing protests was given to permit the resolution of the appeal. SFC REPORT, *supra* note 187, at 234-35. The decision of the Customs Court was reversed by the U.S. Court of Customs and Patent Appeals. 526 F.2d 560 (1975). The court held that the authority delegated to the President by section 5(b) of The Trading With The Enemy Act, 50 U.S.C. § 5(G) (1970) was broad enough to cover the surcharge.

³⁵⁹ This section seems to have originated in the Senate Finance Committee. Although the Trade Act makes no reference to the Automotive Trade Agreement between the United States and Canada, the SFC Report indicates that the Committee believes that amendment of that agreement to permit reciprocal free trade under that agreement would be an almost essential prerequisite to the negotiation of a broader free trade area agreement and that the new agreement could encompass both tariff and nontariff barriers and access to supplies. SFC REPORT, *supra* note 187, at 235.

Section 613. Limit on Credits to be Extended to the U.S.S.R.

In 1974, Congress passed the Export-Import Bank Amendments of 1974.³⁶⁰ Section 8 of that Act places a limit of \$300,000,000 on loans or guarantees to the U.S.S.R. after the date of enactment of the amendments. Section 613 places the same sort of limitation on such loans or guarantees. The Section may have been added, as an afterthought, to assure that the provisions of Title IV of the Trade Act (which of course deals with credits to Communist countries) did not impliedly repeal the limit on loans and guarantees to the U.S.S.R. established in the Export-Import Bank Amendment Act.

Most Important New Provisions

I. NEGOTIATING AND OTHER AUTHORITY

(1) *Non-tariff barriers.* The Trade Act (Section 102) gives the STR explicit authority to negotiate with respect to non-tariff barriers; indeed he is urged (Section 102), and instructed (Section 121(a)) to do so. Granted that the agreements reached by him in this area are subject to subsequent approval by Congress, the great advance here is that he is authorized, and instructed in great detail, to undertake negotiations in this vital area.

(2) *Sector negotiating objectives.* Negotiations are to be undertaken on a product sector basis (Section 104), both in the agricultural field and in the industrial field. This approach is considered necessary by Congress to permit "equivalent competitive opportunities" for the United States.

(3) *Access to supplies.* Though not mentioned by name in the Trade Act, oil and the OPEC countries are undoubtedly responsible for the emphasis in the Trade Act on the development of international rules—assuring access to raw materials, food and manufactured articles and for the characterization of unreasonable restrictions on access to supplies as an "unfair trade practice" (Sections 108, 121(a)(7) and (8), and 301(a)(4)).

(4) *Bilateral Trade Agreements and Multilateral Most-Favored-Nation Treatment.* The United States may not have come full circle to return to bilateral trade agreements and "conditional" most-favored-nation treatment, but it is approaching that position. Section 105 (Bilateral Trade Agreements) and Section 126 (Reciprocal non-

³⁶⁰ 88 Stat. 2333 (1974). See also note 299 *supra* for fuller discussion of Amendments.

discriminatory treatment) show that Congress is far from happy with the pure, unqualified most-favored-nation principle which has been the cornerstone of GATT from its beginning.

(5) *Attitude of Congress Toward GATT; Revisions of GATT.* The United States Congress has never taken GATT to its heart; it has been critical of it, slightly suspicious, and has adopted in the past a somewhat "hands-off" attitude. In the Trade Act, Congress takes a sharply different approach.

(A) It *directs* the STR to amend GATT in a number of highly important and substantial ways (Section 121);

(B) These amendments, if adopted, however, would in many ways, (1) strengthen the organization of GATT (Section 121(a) (1), (9) and (12)) and (2) expand its responsibilities (Section 121 (a)(3), (4), (7), and (11)). Thus, although Congress is still far from happy with GATT, it is apparently willing to give it considerably more responsibility and a substantially wider scope of operations.

(6) *Developing Countries.* The Act specifically stresses the importance of trade agreements between the United States and developing countries and it authorizes duty-free importation of certain manufactured goods produced by developing countries—the so-called "generalized system of preferences," (Section 106 and Title V). From a tactical point of view, these provisions seem to strengthen the position of the United States versus the EEC.

(7) *Advice from Private Sector to STR.* The Act provides an elaborate system of committees to ensure that the private sector—consumers, labor, and industry—have full opportunity to express their views and give advice to the STR on the multilateral trade negotiations. (Section 135).

(8) *United States International Trade Commission.* The Trade Act changes the name of the old Tariff Commission, expands its authority substantially, and takes various steps to assure that it will operate as a body largely independent of the executive branch. (Title I Chapter 7).

II. RELIEF FROM INJURY CAUSED BY IMPORT COMPETITION

(1) *Import Relief and Adjustment Assistance.* The Trade Act makes adjustment assistance to employees displaced by increased imports (and import relief, if deemed necessary) much more readily available, whether or not these imports involve unfair trade practices and whether or not the increased imports result from U.S. tariff concessions. (Sections 201, 221, 223). These are major changes from the 1962 Act. It also ensures that adjustment assistance is furnished much more speedily than under the earlier act. (Sections 221-223)

III. RELIEF FROM UNFAIR TRADE PRACTICES

(1) *Anti-Dumping Duties.* Although the changes made in this area are largely procedural in nature, they are so extensive that they may very well cause substantive changes in both the administration of the Act and in the extent of protection afforded to industries and employees in the United States. On the one hand, the time limits set by the Act will almost surely result in a speedier handling of complaints, and more information will be available to all interested parties as to the actions taken by the Treasury Department and the Commission and the basis for their decisions. On the other hand, the fact that the Treasury Department has somewhat less discretion than in the past may result in its adopting regulations which impose detailed and rigid requirements as to the required content of complaints to be submitted to them. (Section 321).

(2) *Countervailing Duties.* The Act has been much expanded, both substantively and procedurally, and one major result should be that considerably more information will be available both to industry and to importers as to the actions taken by the Treasury Department on complaints. (Section 331).

Section IV. Trade Relations with Communist Countries

Despite the fact that Congress has insisted upon engrafting the freedom of emigration provision into this portion of the Trade Act, the noteworthy fact is that the President is authorized to enter into commercial agreements with Communist countries giving most-favored-nation treatment, if the freedom of emigration requirement is met, if the agreement contains a number of specific provisions set out in the Trade Act, and if the agreement is approved by Congress. The 1962 Act simply prohibited the President from acting in this area. (Title IV)

Section V. Trade Relations with Canada

The Trade Act permits the President to initiate negotiations for a trade agreement with Canada to establish a free trade area covering the United States and Canada, any such agreement to be subject, of course, to Congressional approval. (Section 612).

