

**THE TRADE AND TARIFF ACT OF 1984:
FROM THE CUSTOMS TREATMENT OF MANHOLE COVERS
TO THE RETURN OF GOODS FROM OUTER SPACE**

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I. INTRODUCTION

The Trade and Tariff Act of 1984 (TTA) began life, as a formal matter, as a Miscellaneous Tariff Bill, H.R. 3398, and miscellaneous it certainly is.¹ The TTA reaches literally from the depths to the heights, providing for the method of country-of-origin marking on manhole covers and for the customs treatment of articles returned from space.² While the TTA deals with many items of this magnitude, it does much more, for H.R. 3398 became the vehicle to which other, more significant, trade measures were attached. No fewer than four separate acts are part of the TTA: (1) The "International Trade and Investment Act" is Title III;³ (2) The "Generalized System of Preferences Renewal Act of 1984" is Title V;⁴ (3) The

1. The Tariff and Trade Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984), reprinted in 1984 U.S. CODE CONG. & AD. NEWS SUPP. (No. 10) (Dec. 1984) [hereafter cited as the TTA; hereinafter cited to 98 Statutes at Large (1984)].

2. TTA § 207 amends § 304 of the Tariff Act of 1930 (Tariff Act) by adding a new subsection (e), "Marking of certain manhole rings or frames, covers and assemblies thereof." Tariff Act, § 304(e), 19 U.S.C. § 1304(e) (1982), as amended and redesignated by TTA § 207(2), *supra* note 1, at 2976. Section 209 is entitled "Articles returned from Space." Tariff Act § 484a, as added by TTA § 209, *id.* Both matters were the subject of contemporaneous, but presumably coincident, press coverage: *The Manhole Cover Is A Thing Of Beauty to Howrah, India—Alleyway Industrialists Seek Their Fortunes In Capping The Sewers Of America*, Wall St. J., Nov. 29, 1984 at 1, col. 4; *U.S. Is Looking For New Ways To Spur Space Manufacturing*, Wall St. J., Nov. 16, 1984, at 23, col. 1.

3. TTA § 301, *supra* note 1, at 3000 (to be codified at 19 U.S.C. § 2101 note). See *infra* notes 143-72 and accompanying text.

4. TTA § 501, *supra* note 1, at 3018 (to be codified at 19 U.S.C. § 2101 note). See *infra* notes 173-201 and accompanying text.

"Steel Import Stabilization Act" is Title VIII;⁵ (4) The "Wine Equity and Export Expansion Act of 1984" is Title IX.⁶

In addition to these, the TTA includes important amendments to the antidumping and countervailing duty provisions of the Tariff Act of 1930 (Tariff Act),⁷ changes in the customs treatment of numerous articles,⁸ and authority to enter into a free trade arrangement with Israel.⁹ Also contained in the TTA are important provisions dealing with trade in services and expanding protection for intellectual property rights.¹⁰

II. LEGISLATIVE BACKGROUND

The legislative history of the Trade and Tariff Act of 1984 is diverse, and its antecedents are many. In addition to H.R. 3398, the Miscellaneous Tariff Bill, these include provisions or ideas originally generated in numerous other pieces of proposed legislation such as: (1) H.R. 2848, dealing with reciprocity in services;¹¹ (2) H.R. 3795, concerning trade in wine;¹² (3) H.R. 4784, the Trade Remedies Reform Act of 1984;¹³ (4) H.R. 4901, dealing with customs forfeitures;¹⁴ (5) H.R. 5081, providing for import quotas on steel

5. TTA § 801, *supra* note 1, at 3043 (to be codified at 19 U.S.C. § 2253 note). *See infra* notes 202-19 and accompanying text.

6. TTA § 901, *supra* note 1, at 3047 (to be codified at 19 U.S.C. § 2801 note). *See infra* notes 232-55 and accompanying text.

7. *See infra* notes 29-133 and accompanying text. The antidumping and countervailing duty provisions are contained in Title VII of the Tariff Act, as amended. 19 U.S.C. § 1671 *et seq.* (1982). The antidumping provisions of the Tariff Act are aimed at the practice of an exporter's selling in the United States below "fair value" which generally is the price the exporter charges for the same merchandise at the same time in the markets of its home country. If such sales occur, and if they cause material injury, Title VII of the Tariff Act provides for imposition of a special duty to offset the price differential. The countervailing duty provisions are aimed at subsidies that provide an export incentive. Title VII provides for a duty to offset or "countervail" the amount of such subsidies.

8. *See infra* notes 276-84 and accompanying text.

9. *See infra* notes 220-231 and accompanying text.

10. *See infra* notes 143-72; 320-27 and accompanying text.

11. A bill to establish a service industries development program, and for other purposes. H.R. 2848, 98th Cong., 2d Sess., 129 CONG. REC. H2529 (May 2, 1983).

12. A bill to harmonize, reduce, and eliminate barriers to trade in wine on a basis which assures substantially equivalent competitive opportunities for all wine moving in international trade. H.R. 3795, 98th Cong., 2d Sess., 129 CONG. REC. H2529 (May 2, 1983).

13. A bill to reform the remedies available to U.S. producers regarding unfair import competition, and for other purposes. H.R. 4784, 98th Cong., 2d Sess., 130 CONG. REC. H652 (Feb. 8, 1984).

14. A bill to amend the Controlled Substances Act, the Controlled Substances Import and Export Act, and the Tariff Act of 1930 to improve forfeiture provisions and strengthen

products;¹⁵ (6) H.R. 5188, containing the fiscal 1985 authorizations for the U.S. Customs Service, the International Trade Commission, and the Office of U.S. Trade Representative;¹⁶ (7) H.R. 5377, authorizing the U.S.-Israel free trade area;¹⁷ (8) H.R. 6023, extending the U.S. Generalized System of Preferences (GSP);¹⁸ (9) H.R. 6064, another miscellaneous tariff and customs reform measure;¹⁹ and (10) H.R. 6301, another bill calling for restrictions on steel imports.²⁰

In the autumn of 1984, as the 98th Congress moved to its final adjournment, trade issues coalesced. The Senate acted in September, utilizing H.R. 3398 as its vehicle for trade legislation.²¹ After three days of debate, the Senate unanimously approved an Omnibus Trade Bill on September 20, 1984.²² This measure authorized negotiations on a bilateral free trade area with Canada, as well as with Israel, provided for the extension of GSP, and made a number of revisions in the antidumping and countervailing duty laws.²³

penalties for controlled substances offenses, and for other purposes. H.R. 4901, 98th Cong., 2d Sess., 130 CONG. REC. H809 (Feb. 22, 1984).

15. A bill to reduce unfair trade practices and provide for orderly trade in certain carbon, alloy, and stainless steel mill products, to reduce unemployment, and for other purposes. H.R. 5081, 98th Cong., 2d Sess., 130 CONG. REC. H1514 (Mar. 8, 1984).

16. A bill to authorize appropriations for the U.S. International Trade Commission, the U.S. Customs Service, and the Office of the U.S. Trade Representative for fiscal year 1985, and for other purposes. H.R. 5188, 98th Cong., 2d Sess., 130 CONG. REC. H1787 (Mar. 20, 1984).

17. A bill authorizing the President to enter into, and to proclaim modifications necessary to implement, a trade agreement with Israel providing for duty-free treatment for, and the elimination of import restrictions on, the products of Israel. H.R. 5377, 98th Cong., 2d Sess., 130 CONG. REC. H2460 (Apr. 5, 1984).

18. A bill to amend the Trade Act of 1974 to renew the authority for the operation of the generalized system of preferences, and for other purposes. H.R. 6023, 98th Cong., 2d Sess., 130 CONG. REC. H7842 (July 25, 1984).

19. A bill to change the tariff treatment with respect to certain articles, and for other purposes. H.R. 6064, 98th Cong., 2d Sess., 130 CONG. REC. H8397 (Aug. 2, 1984).

20. A bill to provide authority for enforcing arrangements restricting the importation of carbon and alloy steel products into the United States that are entered into for purposes of implementing the President's national policy for the steel industry, and for other purposes. H.R. 6301, 98th Cong., 2d Sess., 130 CONG. REC. H10193 (Sept. 25, 1984).

21. U.S. Constitution, art. I, § 7 provides "All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills." U.S. CONST. art. I, § 7. Since a tariff measure is a revenue raising measure, the Senate cannot act until the House has provided a legislative "vehicle" for the Senate to amend.

22. 1 INT'L TRADE REP. (BNA) at 336 (Sept. 26, 1984).

23. *Id.*

On October 3, 1984, the House debated and passed five trade related bills: (1) the steel import measure (H.R. 6301); (2) the U.S.-Israel free trade area bill (H.R. 5377); (3) the wine trade measure (H.R. 3795); (4) GSP extension (H.R. 6023); and (5) a modified reciprocity in services trade measure (H.R. 2848). All of these bills had been approved previously by the Ways and Means Committee, and were adopted by overwhelming votes in the House.²⁴ These measures, combined with the Trade Remedies Reform Act of 1984, previously passed by the House, provided most of the bases for what became the TTA.²⁵

Following final House action on October 3, House and Senate managers went to conference on October 4 and 5, and reached the compromise that now is the Trade and Tariff Act of 1984. On October 9, 1984, the TTA passed the House by a vote of 386 to 1 and the Senate by voice vote.²⁶ The President signed the measure into law on October 30, 1984, hailing it as "the most important trade law approved by the Congress in a decade."²⁷ He lauded the House-Senate Conference for crafting "a fine piece of legislation that stands four-square behind free and fair trade."²⁸

The President's assessment that the Trade and Tariff Act of 1984 "stands four-square behind free and fair trade" is one that may not merit unanimous acceptance. A closer look at the major provisions of the TTA will show why this might be the case.

24. 1 INT'L TRADE REP. (BNA) at 388 (Oct. 10, 1984).

25. H.R. 4784, *supra* note 13, passed the House on July 26, 1984. 130 CONG. REC. H7953 (July 26, 1984).

26. *Id.*

27. 1 INT'L TRADE REP. (BNA) at 528 (Oct. 31, 1984). The President's remark is a bit of obvious partisan hyperbole. The Trade Agreements Act of 1979, 19 U.S.C. § 2501 *et. seq.*, implementing the agreements reached in the Tokyo Round of trade negotiations, and making extensive changes in U.S. antidumping and countervailing duty laws, among other things, was a far more important piece of legislation by any measure than the Trade and Tariff Act of 1984, important as this is. The Trade Agreements Act of 1979, however, was enacted during the Democratic Carter Administration. The previous piece of significant trade legislation was the Trade Act of 1974, 19 U.S.C. § 2101 *et. seq.*, enacted during the Ford Administration. U.S. participation in the "Tokyo Round" was authorized by Title I of the Trade Act of 1974, 19 U.S.C. § 2111. It was the seventh round of trade negotiations held under the auspices of the General Agreement on Tariffs and Trade, and officially began with the signing in September 1973, by the ministers of more than 100 countries, of the Tokyo Declaration—hence the name of the round. See, Graham, *Results of the Tokyo Round*, 9 GA. J. INT'L & COMP. L. 153 (1979); McRea & Thomas, *The GATT and Multilateral Treaty Making: The Tokyo Round*, 77 AM. J. INT'L LAW 51 (1983).

28. INT'L TRADE REP., *supra* note 27. The President's enthusiasm might have been generated in part by what was *not* in the bill. See, *e.g.*, *infra* notes 139-142 concerning

III. TRADE LAW REFORM

The most extensive portion of the TTA is Title VI dealing with reform of the antidumping and countervailing duty provisions of the Tariff Act. While no major overhaul of the existing system took place, a number of the changes are important. An examination of those changes will serve as an appropriate starting point for an examination of the many diverse provisions of the TTA.

A. FUTURE SALES AND LEASES

An extension of the reach of the countervailing duty and antidumping provisions of the Tariff Act to sales for future delivery is made explicit by section 602 of the TTA, confirming existing International Trade Administration (ITA) and International Trade Commission (ITC) practice.²⁹ This has particular relevance for the question of "causation" in material injury determinations. Presently, the ITC may reach an affirmative injury determination under the countervailing duty and antidumping provisions of the Tariff Act if the injury is "by reason of imports of that merchandise."³⁰ The TTA adds that an affirmative ITC determination also may be reached if the harm is determined to be "by reason of sales (or the likelihood of sales) of that merchandise for importation."³¹

In addition, reach of these provisions of the Tariff Act to leasing arrangements is made explicit by the TTA. Both are amended to provide that a reference to the sale of foreign merchandise "includes the entering into of any leasing arrangement regarding the

"downstream dumping."

29. Tariff Act § 701(a)(2), 19 U.S.C. § 1671(a)(2), as amended by TTA § 602(a)(1), *supra* note 1, at 3024. Additionally, the countervailing duty provisions of the Tariff Act are made parallel to the antidumping provisions to include goods "sold (or likely to be sold) for importation." Tariff Act § 701(a)(1), U.S.C. § 1671(a)(1), as amended by TTA § 602, *id.* Compare Tariff Act § 701(a), 19 U.S.C. § 1671, as amended by TTA § 602, *supra* note 1, at 3024 with Tariff Act § 731(a), 19 U.S.C. § 1673.

30. 19 U.S.C. §§ 1671, 1673. For a discussion of whether the U.S. International Trade Commission (USITC) should consider the amount of any subsidy or dumping margin in determining whether injury is "by reason of" subsidized or dumped imports, see Palmeto, *Countervailing Subsidized Imports: The International Trade Commission Goes Astray*, 2 UCLA PAC. BASIN L. J. 1 (1983); Easton & Perry, *The Causation of Material Injury: Changes in the Antidumping and Countervailing Duty Investigations of the International Trade Commission*, 2 UCLA PAC. BASIN L. J. 35 (1983); Palmeto, Remarks, 2 UCLA PAC. BASIN L. J. 57 (1983); Note, *ITC Injury Determination in Countervailing Duty Investigations*, 15 LAW & POLY INT'L BUS. 987 (1983).

31. Tariff Act, §§ 701(a)(2), 731, 19 U.S.C. §§ 1671, 1673, as amended by TTA § 602, *supra* note 1, at 3024.

merchandise that is equivalent to the sale of the merchandise."³² The actual working of these provisions could be complex.³³

B. WAIVER OF VERIFICATION: COUNTERVAILING DUTIES

An ostensibly innocuous provision conforming the verification requirements of the countervailing duty provisions of the Tariff Act to the antidumping provisions conceivably could cause difficulty in actual practice. Section 776 of the Tariff Act provides generally that all information relied upon by the ITA in making a final determination shall be verified, and that the methods and procedures used to verify the information shall be published in the determination.³⁴

In an antidumping proceeding, a preliminary determination by the ITA is normally due within 160 days of the filing of a petition.³⁵ However, if the petitioner provides an irrevocable written waiver of verification, and an agreement that it is willing to have a preliminary determination made on the basis of the record then available to the ITA, the preliminary determination shall be made within ninety days of the commencement of the investigation (fifty days earlier than normal).³⁶ Waiver has not commonly occurred, presumably because the fifty-day gain is not seen by petitioners

32. *Id.*

33. When a lease is the "equivalent" of a sale and when it is not is not necessarily clear. It is also not clear whether goods for lease to the United States would be compared, in antidumping investigations, for example, only with leases in the home market, or whether export leases would be compared to home market sales. If the comparison would be to sales, it is not clear how that comparison might be made. Of course, a lease in and of itself cannot be the subject of the duty—only the merchandise that is imported pursuant to the lease can be dutied. There are no provisions in the Tariff Schedules of the United States for leases *per se*. Goods that enter under lease are subject to duty like any other goods in accordance with their value. Because the goods are not subject to a sale, normal transaction value presumably would not apply. One of the other methods of valuation, such as transaction value of identical or similar goods, deductive value or computed value, likely would be utilized. The valuation provisions of the Tariff Act are set forth in § 402, 19 U.S.C. § 1401a (1982). Customs regulations applicable to valuation are set forth in 19 C.F.R. §§ 152.100-152.108 (1984). United States law with regard to the valuation of imported merchandise constitutes domestic implementation of The Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade (relating to customs valuation) done Apr. 16, 1979, reprinted in AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, 96th Cong., 1st Sess., Pt. 1, 1-65 (1979). See, SHERMAN & GLASHOFF, A BUSINESS MAN'S GUIDE TO THE GATT CUSTOMS VALUATION CODE (1980).

34. 19 U.S.C. § 1677(e).

35. 19 U.S.C. § 1673b(b)(1).

36. 19 U.S.C. § 1673b(b)(2).

as worth the risk of relying upon an unverified response by one or more companies to an antidumping questionnaire.³⁷

No comparable provision appeared in the original countervailing duty sections of the Tariff Act. This now is changed by section 603 of the TTA which adds to the countervailing duty section the requirement that the preliminary determination be made "on an expedited basis" if waiver of verification is obtained.³⁸

This provision could have more significance than its antidumping counterpart because (1) countervailing duty investigations have to do with government programs which tend not to change significantly without public announcement. Thus, information verified in one case may be relied upon in the next;³⁹ and (2) in contrast to antidumping procedures, verification of responses in countervailing duty investigations usually takes place *after*, not before, the preliminary determination.⁴⁰ Thus, petitioners may be willing to rely on government responses that essentially repeat previously verified information. If they do, the already shortened time for response and analysis before a preliminary countervailing determination may be shortened even more.

Still, waiver of verification even in these circumstances may not be worth it for a countervailing petitioner. The only benefit a petitioner receives for foregoing verification is earlier application of the estimated duty or bonding sanctions that flow from an

37. The preliminary determination is the first instance in which the investigated imports usually become subject to the sanctions of the law, if they are found preliminary to be sold at less than fair value. From that date importers must post a bond in the amount of the estimated dumping duty, as announced in the preliminarily determination. 19 U.S.C. 1673b(d). Since exporters, in their responses, may be suspected to minimize the amount, if any, by which they are selling below fair value, and since verification in an antidumping proceeding usually occurs prior to the preliminary determination by ITA, petitioners normally prefer to have the verified response serve as the basis of the preliminary determination—and, of course, as the measure of estimated duties that must be paid.

38. Tariff Act § 703(b)(3), 19 U.S.C. § 1671(b)(3), as added by TTA § 603, *supra* note 1, at 3024-25.

39. Antidumping investigations, by contrast, deal with prices and costs of individual firms and—totally apart from the question of whether governments or firms are likely to be more credible in their responses—information obtained in one antidumping investigation is unlikely to be of important use in another.

40. This basically is for administrative reasons: the preliminary determination in an antidumping investigation, as noted, is due within 160 days after the filing of the petition. 19 U.S.C. § 1673b(b)(1). In a countervailing duty proceeding, ITA must reach its preliminary determination within 85 days. 19 U.S.C. § 1671b(b). The comparative shortness of time in a countervailing duty case normally does not permit verification prior to the preliminary determination.

affirmative preliminary determination. But how much earlier? Since the investigation is likely not to have been initiated and a questionnaire presented to the foreign government before the twentieth day after the petition is filed, and since the foreign government is likely to be given at least thirty days to respond to the questionnaire, at most only an additional thirty-five days to the preliminary determination remain.⁴¹ In this time, the ITA must analyze the response and make the calculations necessary to its preliminary determination—a task that will consume a considerable portion of that thirty-five days. This is particularly likely to be the case if, in addition to a response submitted by a foreign government concerning the nature of its programs, ITA must process responses submitted by foreign companies concerning the extent to which they participated in the programs.

Petitioners who elect to waive verification in countervailing duty investigations, therefore, may gain only a few of the thirty-five days between submission of a response and the usual preliminary determination, at a cost of giving up verification entirely. This cost may prove to be unacceptable.

C. SETTLEMENT AGREEMENT AUTHORITY

Both countervailing duty and antidumping investigations may be terminated or suspended in limited circumstances. An investigation may be terminated if the petition is withdrawn or it may be suspended by agreement. In a countervailing duty investigation, the agreement may be to eliminate or offset the subsidy, to cease exports, or to eliminate the injurious effects of exports of subsidized merchandise to the United States. In an antidumping investigation, the agreement may be to eliminate completely sales at less than fair value, to cease exports, or to eliminate the injurious effects of the exports to the United States of merchandise priced below fair value.⁴²

The most important changes to these provisions by the TTA have to do with termination of investigations upon withdrawal of

41. The Department of Commerce must determine, within 20 days after the date on which a petition is filed, whether the petition alleges the elements necessary for the imposition of a countervailing duty, and, if so, to initiate the investigation. 19 U.S.C. § 1671b(c).

42. The provisions governing termination or suspension of countervailing duty investigations are set forth in Tariff Act § 704, 19 U.S.C. § 1671c. Those governing terminations or suspension of antidumping investigations are set forth in Tariff Act § 734, 19 U.S.C. § 1673c.

petitions. Prior to enactment of the TTA, cases were terminated upon withdrawal of petitions without the application of explicit standards.⁴³ Since a proceeding under the countervailing duty or antidumping provisions of the Tariff Act is investigatory and not adversarial, a petition and a petitioner are not necessary to the matter.⁴⁴ However, as a practical matter, both the ITA and the ITC have terminated investigations when petitions were withdrawn.⁴⁵

Withdrawal of a petition does not occur in a vacuum. A petitioner would have little incentive to withdraw unless there were some action or concession on the part of the exporters or their government which was not possible under the other settlement mechanisms of the law and which was sufficient as a *quid pro quo* in the estimation of the petitioner. Since any action exporters could take to obtain withdrawal of a petition would be confined largely, if not exclusively, to matters relating to price or quantity, antitrust problems are apparent. Presumably, in order to establish more public control over this area, the TTA provides specific guidance to ITA before termination upon withdrawal of the petition.

The TTA provides that the ITA may not terminate an investigation upon withdrawal of the petition by accepting "an understanding or other kind of agreement" limiting imports unless ITA "is satisfied" that termination based on the agreement is in the public interest.⁴⁶ In reaching its public interest decision, the ITA is instructed to take into account:

- (i) whether, based on the relative impact on consumer prices and the availability of supplies of the merchandise, the agreement would

43. "An investigation under this part may be terminated by either the administering authority or the Commission after notice to all parties to the investigation, upon withdrawal of the petition by the petitioner." 19 U.S.C. §§ 1671c, 1673c.

44. Tariff Act §§ 702(a) and 732(a), 19 U.S.C. §§ 1671a, 1673a, provide for the initiation of countervailing duty and antidumping investigations, respectively, without petition.

45. See, e.g., *Certain Carbon Steel Products From Mexico; Termination of Countervailing Duty Investigations*, 49 Fed. Reg. 17790 (1984): investigation terminated upon withdrawal of petition; *Certain Steel Products From Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands and the United Kingdom; Termination of Countervailing Duty and Antidumping Investigations*, 47 Fed. Reg. 49058 (1982): antidumping and countervailing duty investigations terminated upon withdrawal of petitions. From January 1980 to December 1984, five antidumping investigations and 10 countervailing duty investigations were terminated by withdrawal of petitions. STAFF OF SUBCOMM. ON TRADE, COMM. ON WAYS AND MEANS, 98TH CONG. 2d SESS., OVERVIEW OF CURRENT PROVISIONS OF U.S. TRADE LAW, 46, 55 (Comm. Print 98-40 1984) [hereinafter cited as OVERVIEW].

46. Tariff Act § 704(a)(2)(A), 19 U.S.C. § 1671c and Tariff Act § 734(a)(2)(A), 19 U.S.C. § 1673c as amended by TTA § 604, *supra* note 1, at 3025-28.

have a greater adverse impact on United States consumers than the imposition of countervailing duties;

(ii) the relative impact on the international economic interests of the United States;

(iii) the relative impact on competitiveness of the domestic industry producing the like merchandise, including any such impact on employment and investment in that industry.⁴⁷

Before making a decision to terminate, the ITA is required by the TTA to consult with all parties to the investigation and with potentially affected consuming industries as well as potentially affected producers and workers in the domestic industry, including producers and workers not party to the investigation.⁴⁸

These expanded, more specific public interest factors are applied by the TTA to acceptance by the ITA of agreements eliminating the injurious effect of exports to the U.S.⁴⁹ The Tariff Act, by contrast, provided simply that such an agreement could not be accepted unless ITA was "satisfied that suspension of the investigation is in the public interest."⁵⁰ Presumably, in actual practice, ITA did consult with domestic interests prior to accepting agreements, and, therefore, this provision of the TTA may mean little actual change. However, the TTA does formalize a significant "injury determination" role for the ITA that did not exist previously. The requirement that the ITA, before terminating upon withdrawal of petition or accepting agreements to eliminate the injurious effect of imports, take into account the agreement's "relative impact on the competitiveness of the domestic industry producing the

47. Tariff Act §§ 704(a)(2)(B), 19 U.S.C. § 1671c, as amended by TTA § 604(a), *id.* at 3025-26; Tariff Act § 734(a)(2)(B), 19 U.S.C. § 1673c, as amended by TTA § 604(b), *id.* at 3026-28.

48. Tariff Act §§ 704(a)(2)(C), 19 U.S.C. § 1671c, as amended by TTA § 604(a), *supra* note 1, at 3026; Tariff Act § 734(a)(2)(C), 19 U.S.C. § 1673c, as amended by TTA § 604(b), *id.* at 3027. The requirement that potentially affected consuming industries be consulted in reaching a "public interest" decision as to whether to accept withdrawal restrictions seems sound. The requirement that non-party producers and workers in the domestic industry be consulted seems odd since, presumably, were they interested in the outcome of the investigation, they could become parties. 19 U.S.C. § 1677(9). In industries with many firms, however, the right to be consulted before petition withdrawal is accepted may induce many firms and workers groups not to become parties to the proceeding and, thereby, avoid unnecessary multiplicity of parties in an already unwieldy process.

49. Tariff Act § 704(c), 19 U.S.C. § 1671(c), provides for agreements eliminating the injurious effects of imports in countervailing duty proceedings. Tariff Act § 734(c), 19 U.S.C. § 1673(c), provides for such agreements in antidumping investigations.

50. 19 U.S.C. §§ 1671c(d)(1)(A), 1673c(d)(1)(A).

like merchandise, including any such impact on employment and investment in that industry,"⁵¹ certainly gives the ITA a task it did not possess earlier. Whether this "injury determination" role for the ITA in the settlement process foreshadows its eventual takeover of that function from the ITC remains to be seen.⁵²

D. CONSULTATIONS AND DETERMINATION REGARDING QUANTITATIVE RESTRICTION AGREEMENTS

The continuing interest of the United States in obtaining elimination of subsidies is reflected in a new requirement for consultations to begin within ninety days after the acceptance of a quantitative restriction agreement in conjunction with termination or suspension of an investigation.⁵³ The President is required to enter into consultation with the government that is a party to the quantitative restriction agreement for the purpose of reducing the net subsidy to a level that completely eliminates the injurious effect of the merchandise exports to U.S. producers.⁵⁴ The ITA is also required to modify a quantitative restriction agreement, at the direction of the President, as a result of these consultations.⁵⁵

51. See *supra* note 47.

52. The ITC plays a formal role in the suspension agreement process. If, within 20 days of suspension of an investigation, an interested party petitions for review, the ITC will determine whether the injurious effects of the imports which are the subject of the agreement are eliminated completely by the agreement. A negative determination will cause resumption of the investigation. 19 U.S.C. § 1071c(h) (countervailing duty); 19 U.S.C. §§ 1673c(h), 1673c(h) (antidumping). See *infra* note 72 and accompanying text.

53. Tariff Act § 761, as added by TTA § 611(a), *supra* note 1, at 3031-32.

54. *Id.* Logically, the goal of reducing the subsidy to a level that eliminates the injurious effect of the imports would seem to be redundant. The quantitative restriction itself may not be accepted unless it eliminates "completely" the injurious effect of the exports. 19 U.S.C. § 1671c(c)(1)(3). If the injurious effect of the exports has been eliminated "completely" by the quantitative restriction, what is left to be eliminated by the reduction of the subsidy?

55. Tariff Act 761(b), 19 U.S.C. § 1676, as added by TTA § 611(a), *supra* note 1, at 3032. The House would have required "negotiations," but the Conferees agreed to alter this to "consultations." H. Conference Rep. No. 1156, 98th Cong., 2d Sess. (1984), reprinted in 1984 U.S. CODE CONG. & AD. NEWS SUPP. (No. 10B) 5220, 5285-86, [hereinafter cited as Conference Report]. It remains to be seen whether at the "direction of the President" in practice may come to mean at the "direction of the U.S. Trade Representative (USTR)." If so, this could mean a larger policy role for the USTR in the settlement of these cases. The USTR's role is at best ambiguous. Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69,273 (1979), 19 U.S.C. § 2171, transferred responsibility for administration of the antidumping and countervailing duty laws from the Department of Treasury to the Department of Commerce. It also gave USTR responsibility for establishing U.S. trade policy with regard to enforcement of the

The TTA provides a mechanism for reinstatement of countervailing duties upon termination of a suspension agreement, if economic conditions warrant. The TTA authorizes the President to direct the ITA to initiate a proceeding to determine whether subsidies continue to be provided on merchandise which is the subject of the agreement, and if so, the amount of the net subsidy. If such a proceeding is initiated, the ITC is required to conduct its own investigation to determine "whether imports of the merchandise of the kind subject to the agreement will, upon termination of the agreement, materially injure or threaten with material injury, an industry in the United States or materially retard the establishment of such an industry."⁵⁶ If both determinations are affirmative, once the agreement terminates, suspension of liquidation on the entries will begin, and the countervailing duty order shall be issued.⁵⁷

E. CRITICAL CIRCUMSTANCES

The present antidumping and countervailing duty provisions of Title VII of the Tariff Act provide for special "critical circumstances" determinations that may have the effect of advancing the date of potential liability for the special duties.⁵⁸ Normally, such liability would begin at the date of "suspension of liquidation" which is the date when the ITA first makes an affirmative determination, whether preliminary or final.⁵⁹ For example, if the ITA preliminary determination is affirmative, then suspension of liquidation would begin at that point.

A "critical circumstances" determination would advance the date of potential duty liability to ninety days before the date on which suspension of liquidation was first ordered.⁶⁰ In a normal antidumping investigation, a preliminary determination is made on day 160.⁶¹ A critical circumstances determination in this event would

antidumping and countervailing duty laws. *Id.* But with operational control at the Department of Commerce, USTR's policy authority has been less than over-whelmingly evident. See, Palmer & Kossel, *Restructuring Executive Branch Trade Responsibilities: A Half-Step Forward*, 12 LAW & POLY INTL BUS. 611 (1980).

56. Tariff Act § 762, 19 U.S.C. § 1676a, as added by TTA § 611(a), *supra* note 1, at 3032.

57. Tariff Act § 762(b), 19 U.S.C. § 1676a(b), as added by TTA § 611(a), *id.*

58. 19 U.S.C. §§ 1671b(e), 1673b(e).

59. 19 U.S.C. §§ 1671b(d), 1673b(d).

60. See *supra* note 58.

61. 19 U.S.C. § 1673b(d).

mean that the potential liability could reach back retroactively to as early as seventy days after the filing of the petition. In a normal countervailing duty investigation, a preliminary determination is made on day eighty-five.⁶² A critical circumstances determination in this event would mean that potential liability could reach back retroactively to as early as five days prior to the filing of the petition itself.

In order for a critical circumstances determination to be made, findings must be made both by the ITA and the ITC. In antidumping investigations, ITA must determine that (1) there is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation, or (2) that the importer knew or should have known that the exporter was selling at less than fair value, and (3) that there have been "massive" imports of the merchandise over a relatively short period of time.⁶³ In countervailing investigations, ITA must determine that (1) the subsidy involved is inconsistent with the Subsidies Agreement⁶⁴ and that (2) there have been massive imports of the merchandise over a relatively short period of time.⁶⁵ In both cases, the ITC must determine whether material injury was by reason of the massive imports of that merchandise over a relatively short period of time, and whether retroactive duties are necessary to prevent material injury from recurring.⁶⁶

The TTA makes an essentially technical correction in the law as regards ITA procedures. Under Title VII of the Tariff Act, before amendment by the TTA, if the preliminary ITA critical circumstances determination was negative there was no explicit authority for the ITA to reverse this preliminary determination and reach an affirmative determination at the final.⁶⁷ The TTA amends Title VII to provide that a final antidumping or countervailing duty determination on critical circumstances may be affirmative even though the preliminary determination was negative.⁶⁸

62. 19 U.S.C. § 1671b(b).

63. 19 U.S.C. § 1673b(e).

64. See, Subsidies Agreement, *supra* note 33.

65. 19 U.S.C. § 1671b(e). The term "massive" is not defined.

66. 19 U.S.C. §§ 1671d(b)(4), 1673d(b)(4).

67. See 19 U.S.C. §§ 1671b, 1671d (countervailing duty); 19 U.S.C. §§ 1673b, 1673d (antidumping).

68. Tariff § 705(a)(2), 19 U.S.C. § 1671d(a)(2), as amended by TTA § 605(a)(1), *supra* note 1, at 3028. The critical circumstances rule has the effect of discouraging exporters and

F. COUNTRY-WIDE OR FIRM-SPECIFIC COUNTERVAILING DUTIES

A persistent question in the administration of the countervailing duty provisions of the Tariff Act is whether the duties should be applied uniformly, on a country-wide basis, or whether they should be company-specific. If Firm A in the exporting country receives a subsidy of twenty percent, and Firm B a subsidy of 10 percent, should the countervailing duty be 20 percent for Firm A and 10 percent for Firm B, or should it be the average—say, 15 percent—for both of them?

ITA has favored the country-wide average approach.⁶⁹ An average tends to be simpler to administer, particularly in the annual review phase. Moreover, since it may be said that in a countervailing duty investigation—in contrast to an antidumping investigation—the ITA is concerned with the programs of governments rather than the practices of companies, the averaging approach may be more effective. Since the average will impose a duty on the products of firms below the average that is higher than the benefit they receive, their complaints to their governments about this state of affairs might be effective in obtaining changes in the programs involved—provided, of course, that the expressions of glee from the firms receiving benefits greater than average, and whose duty is less than the benefit, do not outweigh these complaints.

The TTA, in any event, reinforces ITA's preference without making it mandatory. It amends section 706 of the Tariff Act by providing that the same countervailing duties shall "presumptively apply" to all of the merchandise in question from a particular country unless there is a significant differential between companies receiving subsidy benefits or unless a state-owned enterprise is involved.⁷⁰ If either of these conditions is satisfied, ITA "may pro-

importers from attempting to enter as much merchandise as possible prior to a preliminary determination. Congress, in enacting the critical circumstances provisions, apparently was concerned that exporters and importers, in anticipation of an adverse determination, would flood the market with massive imports in the relatively short period between the time they first learned of the investigation and the time of the preliminary determination.

69. See, e.g., *Final Affirmative Countervailing Duty Determination; Cold-Rolled Carbon Steel Flat-Rolled Products From Korea; and Final Negative Countervailing Duty Determination; Carbon Steel Structural Shapes from Korea*, 49 Fed. Reg. 47284, 47297 (1984): "It is the Department's policy to issue country-wide rates unless separate enterprises have received significantly different benefits." *Id.*

70. Tariff Act § 706(a), 19 U.S.C. § 1671e(a), as amended and redesignated by TTA § 607, *supra* note 1, at 3029.

vide for differing countervailing duties."⁷¹ The permissive language appears to give ITA a free hand to decide either way.

G. MONITORING

Under TTA section 609, explicit authority is given to ITA to monitor imports of merchandise from countries not subject to antidumping investigations if (1) imports from other countries of the same merchandise have been subject to antidumping duty orders; (2) there is reason to believe that persistent, injurious dumping of that product from additional countries is occurring; and (3) in the judgment of ITA, "this extraordinary pattern is causing a serious commercial problem for the domestic industry."⁷² The ITA is directed to initiate an investigation on its own motion, if during this monitoring period it determines that there is sufficient information to commence a formal investigation regarding an additional supplier country.⁷³

H. REVIEWS AND DETERMINATIONS

Section 751 of the Tariff Act presently requires an annual review of each outstanding antidumping and countervailing duty order.⁷⁴ The purpose of this review is to determine, for the preceding twelve month period, the actual amount of any dumping margin or subsidy.⁷⁵ Upon determination of these amounts, entries are liquidated and the appropriate antidumping or countervailing duty, if any, is assessed.⁷⁶ The amount of dumping margin or subsidy established for the review period then becomes the deposit

71. *Id.* The Conferees observed: "This provision is intended to lessen the administrative burden on the administering authority stemming from implementing company-specific rates. The amendment continues to permit individual company rates for significant differences in benefits. The administering authority is expected to determine under what conditions company-specific rates are appropriate when one of the requirements of paragraph 2 are met." Conference Report, *supra* note 55, at 5297.

72. Tariff Act § 732(a)(2)(A)(iii), 19 U.S.C. 1673a(a)(2)(A)(iii), as amended by TTA § 609, *supra* note 1, at 3030. The ITA's responsibility to determine whether imports from countries not subject to antidumping investigations are "causing a serious commercial problem for the domestic industry" appears to be further encroachment of the ITC's responsibility to make injury determinations. See *supra* note 52 and accompanying text.

73. 19 U.S.C. §§ 1673a(a)(2)(B), 1675(a).

74. 19 U.S.C. § 1675(a)(1).

75. *Id.*

76. *Id.*

amount for the twelve months to come, at which time the review process is repeated.⁷⁷

In actual practice, the administrative burden imposed upon ITA by section 751 has proved to be too much.⁷⁸ The TTA relieves this administrative burden by providing that annual reviews of outstanding antidumping or countervailing duty orders need not be conducted unless a request is made.⁷⁹ This change "is designed to limit the number of reviews in cases in which there is little or no interest, thus limiting the burden on petitioners and respondents, as well as the administering authority."⁸⁰

The language of the TTA does not itself address the question of liquidation of these entries, and how that is to be accomplished. Under the prior statutory scheme, an annual review would be conducted to determine the amount of any antidumping or countervailing duty actually due on each entry during the review period.⁸¹ The estimated duties deposited would not necessarily be related to these amounts, as those estimated duties reflect only the amount of dumping margin or subsidy found to exist in the prior investigatory period or earlier administrative review. If the new amendment is to ease the administrative burden, as well as the burden on the parties, then entries would have to be liquidated without adjustment of the estimated duties deposited. While the

77. Tariff Act § 751(c), 19 U.S.C. 1675(c), provides for revocation of countervailing duty or antidumping duty orders. Ordinarily the Department of Commerce will consider applications to revoke only after a minimum of two years of no sales at less than fair value (antidumping) or no benefits from subsidies (countervailing). 19 C.F.R. §§ 353.54(b), 355.42(b) (1984).

78. This is well known to any practitioner in the area. For example, on June 18, 1982 the Department issued a final determination of sales of less than fair value in *Certain Steel Wire Nails From the Republic of Korea*. 47 Fed. Reg. 39549 (1982). Despite the requirement of section 751 of the Tariff Act, 19 U.S.C. § 1675, that the Department review annually each outstanding order that follows upon an affirmative determination, no such review was conducted in the case of steel wire nails through the end of 1984, some two and one half years after the affirmative determination. The problem is one of resources: the affirmative determinations continue to issue, so the case load increases, but in these days of budget cuts and hiring freezes, the personnel to accomplish the assigned tasks are not increased. With an increased workload and a constant workforce, the result is predictable: delays mount despite the strictures of the law.

79. Tariff Act § 751(a)(1), 19 U.S.C. § 1675(a)(1), as amended by TTA § 611, *supra* note 1, at 3031. The TTA does not, by its terms, require that the request be made by an "interested party."

80. Conference Report, *supra* note 55, at 5298.

81. See *supra* note 40.

statute does not make this explicit, liquidation on this basis is the only logical result of a provision intended to ease the administrative burden on ITA, as well as the burden on petitioners and respondents. The Conference Committee Report makes this explicit: "The committee intends the administering authority should provide by regulation for the assessment of antidumping and countervailing duties on entries for which review is not requested, including the elimination of suspension of liquidation, and/or the *conversion of cash deposits of estimated duties*, previously ordered."⁸²

I. UPSTREAM SUBSIDIES

The term "upstream subsidy" refers to a subsidy conferred upon a product utilized in the production of an exported product. For example, a subsidy paid to a producer of wire could be an "upstream" subsidy in an investigation of coat hangers manufactured from wire. Even if a coat hanger manufacturer receives no subsidies directly, it is possible that coat hanger exports are encouraged artificially by the subsidy paid on wire, an essential input. This would occur if the cost of the coat hanger manufacturer's raw materials were reduced by reason of the subsidy paid to the input supplier.

The ITA, and the Department of Treasury before it, has wrestled with the problem of determining when an upstream subsidy is conferring a benefit upon an investigated, exported product. The TTA essentially codifies current ITA practice. An upstream subsidy, as defined by the TTA, is a government subsidy that:

- (1) is paid or bestowed by that government with respect to a product hereafter referred to as an input product that is used in the manufacture or production in that country of merchandise which is the subject of a countervailing duty proceeding;
- (2) in the judgment of the administering authority bestows a competitive benefit on the merchandise; and
- (3) has a significant effect on the cost of manufacturing or producing the merchandise.⁸³

The question of competitive benefit has been crucial to prior determinations, upon the rationale, preserved in the TTA, that even

82. Conference Report, *supra* note 55, at 5298 (emphasis added).

83. Tariff Act § 771A(a), 19 U.S.C. § 1677, as added by TTA § 613(a), *supra* note 1, at 3035-36.

if a subsidy is being paid on the upstream input, it is not necessarily being passed on to the downstream producer of the exported product. If the subsidized input producer is unrelated to the manufacturer of the exported product, for example, ITA has presumed, in the absence of contrary information, that no competitive benefit is being conferred. After all, the subsidized producer of the input normally could be expected to pocket the benefit if competitive conditions permit it.⁸⁴ In addition, the ITA has looked at the issue of whether the input that benefits from the subsidy is available only "to a specific enterprise or industry" or, if it is generally available in the foreign economy.⁸⁵ Even if a subsidy is passed through it is not countervailable if it is generally available.⁸⁶

The TTA provides generally that the ITA will find that a competitive benefit has been conferred "when the price for the input . . . is lower than the price that the manufacturer or producer of merchandise which is the subject of a countervailing duty proceeding would otherwise pay for the product in obtaining it from another seller in an arms-length transaction."⁸⁷ If ITA decides that an upstream subsidy is being conferred upon the investigated merchandise, it "shall include in the amount of any countervailing duty imposed on the merchandise an amount equal to the amount of the competitive benefit"⁸⁸

The comparatively short time limits of a normal countervailing duty investigation will be extended if upstream subsidy issues

84. See *Final Negative Countervailing Duty Determination; Certain Steel Wire Nails From the Republic of Korea*, 47 Fed. Reg. 39549 (1982); *Final Affirmative Countervailing Duty Determinations; Certain Steel Products From the Republic of Korea*, 47 Fed. Reg. 57535 (1982).

85. 19 U.S.C. § 1677(5)(B). See *Final Affirmative Countervailing Duty Determinations; Certain Steel Products From the Federal Republic of Germany*, 47 Fed. Reg. 39345, 39351 (1982).

86. *Final Negative Countervailing Duty Determination; Fresh Asparagus From Mexico*, 48 Fed. Reg. 21618 (1983). "The prices set for fertilizer are established on a country-wide basis and are not established or adjusted on either a regional or product basis. Thus fertilizer is available at a uniform price to all agricultural producers throughout Mexico. No discounts are granted on either a regional or product basis. We determine that producers or exporters of Fresh Asparagus do not receive benefits which constitute bounties or grants through the Mexican government's system of setting prices for fertilizers." *Id.* at 21622. See, Bello & Holmer, *Subsidies and Natural Resources: Congress Rejects a Lateral Attack on the Specificity Test*, 18 GEO. WASH. J. INT'L L. & ECON. 297 (1984).

87. Tariff Act § 771A(b), 19 U.S.C. § 1677(b), as added by TTA § 613(a), *supra* note 1, at 3035.

88. Tariff Act § 771A(c), 19 U.S.C. § 1677(c), as added by TTA § 613(a), *id.*

are involved. If the issue arises prior to a preliminary determination, that determination may be made within 250 days⁸⁹ of the filing of a petition, rather than within the eighty-five days that applies normally.⁹⁰ If the issue of upstream subsidies arises after a preliminary determination, the final determination may be extended to 165 days⁹¹ after the preliminary, as compared to the seventy-five days that normally would apply.⁹² This presents no procedural problem if the preliminary determination is negative, as a negative preliminary determination causes no change in the *status quo*. In particular, it does not result in the imposition of "provisional measures" (i.e., suspension of liquidation of all entries of the merchandise and the posting of security).⁹³ Imports continue to enter normally.

But if the preliminary determination is affirmative, a problem arises. The international Subsidies Code⁹⁴ provides that provisional measures may be applied for only 120 days.⁹⁵ The TTA, nevertheless, provides for a possible 165 day extension, "except that the suspension of liquidation ordered in the preliminary determination shall terminate at the end of 120 days . . . and not be resumed unless and until the publication of a Countervailing Duty Order"⁹⁶

Conflict between the maximum time permitted by the Subsidies Code for the application of provisional measures and the time needed to investigate upstream subsidies is apparent in this provision. The solution—a forty-five day interruption in suspension of

89. Tariff Act § 703A(h)(1), 19 U.S.C. § 1617b(h), as added by TTA § 613(c), *id.* at 3036.
90. 19 U.S.C. § 1671b(b). The 250 days may be extended to 310 days in extraordinarily complicated cases. Tariff Act § 703(h)(1), 19 U.S.C. § 1617b(h)(1), as added by TTA § 613(c), *supra* note 1, at 3036.

91. Tariff Act § 703A(h)(2)(A), as added by TTA § 613(c), *supra* note 1, at 3036.

92. 19 U.S.C. § 1671d(a)(1).

93. 19 U.S.C. § 1671d(c)(1)(B). This means that at the time of the entry, the importer must post a cash deposit or bond for countervailing duties that subsequently may, after a final determination, be found to be due. Quite obviously, this adds an element of uncertainty to the transaction and, therefore, can be expected to have a chilling effect on trade in many circumstances.

94. Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, *done* Apr. 12, 1979 (relating to subsidies and countervailing measures), reprinted in AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, *supra* note 33, at 259-306 [hereinafter cited as Subsidies Agreement].

95. *Id.* art. 5, para. 3.

96. Tariff Act § 703(h)(2)(B)(ii), 19 U.S.C. § 1617b(h)(2)(B)(ii), as added by TTA § 613(c), *supra* note 1, at 3036.

liquidation—could create obvious problems, as merchandise entered during the interregnum would escape countervailing duties altogether. The TTA attempts to cope with this by exhortation: "There may be an extension of time for the making of a final determination under this subsection only if the administering authority determines that such additional time is necessary to make the required determination concerning upstream subsidization."⁹⁷ More effectively, the TTA provides that the ITA may postpone the problem. In cases in which the preliminary determination is affirmative, if the petitioner requests, the determination concerning upstream subsidization need not be made until the conclusion of the first annual review.⁹⁸

Rarely would a petitioner not opt for determination of the upstream subsidy issue at the end of the first annual review if the preliminary determination is affirmative. Suspension of liquidation would begin with the preliminary affirmative determination, and would continue through the final determination—provided the final determination, too, is affirmative.⁹⁹ The amount of estimated duty importers would be required to deposit in the period between a final affirmative determination and completion of the first review would not reflect the amount of any upstream subsidy, but that amount would be recaptured with interest at liquidation of the entries following the first review.¹⁰⁰ In short, no entries would escape.

J. FOREIGN MARKET VALUE

In an antidumping investigation, the crucial issue is whether

97. Tariff Act § 703(h)(2), 19 U.S.C. § 1617b(h)(2), as added by TTA § 613(c), *id.*

98. Tariff Act § 703(h)(2)(B)(i), 19 U.S.C. § 1617b(h)(2)(B)(i), as added by TTA § 613(c), *supra* note 1, at 3036. Tariff Act § 751, 19 U.S.C. § 1675, provides for annual administrative reviews of outstanding antidumping and countervailing duty orders. These reviews update the dumping or subsidy information, provide for the assessment and collection of the duties, and establish the estimated deposit rates for the coming year, at which time the process is repeated. There are problems with this. See notes 74-82 and accompanying text.

99. There is some risk in this strategy, however. If a final negative determination reverses a preliminary affirmative determination, then, of course, there never would be an annual review, and the upstream subsidy issue might never be considered. Indeed, such an election itself conceivably could cause a final negative determination, if the amount of the upstream subsidy would have resulted in a level of benefit more than *de minimis*. Benefits in the amount of 0.5 percent or less are considered *de minimis*, and a negative determination is made. *Final Negative Countervailing Duty Determination; Certain Steel Wire Nails From the Republic of Korea*, 47 Fed. Reg. 39549 (1982).

100. 19 U.S.C. § 1677g.

the price to the United States is below fair value, normally defined as the foreign market value or the price in the foreign country of such or similar merchandise.¹⁰¹ Traditional ITA practice is to examine sales to the United States for the five months immediately preceding the filing of a petition and for one month thereafter.¹⁰² Prior to the TTA, selection of sales in the home market of the exporter to be utilized for comparison depended upon whether the exporter was related or unrelated to the importer in the United States. If the exporter and the importer are unrelated, then the home market sales examined are those that occurred during the same six months as the sales to the United States which are under investigation.

If, however, the parties are related, the situation is different. The international transaction between the related exporter and importer is ignored because the price may not be a *bona fide* price. Instead, the exporter and importer are considered as one, and the "exporter's" sales price in the U.S.—the price of the related importer to the first unrelated purchaser—is used. Prior to the TTA, the home market sales compared to those in the U.S. were those that occurred in the home market at the time the merchandise under investigation was *exported* to the United States, irrespective of the date of sale by the related U.S. importer.¹⁰³ Thus, merchandise sold by a U.S. subsidiary of a foreign exporter during the six months July-December may have been exported to the U.S. during the previous January-June. If so, sales in the foreign home market during January-June would be compared to the July-December U.S. sales.¹⁰⁴ The TTA eliminates this time difference. Under the new law, the relevant home market sales would be those that occurred at the same time as the U.S. sales to an unrelated buyer—in the above example, July-December for both.¹⁰⁵

This provision may lead to simplification of the investigatory process, but it is questionable whether the amendment is sound.

101. 19 U.S.C. § 1677b.

102. 19 C.F.R. § 353.38(a) (1984).

103. To compensate for the presumably higher price from the importer to its customer, as compared to the price to the importer, additional adjustments are made prior to the final price comparison. See 19 C.F.R. § 353.10 (1984).

104. 19 U.S.C. § 1677b.

105. Tariff Act § 772(b), 19 U.S.C. § 1677b(a)(1), as added by TTA § 615(1), *supra* note 1, at 3036-37.

Central to the notion of dumping is the exporter's election to sell in one market rather than in another, specifically the election to sell at a lower price for export than is available at home.¹⁰⁶ The theory of the former practice, presumably, was that the exporter's moment of market choice occurred at the time of exportation. The goods could be shipped to the related importer or could be sold on the home market. Once goods are exported, developments in the home market are essentially irrelevant unless they are of a magnitude to justify re-exportation.

The TTA, by mandating simultaneous comparison, ends this "distinction." Whether the change will result in more findings of sales below fair value remains to be seen. In an inflationary market, the later period of comparison likely would result in higher home market prices, and thus an increased likelihood of margins, or of greater margins. If prices were falling in a product area, however, the reverse would occur.

K. SAMPLING AND AVERAGING

Prior to the TTA, the Tariff Act provided for the determination of foreign market value by use of averaging or generally recognized sampling techniques only in antidumping investigations.¹⁰⁷ The TTA expands the instances in which the ITA may use sampling and averaging techniques to include, in antidumping investigations, the determination of U.S. price as well as foreign market value, and, in annual reviews, to include both antidumping and countervailing duty determinations.¹⁰⁸ This could streamline considerably the administrative process.

The authority to utilize sampling techniques in the annual reviews of both antidumping and countervailing duty matters, combined with the authority to avoid reviews altogether unless requested,¹⁰⁹ could make the administrative review process more workable than existing law heretofore permitted it to be.

106. The classic work on the subject is VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (reprinted 1966).

107. 19 U.S.C. § 1677b(f).

108. Tariff Act § 777A, 19 U.S.C. § 1677a, as added by TTA § 620, *supra* note 1, at 3039.

109. See *supra* note 79 and accompanying text.

L. CUMULATION

In antidumping and countervailing duty proceedings involving imports from more than one country, the ITC has long wrestled with the problem of when imports from one country should be "cumulated" with imports from another in order to determine their combined injurious impact, if any.¹¹⁰ The volume of imports from a single country, of course, is less than the volume from two or more, and therefore, presumably, less likely to be injurious. The TTA provides that, "the Commission shall cumulatively assess the volume and effect of imports from two or more countries of like products subject to investigation if such imports compete with each other and with like products of the domestic industry in the United States market."¹¹¹

In investigations in which the ITC considers imports from two or more countries, there would seem to be little ambiguity if the

110. See, e.g., *Certain Carbon Steel Products from Belgium, the Federal Republic of Germany, France, Italy, Luxembourg, the Netherlands and the United Kingdom*, USITC Pub. 1064 at 64 (1980) (views of Commissioner Stern).

111. Tariff Act § 771(7)(c)(iv), 19 U.S.C. § 1677(7)(c), as added by TTA § 612(a)(2)(A), *supra* note 1, at 3033. The first instance of cumulation appears to have been *Portland Gray Cement from Portugal*, T.C. Pub. 37 (1961) where the Commission was faced with a small group of importers who were importing cement below fair value from a succession of foreign supplying countries. Even though the volume of cement from Portugal was small, the "hammering" effect of Portuguese imports when cumulated with those from the countries involved in previous cases was found to be injurious. Upon appeal, the U.S. Customs Court affirmed. *City Lumber Co. v. United States*, 311 F. Supp. 340 (1970), *affirmed*, 457 F.2d 991 (1972). However, § 771(7)(B)(i) of the Tariff Act, defining the term "material injury," refers to "the volume of imports of the investigation" (emphasis added). It goes on to require the ITC to consider "the effect of imports of that merchandise on prices in the United States" and to consider as well "the impact of imports of such merchandise on domestic producers" (emphasis added). This emphasis on the single proceeding, which involves imports from a single country, is consistent with the notion that a foreign supplier is entitled to avoid antidumping or countervailing duties if its products are not causing injury, without regard to other suppliers. This notion received support in the Senate Report on the Trade Act of 1974 (1974 Act), which stated:

[T]he Commission has considered the combined impact of less-than-fair-value imports in making injury determinations when the facts and economic considerations so warrant. Such a result does not follow as a matter of law; it follows, on a case by case basis, only when the factors and conditions of trade show its relevance to the determination of injury.

S. Rep. No. 1298, 93d Cong., 2d Sess. 180 (1974), *reprinted in* 1974 U.S. CODE CONG. & AD. NEWS 7186, 7317. In *Republic Steel Corp. et al v. United States*, 591 F. Supp. 640 (C.I.T. 1984), the Court of International Trade appears to have held that the Commission must cumulate imports for purposes of the preliminary stage but may not do so for purposes of its final determination.

imports in fact compete with each other and with like products of the domestic industry. A more difficult question arises, however, with investigations that are not simultaneous. In an antidumping investigation involving Country A, for example, should the Commission cumulate with imports considered in an antidumping investigation involving County B a week earlier? A month earlier? A year earlier? Five years earlier? The Conference Committee Report provides the formula: the Commission is to cumulate imports if their sale in the United States is "reasonably coincident."¹¹² Just what is "reasonably coincident" will depend upon the facts of particular cases.¹¹³

Because of the structure of antidumping and countervailing duty proceedings, the ITC may be faced with an awkward problem under the cumulation provisions of the TTA. Consider two separate investigations, initiated several months apart, involving products which otherwise meet the cumulation criteria of the statute. If the Commission reaches an affirmative preliminary determination in the first case, it would then cumulate the imports in the second investigation with those involved in the first for purposes of the second preliminary determination. If that determination were affirmative, the Commission next would be faced with a final determination in the first case. If the Commission cumulates imports at the final determination of the first case, with imports from the preliminary determination in the second case, and finds affirmatively, that affirmative determination might be flawed. This would occur if the Department of Commerce, in its final fair value determination in the second investigation, were to reach a negative determination. The Commission then would have cumulated subsidized or dumped imports from the first investigation with imports

112. Conference Report, *supra* note 55, at 5290. The question might be answered by the statutory language itself which speaks of "products subject to investigation." Query whether products under an "order" from a completed investigation are "subject to investigation?" If one speaks, as does the statute, in the present tense, products subject to an order are not "subject to investigation" in the present. They were so in the past.

113. *Portland Gray Cement from Portugal*, *supra* note 111, involved such "serial" dumping over time. The USITC determination that was the subject of the appeal in *Republic Steel Corp. et al v. United States*, 591 F. Supp. at 640, involved contemporaneous investigations of imports from Korea, Spain and Italy. *Certain Steel Products from the Republic of Korea*, USITC Pub. 1261 (1982). In *Carbon Steel Wire Rod from Poland*, USITC Pub. 1574 (1984), the Commission refused to cumulate imports from Poland with those subject to previous affirmative determinations in final antidumping investigations because of changed circumstances of trade and improvements in the condition of the domestic industry.

from the second that subsequently were found not to have been subsidized or dumped. This result would be manifestly unjust to the exporters involved in the first investigation, but the TTA does not deal with this problem.

M. THREAT OF MATERIAL INJURY

The TTA adds a new subparagraph to that portion of the Tariff Act that deals with material injury.¹¹⁴ The new subparagraph outlines ITC considerations for threat of material injury specifying that in countervailing duty cases, the Commission should consider the nature of the subsidy, and particularly whether an export subsidy is involved.¹¹⁵ In both antidumping and countervailing duty cases, the Commission should consider "any increase in production capacity or existing unused capacity in the exporting country;" any rapid increase in penetration of the U.S. market; the probability of imports entering at prices that would depress domestic prices; any substantial increase in U.S. inventories; the presence of underutilized capacity in the exporting countries; "any other demonstrable adverse trends that indicate the probability that the importation . . . of the merchandise . . . will be the cause of actual injury;" and "the potential for product-shifting, if the production facilities owned or controlled by the foreign manufacturers, which can be used to produce . . ." articles subject to other antidumping or countervailing duty investigations or orders, are also used to produce the merchandise under the investigation at issue.¹¹⁶ The TTA requires, however, that any determination that an industry in the United States is threatened with material injury be made on the basis of evidence that the threat is real and that actual injury is imminent.¹¹⁷ "Such a determination may not be made on the basis of mere conjecture or supposition."¹¹⁸

For the most part, the new subparagraph codifies existing practice and law. For example, the Senate Report on the Trade Act of 1979 stated:

114. Tariff Act § 771(7)(F), 19 U.S.C. § 1677(7)(F), as added by TTA § 612(a)(2)(B), *supra* note 1, at 3033.

115. Tariff Act § 771(7)(F)(i)(I), 19 U.S.C. § 1677(7)(F)(i)(I), as added by TTA § 612(a)(2)(B), *id.*

116. *Id.*

117. Tariff Act § 771(7)(F)(ii), 19 U.S.C. § 1677(7)(F)(ii), as added by TTA § 612(a)(2)(B), *supra* note 1, at 3034.

118. *Id.*

In determining whether an industry in the United States is threatened with material injury, the ITC will consider the likelihood of actual material injury occurring. It will consider any economic factors it deems relevant, and consider the existing and potential situation with respect to such factors. An ITC affirmative determination with respect to threat of material injury must be based upon information showing that the threat is real and injury is imminent, not a mere supposition or conjecture.¹¹⁹

However, the requirement of an analysis of the potential for product shifting when the foreign producer owns or controls facilities that are used to manufacture products subject to other antidumping or countervailing duty investigations is a new concept.

The TTA Conference Report sheds no light on this provision.¹²⁰ Presumably the provision could have application where products are sold at various stages of production. For example, hot-rolled carbon steel sheet is used to produce cold-rolled carbon steel sheet, and is also sold in its own right for other uses.¹²¹ Where the Commission is considering threat of injury from imports of cold-rolled carbon steel sheet, at a time when previous investigations or orders limited the ability of the exporter to export hot-rolled carbon steel sheet, the new provision could apply. Whether in fact a producer freely could shift production between these items would be a question to be determined in a particular investigation.

N. OTHER PROVISIONS

The trade law reform provisions of TTA Title VI are extensive. In addition to the more significant measures noted above, Title VI makes numerous other changes. For example, the TTA extends the time of countervailing investigations when a simultaneous antidumping petition has been filed involving imports of the same class or kind of merchandise. This would permit simultaneous determinations at the ITA, and would facilitate a single investigation at the ITC.¹²² Even in the absence of simultaneous ITA determinations,

119. S. Rep. No. 96-249, 96th Cong., 1st Sess. 88-89 (1979).

120. See Conference Report, *supra* note 55, at 5290-92.

121. See, e.g., *Carbon and Certain Alloy Steel Products*, USITC Pub. 1553 at a-15 (July 1984).

122. Tariff Act § 705(a)(1), 19 U.S.C. § 1671d(a)(1), as amended by TTA § 606, *supra* note 1, at 3029.

the TTA requires the ITC to hold only one public hearing if investigations are initiated under both antidumping and countervailing duty provisions within six months of each other regarding the same merchandise from the same country.¹²³

In antidumping proceedings, a reseller's price may be taken into account in determining purchase price.¹²⁴ The Conference Report states that "a reseller's price may serve as purchase price if it is prior to the date of importation and if the merchandise is for exportation to the United States."¹²⁵

Presumably, this means the reseller's price may be used if it is established by the parties to the transaction prior to the date the goods are imported into the United States. The phrase "if the merchandise is for exportation to the United States" seems obvious: if it were not for export to the United States, it is unlikely to be here.

But the provision raises a question of fundamental fairness. It would threaten an exporter with a possible dumping finding because of the price charged by another, unrelated party. This could be particularly unfair in a falling market. If, for example, an exporter on the same day sold identical merchandise for \$100 in its home market and for \$110 for export to the United States, it would be selling to the United States above fair value. If, while the \$110 merchandise was making a long sea-voyage to the United States, the market began to drop, normally the exporter should be unconcerned: it sold high and its customer is the victim. But if the customer—fearing a further price fall—sells the goods for ninety dollars prior to the date of their importation, then, under this provision of the TTA, the exporter could be determined to have dumped—based solely on the action of an unrelated party over whom the exporter has no control. Such a result has nothing to commend it.

Other provisions of Title VI deal with verification of information;¹²⁶ records of ex-parte meetings and release of confiden-

123. Tariff Act § 774(a), 19 U.S.C. § 1677c(a), as amended by TTA § 616, *supra* note 1, at 3037.

124. Tariff Act § 772(b), 19 U.S.C. § 1677a(b), as amended by TTA § 614, *supra* note 1, at 3036. The term purchase price refers to transactions in which the exporter and importer (the reseller) are unrelated. See *supra* note 103 and accompanying text. 19 C.F.R. § 353.10 (1984).

125. Conference Report, *supra* note 55 at 5302.

126. Tariff Act § 776(a), 19 U.S.C. § 1677e(a), as amended by TTA § 618, *supra* note 1, at 3037-38.

tial information;¹²⁷ payment of interest on overpayments and underpayments of estimated duties;¹²⁸ conditional payment of countervailing duties;¹²⁹ and the elimination of certain interlocutory appeals to the United States Court of International Trade.¹³⁰

Under present law, antidumping duties are treated as any other customs duties for purposes of the duty drawback provisions of the customs law. The TTA extends this coverage to countervailing duties as well.¹³¹

Finally, Title VI orders two studies: The Secretary of Commerce is instructed to undertake a study of the current practices that are applied to making adjustments in antidumping investigations¹³² and the Secretaries of Commerce and Labor, as well as the U.S. Trade Representative and the Comptroller General of the United States, are required to "submit to Congress, not later than June 1, 1985, a comprehensive study of the problem of foreign industrial targeting."¹³³

O. DROPPING THE "VETO BAIT"

Crucial to the final passage and approval by the President of the TTA was the dropping in conference of two House-passed provisions, one of which also had been passed in modified form by the Senate. These dealt with "natural resource subsidies" and "downstream dumping." If enacted, both provisions would have been highly restrictive, probably would have provoked serious reactions from U.S. trading partners, and in any event, were so unacceptable to the administration that their inclusion probably would have meant a veto of the bill.¹³⁴

The "natural resource subsidies" provision was contained in

127. Tariff Act § 777, 19 U.S.C. § 1677f, as amended by TTA § 619, *id.* at 3038.

128. Tariff Act § 778, 19 U.S.C. 1677g, as amended by TTA § 621, *id.* at 3039.

129. Tariff Act § 709, as added by TTA § 608, *id.* at 3030.

130. Tariff Act § 516A(a), 19 U.S.C. § 1516a(a), as amended by TTA § 623, *id.* at 3040-41.

131. Tariff Act § 779, 19 U.S.C. § 1673i; as added by, TTA § 622, *supra* note 1, at 3039-40.

The term "drawback" refers to the refund of duties paid on imported merchandise when that merchandise is exported as part of an article manufactured or produced in the United States. See 19 U.S.C. § 1313.

132. TTA § 624, *supra* note 1, at 3041-42.

133. TTA § 625, *supra* note 1, at 3042. The term "targeting" is described in the TTA as the practice "whereby foreign governments adopt plans or schemes of coordinated activities to foster and benefit specific industries." *Id.*

134. 1 INT'L TRADE REP. (BNA), at 389 (Oct. 10, 1984).

the Trade Remedies Reform Act passed by the House.¹³⁵ The amendment would have included within the definition of a subsidy the pricing policies of foreign government-regulated or controlled natural resource producers—such as natural gas producers—who sell in their home markets at prices lower than those at which they sell to the United States.¹³⁶

The proposal seemed clearly aimed at Mexico, whose supplies of natural gas are the envy of some United States users, but it might well have caused some problems for the United States itself, where natural gas price controls are not unknown.¹³⁷ The conference agreed to strike the House provisions.¹³⁸

Both the Senate and the House passed “downstream dumping” provisions, but the conferees agreed to strike both. The House provision would have looked into the question of downstream dumping in both countervailing and antidumping investigations, while the Senate provision, similar in substance, would have applied only in antidumping cases.¹³⁹

“Downstream dumping” was defined by the House as occurring “when a product that is subject to a countervailing duty or antidumping investigation includes materials or components which were themselves dumped.”¹⁴⁰ For example, consider the case of the foreign manufacturer of wire coat hangers discussed above with regard to “upstream subsidies.”¹⁴¹ In an antidumping investigation to determine whether the coat hangers are sold below their fair

135. Conference Report, *supra* note 55, at 5287.

136. *Id.* Note the neat twist of this proposal. It is a condemnation of *not* dumping. Dumping, of course, generally is defined as selling to the United States at a price lower than the price charged in the home market. See 19 U.S.C. § 1673. If a foreign natural resource producer decided to be extra cautious, and to guard against dumping, by making certain that its price to the United States was higher than its price in its home market, it would have run afoul of this provision. Only absolutely equal pricing would permit a producer to avoid violating one law or the other, but given exchange rate movements, differences in quantities, qualities, delivery terms and the like, it is doubtful whether pricing always could be exactly equal. Thus, the House would have put many a foreign natural resource producer in a “damned if you do, damned if you don’t” position. Perhaps what the amendment really shows is that “dumping” is not always that pernicious. U.S. consumers—even consumers of natural resources who may well be manufacturers—certainly do benefit from lower prices.

137. See Bello & Holmer, *supra* note 86.

138. *Id.*

139. Conference Report, *supra* note 55, at 5289.

140. STAFF OF SUBCOMM. ON TRADE, HOUSE COMM. ON WAYS AND MEANS, 98TH CONG. 2d SESS., REPORT ON H.R. 474, TRADE REMEDIES REFORM ACT OF 1984 25 (Comm. Print 1984).

141. See *supra* note 83 and accompanying text.

value, the question normally would be whether the net price of coat hangers to the United States is above or below the net price for coat hangers in the home market. If the U.S. price is higher, generally that would be the end of the inquiry; if lower, the difference would establish the margin of dumping.

But the "downstream" dumping provisions would have looked beyond this into the coat manufacturer's costs of obtaining wire. Perhaps that hanger manufacturer, located in hypothetical country A, buys its wire from suppliers in countries B, C, or D, depending upon price, delivery schedules, and other terms. Since the coat hanger manufacturer normally is interested in purchasing at the cheapest price possible, there is little reason for that manufacturer to care about the home market prices of its suppliers. But the downstream dumping provisions would have made such inquiry crucial. These provisions would carry the inquiry into a further dumping investigation of the wire suppliers in countries B, C, or D,—an inquiry to compare their export price to the coat hanger manufacturer in country A with their own fair value, generally their home market price.

Not only would such a provision have been close to an administrative nightmare—a Rube Goldberg *reductio ad absurdum*—but it probably would have been close to impossible to administer in any way other than arbitrarily. Imagine a conscientious coat hanger manufacturer, determined to comply with the antidumping provisions of U.S. law, in order to be sure of a fair value sale, asking its suppliers in countries B, C, or D, the amount of their home market price. The likely response would be, "none of your business."¹⁴² The dropping of the "downstream dumping" provision of the House and Senate bills by the conference removed a potentially highly restrictive provision of the law, one that could well have amounted to a nontariff barrier by legal procedure.

IV. INTERNATIONAL TRADE AND INVESTMENT

Title III of the TTA constitutes one of the legislative provisions with a prior life of its own that eventually was attached to

142. Common sense suggests that suppliers are not likely to tell too many of their customers what their prices are to the customer's competitors at home or elsewhere; antitrust considerations suggest that this common sense caution would be well placed. Note that "downstream dumping" normally would occur on transactions between countries, whereas upstream subsidies apply within a single country (or customs union). TTA § 613, 19 U.S.C. § 1677, *supra* note 1, at 3035-36.

H.R. 3398 on its way to becoming the Trade and Tariff Act of 1984.¹⁴³ Title III itself is denominated the "International Trade and Investment Act."¹⁴⁴ It is basically market-opening legislation. It expands the authority of the President to take retaliatory action against foreign nations that impose barriers to U.S. exports, and indeed, in many ways increases the political pressure on the President to take such action. Moreover, Title III expands the area of export concern to include the increasingly important area of trade in services, and expresses explicit concern for intellectual property rights in international trade.¹⁴⁵

The increase in political pressure manifests itself in section 303 of the TTA in which the U.S. Trade Representative is instructed to produce annual "national trade estimates" of significant barriers to exports of U.S. goods and services, as well as restrictions on foreign direct investments by United States companies. These annual estimates must identify not only foreign barriers (including intellectual property barriers), but also must estimate their trade-distorting impact.¹⁴⁶ The estimates, which must be submitted to the Senate Committee on Finance and to the House Committee on Ways and Means, must include information as to any action taken to eliminate the practices, or—more significantly—the reasons why no action was taken.¹⁴⁷

Section 303 is an aggressive approach to trade policy. Requiring the public ventilation of all foreign barriers to trade in goods and services, as well as any barriers to investment, and requiring reports on reasons why no action may be taken to attempt to eliminate all of these, certainly is potentially provocative.¹⁴⁸ These

143. See *supra* notes 11-28 and accompanying text.

144. TTA § 301(a), *supra* note 1, at 3000 (to be codified at 19 U.S.C. § 2101 note).

145. Concern for protection of intellectual property rights—copyrights, patents and trademarks—is expressed in several parts of the TTA. See text accompanying *infra* notes 320-27. See also, Palmeto, *The U.S. International Trade Commission at Common Law: Unfair Competition, Trademark, and Section 337 of the Tariff Act*, 18 J. WORLD TRADE L. 497 (1984); Walker, *The Evaluation and Status of the International Anticounterfeiting Code*, 11 INDUS. PROP. 325 (1982). For a discussion of trade in services, see Cohen & Morante, *Elimination of Nontariff Barriers to Trade in Services: Recommendations for Future Negotiations*, 13 LAW & POLY INTL BUS. 495 (1981). See also, *The Relationship of Exports in Selected U.S. Service Industries to U.S. Merchandise Exports, Report of Investigation No. 332-132 under Section 332 of the Tariff Act of 1930*, USITC Pub. 1290 (Sept. 1982).

146. 1974 Act, § 181(a)(1)(B), 19 U.S.C. § 2241, as amended by TTA § 303(a), *supra* note 1, at 3001-02.

147. *Id.*

148. The United States itself, of course, maintains barriers to trade in goods and services,

national trade estimates can be expected to lead to increased activity under the most extensive portion of Title III, which amends section 301 of the 1974 Act.

A. AMENDMENTS TO SECTION 301

Section 301 of the 1974 Act probably is unique among U.S. trade laws in that its goal is not the restriction of imports, but the expansion of exports.¹⁴⁹ Its immediate antecedent was section 252 of the Trade Expansion Act of 1962,¹⁵⁰ although its roots may be traced at least as far back as 1794.¹⁵¹

As amended by section 304 of the TTA, section 301 requires the President to take "all appropriate and feasible action within his power" if he determines that such action is appropriate to enforce the rights of the United States under any trade agreements,

as well as barriers to investment. Imports of dairy products are severely restricted and as are imports of textiles and apparel. See, e.g., items 949.80 through 950.23, Tariff Schedules of the United States Annotated (1985), setting forth import quotas for dairy products. COMPTROLLER GENERAL OF THE UNITED STATES, IMPLEMENTATION OF TRADE RESTRICTIONS FOR TEXTILES AND APPAREL, REPORT TO THE CHAIRMAN, SUBCOMMITTEE ON TRADE, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES (1983). Title VIII of the TTA itself, providing the mechanism for the restriction of steel imports, is a new, and formidable, barrier to trade in goods. See *infra* notes 202-19 and accompanying text. Trade in services may present special problems for the United States as many services are controlled by state law. Banking and insurance are two obvious examples, to say nothing of the more personal services provided by barbers, beauticians, dentists, lawyers, physicians and psychologists. Indeed, immigration barriers may well be the most restrictive trade barriers for some services. While the United States generally welcomes foreign investment, there are some restrictions imposed on foreigners. PRACTISING LAW INSTITUTE, FOREIGN INVESTMENT IN THE UNITED STATES (1982). Of course, the point is not that the United States is without restrictions, but rather that the United States is willing to negotiate with its trading partners for the mutual reduction or elimination of restrictions. When it comes to trade in goods, however, it is doubtful whether the removal of barriers to trade in dairy products, textiles or steel will be prime negotiating objectives of the United States.

149. Threat of 301 action "to defend American firms and workers from the predatory trade practices of other nations" was contained in a release from the Office of the United States Trade Representative. See, Release 84/23, Sept. 18, 1984.

150. Pub. L. 87-974 § 252, 76 Stat 872.

151. For an extensive discussion of § 301 before the TTA amendments, advocating its use by U.S. firms, see Fisher & Steinhardt, *Section 301 of the Trade Act of 1974: Protection of U.S. Exporters of Goods, Services and Capital*, 14 LAW & POLY INT'L BUS. 569 (1982). The authors in note 18 observe: "President George Washington was empowered by statute to lay embargoes and other restrictions on imports and exports whenever he felt that foreign countries were discriminating against the United States. An Act to authorize the President of the United States to lay, regulate and revoke embargoes, 1 Stat. 372 (1794)." *Id.* at 573 n.18.

or to respond to any act, policy, or practice of a foreign nation inconsistent with the provisions of any trade agreement, or, which is "unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce" ¹⁵²

Special retaliatory authority is added to section 301 for services. The new section 301(c) empowers the President, "notwithstanding any other provision of law governing any service sector access authorization," to deny such service authorizations, or to restrict their terms and conditions. ¹⁵³ The Conference Committee Report explains:

The Conferees recognize that at the Federal level most services are subject to the regulation of independent agencies. For example, telecommunications is regulated by the Federal Communications Commission and trucking is regulated by the Interstate Commerce Commission.

As a result, such services enter the U.S. market, not at ports of entry as do goods, but rather upon the receipt of a license, permit or other authorization issued by the appropriate regulatory authority.

For this reason, the Conferees believe the authority granted in section 304(c) of the Conference Agreement is important for the President to be able to impose effective restrictions on foreign service firms in the domestic U.S. market should he determine such restrictions are needed. ¹⁵⁴

Section 301 retains provisions for interested persons to initiate section 301 proceedings by filing a petition with the U.S. Trade Representative. ¹⁵⁵ In addition, however, the TTA authorizes the U.S.

152. 1974 Act § 301(a), 19 U.S.C. § 2411(a), as amended by TTA § 304(a), *supra* note 1, at 3002. The President's action may be taken on a nondiscriminatory basis or solely against the particular country involved. Of course, the restrictive action is not confined to the particular U.S. goods which are the subject of the alleged barriers. *Id.*

153. 1974 Act § 301(c), 19 U.S.C. § 2411(c), as added by TTA § 304(c), *supra* note 1, at 3003. § 304(c) redesignates former § 301(c) and (d) as 301(d) and (e), and adds the new § 301(c).

154. Conference Report, *supra* note 55, at 5263.

155. 1974 Act § 302, 19 U.S.C. § 2412, as amended by TTA § 304(d)(1), *supra* note 1, at 3003-04. As amended by the TTA, § 302 of the Trade Act of 1974 provides for the filing of petitions requesting presidential action under § 301 with USTR. *Id.* Within 45 days, USTR must review the petition's allegations and determine whether to initiate an investigation. *Id.* If the determination is negative, USTR must notify the petitioner and publish a summary of the reasons in the Federal Register. *Id.* If affirmative, USTR shall initiate the investigation, publish a summary of the petition in the Federal Register, and schedule a public hearing for the presentation of views concerning the issues. *Id.* The regulations of the USTR concerning § 301 investigations are set forth in 15 C.F.R. §§ 2006.0-2006.15 (1984).

Trade Representative to initiate cases on its own in the absence of petitions.¹⁵⁶

The TTA also defines the crucial operative words of section 301: unjustifiable, unreasonable, or discriminatory. "Unjustifiable" means "any act, policy, or practice . . . in violation of, or inconsistent with, the international legal rights of the United States."¹⁵⁷ The term is defined to include specifically any foreign act, policy or practice "which denies national or most-favored-nation treatment, the right of establishment, or protection of intellectual property rights."¹⁵⁸

"Unreasonable" is defined as "any act, policy or practice which, while not necessarily in violation of or inconsistent with the international legal rights of the United States, is otherwise deemed to be unfair and inequitable."¹⁵⁹ Here, too, specific reference is made to acts, policies or practices that deny "fair and equitable" market opportunities, opportunities to establish enterprises, or that deny provision of "adequate and effective protection of intellectual property rights."¹⁶⁰

"Discriminatory" means any "act, policy or practice which denies national or most-favored-nation treatment to United States goods, services or investment."¹⁶¹

B. NEGOTIATING OBJECTIVES: SERVICES, INVESTMENT, AND HIGH TECHNOLOGY

Specific U.S. negotiating objectives are stated with respect to trade in services, foreign direct investment, and high technology products.¹⁶² These, in general, are — for services and investment —

156. The President under the prior statute, § 301(c), and as amended by the TTA, § 301(d), 19 U.S.C. § 2412(d), has authority to act without petition. The added authority for the USTR to commence investigations, and to set in motion the procedural panoply of that process, including a public hearing, may have been expected by Congress to add to the manner in which section 301-type disputes are perceived by participants, and lead, perhaps, to better resolutions of the disputes.

157. 1974 Act § 301(e), 19 U.S.C. § 2411(e)(4)(A), as amended and redesignated by TTA § 304(f)(2), *supra* note 1, at 3005.

158. 1974 Act § 301(e)(4), 19 U.S.C. § 2411(e)(4), as amended and redesignated by TTA § 304(f)(2), *id.* at 3005-06.

159. 1974 Act § 301(e)(3), 19 U.S.C. § 2411(e)(3), as amended and redesignated by, TTA § 304(f)(1), *id.* at 3005.

160. *Id.*

161. 1974 Act § 301(e)(5), 19 U.S.C. § 2411(e)(5), as amended by TTA § 301(e), *id.* at 3006.

162. 1974 Act § 104A, 19 U.S.C. § 2114a, as added by TTA § 305, *id.* at 3006-08.

to reduce or to eliminate barriers to trade¹⁶³ and "to develop internationally agreed rules, including dispute settlement procedures."¹⁶⁴ For trade in high technology products and related services, the stated principal U.S. negotiating objectives are to obtain and preserve maximum openness with respect to trade and investment,¹⁶⁵ and to obtain the elimination or reduction of—or compensation for—specified distorting effects of foreign government activities affecting U.S. exports of high technology products.¹⁶⁶ The foreign practices referred to are those that are included in the national trade estimates, including limitations on acquisition and protection of intellectual property.¹⁶⁷

C. NEGOTIATING AUTHORITY

The President is authorized to "enter into such bilateral or multilateral agreements as may be necessary or appropriate" to achieve Title III's negotiating objectives with respect to trade in services and high technology products and direct investment.¹⁶⁸ The TTA expands the definition of "international trade" contained in the 1974 Act to include "foreign direct investment by United States persons, especially if such investment has implications for trade in goods and services"¹⁶⁹ as well as trade in "both goods and services" as set out in the Trade Act of 1974.

Specific negotiating authority also is provided for trade in high technology products.¹⁷⁰ The TTA adds a new section to the 1974 Act, authorizing the President, for a period of five years, to proclaim, subject to the provisions of chapter 3, such duty modifications as he deems appropriate in order to carry out high technology trade agreements.¹⁷¹ This authority is granted for seven particular

163. 1974 Act § 104A(a)(1)(A), 19 U.S.C. § 2114a(a)(1)(A), as added by TTA § 305(a)(1), *id.* at 3007.

164. 1974 Act § 104A(a)(1)(B), 19 U.S.C. § 2114a(a)(1)(B), as added by *id.*

165. 1974 Act § 104A(c)(1), 19 U.S.C. § 2114a(c)(1), as added by *id.*

166. 1974 Act § 104A(c)(2), 19 U.S.C. § 2114a(c)(2), as added by *id.*

167. See *supra* notes 146-48 and accompanying text.

168. TTA § 308(a), 19 U.S.C. § 2114e, *supra* note 1, at 3013.

169. 1974 Act § 102(g)(3), 19 U.S.C. § 2112(g)(3), as amended by TTA § 307, *id.* at 3012.

170. 1974 Act § 128, 19 U.S.C. § 2138, as added by TTA § 308(b)(1), *id.* at 3013. Chapter 3 of Title I of the 1974 Act requires the President, before concluding trade agreements to obtain the advice from the International Trade Commission, from executive branch departments, from the private sector, and to hold hearings. 19 U.S.C. §§ 2151-2155.

171. 1974 Act § 128, 19 U.S.C. § 2138, as added by TTA § 308(b)(1), *supra* note 1, at 3013.

categories of products as set out in subsection (b) of the new provision.¹⁷² This specific definition of "high technology" seems unusual. One wonders what such a list would show were it drawn up in, say, 1974 rather than in 1984. Perhaps the five-year limitation of the negotiating authority provides adequate assurance that 1984's list of high technology articles will not become obsolete before it can be used.

V. GENERALIZED SYSTEM OF PREFERENCES

The Generalized System of Preferences (GSP) provides for duty free treatment on most imports from most developing countries. Originally enacted as part of the Trade Act of 1974, the preferences were scheduled to expire in January 1985.¹⁷³ The TTA extended GSP through July 4, 1993, while making some important changes in the program.¹⁷⁴

The concept of preferences for exports of developing countries grew out of the 1964 United Nations Conference on Trade and Development (UNCTAD). Developing countries contended that they were disadvantaged by the existing international trading system as they were unable, given their developing status, to compete on an equal basis with developed countries.¹⁷⁵ With passage of the 1974 Act, the United States became the last major developed country to grant preferences to the developing countries.¹⁷⁶ President Ford,

172. (b) The President shall exercise his authority under subsection (a) only with respect to the following items listed in the Tariff Schedules of the United States (19 U.S.C. 1202):

- (1) Transistors (provided for in item 587.70, part 5, schedule 6).
- (2) Diodes and rectifiers (provided for in item 687.72, part 5, schedule 6).
- (3) Monolithic integrated circuits (provided for in item 687.74, part 5, schedule 6).
- (4) Other integrated circuits (provided for in item 687.77, part 5, schedule 6).
- (5) Other components (provided for in item 687.81, part 5, schedule 6).
- (6) Parts of semiconductors (provided for in item 687.85, part 5, schedule 6).
- (7) Parts of automatic data-processing machines and units thereof (provided for in item 676.52, part 4G, schedule 6) other than parts incorporating a cathode ray tube.

1974 Act § 128(b), 19 U.S.C. § 2138(b), as added by TTA § 308(b)(1), *supra* note 1, at 3013.
173. 19 U.S.C. §§ 2461-2465.

174. Title V of the TTA, as noted, is the "Generalized System of Preferences Renewal Act of 1984." TTA § 501(a), *id.* at 3014. See *supra* note 4. § 505(a) provides that "no duty-free treatment provided under this title shall remain in effect after July 4, 1993."

175. OVERVIEW, *supra* note 45, at 11.

176. Nemmers & Rowland, *The U.S. Generalized System of Preferences: Too Much System, Too Little Preference*, 9 LAW & POLY INT'L BUS. 855 (1977).

by Executive Order, implemented the U.S. Generalized System of Preferences in November 1975.¹⁷⁷

The GSP provisions of the 1974 Act gave the President wide berth. Certain countries were excluded statutorily from designation as beneficiary developing countries (BDC), but beyond that, the President was given virtual *carte blanche* in designating countries as eligible for GSP treatment.¹⁷⁸ He is instructed by the 1974 Act to consider (1) the desire of a proposed BDC to be designated as eligible; (2) the level of the country's economic development, (3) the extent to which other developed countries grant preferential treatment to exports from that country, and (4) the extent to which that country offers access to its market for United States goods.¹⁷⁹

The TTA expanded these criteria. In order to be eligible for designation, the President also will be required to consider (1) the extent to which a country "has assured the United States that it will refrain from engaging in unreasonable export practices;"¹⁸⁰ (2) the extent to which a particular country "is providing adequate and effective means under its laws for foreign nationals to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks and copyrights;"¹⁸¹ (3) the extent to which the country has taken steps to reduce "distorting" investment practices and barriers to trade in services;¹⁸² and (4) the steps taken by the country to afford its workers "internationally recognized worker rights."¹⁸³ The reference to intellectual property rights and to trade in services reflects areas of particular

177. E. O. 11,888, 40 Fed. Reg. 55276 (1975).

178. The countries excluded from eligibility by law are: 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. 19 U.S.C. § 2462(b).

179. 19 U.S.C. § 2462(c)(1)-(4).

180. 1974 Act § 502(c), 19 U.S.C. § 2462(c), as amended by TTA § 502(c)(2), *supra* note 1, at 3019.

181. 1974 Act § 502(c), 19 U.S.C. § 2462(c), as amended by TTA § 503(c)(3), *id.*

182. *Id.* at 3020.

183. *Id.* The term "internationally recognized worker rights" is defined to include the "right of association; . . . the right to organize and to bargain collectively; . . . a prohibition on the use of any form of forced or compulsory labor. . . . a minimum age for the employment of children; . . . acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." 1974 Act § 502(a), 19 U.S.C. § 2462(a), as amended by TTA § 503(a), *id.* at 3019.

importance to the United States for the world trade agenda in the years ahead.¹⁸⁴

Under the 1974 Act, the President was authorized to designate any article as eligible for duty free treatment under the GSP, provided it met certain rules of origin and was not "import sensitive."¹⁸⁵ The TTA expands the list of articles not eligible for GSP treatment by six: footwear, handbags, luggage, leather flat goods, work gloves and leather wearing apparel.¹⁸⁶ In actual practice, this represents no change at all since these articles were excluded from duty free treatment under GSP prior to enactment of the TTA by operation of the "competitive need" test.¹⁸⁷

The "competitive need" test is the mechanism originally set forth in the 1974 Act for eliminating GSP treatment for a particular BDC for particular products, if the country no longer had a "competitive need" for duty free treatment in a particular product. Generally, if a country accounted for fifty percent or more of U.S. imports of a product, or if U.S. imports from a particular BDC exceeded a specific dollar amount, that country was deemed not to need GSP treatment to compete for trade in that particular article. GSP benefits therefore were withdrawn.¹⁸⁸ Important changes were made in the "competitive need" criteria of the law by the TTA. Some background will explain.

The GSP program was hardly free from controversy.¹⁸⁹ A review and evaluation of the program conducted in 1980 did find that the program was fulfilling its objectives of providing opportunities for developing countries to diversify their export base, while

184. See *infra* notes 320-27 and accompanying text.

185. 19 U.S.C. § 2463. "Import sensitive" articles were enumerated in 1974 Act § 503(c)(1), 19 U.S.C. § 2463(c)(1). These include textile and apparel articles which are subject to textile agreements, watches, and certain electronic, steel, footwear and glass articles. *Id.* § 2464(c)(A)-(G).

186. 1974 Act § 503(c)(1)(E), 19 U.S.C. § 2463(c)(1)(E), as amended by TTA § 504(b), *supra* note 1, at 3020. The footwear restriction expands on the restriction contained in the 1974 Act.

187. Conference Report, *supra* note 55, at 5277.

188. 19 U.S.C. § 2464.

189. The AFL-CIO, for example, stated: "We believe the GSP program has not fulfilled its goals, is contrary to the interest of U.S. workers, and represents a prime example of misguided government policies and practices in the area of international trade and investment." *Possible Renewal Of The Generalized System of Preferences—Part 2: Hearing Before the Subcommittee On Trade Of the Committee on Ways and Means, House of Representatives, 98th Cong., 2d Sess. 69 (1984)* (statement of Stephen Koplan, Legislative Representative, Department of Legislation, American Federation of Labor and Congress of Industrial Organizations).

at the same time not adversely affecting United States interests.¹⁹⁰ However, some interests in the United States saw the matter differently.¹⁹¹ Particular criticism was directed toward the fact that a comparatively small number of developing countries accounted for most of the imports entered duty free under the program.¹⁹² The legislative result was a change in the "competitive need" criteria of the law.

Under the TTA, the President is required, not later than January 4, 1987 (and periodically thereafter), to conduct a general review of eligible articles and to evaluate whether particular BDCs have reached a degree of "comparative competitiveness" with respect to particular articles.¹⁹³ There are no set standards for determining when a BDC has reached a "sufficient degree of competitiveness" compared to other BDCs. Consequently, the determination will depend upon certain "policy" considerations, which basically will give the President the power to grant duty free treatment in exchange for political considerations.

Under the TTA, if the President determines that a particular BDC has demonstrated a sufficient degree of competitiveness with respect to a particular article, then a new competitive need test is substituted.¹⁹⁴ Specifically, the particular BDC will be determined to have no further competitive need for duty free treatment if it accounts for twenty-five percent of total imports of the article, rather than fifty percent.¹⁹⁵ Similarly, it will be deemed no longer to have a competitive need for duty free treatment if the value of

190. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 96TH CONG. 2D SESS., REPORT TO THE CONGRESS ON THE FIRST FIVE YEAR'S OPERATION OF U.S. GENERALIZED SYSTEM OF PREFERENCES (GSP), (Comm. Print 1980) (transmitted by the President of the United States) (report of the President).

191. *Id.*

192. As of 1978, Taiwan, Korea, Hong Kong, Mexico and Brazil accounted for 68 percent of all GSP benefits. *Id.* at 26-27. For a critique of the U.S. GSP system on the ground that it favors the "more developed" developing countries at the expense of the least developed developing countries, see Lahoud, "Non-Discriminatory" United States Generalized System of Preferences: *De Facto Discrimination Against The Least Developed Developing Countries*, 23 HARV. INT'L L.J. 1 (1982).

193. 1974 Act § 504(c)(2), 19 U.S.C. 2464(c)(2), as amended by TTA § 505(b), *supra* note 1, at 3020-22.

194. 1974 Act § 504(c)(1), 19 U.S.C. § 2464(c), as amended by *id.* at 3020.

195. 1974 Act § 504(c)(2)(B)(ii), 19 U.S.C. § 2464(c)(2)(B)(ii), as amended by *id.* at 3021.

its exports exceed twenty-five million dollars, adjusted for inflation after 1984.¹⁹⁶ Under the "normal" competitive need test, the twenty-five million dollars is adjusted for inflation as of 1974.¹⁹⁷

The President, however, is authorized to waive this determination, and to avoid substitution of the more restrictive competitive need test. Before doing so, however, the President is instructed by the TTA to "give great weight to" the extent to which the particular BDC has assured the United States that it will provide "equitable and reasonable access" to its markets and to its basic commodity resources, and the extent to which the BDC provides adequate and effective means under its law for foreign nationals—i.e. U.S. companies—"to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademark and copyright rights."¹⁹⁸ Quite clearly, a developing country—a country that by definition has limited leverage in international trade negotiations—may be pressed hard by the United States on these points, at the risk of losing GSP treatment.

Limitations are placed on the total quantity of designated articles that can be subject to Presidential waiver. Not more than thirty percent of the total GSP imports are permitted to be subject to waiver in any year, and of that thirty percent, not more than one half of the articles subject to waiver can be imported from countries with either a *per capita* gross national product of five thousand dollars or more, or from countries which had in excess of a ten percent share of exports to the United States of articles subject to GSP.¹⁹⁹ These countries would include Hong Kong, Korea, Taiwan, Israel, Singapore, Brunei and Trinidad and Tobago.²⁰⁰

The TTA also establishes, for the first time, a basis on which to graduate a country from BDC status entirely, rather than on an article-by-article basis. Total graduation would occur when a BDC's annual *per capita* gross national product exceeds eight thousand five hundred dollars adjusted by fifty percent of the growth of the U.S. gross national product since 1984. When this occurs, the twenty-five percent competitive need ceiling will apply for the

196. 1974 Act § 504(c)(1)(A), 19 U.S.C. § 2464(c)(1)(A), as amended by *id.* at 3020.

197. 19 U.S.C. § 2464(c)(1)(A).

198. 1974 Act § 504(c)(3)(B), 19 U.S.C. § 2464(c)(3)(B), as amended by TTA § 505(b), *supra* note 1, at 3021.

199. 1974 Act § 504(c)(3)(D), 19 U.S.C. § 2464(c)(3)(D), as amended by TTA § 505(b), *id.*

200. 50 Fed. Reg. 6295 (1985).

following two years, and subsequently, the country no longer will be considered an eligible BDC.²⁰¹

Extension of GSP certainly is a trade liberalizing element of the TTA and must be reckoned as a major political achievement of the Administration at a time of record trade deficits and strong pressures for protection. Its continuation until July 1993—the mid-point in a non-election year—is a stroke of political astuteness, for the next renewal battle may be undertaken apart from the pressures of electioneering. Still, one may wonder how much the program really is worth. With such products as textiles—basic to industry in developing countries—excluded from the program, with the more restrictive competitive need test in place, and with declining tariffs for developed countries which reduce the comparative benefit of duty-free status, it just might be that GSP will be of minor importance come July 4, 1993.

VI. STEEL IMPORT STABILIZATION ACT

The "Steel Import Stabilization Act," another of the provisions of the TTA to have had a separate existence, constitutes Title VIII of the law.²⁰² Title VIII grants to the President the power to enforce bilateral agreements²⁰³ with our trading partners in order to implement the purposes of the Act.²⁰⁴ In plain language, this means

201. 1974 Act § 504(f), 19 U.S.C. § 2464(f) as amended by TTA § 505(c), *supra* note 1, at 3022-23.

202. TTA §§ 801-808, *id.* at 3043-47. See *supra* note 20.

203. The term 'bilateral arrangement' means any arrangement, agreement, or understanding (including but not limited to, any surge control understanding or suspension agreement) entered into or undertaken, or previously entered into or undertaken, by the United States and any foreign country or customs union containing such quantitative limitations, restrictions, or other terms relating to the importation into, or exportation to, the United States of categories of steel products as may be necessary to implement the national policy for the steel industry. TTA § 804(1), 19 U.S.C. § 2253 note, *supra* note 1, at 3045.

204. The purposes of the Steel Import Stabilization Act are:

(1) to supplement the authority of the President to achieve the goals of the national policy for the steel industry by granting enforcement powers regarding those bilateral arrangements that are entered into or undertaken for purposes of implementing that national policy; and

(2) to make the continuation of those powers subject to the condition that the steel industry undertake a comprehensive modernization of its plant and equipment.

TTA § 802(b), 19 U.S.C. § 2253, *id.* at 3044.

the President may enter into and enforce—by embargo, if necessary—quotas that limit U.S. imports of steel products.²⁰⁵

The President's authority to enforce quotas on imports of steel products extends for a period of five years.²⁰⁶ However, the authority will terminate on each anniversary of the effective date of the Steel Import Stabilization Act²⁰⁷ unless the President submits to the Congress annually an affirmative determination that the "major companies of the steel industry"²⁰⁸ have, during the preceeding 12 months:

- (i) committed substantially all of their net cash flow from steel product operations for purposes of reinvestment in, and modernization of, that industry through investment in modern plant and equipment, research and development, and other appropriate

205. The President is, of course, authorized by the escape clause provisions of the 1974 Act, to impose import restrictions following an affirmative determination by the USITC. See *infra* notes 285-312 and accompanying text. In July 1984 the President received precisely this authority by virtue of the USITC's determination in Carbon and Certain Alloy Steel Products, USITC Pub. 1553 (July 1984). A majority of the ITC found affirmatively as to all products except pipe and tube. But unilateral, restrictive action could cause retaliation from our trading partners. Thus, the President rejected the ITC-recommended remedy of new tariffs, quotas, and tariff-rate quotas on imported steel. The Administration attributed the problems of the steel industry to diversion of imports into the U.S. because of quotas and import restraints in other nations, and to "massive unfair trade practices such as subsidies and predatory below market pricing, or dumping." *Press Release 84/23, Office of the United States Trade Representative, Executive Office of the President, Sept. 18, 1984*. The President announced he was confining action to elimination of the unfair practices, but not to restrict imports in a protectionist way. "This decision clearly indicates the President's commitment to maintain our efforts to liberalize world trade and to take those actions which create jobs for American workers in sales overseas rather than closing our markets here at home. In sum, the President has refused to put at risk the thousands of jobs in steel fabricating and other consuming industries, whether they make refrigerators, tractors or automobiles. He has refused to take any action that would put at risk the exports of our farmers and other workers in export industries." *Id.* The President, however, seems to have done exactly that. On December 19, 1984 U.S. Trade Representative Bill Brock announced conclusion of negotiations limiting exports of steel from Japan, Korea, Brazil, Mexico, Spain, Australia, and South Africa, in addition to quotas already in place on imports from the European Community. *Press Release 84/26, Office of the United States Trade Representative, Executive Office of the President, Dec. 19, 1984*. "It is expected," Brock stated, "that overall steel import penetration will decline significantly as a result of these agreements." *Id.* So much for refusing to put at risk those thousands of jobs in the steel fabricating industries.

206. TTA §806(a)(1), 19 U.S.C. § 2253 note, *supra* note 1, at 3046.

207. The effective date is October 1, 1984. TTA §808, 19 U.S.C. §2253 note, *id.* at 3047.

208. TTA §806(a)(1), 19 U.S.C. § 2253 note, *id.* at 3046. The term "major company" means an enterprise whose raw steel production in the United States during 1983 exceeded 1,500,000 net tons. TTA §806(b)(2)(A), 19 U.S.C. § 2253 note, *id.* at 3047.

projects, such as working capital for steel operations and programs for the retraining of workers; and

(ii) taken sufficient action to maintain their international competitiveness, including action to produce price-competitive and quality-competitive products, to control costs of production, including employment costs, and to improve productivity. . . .²⁰⁹

The Steel Import Stabilization Act is based upon Congressional findings that "the United States steel industry has a serious need to modernize its plant and equipment"²¹⁰ and that "the ability of the domestic steel industry to be internationally competitive is, and has been, impeded by the effects of the enormous Federal budget deficit, an overvalued dollar, and increasing trade deficits, as well as serious injury due to imports of, and subsidies, dumping, and the use of other unfair and restrictive foreign trade practices regarding steel products"²¹¹ This statement of Congressional purposes goes on to assert that extensive unfair trade practices in the international market reduce the effectiveness of the trade remedy laws for the steel industry, and that expeditious action by the executive branch is needed.²¹²

The stated reason for the statute's requirement that the President affirmatively determine and notify Congress that the major steel companies have taken the requisite steps to reinvest and to modernize is "to make the continuation of those powers subject to the condition that the steel industry undertake a comprehensive modernization of its plant and equipment."²¹³ As Congress significantly observes: "[I]mport relief will be ineffective and will not serve the national economic interest unless the industry during the period of relief engages in serious efforts substantially to modernize and to improve its international competitiveness"²¹⁴

In enacting the Steel Import Stabilization Act, the legislators

209. TTA § 806(b)(1)(A), 19 U.S.C. § 2253 note, *id.* at 3046. In addition, the President must determine (1) that each of these "companies committed, for the applicable 12-month period, not less than 1 percent of net cash flow to the retraining of workers" (subject to waiver by the President in "unusual economic circumstances") and (2) that "the enforcement authority . . . remains necessary to maintain the effectiveness of bilateral arrangements." TTA § 806(b)(1)(B) & (C), 19 U.S.C. § 2253 note, *id.*

210. TTA § 802(a)(1), 19 U.S.C. § 2253 note, *id.* at 3044.

211. TTA § 802(a)(2), 19 U.S.C. § 2253 note, *id.*

212. TTA § 802(a)(3) & (4), 19 U.S.C. § 2253 note, *id.*

213. TTA § 802(b)(2), 19 U.S.C. § 2253 note, *id.*

214. TTA § 802(a)(5), 19 U.S.C. § 2253 note, *id.*

express the sense of the Congress that implementation of its national policy for the steel industry would result in a foreign share of the domestic market of 17.0 to 20.2 percent—which Congress believes “is commensurate with a level which would obtain under conditions of fair, unsubsidized competition”²¹⁵ Congress also expressed its “sense” that the steel policy should not be implemented in a manner contrary to the antitrust laws,²¹⁶ and went on to observe—or threaten—that:

[I]f the national policy for the steel industry does not produce satisfactory results within a reasonable period of time, the Congress will consider taking such legislative actions concerning steel and iron ore products as maybe necessary or appropriate to stabilize conditions in the domestic market for such products.²¹⁷

Congressional satisfaction with its steel handiwork apparently is short-lived. On January 3, 1985, on the first day of the 99th Congress, Senator Heinz, for himself and nineteen co-sponsors, introduced “S. 11. A bill to Amend the Steel Import Stabilization Act.”²¹⁸ S. 11 would direct the U.S. Trade Representative to negotiate bilateral agreements with Japan and Korea containing, in addition to an overall ceiling on imports, sublimits on twenty-seven categories of steel mill products. The bill provides: “If such negotiations are not successfully concluded within 30 days of the date of enactment of this subsection, the U.S. Trade Representative shall unilaterally apportion the aggregate limit among the sub categories”²¹⁹

VII. UNITED STATES—ISRAEL FREE TRADE AREA

A significant departure from traditional U.S. adherence to most-favored-nation (MFN) principles is contained in Title IV of the TTA, which authorizes the President to negotiate a bilateral free trade agreement with Israel.²²⁰ This provision had its genesis in a

215. TTA § 803(1), 19 U.S.C. § 2253 note, *id.*

216. TTA § 803(2), 19 U.S.C. § 2253 note, *id.*

217. TTA § 803(3), 19 U.S.C. § 2253 note, *id.* at 3044-45.

218. 131 Cong. Rec. S75 (daily ed. Jan. 3, 1985) (statement of Sen. Heinz).

219. *Id.* at 576 quoting S.11, 98th Cong., 2d Sess.

220. TTA §§ 401-406, *supra* note 1, at 3013-16. The United States in 1923 adopted the policy of unconditional most-favored-nation customs treatment. “Other than the passage of the Trade Agreements Act in 1934, there is probably no development in United States commercial policy of greater importance.” KELLY, STUDIES IN UNITED STATES COMMERCIAL POLICY 29 (1963).

November 1983 agreement between President Reagan and then Prime Minister Shamir of Israel.²²¹ The two leaders, confronted with Israel's sagging economy and a perceived need to strengthen strategic ties between the two countries, agreed to begin bilateral negotiations with a view toward the free trade area.²²²

The TTA amends section 102 of the 1974 Act, by adding authority for the President to negotiate agreements harmonizing, reducing or eliminating tariff as well as non-tariff trade barriers with Israel.²²³ Any agreement reached would require congressional approval, but these would be subject to the "fast track" procedures set forth in the 1974 Act for consideration of trade agreements.²²⁴ In general, those procedures provide for notification of Congress ninety days before the President enters into an agreement; submission of the agreement and implementing legislation for congressional approval after the agreement is entered into; and approval or disapproval by both houses within sixty days.²²⁵ The "fast track" procedures, therefore, do not ensure congressional approval, but they do ensure prompt congressional action.²²⁶

The TTA provides criteria for determining the Israeli origin of products that would benefit from a free trade agreement. These include the requirements that (1) "the article is the growth, product or manufacture of Israel;" (2) the article is imported directly into the United States from Israel; (3) "the cost of the value of the materials produced in Israel, . . . [and] the direct cost of processing operations performed in Israel, . . . [be] not less than 35 percent of the appraised value" of the article at the time of entry into the U.S.; and (4) simple combining or packaging operations, or other such procedures, will not, alone, characterize an article as "Israeli."²²⁷ Notwithstanding a free trade agreement, imports from Israel may

221. See remarks of Rep. Thomas J. Downey, 130 Cong. Rec. E1483 (Apr. 5, 1984).

222. Auerbach, *U.S. and Israel Near Accord on Free-Trade Pact*, Washington Post, Jan. 29, 1985, § D, at 1, col. 4.

223. 1974 Act § 102, 19 U.S.C. § 2112(b), as amended by TTA § 401(a)(2), *supra* note 1, at 3014.

224. 19 U.S.C. §§ 2112(e)-(f); §§ 2191-2194.

225. 19 U.S.C. §§ 2112(e); §§ 2191-2194.

226. As a practical matter, the requirement of notification of Congress at least 90 days before entering into an agreement amounts to a requirement to brief Congress and to obtain prior approval. No administration is likely to go to the Congress under the "fast track" procedures with an agreement whose approval has not been insured in advance.

227. TTA § 402(a)(1) & (2), 19 U.S.C. § 2112 note, *supra* note 1, at 3015.

be restrained by the President pursuant to the "escape clause" provisions of the 1974 Act and the National Security provisions of the Trade Expansion Act of 1962.²²⁸ Special "fast track" procedures for relief from imports of perishable articles also are provided by the Act.²²⁹

Following passage of the TTA, events moved rather swiftly with regard to a free agreement with Israel. By January 1985, a draft agreement was circulating within the Congress and the Administration.²³⁰ Reportedly, the agreement provides for tariff reductions on some items immediately, on others within five years, and on others by 1995.²³¹

VIII. THE LAND OF WINE AND HONEY—AS WELL AS COPPER

In August 1976, the President declined to impose additional import restrictions on honey.²³² In March 1984, the U.S. International Trade Commission determined that there was no reasonable indication that an industry in the United States was being materially injured by reason of imports of ordinary table wine from France or Italy—wine that allegedly was subsidized or sold below its fair value.²³³ In September 1984, the President declined to impose additional import restrictions on unwrought copper.²³⁴

These three industries, having tried unsuccessfully to obtain relief from import competition through the administrative process, sought to obtain relief legislatively. All three obtained congressional acknowledgment of their plight in the TTA, but the wine industry seems to have done best.

228. TTA § 403(a), 19 U.S.C. § 2112 note, *id.* at 3016.

229. TTA § 404, 19 U.S.C. § 2112 note, *id.* at 3016-17. Perishable products are vegetables, edible nuts and fruits, fresh cut flowers and concentrated citrus fruit juice. TTA § 404(e), 19 U.S.C. § 2112 note, *supra* note 1, at 3017.

230. 2 INT'L TRADE REP. (BNA), at 161 (Jan. 30, 1985).

231. *Id.*

232. 122 Cong. Rec. 28532, 28617 (1976). The President was authorized to take action by virtue of an affirmative determination by the U.S. International Trade Commission in a proceeding under Section 201 of the 1974 Act. *See*, Honey, USITC Pub. 781 (June 1976).

233. *Certain Table Wine from France and Italy*, USITC Pub. 1502 (March 1984).

234. 130 Cong. Rec. H9216, S10930 (daily ed. Sept. 11, 1984). The President was authorized to take action by virtue of an affirmative determination by the U.S. International Trade Commission in a proceeding under section 201 of the 1974 Act. *See*, *Unwrought Copper*, USITC Pub. 1549 (July 1984).

A. WINE

The wine industry in the United States achieved two major victories in the passage of the TTA: first, as noted, Title IX of the TTA is the "Wine Equity and Export Expansion Act of 1984."²³⁵ In addition to this Act, the wine industry established its legal right to special treatment in future antidumping or countervailing duty investigations by means of an amendment to Title VI of the TTA, dealing with trade law reform.²³⁶ This amendment deals with the definition of the term "industry" as it is used in the Tariff Act for purposes of antidumping and countervailing duty investigations.²³⁷ The Tariff Act provides that "industry" "means the domestic producers as a whole of a *like product*, or those producers whose collective output of the *like product* constitutes a major proportion of the total domestic production of *that product*."²³⁸ The TTA adds to this definition special treatment for the wine industry by providing that, in the case of wine and grape products subject to antidumping and countervailing duty investigations, the term industry also means the domestic producers of grapes not just the producers of wine.²³⁹ This special treatment shall apply to any petitions filed for antidumping or countervailing relief through September 30, 1986.²⁴⁰

Refusal of a unanimous International Trade Commission to consider grape growers as part of the domestic wine industry was

235. TTA §§ 901-907, *supra* note 1, at 3047-50. See *supra* note 6.

236. See *supra* notes 29-133 and accompanying text, for a discussion other aspects of trade law reform.

237. TTA § 612(a)(1), *supra* note 1, at 3033, amends Tariff Act § 771(4)(A), 19 U.S.C. § 1677(4)(A), which defines the term "industry."

238. 19 U.S.C. § 1677(4)(A) (Emphasis added).

239. Tariff Act § 771(4)(A), 19 U.S.C. § 1677(4)(A), as amended by TTA § 612(a)(1), *supra* note 1, at 3033.

240. TTA § 626(c)(2), 19 U.S.C. § 1671 note, *id.* at 3043. The Antidumping Code, the Agreement on Implementing of Article VI of the General Agreement on Tariffs and Trade done Apr. 12, 1979 (relating to antidumping measures), reprinted in AGREEMENTS REACHED IN THE TOKYO ROUND OF MULTILATERAL TRADE NEGOTIATIONS, *supra* note 33, at 309-337, defines "like product" as "a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." *Id.* art. 2, para. 2. The Subsidies Code Art. 6, para. 1, *supra* note 18 uses the same definition. Subsidies Agreement, *supra* note 94, at 259-306. The European Communities have complained to the General Agreement on Tariffs and Trade that this special definition of "industry" in the TTA violates those codes. See, *GATT Conciliation Fails to Halt Dispute Over U.S. Wine Act*, Wall St. J., Jan. 8, 1985, at 40, col. 6.

part of the reason for the negative determination reached in the countervailing duty and antidumping cases brought against table wine from France and Italy.²⁴¹ Not only did the Commission decline to consider the grape growers as part of the wine industry, but, indeed, the Commission noted that the interests of grape growers and wine producers are not necessarily the same. "Thus, wineries actually benefit from the low grape prices which result from an over-supply situation; conversely, growers benefit from the higher prices generally characteristic of shortage periods."²⁴² But, for a period of two years, at least, it appears that Congress has suspended this economic determination of the ITC.²⁴³

The "Wine Equity and Export Expansion Act of 1984," like the "International Trade and Investment Act,"²⁴⁴ may be viewed as a market-opening measure, rather than as a narrow, special interest measure, which seems to be a fair characterization of the "industry" definition provisions. It is based upon congressional findings that the United States wine industry faces restrictive tariff and non-tariff barriers in virtually every existing or potential foreign market, a decided contrast with the relatively open U.S. market.²⁴⁵ In addition to these foreign practices, Congress also found that the competitive position of U.S. wine in international trade has been weakened by "high domestic interest rates, and unfavorable foreign exchange rates,"²⁴⁶ but through the TTA—at least—it is unable to address these difficulties.

The stated purposes of the Wine Equity and Export Expansion Act of 1984 are typical of the purposes stated for any statute that envisions increased international trade.²⁴⁷ They are to provide consumers with greater choice; to expand foreign markets for U.S. wine through export promotion; and to achieve greater access to foreign markets for U.S. wine and grape products through the reduction or elimination of tariff and non-tariff barriers.²⁴⁸

241. USITC Pub. 1502, *supra* note 234.

242. *Id.* at 10.

243. The grape growers and wine producers seem to be losing little time. See, *Countervailing Duties, Grape Growers, Wine Producers Set to File New Petition Against French, Italian Imports*. 2 INT'L TRADE REP. (BNA), at 201 (Feb. 6, 1985).

244. See *supra* notes 143-45 and accompanying text.

245. TTA § 902(a), *supra* note 1, at 3047-48.

246. TTA § 902(a)(3), 19 U.S.C. § 2801(a)(3), *id.* at 3047.

247. See, e.g., 19 U.S.C. §§ 2502(c), 2102; Trade Expansion Act of 1962 § 102, Pub. L. 87-794, 76 Stat. 872.

248. TTA § 902(b), 19 U.S.C. § 2801(b), *supra* note 1, at 3048.

The TTA requires the U.S. Trade Representative to designate, as a major wine trading country, those nations that offer a potentially significant market for U.S. wine, and that maintain tariff or non-tariff barriers to U.S. exports of wine.²⁴⁹ That portion of the TTA harkens back to the Trade Agreements Act of 1979, which required the President to review foreign tariff and non-tariff barriers affecting U.S. exports of alcoholic beverages, and to report the results of this review to Congress by January 1, 1982.²⁵⁰

The TTA requires the President to direct the USTR to enter into consultations with each major wine trading country to see the reduction or elimination of that country's barriers to imports of U.S. wine,²⁵¹ and further requires the President to notify Congress annually regarding the extent and the effect of efforts undertaken since submission of the report required by the Trade Agreements Act of 1979 to expand the opportunity in those countries for exports of U.S. wine.²⁵²

This report, quite clearly, can become the focus of increased political pressure to take action if progress toward opening markets to U.S. exports is not made. The TTA then, in the manner of Title III,²⁵³ authorizes the President, if he determines that action is appropriate, to "take all appropriate and feasible action under the Trade Act of 1974 to enforce the rights of the United States."²⁵⁴ The language parallels that of Title III, speaking of actions that are inconsistent with the provisions of trade agreements, or are unjustifiable, unreasonable, or discriminatory.²⁵⁵

B. HONEY

The honey industry did not do as well as the wine industry in the TTA. The Senate-passed version of the TTA expressed the sense of Congress that the Secretary of Agriculture should request the President to call for an ITC investigation into honey imports

249. TTA § 904(a), 19 U.S.C. § 2803(a), *id.*

250. 19 U.S.C. § 2135. See, REPORT BY THE PRESIDENT TO THE CONGRESS ON FOREIGN TARIFF AND NON-TARIFF BARRIERS AFFECTING UNITED STATES EXPORTS OF ALCOHOLIC BEVERAGES, submitted pursuant to § 854(a) of the Trade Agreements Act of 1979 reprinted in 127 Cong. Rec. H9082, S5001 (Dec. 10, 1981).

251. TTA § 905(a), 19 U.S.C. § 2804(a), *supra* note 1, at 3049.

252. TTA § 905(b), 19 U.S.C. § 2804(b), *id.*

253. TTA §§ 301-308, *id.* at 3000-3013. See *supra* notes 143-45 and accompanying text.

254. TTA § 905(c), 19 U.S.C. § 2804(c), *supra* note 1, at 3049-50.

255. *Id.*

under section 22 of the Agricultural Adjustment Act (section 22).²⁵⁶ The House-passed bill contained no honey provisions. The conferees agreed to the Senate provision, but with the modification that it expressed the sense of the Senate only, not the sense of the Congress.²⁵⁷

The Senate-passed provision, now adopted by the TTA as the sense of the Senate only, basically combines two elements. First, the Senate finds that in 1976 honey imports threatened serious injury to the domestic honey industry, and that the honey bees are an essential element of insect pollination required for many agricultural crops.²⁵⁸ It then calls for the section 22 investigation.²⁵⁹

This small section contains two confused, implied arguments: First, it implies that the honey industry — meaning beekeepers — is being injured by imports of honey. But, if this is the case, it would seem only logical that the industry would again try its hand at the various trade laws designed to protect domestic industries from import competition. Section 22 is not such a law. Second, it is asserted that honey bees are essential to the pollination of many agricultural crops. The implication seems to be that if imports of honey are entering the United States in sufficient quantities to cause serious injury to the honey industry, beekeepers will go out of business, there will be fewer bees to pollinate crops, and, consequently fewer crops. It is not clear on what facts Congress bases this forecast, but before it comes to pass, one would imagine that the economic value of bees would increase greatly. Honey imports — and honey production — would be irrelevant to the costs agricultural producers would be willing to incur in order to guarantee adequate pollination of their crops before we all starve. Certainly there is no sound reason to impose import restraints on honey in order to provide free pollination services to producers of other crops.

Invoking section 22 as a remedy for these perceived difficulties — even if they are real — would be a misapplication of the statute. Section 22 authorizes the President to impose restrictions on imports of articles that threaten the effectiveness, or materially

256. §22 of the Agricultural Adjustment Act, 7 U.S.C. § 624, provides generally that the President may impose limits on imports of agricultural products if he finds that imports are interfering with the various price support programs of the Department of Agriculture.

257. Conference Report, *supra* note 55, at 5249.

258. TTA § 246(a), *supra* note 1, at 2997.

259. TTA § 246(b), *id.*

interfere with, agricultural price support programs. In order to justify section 22 restrictions, the President must find "the fact, or probability, that importations of the articles are, or are likely to be, under such conditions and in such quantities as to threaten the price support program"²⁶⁰

The purpose of section 22, then, is to protect the various price support programs of the Department of Agriculture, not to protect industries from import competition *per se*. If imports add to the supply of an agricultural product, the price of which the Department of Agriculture is attempting to support at a minimum level, then, of course, the increase in supply could have the effect of reducing the domestic price below the support level, and consequently interfering with the support program. None of this, however, has anything directly to do with the question of whether imports are or are not injuring the domestic honey industry, or whether they are, or are not, threatening famine through decimation of honey bees needed to pollinate crops. To utilize section 22 to deal with these perceived difficulties would be a misuse of the statute.

C. COPPER

The President's refusal to impose additional restrictions on imports of copper, following the unanimous ITC determination that imports were seriously injuring the U.S. industry, prompted provisions in the TTA with the avowed purpose of increasing copper prices.²⁶¹ In its statement of findings, Congress observes that worldwide copper prices are at record low levels and that this situation threatens severe economic distress for developing countries dependent on copper exports as their major source of foreign exchange.²⁶² Congress observes that the position of U.S. copper producers could be "enhanced" if copper prices returned "to more historically representative levels,"²⁶³ and finds commendable "a balanced reduction in foreign copper production which raises marginally the world price for copper"²⁶⁴

In response to this situation, the Senate would have required the President to initiate negotiations with the governments of

260. *Best Foods, Inc. v. United States*, 218 F. Supp. 576, 583 (Cust. Ct. 1963).

261. TTA § 247, *supra* note 1, at 2997-98.

262. TTA § 247(a), *id.*

263. TTA § 247(a)(6), *id.* at 2997.

264. TTA § 247(a)(7), *id.* at 2998.

copper-producing countries to conclude "voluntary" agreements to reduce foreign (but not U.S.) copper production in order "to allow copper prices to rise to levels with which U.S. producers can compete."²⁶⁵ The conferees modified this provision to express the sense of Congress that the President should negotiate, and to express the further sense of Congress that the President should submit a report to Congress within twelve months explaining the results of his negotiations, or explaining why he felt it was inappropriate or unnecessary to undertake such negotiations.²⁶⁶ It remains to be seen what action, if any, the President will take pursuant to this provision.

IX. CUSTOMS AND MISCELLANEOUS AMENDMENTS

A. PERMANENT AND TEMPORARY DUTY FREE TREATMENT

The Trade and Tariff Act of 1984, as noted, began as a Miscellaneous Tariff Bill, and a multitude of tariff provisions are included within the law. Both permanent and temporary changes are made in the tariff treatment of a wide variety of articles. For example, the TTA provides for the permanent duty-free treatment of warp knitting machines and parts thereof entered after June 30, 1983,²⁶⁷ and for an 8.5 percent *ad valorem* duty on imported toys for pets, if the toys are made of textile materials.²⁶⁸

Most of these are non-controversial, often highly technical changes.²⁶⁹ Quite obviously, however, these "miscellaneous" tariff measures of a "technical" nature can have important consequences. For example, the House would have amended the Tariff Schedules of the United States to impose a duty of one-tenth of one cent per

265. Conference Report, *supra* note 55, at 5260.

266. TTA § 247(b) & (c), *supra* note 1, at 2998.

267. TTA § 112, *id.* at 2952.

268. TTA § 114, *id.* See Conference Report, *supra* note 55, at 5221.

269. Articles subject to permanent changes in tariff treatment are: coated textile fabrics, warp knitting machines, certain gloves, pet toys, water chestnuts and bamboo shoots, gut for use in manufacture of sterile surgical sutures, orange juice products, reimportation of certain articles originally imported duty free, geophysical equipment, scrolls or tablets used in religious observances, steel pipes and tubes used in lampposts, wearing apparel, recently developed dairy products, telecommunications product classification, fresh asparagus, chipper knife steel, implementation of customs convention on containers, 1972. TTA §§ 111-27, *supra* note 1, at 2951-59. Articles subject to temporary changes in tariff treatment are: fresh, chilled, or frozen brussels sprouts, B-naphthol, 4-chloro-3-methylphenol, tetraamino biphenyl, 6-amino-1-naphthol-3-sulfonic acid, DSA, guanidines, certain antibiotics, acetylsulfaguanidine,

gallon on imports of apple or pear juice—in purely monetary terms, hardly a measure of economic significance. But the provision, had it passed, would have had important legal significance and would have amounted to an amazing piece of special interest legislation.

At present, apple or pear juice enters the United States free of duty.²⁷⁰ Because of this duty free status, countervailing duties may not be imposed to offset subsidies conferred on exports to the United States, unless it is shown that the subsidized imports are causing material injury. But if an article is subject to duty—even a duty as small as one tenth of one cent per gallon—then there is no need to prove material injury if the imports are from a country that is not a signatory of the international Subsidies Code or its equivalent.²⁷¹

It seems that exporters in Argentina have been making considerable headway in their efforts to increase their exports of these products to the United States. Argentina is not a signatory to the Subsidies Code. The apple and pear juice producers in the United States claim the Argentine Government subsidizes these exports, but unfortunately for the apple and pear juice producers in the United States, since the merchandise is duty free, there can be no countervailing duty to offset these alleged subsidies—not unless the U.S. apple and pear juice producers are able to show that they are being materially injured.

The solution would seem to be a simple one: prove that the subsidized Argentine imports are causing material injury. But this

fenridazon-potassium, uncomounded allyl resins, sulfamethazine, sulfaguanidine, terfenadine, sulfathiazole, sulfaquinoxaline and sulfanilamide, dicyclomine hydrochloride and mepenzolate bromide, amiodarone, desipramine hydrochloride, clomiphene citrate, yttrium bearing materials and compounds, tartaric acid and chemicals, certain mixtures of magnesium chloride and magnesium nitrate, nicotine resin complex, rifampin, lactulose, iron-dextran complex, natural graphite, zinc, certain diamond tool blanks, clock radios, lace-braiding machines, certain magnetron tubes, narrow fabric looms, umbrella frames, crude feathers and down, canned corned beef, hovercraft skirts, disposable surgical drapes and sterile gowns, MXDA, 4,4'-Bis(α , α -dimethylbenzyl) diphenylamine, flecainide acetate, caffeine, watch crystals, unwrought lead, flat knitting machines, certain menthol feedstocks, 2-methyl-4-chlorophenol, unwrought alloys of cobalt, circular knitting machines, o-Benzyl-p-chlorophenol, certain benzenoid chemicals, m-Toluic acid. TTA §§ 131-183, *id.* at 2960-69.

270. TSUSA (1985) item 165.1500.

271. See Subsidies Agreement, *supra* note 94. The countervailing duty provisions of Title VII of the Tariff Act of 1930, 19 U.S.C. § 1671 *et seq.*, by their terms apply only to countries "under the Agreement." Other countries are subject to § 303 of the Tariff Act, 19 U.S.C. § 1303, which contains no injury requirement for dutiable merchandise.

solution did not appeal to the U.S. producers who, apparently, could prove no such thing. Instead, they prevailed upon Senator John Warner (Rep.-Va) to introduce S. 453 to impose a one-tenth of one cent per gallon duty on imported apple and pear juice.²⁷² As the witness in support of the measure candidly told the Subcommittee on International Trade of the Committee on Finance of the Senate, the measure was "merely a way to place subsidized Argentine apple juice imports in a dutiable category enabling the Farm Bureau to file a countervailing duty petition without the bother and tremendous expense of proving 'injury' to the domestic apple industry."²⁷³ The conferees would not agree, and the measure was dropped from the TTA.²⁷⁴

The Senate also would have provided for a temporary increase in the duty on the chemical melamine, an increase justified by its supporters on the ground that they have been unable to meet the criteria for higher duties under the antidumping provisions of the law.²⁷⁵ This too was rejected by the conferees, and dropped from the TTA.²⁷⁶

Perhaps one of the more unusual provisions dealt with the classification of naphtha in the Tariff Schedules of the United States. Both the Senate and the House passed measures concerning the classification of naphtha, a product derived from petroleum, but the conferees gave up on the matter, explaining in a statement unusually candid for congressional prose: "Due to the unusual complexity of the products involved, the conferees determined that neither provision would accomplish the purposes intended by the respective Houses."²⁷⁷ The conferees, having concluded that neither House accomplished what it set out to accomplish, and apparently throwing their own hands up at the task, concluded that it would be best to request a study by the International Trade Commission.²⁷⁸

272. S. 453, 98th Cong., 1st Sess., 129 Cong. Rec. S972 (Feb. 3, 1983).

273. Hearing before the Subcommittee on International Trade, Committee on Finance, United States Senate, 98th Cong. 1st Sess. Oct. 21, 1983 at 294 (Statement of the American Farm Bureau Federation to the Subcommittee on International Trade of the Senate Finance Committee regarding S. 453.)

274. Conference Report *supra* note 55, at 5239.

275. Hearing before the Subcommittee on International Trade of the Committee on Finance, United States Senate, 98th Cong., 1st Sess. Oct. 21, 1983 at 241 (Statement of James Miller).

276. Conference Report *supra* note 55, at 5240.

277. *Id.*

278. *Id.*

B. PIPE AND TUBE COUNTRY OF ORIGIN

Despite the ultimate rejection of the apple and pear juice and melamine provisions, not all special interest measures escaped inclusion in Title II. Honey and copper, for example, are set forth within that Title.²⁷⁹ Another special interest provision was hidden under the innocuous section heading, "Certain Country of Origin Marking Requirements."²⁸⁰ This provision requires that pipes and fittings of iron, steel or stainless steel be marked with the English name of the country of origin by means of "die stamping, cast-in-mold lettering, etching, or engraving."²⁸¹ This, to the uninitiated, seems harmless enough, but it certainly was not harmless to the initiated. The provision provoked the Customs Service to publish a notice in the Federal Register, soliciting comments as to how it should be applied because "[i]t has been brought to Customs attention that certain pipe and pipe fittings of iron or steel cannot be marked by any of the four prescribed methods without rendering such articles unfit for the purpose for which they are intended or violating industry standards for such articles."²⁸²

In other words, it is virtually impossible to mark these products in a way that conforms with the statute. Cast-in-mold lettering, of course, can only be done if pipe is cast, and as the Customs notice suggests, not all pipe—indeed probably not most pipe—is cast. But the other permitted means of labelling—die stamping, etching, or engraving—all involve cutting into the wall of the pipe, and thereby reducing its thickness and its ability to withstand pressure from liquid or gas. Undoubtedly, this is what the Customs Service had in mind when it noted that marking could violate "industry standards."²⁸³ The pipe and tube marking provisions would seem to be a classic example of a nontariff barrier of the type proscribed by the international Standards Agreement.²⁸⁴

279. See *supra* notes 248-253 and accompanying text.

280. TTA § 207, *supra* note 1, at 2976.

281. Tariff Act § 304(c), 19 U.S.C. § 1304(c), as amended and redesignated by TTA § 207(2), *supra* note 1, at 2976.

282. 50 Fed. Reg. 1064 (Jan. 9, 1985).

283. *Id.*

284. *Agreement on Technical Barriers To Trade (relating to produce standards)*, reprinted in *Agreements Reached In The Tokyo Round Of The Multilateral Trade Negotiations*, note 33, *supra* 209-256. TTA § 207 also contains provisions for the country of origin marking of gas cylinders and—as noted in the outset of this article—manhole covers. Tariff Act § 304(c), 19 U.S.C. § 1304(c), as amended and redesignated by TTA § 207(2), *supra* note 1, at 2976. See *supra* note 2 and accompanying text.

C. "ESCAPE CLAUSE" AMENDMENTS

Two sections of the TTA amended the "escape clause" provisions of the 1974 Act.²⁸⁵ The "escape clause" is the provision of law that permits the President to provide import relief, usually in the form of higher tariffs or quotas, to industries in the United States that are suffering actual or threatened serious injury substantially caused by increased imports.²⁸⁶ Unlike the antidumping and countervailing provisions of the law,²⁸⁷ the escape clause has nothing to do with so-called "unfair" competition from imports. It is a remedy for fair, but simply more efficient or more economical, import competition, designed to give U.S. industries a "breathing space" within which to adjust to import competition.²⁸⁸ In order to establish eligibility for relief under the escape clause, the ITC must determine that an industry in the United States is being seriously injured as a result, in substantial part, of increased imports.²⁸⁹ If it finds affirmatively, the President is authorized to provide import relief to that industry.²⁹⁰ The TTA amendments to the escape clause deal with the criteria by which the ITC is to determine eligibility, and the steps that may be taken by the Congress if it disapproves of the President's action in providing import relief after receiving an affirmative ITC determination.

1. Criteria

The TTA's criteria changes are a direct result of the negative determination of the ITC its 1984 investigation of Nonrubber Footwear.²⁹¹ The unanimous negative determination of the Commis-

285. 19 U.S.C. §§ 2251-2253.

286. *Id.*

287. *See supra* note 7.

288. 1974 Act § 201(a)(1) provides in part that import relief is "for the purpose of facilitating orderly adjustment to import competition." 19 U.S.C. § 2251(a)(1).

289. 19 U.S.C. § 2251(b).

290. 19 U.S.C. § 2251.

291. *Nonrubber Footwear, Report to the President on Inv. No. TA-201-50*. USITC Pub. 1545 (July 1984). The Conference Report, *supra* note 55, at 5258 states: "The Senate approved amendments to section 201 of the Trade Act are in response to the decision of the International Trade Commission in the non-rubber footwear case. These amendments reflected Senate dissatisfaction with the ITC's interpretation of section 201 in the nonrubber footwear case." The Senate passed a variety of escape clause amendments, to which reference is made in the previous quotation. *See* Conference Report, *supra* note 55, at 5256-59. In addition to the amendment specifying that the presence or absence of any particular factor is not dispositive of the issue of serious injury, the conference also adopted a Senate amendment

sion stunned the footwear industry and its legislative supporters.²⁹² So pronounced was the chagrin that Sen. John C. Danforth (Rep.-Mo.), Chairman of the Subcommittee on International Trade of the Senate Finance Committee, summoned the entire ITC investigative staff to a hearing and questioned them as to how they arrived at specific figures in their investigation.²⁹³

The basic dispute centered on the fact that the Commission found the footwear industry to be profitable, and, accordingly, not injured, even though imports had increased, and by 1983 were equal to 171 percent of U.S. production.²⁹⁴ The Commission, in essence, determined that the footwear industry in the United States, long under seige from imports, had adjusted to import competition in accordance with the purposes of the escape clause.

The 1984 proceeding was the third ITC escape clause investigation of the nonrubber footwear industry under the provisions of the 1974 Act.²⁹⁵ In the first investigation, the Commission unanimously found that increased imports were a substantial cause of serious injury to the U.S. industry.²⁹⁶ President Ford declined to impose higher tariffs or quotas, however, and determined that "adjustment assistance" was the most effective remedy.²⁹⁷

The second investigation was begun less than a year after President Ford declined to provide import relief. This was accomplished in October 1976 by a resolution of the Senate Committee on Finance, directing the Commission to reinvestigate the effect of imports on the domestic industry, even though one

relating to the criteria for threat of serious injury. This amendment specifies that the ITC, in considering a decline in sales, is to measure that decline in terms of articles that are like or directly competitive with the imported article, and that a higher or growing inventory may exist whether maintained by domestic producers, importers, or wholesalers. 1974 Act § 201(b), 19 U.S.C. § 2251(b), as amended by TTA § 249, *supra* note 1, at 2998-99.

292. See *Outrage Over ITC Vote on Footwear Relief Spurs Senate Subcommittee Investigation*, 9 U.S. Import Weekly (BNA), at 1156 (June 27, 1984) [hereinafter cited as BNA].

293. *Id.*

294. *Nonrubber Footwear*, *supra* note 291, at 9.

295. Background concerning the earlier investigations, and the source of their discussion, is set forth in *Nonrubber Footwear*, *id.* at A-1-A-6. Also discussed there are Commission investigations of the product under the countervailing duty laws.

296. *Id.*

297. The Adjustment Assistance provisions are set forth in chapters 2, 3, and 4 of Title II of the 1974 Act. 19 U.S.C. § 2271 *et. seq.* Various benefits are authorized including readjustment, retraining and relocation allowances for workers, financial assistance for firms and benefits for communities impacted by import competition.

year had not passed since the conclusion of the Commission's first investigation.²⁹⁸ Once again the Commission unanimously reached an affirmative determination, but this time President Carter rejected the Commission's proposed remedy of tariff-rate quotas, determining that a major new adjustment assistance program was the most effective remedy.²⁹⁹ In addition, Orderly Marketing Agreements were made with Taiwan and Korea, limiting imports from those countries for a four year period. Together those countries accounted for more than half of U.S. imports of nonrubber footwear.

With this background, the Commission in the 1984 case saw a shrunken footwear industry, but a profitable one, one in which many of the leading importers also were U.S. manufacturers. They saw an industry that had, therefore, adjusted to import competition, by shrinking and by becoming more profitable.

Many in the industry, and many in Congress, however, saw the matter differently. In particular, the Commission's concentration on profitability without equal concentration on the decline in the number of firms and in employment, was criticized.³⁰⁰ Addressing this concern, a new section (D) is added by the TTA to section 201(b)(2) of the escape clause. It provides:

[T]he presence or absence of any factor which the Commission is required to evaluate in subparagraph (A) and (B) shall not necessarily be dispositive of whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury or threat of serious injury to the domestic industry.³⁰¹

It did not take long for things to move after that. "Following receipt of a resolution of the Committee on Finance of the United

298. 1974 Act § 201(e) provides that "except for good cause determined by the Commission to exist, no investigation for the purposes of this section shall be made with respect to the same subject matter as a previous investigation under this section, unless 1 year has elapsed since the Commission made its report to the President of the result of such previous investigation." 19 U.S.C. § 2251(e).

299. Fed. Reg.

300. BNA, *supra* note 292.

301. 1974 Act § 201(b)(2)(D), 19 U.S.C. § 2251(b)(2)(D) *as amended and redesignated by* TTA § 249(D), *supra* note 1, at 2999. 1974 Act § 201(b)(2)(A) and (B) provide generally that the Commission, in determining whether serious injury exists, examine such factors as the idling of productive facilities, profit levels, and employment levels, and with respect to threat of serious injury, declines in sales, growth in inventory, and downward trends in production, profits, wages or employment. 19 U.S.C. § 2251(b)(2)(A) & (B).

States Senate on December 31, 1984, and upon consideration of all relevant data," the U.S. International Trade Commission in January 1985 announced the launching of Investigation No. TA-201-55, yet a fourth escape clause investigation of nonrubber footwear.³⁰² The Commission will make its determination by July 1, 1985.³⁰³

2. DISAPPROVAL OF PRESIDENTIAL ACTION

Presidents do not always follow International Trade Commission recommendations for import relief, as the history of the footwear investigations demonstrates.³⁰⁴ This is not surprising, for the Commission, having found injury, is directed by the statute simply to "find the amount" of any duty increase or quota necessary to remedy the injury.³⁰⁵ The Commission is not directed to consider other consequences of the imposition of that relief. The President, however, is so directed.

In determining whether to provide import relief, and in determining the method and amount he will provide, the President is required to take into account numerous considerations, including the effect of the action on consumers and on the international economic interests of the United States.³⁰⁶ But while permitting—indeed requiring—the President to take a broader view than the Commission, Congress in passing the TTA provided for congressional "override" of presidential determinations that did not conform with Commission recommendations. Under the 1974 Act, a concurrent resolution, passed by an affirmative vote of a majority of each House, disapproving the President's action, would require imposition of the ITC-recommended relief.³⁰⁷ The constitutionality of this "legislative veto" procedure was called into question by the decision of the Supreme Court in *Immigration and Naturalization Service v. Chadha*.³⁰⁸ There the Court held unconstitutional the particular form of legislative veto before it, and seriously called into question most, if not all, forms of legislative veto.³⁰⁹

302. 50 Fed. Reg. 4278 (1985).

303. *Id.*

304. See, e.g. *supra* notes 232-34 and accompanying text.

305. 19 U.S.C. § 2251(d)(1)(A).

306. The factors the President is instructed to considered are set forth in the 1974 Act § 202(c)(1)-(9). 19 U.S.C. § 2252(c)(1).

307. 19 U.S.C. § 2253(c).

308. *Immigration and Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983).

309. For a discussion of the *Chadha* case, see Bolton & Abrams, *The Judicial and*

To overcome the constitutional problems, the TTA amends the legislative veto provisions of the escape clause by substituting congressional use of a joint resolution for the concurrent resolution originally contained in the 1974 Act.³¹⁰ A joint resolution is not different in a practical sense from a bill: it must be adopted by both Houses of Congress and approved by the President. A concurrent resolution, by contrast, need not be approved by the President.³¹¹ The TTA Conference Report states the change "would conform current procedures to the Supreme Court's *Chadha* ruling by substituting joint for concurrent resolutions. As a result, such joint resolutions disapproving the President's determination could be vetoed by the President."³¹²

D. COMPUTER SOFTWARE

The TTA, as noted, is an agglomeration of many ideas, concepts and interests, and Title II is something of an agglomeration in its own right.³¹³ When the TTA's many Titles and all of their disparate provisions were being melded together in the waning days of the 98th Congress, something was bound to go wrong—and no doubt many "somethings" did.³¹⁴ One such "something" was section 251 of the TTA, which accidentally was dropped. Section 249, dealing with the escape clause criteria, is the final printed section of Title II in the Conference Report. The document then goes on to Title III, the International Trade and Investment Act.³¹⁵ Two days after passage of the TTA, Congress by adoption of concurrent resolution,³¹⁶ corrected the enrollment of H.R. 3398—prior to its being sent to the President—to include section 251 which is entitled "Copyright Protection of Computer Software."³¹⁷

Congressional Response to the Invalidation of the Legislative Veto, 1 J. OF LAW & POLITICS 299 (1984).

310. 1974 Act § 203(c)(1), 19 U.S.C. § 2253(c)(1), as amended by TTA § 248(a)(1), *supra* note 1, at 2998.

311. HOW OUR LAWS ARE MADE. H.R. Doc 96-352, 96th Cong., 2d Sess. (1980).

312. Conference Report *supra* note 55, at 5260.

313. See *supra* notes 1-10 and accompanying text.

314. The Conference Report is plagued with many typographical and editorial problems. A few have been noted in this article. No doubt many will be discovered in the years ahead, as specific cases and controversies require lawyers to look with precision at the language.

315. See *supra* notes 143-72 and accompanying text.

316. 130 Cong. Rec. H12213 and S14388 (daily ed. Oct. 11, 1984).

317. TTA § 251, *supra* note 1, at 2999-3000. Section 250, in keeping with the spirit of the TTA, is entitled "Hogs and Pork Products from Canada." It consists of a recitation of

Section 251 declares the sense of the Congress that copyright is the appropriate form of protection for computer software, and that it is in the interests of the United States to seek appropriate relief if any country withdraws copyright protection from software, or provides for compulsory licensing of software.³¹⁸ It states that copyright protection presently is afforded to computer software by most industrialized nations, including Japan, the Netherlands, France, the Federal Republic of Germany, the United Kingdom, South Africa, Hungary, Taiwan and Australia. It notes, however, that "Japan is reviewing a proposal to abandon copyright protection of software and to adopt a system that rejects the principle that software is work of authorship." The provisions of section 251 do not require any action, but state simply that "it would be in the interests of the United States and other nations to seek appropriate relief, including that provided under the Universal Copyright Convention, to ensure the just protection of intellectual property rights and the promotion of free and fair trade."³¹⁹ The threat would seem to be there.

X. INTELLECTUAL PROPERTY—AND A CONCLUSION

It probably is impossible to find a common thread or theme in the provisions of the Trade and Tariff Act of 1984. The law is a collection of laws, and therefore contains many threads and reflects many themes. In important ways it looks to the past: Title VIII of the Bill, the Steel Import Stabilization Act, manifests congressional concern with an important, visible, and declining basic manufacturing industry; the escape clause amendment aimed at footwear imports may be seen in the same light. Both are attempts to stem the flow of import competition, to slow the pace of inevitable change, as the U.S. moves from a basic manufacturing society to

the importance of the pork industry to the United States, and perceives a threat to that industry by imports from Canada that are fueled, in the congressional view, by a price support program for hogs maintained by the Canadian Government. The section expresses the sense of the Senate (but not the House) that the President should direct the appropriate members of the administration "to aggressively pursue discussions with the Canadian Government directed toward resolving this situation." TTA § 250, *id.* at 2999. Section 250 also escaped being included in the Conference Report.

318. TTA § 251, *id.* at 3000.

319. *Id.*

a high technology, service-oriented society.³²⁰ But concern for the issues of a high technology, service-oriented society also are apparent in the provisions of the TTA. Title III's encouragement of liberalized trade in services and high technology products makes this apparent.³²¹

Closely related with services and technology is the concept of intellectual property, and the 98th Congress, particularly in the TTA, also manifested a growing concern with this subject. The TTA expands the authority of the President to take retaliatory action against imports from nations that do not provide effective protection of intellectual property rights;³²² it provides that a principle U.S. trade negotiating objective be the elimination or alteration of practices of other countries that fail to provide effective means for U.S. nationals to secure, exercise and enforce exclusive rights in intellectual property;³²³ it adds to the criteria for eligibility for duty-free GSP treatment the requirement that developing countries provide adequate and effective means under their laws for foreigners to secure, exercise and enforce intellectual property rights.³²⁴ Beyond this, the TTA permits the President to impose a more restrictive "competitive need" test to countries that do not adequately protect the copyrights, patents and trademarks of foreign nationals.³²⁵ And, of course, it provides—however belatedly—section 251 dealing with copyright protection of computer software.

Concern for intellectual property rights in the international context was not confined by the 98th Congress to the TTA. That same Congress also passed the Semiconductor Chip Protection Act, which created a new section of U.S. copyright law devoted exclusively to the protection of semiconductor chips,³²⁶ and the Trademark Counterfeiting Act, designed to afford increased protection to owners of U.S. trademarks—including foreign owners of

320. Behr, *Shift Toward Services Continues, Observers Divided On Whether Trend Is Sapping Or Bolstering U.S. Strength*, Washington Post, Jan. 13, 1985, § F at 1, col. 1.

321. See TTA § 305, *supra* note 1, at 3006-08.

322. See *supra* notes 158-72 and accompanying text.

323. See *supra* note 167 and accompanying text.

324. See *supra* notes 183-84 and accompanying text.

325. See *supra* note 198 and accompanying text.

326. The Semiconductor Chip Protection Act of 1984 is set forth Title III of the "Trademark Clarification Act of 1984," Pub. L. 98-620, 98 Stat. 3335, 3347 (1984).

U.S. trademarks—against the growing problem of the counterfeiting of commercial merchandise.³²⁷

Perhaps when the dust settles, the most enduring facet of the TTA will be its look to the future as embodied in the services, high technology, and intellectual property provisions of this law that otherwise seems to have something for just about everyone.

327. The Trademark Counterfeiting Act of 1984 is Chapter XV of the Continuing Appropriations, 1985—Comprehensive Control Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 1837, 2178. Product counterfeiting is a global business that reportedly accounted for \$6 billion to \$8 billion in lost domestic and export sales to U.S. industry in 1982. *The Effects of Foreign Product Counterfeiting on U.S. Industry*, USITC Pub. 1479 (Jan. 1984).