Unilateral Enforcement of U.S. Trading Rights Within the Gatt System

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SUMMARY

Over the last two generations the development of a more orderly and comprehensive international approach has been viewed as the most promising avenue for realization of effective enforcement of national trading rights. Growing cautiously from humble beginnings and subject to the shifting interests and commitment of its members, the General Agreement on Tariffs and Trade (GATT) has endeavored to temper contentious trading rights issues by stressing conciliation and amelioration rather than by ringing denunciations and immediate authorization of retaliation. U.S. efforts to create an effective domestic trading rights enforcement system have undergone a similar evolutionary process. However, the more rapid development of comprehensive, detailed domestic procedures and their greater emphasis on legal concepts and processes (due process, findings of guilt/blame and consequent assessment of punitive damages, etc.) have tended to place them "ahead" of, and not infrequently seemingly hampered by, the international mechanism.

The U.S. policy official has been faced with the sensitive and pressure-filled task of balancing strong Congressional resolve and the legitimate trading rights of the private sector against the perceived requirements of our overall national interest, the corresponding interests of our trading partners and the maintenance of a viable international trading system based on widely-accepted norms and institutions. The difficulties inherent in this delicate task have been increased significantly - perhaps even raised to the critical level - by the demanding requirements imposed by explicit statutory instructions which, if they are to be fully implemented, need a corresponding increase in the perceived effectiveness of international enforcement efforts.

Given these considerations, it can be seen that the future course of U.S. trade policy, at least in this area, could be determined in the near future. If the international system proves unable to accommodate to growing domestic resolve for more effective enforcement, a substantial shift of U.S. emphasis to other avenues, including unilateral enforcement, could occur. This, in turn, could signal that the era of international regulation and coordination has reached its high-water mark.

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FOREWORD

U.S. international economic policy and trade policy in particular have become major topics of interest over the last several years. The basic causes for this development are numerous and often complex, ranging from the global economic shocks stemming from the "oil crisis" and the resultant adverse effects (tangible and psychological) on the economies of the U.S. and other countries to the seemingly intractable inflationary spiral and loss of U.S. competitiveness in both domestic and world markets. Given the intensity, scope and importance of the ensuing national debate, it has become clear that, in the future, trade policy will be viewed as too central to our national interests to be left to the economists or diplomats.

To date, the vast majority of public attention and concern in the trade area has been devoted to the depredations (real or purported) of a "rising tide" of imports. What is often ignored by the general public, or at least accorded only secondary or tertiary consideration, is a complementary array of factors which are equally important to our economic well-being:

- a substantial, multi-year growth in U.S. exports is required not only to help defray the increased unit cost of oil imports in our international trade and payments accounts but also to provide an increasingly vital impetus to domestic economic growth, job creation, technological innovation and industrial competitiveness;

- a similar growth in the importance of trade has taken place throughout the developed and developing world, a situation which could lead to the adoption of protectionist, import-limiting actions (i.e., restrictions on U.S. exports) by a number of countries;

- the U.S. Congress has established an unprecedented and notably wide-ranging procedure for action against "unjustifiable" or "unreasonable" market limiting actions by foreign countries, has called repeatedly for its aggressive implementation with or, as necessary, without recourse to the provisions and procedures in the GATT and has insured its own close and continuing scrutiny of the Executive Branch's activities in this area;

- the precepts and principles of an open international trading system, primarily embodied in the GATT, will face a severe and continuing test as the U.S. and others seek to adjust to the economic realities of the 1980's; including the vigorous defense of trading rights in a period of significant global economic dislocations.

Thus, for the foreseeable future, those public officials concerned with U.S. foreign policy will be faced with reconciling the legitimate needs and rights of U.S. trading interests, supported by a strong Congressional mandate and resolve, with the interests of our trading partners and the necessity for the effective operation/evolution of the international trading system.

As noted above, little attention has been given to the enforcement of our trade (i.e., market access) rights by the public; moreover, this important and

potentially volatile issue has been approached by the Executive Branch primarily on an ad hoc basis, with considerably less attention devoted to policy considerations concerning where we are and where we are going. The objective of this case study is to provide a necessarily limited and selective response to these questions by (1) presenting an examination of the factors underlying both unilateral and multilateral enforcement of trade rights obtained from domestic legislation and international agreements, (2) surveying the recent efforts which have been made to enforce such rights and (3) reviewing the practical implications of the findings and highlight key areas requiring further consideration/action. Since the study is intended to provide a more systematic examination and assessment of the subject for the public policy official, it will address itself primarily to operational needs and considerations (e.g., Congressional "intent" as well as legislative provisions, the nature and sources of practical limitations on enforcement efforts, etc.) rather than a more scholarly exposition of domestic and international legal principles and practices. As a result, the study is intended to furnish some additional insights to those more familiar with the subject while providing the general reader with a case example of a public policy area involving multiple domestic and international factors, interests and limitations all operating in a considerably pressure filled and time-constrained context.

I.

THE GATT CONTEXT

"The GATT is perhaps the least handsome of all the major international institutions of our time. It began as only one wheel of a larger machine, the ill-fated International Trade Organization, and, when that larger machine fell apart before leaving the assembly line, this wheel became a unicycle on which burdens of the larger machine were heaped. The unicycle, for reasons not quite fully understood, has continued to roll through three decades since it was put together." (John H. Jackson, Professor of Law, University of Michigan)[1]

The rise of international regulation of trade has its origins in the growing belief of national governments that some international mechanism is essential to prevent the pursuit of self-interested national management of trade in a manner that can harm other countries and, when combined with the inevitable retaliatory actions by those countries adversely affected, can result in a sharp and destabilizing contraction of the overall volume and value of such trans-border commerce. Inherent in this belief is a widely shared attachment to such supporting premises as (1) international trade is beneficial to all participating countries (benefits from comparative advantage, realization of economies of scale, etc.); (2) pursuit of solely narrow self-interest in the global arena contributes to misundersatndings, disputes, instability and, possibly, war; and (3) self-interest actions usually can and will be frustrated by the counter-actions of other independent states.

Such international regulation of merchandise trade today is centered primarily in the General Agreement on Tariffs and Trade, the GATT. This international agreement and institution not only sets out certain rights and benefits which countries can expect from participation in an orderly and equitable international trading system but also lays out both the procedures for and limits to a country's actions in seeking enforcement of those trading rights. Consequently, it is necessary to review briefly the origins, nature, operations and precepts of the GATT before proceeding to an examination of the domestic aspects of trading rights enforcement.

The Origins and Development of the GATT

The origins of international trade cooperation predate the GATT by a considerable margin. The most notable achievement in the interwar period was the series of bilateral trade treaties concluded by the United States as a result of the Reciprocal Trade Agreements Act of 1934 (RTA). The series of 32 separate agreements concluded under the Act during the 1934-45 period not only established a pattern of regularized multi-country trading relationships but also provided a number of clauses (encompassing such concepts as orderly consultation and dispute settlement procedures, periodic renegotiation, maintenance of an equitable balance of benefits/concessions) which became the direct antecedents of comparable provisions in the GATT.[2]

During World War II and the immediate post war period, the United States took the lead in the base-building for a more comprehensive international economic system and, ultimately, to the drafting of the GATT. In the U.S. view, the basis

for a secure and peaceful world was to be provided by a series of international economic institutions which would prevent the dislocation of the interwar period from reappearing and thus preclude further global economic destabilization. The fruition of these broader efforts was realized for monetary and financial affairs at the Bretton Woods Conference in 1944 with the establishment of an International Monetary Fund (IMF) and an International Bank for Reconstruction and Development (IBRD, the "World Bank"). With regard to international trade, the Executive Branch followed a two-fold strategy which (1) after lengthy Congressional hearings and debate obtained (June 1945) an extension of the President's Reciprocal Trade Agreements Act authority through June 1948 and, subsequently, (2) saw the State Department publish draft proposals for an International Trade Organization (ITO). In accordance with overall U.S. views regarding the needs of global economic security, these ambitious proposals envisioned the ITO as a major, powerful entity empowered to attack what were viewed as the four most important factors inhibiting international trade - government restrictions, restraint by private cartels and combines, disorderly markets for vital primary commodities and disturbances or threats thereof in production and employment. In short, the ITO would be a force to be reckoned with, addressing both international and domestic factors and policies which would hamper trade. Thus the U.S. was seeking (1) under the RTA a limited, practical trade negotiations to lower specific tariffs plus a narrowly formed General Agreement on Tariff and Trade (GATT) to protect the results of these negotiations, as well as (2) a much broader ITO through global negotiations under UN auspices.

The relatively steady progress towards a comprehensive international trade agreement was halted in December 1950 with the announcement by the United States that the ITO Charter would not be submitted for Congressional approval--in effect the obituary notice for the ITO. Explanations for the Congressional refusal to approve the ITO are many and voluminous; suffice it to say all commentators agree that a combination of protectionism, a degree of isolationism and a general Congressional concern regarding an accelerating shift of power to the Executive Branch in the foreign policy area played a major role. In any event the GATT was on its own; the unexceptionsl "wheel" in the larger machine was suddenly a "unicycle" and, even more importantly, the "only vehicle in town."

Enforcement of Trading Rights in GATT

The subject of the enforcement of trading rights under GATT concerns (1) the relevant GATT principles and concepts and (2) the provisions of the General Agreement which lay out the procedures through which these rights can be protected. The basic concept relating to such trade rights is that of "nullification and impairment" of the "benefits" which would flow from the agreement, a principle which originated in the Reciprocal Trade Agreements of the 1930's. These earlier trade agreements contained a general obligation that any government action could produce adverse effects on the balance of commercial opportunities created by the treaty and that this was legitimate grounds for formal consultations. Since the treaties called only for consultations and could not guarantee satisfactory resolution of any specific dispute, a termination clause also was included. During the course of these bilateral agreements, "nullification and impairment" came to be interpreted as any adverse measure even if it did not conflict with the precise terms of the accord.

Further elaboration of the "nullification and impairment" concept took place during the negotiations on the ITO Charter. It was agreed that the

object of redress efforts would be compensation only (i.e., limited to the value of the injury) and sanctions (i.e., punitive costs over and above the injury sustained) were to be ruled out. In addition, no distinction was made between actions which violated the Charter and other actions which, while not actual violations, had the effect of limiting the commercial opportunities created by the agreement. Since the ITO was to be a powerful, broad-gauged entity, it is not surprising that this more expansive interpretation of actions covered (actual violations and other actions) was adopted.

When the GATT became the only international trade agreement, it found itself the inheritor of this expanded mandate (protection of "all benefits accruing") but without definition of what constituted "nullification and impairment." Consequently, during its life the GATT has been compelled to fashion a working definition only as disputed cases arose in a "know-it-when-see-it" process. Since there were no defined characteristics, the key in any given case became the development of a pragmatic consensus as the ultimate arbiter and safeguard. Over the period certain factors emerged:

1. approximately 75 cases were referred to the GATT of which only 29 went to third party decision, interim or final; the majority were settled between the disputants,

2. successful cases have required detailed supporting information and an explanation of why the measure concerned constituted nullification or impairment as well as precise delineation of the resultant injury and specific recommendations on what was needed for the restoration of equity,

3. most cases alleged violation of specific GATT provisions; only 7 cases concerned actions alleged to be damaging in other respects (i.e., "other actions"),

4. in cases concerning such "other actions," not all impediments to commercial opportunity were seen to be equally actionable; the Contracting Parties look for some additional "wrong" in the defendant's actions (e.g., "bad faith," lack of adequate reason, failure to take less damaging alternatives) or some other indication of "seriousness" and, even if this is found, the remedy sought must bear a relation ("appropriateness") to the amount of injury,

5. a clear thread running through all cases is the strong desire for pragmatic resolution of the dispute by the parties, rather than GATT-approved compensation or sanction/punishment; i.e., withdrawal of the measure concerned instead of offsetting, retaliatory action...in only one formal case have the Contracting Parties authorized an offsetting suspension of concessions.

With regard to the procedures for seeking enforcement of trade rights, there are 2 articles central to all consideration of dispute settlement, nullification and impairment, compensation or sanctions - Articles XXII and XXIII. (See Appendix "A" for the text of these provisions.) Article XXII provides for (1) consultations on "any matter affecting the operation of the Agreement" and (2) if bilateral consultations do not lead to a resolution, the matter may be

referred to the Contracting Parties jointly for consultations with the countries concerned. Article XXIII, entitled "Nullification and Impairment", provides for: (1) initial written representations or proposals by one member to another concerning "any measure or other situation" which the initiating country believes is nullifying or impairing any benefit or objective of the Agreement; (2) in the absence of a bilateral resolution, establishment by the GATT of a panel or Working Party to investigate the case; (3) a finding by the panel or Working Party and its adoption by the Contracting Parties; and (4) in "serious" cases where there is still no resolution, GATT authorization for the injured party to suspend "appropriate" concessions as compensation. While the definition of "nullification and impairment" is absent, as is any precise characterization of the "benefits" adversely affected, there is explicit evidence that some areas which were to be included in the ITO are outside the GATT purview. In a 1960 report a group of experts concluded that "it would be unrealistic to recommend at present a multilateral agreement for the control of restrictive business practices...the necessary consensus among countries...does not exist..."[3] In addition to restrictive business practices, per se, the broader areas of international trade in services and international investment have been excluded from the GATT.

Policy Considerations

The character, concepts and procedures of the GATT summarized above have important and continuing implications for the U.S. policy official dealing with enforcement of trading rights:

1. The need to maintain an ongoing consensus among the members, inherent in an organization without strong sanctions or other enforcement devices and yet impelled to evolve into a role considerably greater than originally intended, requires the GATT to act cautiously when facing a major issue of dispute or when addressing a question which breaks new ground

2. the lack of precision in defining such concepts as "nullification and impairment" and "other actions" or in indicating the scope of the "benefits" of "commercial opportunities" affected adds to the perceived need for caution (and, not infrequently, uncertainty re outcome), thus leading the Contracting Parties to seek factors (e.g., gross violation) beyond the immediate circumstances of a case before taking resolute action

3. the concomitant predisposition to achieve a solution of the problem through elimination/amelioration of the exacerbating measure, rather than authorization of compensation or sanction for the complainant, is evident even in cases which do reach the compensation stage to the extent that great attention is devoted to the type and magnitude of the compensatory suspension of benefits which might be authorized ("appropriateness"). Thus, a country seeking such redress must draw its requests for compensation most carefully and moderately.

In light of the above, it becomes apparent that recourse to formal GATT dispute settlement (Article XXIII) for enforcement of trading rights is not a

step to be taken lightly or in haste. The caution and substantive rigors accorded to such cases by the GATT, the resultant uncertainty regarding the likely outcome (actual decision and/or adequacy of settlement) and the serious nature of "taking a nation to court" in view of the entire world all combine to make such action a very significant step. Consequently, it often proves more prudent for the policy official, even in a case where the issue is major and the facts strongly favorable, to adopt a strategy of generally increasing pressure involving (1) informal, bilateral discussions seeking redress; (2) recourse to the formal consultations provided by GATT Article XXII, a step which puts the other country and the GATT on notice regarding the complainants resolve; and, only as a last step failing all else, (3) recourse to the formal GATT investigation, findings and possible authorization of compensation inherent in Article XXIII. (Even the formal Article XXIII proceedings can be implicitly staged so that the investigation and/or issuance of findings by the panel or Working Group can be delayed to allow further bilateral efforts in which the complainant can participate with the additional leverage afforded by the GATT involvement.)

This type of delicately orchestrated, graduated strategy, though more time-consuming, can prove to be quite effective; an imaginative practice which has led one observer to comment that "...it is very difficult to ascertain where dispute settlement leaves off and trade bargaining or policy formulation begins."[4]

II.
THE TRADE ACT OF 1974: NEW ERA IN ENFORCEMENT OF U.S. TRADE RIGHTS

> " The Committee is not urging that the United States undertake wanton or reckless retaliatory action...in total disdain of applicable international agreements. However, the Committee felt it was necessary to make it clear that the President could act to protect U.S. economic interests whether or not such action was consistent with articles of an outmoded agreement initiated by the Executive 25 years ago and never approved by the Congress."[5]
> (Senate Finance Committee Report on H.R. 10710, The Trade Act, 1974)

Background

Among the many factors which led to the strong legislative mandate regarding enforcement of U.S. trading rights in the Trade Act of 1974 were: (1) renewed Congressional assertiveness in the international trade area; (2) perceived shortcomings in earlier legislative attempts to support our trade interests; (3) growing disillusionment on the part of the Congress and the private sector with GATT as the ultimate arbiter of a growing number of trade problems; (4) a changing structure of international trade in which the U.S. was no longer head and shoulders above our competitors; (5) the aftershock of the oil crisis and (6) a substantial degree of Executive Branch agreement with Congressional and private sector critics combined with strong Administration interest in obtaining Congressional authorization for a new round of GATT trade negotiations of unprecedented scope.

Consequently, as the proposed legislation was being developed there was a Congressional, private sector and Executive Branch concensus on the need for (1) a more effective system for U.S. enforcement of its trading rights (ultim-

ately established in section 301 of the Trade Act) and (2) reform of the GATT to facilitate its meeting the more complex problems of a changed world (reflected in section 121 of the Act).

Trade Enforcement Provisions of the Act (Section 301)

The enforcement of U.S. trading rights are treated in section 301 of the Trade Act which provides, inter alia:

1. Whenever the President determines that a foreign country or instrumentality maintains "unjustifiable" or "unreasonable" tariffs, acts, policies or other restrictions which impair the value of trade commitments made to the U.S. or which otherwise burden, restrict or discriminate against "U.S. commerce", then he shall take "all appropriate and feasible steps" to obtain the elimination of such restrictions and

    a. may suspend or withdraw benefits of trade agreement concessions with such country

    b. may impose duties or other import restrictions on the products and impose fees or restrictions on the services of such country for such time as he deems appropriate;

2. the term "commerce" includes services "associated with international trade";

3. upon receipt of a petition by "any interested party", the President's Special Trade Representative (the "STR") shall conduct a review of the alleged restriction and hold public hearings, if requested;

4. every 6 months the STR must submit a report to the House and the Senate summarizing these reviews, hearings and actions taken;

5. the President, upon taking action after receipt of the STR's recommendations, must submit to the House and the Senate a document describing the action and his reasons for it.

House Consideration

The House Committee on Ways and Means held six weeks of public hearings on the trade bill during May-June 1973. The testimony of Administration witnesses placed emphasis on the new economic realities including increased international competition, the oil crisis and the growing U.S. trade imbalance. Secretaries Shultz and Rogers called for a revised trading system and a focus on nontariff barrier reductions. A number of the Committee members (e.g., Reps. Mills, Vanik, Broyhill, Burke, Conable and Ullman) expressed concern over the proposed new delegation of power the bill would give to the Executive Branch and supported (1) a close and continuing Congressional oversight procedure and (2) a set and detailed process for action on private sector trade complaints.

The important question of our trade rights enforcement's consistency

with the GATT was approached by Ambassador William D. Eberle, the President's Special Trade Representative, as follows:

> "A few provisions in the bill (e.g., section 301) would authorize the President to take action which would not necessarily be in accordance with U.S. international obligations...The Administration does not want to create any impression that we are taking our obligations lightly..If countries realize, which they will, that we can in fact respond, it is our feeling that they will not take an initial unreasonable or unfair action to start with. I think that having that right, we will never have to use it."[6]

The House Committee Report (i.e., the "legislative history") provides additional rationale and evidence of Congressional intent. With regard to the central issue of enforcement actions' consistency with U.S. international obligations the report begins, "The Committee expects that the President will depart from international obligations only where international procedures are inadequate to deter the unjustifiable or unreasonable practice or subsidy."[7] Nevertheless, the Report then states:

> "So long as decisions in GATT are made on a basis of political consensus of the Contracting Parties, the United States will have no assurance that questions of consistency with the GATT will be resolved impartially. The Committee believes it is essential for the United States to be able to act unilaterally in any situation where it is unable to obtain redress through the GATT against practices which discriminate against or unreasonably impair U.S. export opportunities."[8]

In short, the Committee felt that, as long as the GATT could not guarantee bold and objective decisions (a trying standard for any international and numerous national bodies), the U.S. should be able to retaliate unilaterally and impose a self-determined solution or sanction on the alleged transgressor.

The Report also contains the Committee's explicit intention to have services covered by section 301:

> "Although trade agreements do not usually extend to the treatment of services, it is much concerned over discrimination against U.S. service industries including, but not limited to, transportation, tourist, banking, insurance and other services in foreign countries. It is the Committee's intent that the President give special attention to the practical elimination of this discrimination by the use of the authority under this provision (section 301)."[9]

Senate Consideration

Senate Finance Committee hearings on the trade bill were held March 4-April 10, 1974. In essence, the Committee adopted a skeptical attitude, (1) wary of Administration professions of resolve or determination and (2) determined to make certain that the U.S. reserved to itself enough leverage and freedom of action to preserve and defend its trade rights. The testimony of Administration and key private sector witnesses supported this approach, with the result that the consensus on firm U.S. enforcement, which had been evident during the House hearings, was maintained. Once again, the notion prevailed

that the very ability of the U.S. to violate our international obligations would prevent other countries from erecting or maintaining trade barriers; i.e., a type of "commercial massive retaliation" theory.

The Committee's attitude regarding the relationship of section 301 action to U.S. international obligations (read: GATT) was capsulized succinctly by the section of its Report quoted as an introduction to this Chapter. While not expressing "total disdain" for such agreements, the Committee was determined that their provisions not get in the way of the protection of our trading rights. As further evidence of its resolve that enforcement of U.S. trading rights be forcefully exercised, the Committee's discussion of section 301 concludes:

> "The Committee intends that these powers be exercised vigorously to insure fair and equitable conditions for U.S. commerce. The Committee does not intend that this 'retaliation authority' be a dead letter. Foreign trading partners should know that...if they insist on maintaining unfair advantages, swift and certain retaliation against their commerce will occur."[10]

Policy Observations

While attempting to enforce U.S. trading rights, fulfill the requirements of the law and remain consistent with U.S. international obligations, the policy official must take into account (1) the Trade Act definitions of "unjustifiable" or "unreasonable" practices to be acted against, (2) the implications for enforcement efforts under international agreements (GATT), and (3) the international norms, dispute-settlement machinery, etc. in the area of international trade in services.

The legislative history of the Trade Act defines "unjustifiable" as restrictions "which are illegal under international law or are inconsistent with international obligations."[11] For purposes of the GATT, the part of this definition regarding illegal practices presents a relatively straightforward case for the U.S. policy official. If taking a formal Article XXIII action, the U.S. would have to develop a tight and well-reasoned case delineating why the practice violated a specific provision(s) of the GATT and also develop a reasonable quantification of the compensatory withdrawals sought if the offending practice were not stopped.

The situation is decidedly less clear when dealing with the final part of the definition which treats practices "inconsistent with international obligations." A case of this type soon gets into the area of GATT application/interpretation concerning trade rights which are being violated in contravention of the "spirit" of the GATT or some other less-than-specific objective or norm and also runs into similar problems when quantifying the resultant "nullification or impairment" and compensation sought. While it would be an overstatement to suggest that such a case under Article XXIII would be short-lived, it is realistic to note that the burden of proof would be substantially heavier.

The legislative history defines "unreasonable" as restrictions which are "not necessarily illegal but which nullify or impair benefits accruing to the United States under trade agreements or otherwise discriminate against or unfairly restrict or burden U.S. commerce."[12] The part of this definition which concerns practices not necessarily illegal but which nullify or impair trade

agreement benefits adds another level of ambiguity and difficulty for the U.S. policy official. A GATT case (Article XXIII) involving this type of practice encounters those decidedly gray areas of "other actions" (i.e., not illegal) and "other benefits" (i.e., not stemming explicitly from the precepts of the Agreement). These are precisely the areas in which GATT dispute settlement has had the most difficulty and has exhibited the most caution, generally requiring additional evidence of bad faith, wilful intent, failure to take obvious, less harmful steps to accomplish the same end, etc. The discomforture of the GATT is understandable since (1) the complainant is not challenging the legality of the practice, per se, but only contending it is inconsistent with some less-than-explicitly-defined benefit anticpated from the GATT; (2) in any review, the Panel would have to publically second-guess the intent, motivation and, in effect, competency of the alleged offender in order to see whether there had been an easier, better or less harmful alternative available; and (3) a decision against the accused country would be a global "black mark" which could also call into question analogous practices of other GATT members. Consequently, the burden of proof and the sensitivity of such cases is increased notably.

That section of the definition which describes practices which "otherwise discriminate or unfairly burden and restrict" presents the U.S. policy official with the greatest difficulty. The practical problems center on the decision re what constitutes unfair burdens or restrictions - what are the critical norms and standards and who makes the decision. Given the text of the law and the legislative history, such actions must be wrong in some sense and serious but, to have international legitimacy, this decision should be based on some recognizable and reviewable standard which has general acceptance in the international community. According to a number of legal experts, a unilateral claim of burden/restriction with regard to a practice which is otherwise not found illegal under any agreement has no international validity, nor would any resultant retaliatory action.[13] In effect, any such U.S. action would not only be invalid but, if pressed by the GATT member affected, could conceivably be found in contravention of the GATT and subject to retaliatory action in return. Consequently, exercise of this authority in disputes should only be undertaken with great care.

The situation concerning services connected with international trade is notably murkier with regard to multilateral agreements, standards or norms. The only two international entities with significant operations in the services area are the Organization for Economic Cooperation and Development (OECD) and the United Nations' Conference on Trade and Development (UNCTAD). Neither of these are considered by U.S. policy officials as providing effective global norms or procedures since (1) the OECD's efforts, though relatively extensive, are viewed by many developing countries as having applicability only among the developed country membership of that organization and (2) the U.S. and a number of other developed countries are opposed to the anti-free-market bias of UNCTAD's activities and proposals. Given this lack of international guidelines, standards and dispute-settlement procedures as well as a parallel absence of extensive bilateral initiatives, enforcement of perceived U.S. trade rights in the services area could be described as a foray into uncharted waters where caution was required.

III.

ENFORCEMENT CASES UNDER THE TRADE ACT (1974-79)

"Section 301 will probably never work well." [13] (Professor Robert Hudec)

During the 1974-79 period - from the passage of the Trade Act (December 1974) to the entry into force of the Trade Agreements Act (July 1979) with its revised program - a total of 18 petitions were filed by the private sector and formally initiated by STR under provisions of section 301. (The actual process of investigating and acting upon cases takes place under a formal interagency committee system, with STR chairing and coordinating the procedures.) This chapter will focus on the policy considerations presented by those 7 cases which were the subject of a USG determination, interim or final, during the period.

Guatemalan Shipping Restrictions (301-1): This July 1, 1975 petition concerned Guatemalan reservation of certain imports to FLOMERCA, the national shipping line, and, given the absence of any bilateral treaties and the fact that Guatemala was not a GATT member, raised questions regarding the lack of a multilateral or other basis for U.S. action. The case's resolution resulted primarily from Federal Maritime Commission (FMC) threats of retaliation under the Merchant Marine Act of 1920, a development brought about by the U.S. complainant's petition to the FMC in a separate but parallel action. Its early 1976 resolution did little to allay concerns about the lack of accepted norms in the services area since developments could have been considerably different if the alleged violator had been a less amenable, major commercial power.

Canadian Import Controls on Eggs and Related Products (301-2): Following an informal GATT advisory opinion supporting Canada's claim of GATT consistency, the U.S. was faced with 3 policy options: (1) proceed to a formal Article XXIII action despite the adverse preliminary ruling; (2) retaliate on a unilateral basis outside the GATT; or (3) follow the GATT suggestion by returning to bilateral negotiations and hacking out the best deal possible. The U.S. chose the bilateral option; the apparently generous quota level obtained headed off any subsequent push for unilateral punishment and the case was terminated in 1976.

EC Restrictions on Imports of Canned Food (301-4): This September 25, 1975 complaint focused on a new EC system of minimum import prices (MIPS), licensing and surety deposits. Following a GATT Panel (Article XXIII) finding against the MIP's aspect, the EC switched to production subsidies but continued the other components of the system. The case (1) was the first of several directed against various facets of the EC's overall Common Agricultural Policy (CAP); (2) showed the EC's basic unwillingness to modify the CAP, its vital agricultural support mechanism, in any significant way; and (3) led the U.S. to make what it could of the GATT decision and grudging EC accommodation and terminate the case in 1979.

EC Feed Mixing Regulations (301-8): This March 30, 1976 complaint charged that a new EC requirement for mixing of domestic non-fat dry milk (NFDM) in all animal feeds would displace a significant quantity of U.S. soybean exports. The U.S. quickly brought Article XXIII action against this blatant EC attempt to dispose of mounting surplus of NFDM, a glut occasioned by its own production

policy mismanagement. The GATT Panel ceased its investigation when the EC withdrew the measure (1977) and the case was terminated in 1979. U.S. policy officials demonstrated restraint in this temper-raising case by: (1) eschewing possible unilateral retaliation; (2) resorting to GATT dispute settlement and (3) ultimately settling for EC withdrawal of the measure without a formal GATT finding.

Taiwan Import Restrictions on Consumer Goods (301-9): The March 15, 1976 petition challenged imposition of prohibitive duties on imports of a wide range of household appliances, though each was produced domestically on an internationally competitive basis. Solved in November 1977 through restoration of lower tariffs, the case raised several intriguing problems. It touched upon the "level of protection" (i.e., how much domestic industry protection is justified and when does it become unjustifiably exclusionary), "luxury product" and "infant industry" issues, matters which even the GATT had not addressed frontally since they involved, in effect, a second-guessing of a country's basic development strategy, as well as whether non-GATT members should be afforded similar treatment and consideration. It is interesting to speculate regarding possible differences in the handling and outcome of the case if the country concerned had been a GATT member and/or a more vociferous exponent of the rights of self-defined developing nations.

EC - Japan Steel Exports Agreement (301-10): The October 6, 1976 complaint alleged that "voluntary" Japanese limits on steel exports to the EC led to a redirection of Japanese surplus production to the unprotected U.S. market. After 14 months of intensive interagency study, the President terminated the case on the basis of lack of sufficient justification, with the Special Trade Representative noting USG refusal to seek similar bilateral import-limiting agreements and suggesting adequate industry recourse through U.S. antidumping statutes. In addition to providing a strong U.S. objection to trade-restrictive sectoral accords, the case ultimately contributed to further domestic (Trigger Price Mechanism) and multilateral (new OECD Steel Committee) efforts toward coordination of government policies in a sensitive, troubled industrial sector.

Japanese Import Restrictions on Thrown Silk (301-12): This February 14, 1977 petition challenged the severe restrictions on all imports except from those countries (PRC, Korea, Brazil) with which Japan had negotiated specific bilateral agreements. While the U.S.-initiated GATT Article XXIII Panel was underway, a bilateral settlement was reached which increased considerably U.S. market access via a raised quota allocation. Of particular note, a considerable interagency debate ensued following receipt of the acceptable Japanese offer regarding whether we should settle bilaterally immediately or first let the GATT Panel proceed to its likely finding of illegality. Some officials who favored waiting noted that any agreement would be internationally enforceable only if based on a GATT ruling and also believed that GATT action could reinforce the perception of its dispute-settlement system. Others felt that a "deal in hand is worth two in anticipation" and contended that a formal GATT finding of violation was an unnecessary embarrassment of the Japanese. The dispute was settled in favor of an informal, bilateral settlement, despite Congressional and other sentiment to make an example of violators.

Overview of 1974-79 Cases

The basic objective of the Congress in its drafting of section 301 was more vigorous and effective enforcement of U.S. trading rights and, to this end, it

created (1) a more public and organized procedure for receipt of and action on specific complaints, (2) a more comprehensive interpretation of the nature and scope of these rights and (3) a considerably expanded array of retaliatory measures which the president could use as either persuasion or punishment. In order to evaluate the operations of section 301 under the Trade Act provisions, it is necessary to consider performance in the corresponding areas of (1) process- did it contribute to enforcement, (2) precedent-what "pathfinding" efforts matched the expanded perception of trading rights and (3) techniques-what new methods or devices were utilized.

With regard to process, it can be stated that the regularized procedures, combined with public and Congressional scrutiny (semi-annual reports to Congress, public hearings, Federal Register notices, etc.) did serve to provide U.S. trade interests with a more comprehensible, orderly system for the seeking of redress. While the system was time-consuming and often costly (legal briefs, travel for public hearing, cost of collection of supporting information), it was perceived widely as a decided improvement over the former situation in which no predictable sequence of events or rules pertained. There is no evidence to support the misgivings of some that the very existence of such a procedure would necessarily give rise to a series of "frivolous" petitions.

The subject of precedent, however, is a different matter. While the Guatemalan Shipping case led to immediate involvement in the services area, the explicit Congressional mandate precluded any other course of action and the impetus for resolution came from another statute (Merchant Marine Act of 1920). The case involving Taiwan's restrictions on consumer goods imports could be claimed as indicating U.S. willingness to take on LDC's and the "level of protection" issue, but the special stature of the ROC (economically and politically) and a decided reluctance by policy officials to make such a post-facto claim do not support this assertion. Though the EC-Japan steel agreement case might appear to establish a precedent, given U.S. reliance on antidumping statutes and refusal to negotiate its own international sectoral trade limitations, it can also be seen as another reiteration of our open trading system policy. Consequently, the case history of 1974-79 saw little pathbreaking activities in the administration of section 301.

There were some interesting, though not earthshaking developments in the area of techniques. The Taiwan and Japanese thrown silk cases were the first in which public hearings were held on specific lists of possible retaliatory items, potentially a notable boost to establishing the seriousness of our intent. A rather mixed signal emanates from the conclusion of the thrown silk case; viz. did the pressure of a pending 301 case cause the U.S. to abandon a promising GATT dispute settlement case to "cut a quick deal" or would waiting for a GATT finding have been truly a case of overkill? The other cases developed along the traditional lines and techniques; bilateral where possible or under the flexible strategy lines noted in the "GATT Context" chapter.

Thus, the 1974-79 case history of section 301 shows a definite improvement in the access of U.S. trade interests to active USG efforts for redress and a small increase in the array of techniques used to settle the issues concerned. This modest record can be attributed to several factors; however, the conduct of the multilateral trade negotiations (MTN) during the same period did have a noticeable effect in that a number of the most difficult issues (subsidies, other nontariff barriers, various improvements in the international dispute

settlement process, etc.) were under intensive bargaining in Geneva and there was a conscious effort on the part of U.S. policy officials to use section 301 efforts as a tool to solve specific problems and highlight areas requiring more global (i.e., MTN) solutions but without exacerbating the already sensitive atmosphere of the Geneva sessions.

Finally it is important to note the ten section 301 cases which, while received during the 1974-early 1979 period, remained outstanding when the Trade Agreements Act of 1979 was enacted. While there are good reasons for the lack of definitive action in specific instances (e.g., relatively recent submission, initial efforts directed toward reaching a solution in the MTN, press of MTN workload, etc.), several of the cases had been pending for 3 - 4 years. The lack of action on specific cases was seen by Executive Branch policy officials as regrettable; others, including the Congress, took a somewhat harsher view and resolved to take corrective action.

IV.
THE TRADE AGREEMENTS ACT OF 1979: INCREASED EMPHASIS ON ENFORCEMENT OF U.S. TRADING RIGHTS

> "The MTN agreements are merely rules. Rules mean nothing unless they are enforced...If history is any indication, international enforcement of the new trade rules will depend on the United States...our negotiators will never again make trade agreements for the United States without close Congressional review. This is something that is going to have to be monitored with exquisite skill."[14] (Senator Abraham Ribicoff, Senate Finance Committee hearings, July 1979)

Setting

The primary focus of the preparations for and provisions of the 1979 trade bill was the complex series of agreements resulting from the MTN. These MTN agreements encompassed (1) six major international codes of rights and obligations on specific nontariff barriers (Standards, Government Procurement, Customs Valuation, Subsidies, Import Licensing, Antidumping) each with its own dispute-settlement process and related guidelines for duration of that process; (2) multipoint Framework Agreement to reform various aspects of the GATT, including a reaffirmation of the members' commitment to GATT dispute-settlement procedures and support for completion of all GATT Panel work within 3-9 months after initiation; (3) tariff protocols (multilateral and bilateral) encompassing duty reductions - and some specific nontariff barrier reductions - on over 90% of world industrial trade; and (4) an international agreement on liberalized trade in civil aircraft, again with dispute settlement procedures and timing guidelines.

Since the nontariff codes and agreements required conforming changes in extant U.S. legislation, Congressional approval of these international agreements as well as action on domestic legislative revisions were required. The tariff agreements, though not requiring direct Congressional approval, were also submitted to Congress in order to present a complete picture of the MTN results. In addition, the updating of the overall GATT dispute-settlement process, creation of the parallel procedures in the nontariff barrier codes and agreements, and Congressional desire for continued "improvement" in U.S. enforcement called

for changes in the original section 301 provisions of the Trade Act of 1974. The end result of all these converging needs was the 1979 trade agreements bill.

As had been the case in 1974, the basic drafting of the bill was a close collaborative effort between the Executive and Legislative branches. The Administration spared no effort in attempting to enlist the support of Congressional and private sector allies. As an aid to Congressional review and action, the Administration accompanied the Presidential message transmitting the actual agreement with a 547 page "Statement of Administrative Action" which summarized the changes in U.S. law required to implement the MTN accords and laid out specific examples of Executive Branch resolve in supporting U.S. trade interests. This document noted:

> "A principal objective in the MTN has been to devise rules and procedures to ensure vigorous enforcement of U.S. rights under the GATT and under agreements negotiated in the MTN, as well as appropriate responses to other practices which may impose unreasonable or unjustifiable burdens on U.S. commerce."[15]

Such statements, of course, were in accord with the Congressional desire for vigorous enforcement, a resolve made even stronger and more explicit by the ambitious and unprecedented scope of the MTN agreements and the substantial accommodations required in U.S. law and practice. However, there did develop a notable point of Executive-Legislative contention regarding the statutory imposition of time limits on U.S. enforcement efforts; a point which the Executive was to lose.

House Consideration of the Trade Agreements Legislation

The Subcommittee on Trade of the House Ways and Means Committee held public hearings on the bill from April 23-27, 1979 Private sector witnesses supported strong enforcement and continuing scrutiny by the Congress and business. Former STR Ambassador Eberle, now a spokesman for the U.S. Chamber of Commerce, stated: "If the codes are to be effective, there must be a well-enforced set of domestic laws to combat unfair trade practices...the (domestic enforcement) process must have not only the oversight of Congress, but also the private parties affected...we must ensure that others do not take advantage of our reduced barriers and engage in unfair trade practices that injure U.S. producers."[16]

The Committee's Report on the bill underscores its view of the important role of the revised U.S. enforcement provisions "to provide a comprehensive domestic mechanism for the U.S. to utilize the new international dispute-settlement provisions under the GATT and the MTN agreements, to pursue and enforce rights under international trade agreements and to seek the elimination of other acts, practices or policies of foreign countries which impose an unjustifiable or unreasonable burden or restriction on U.S. commerce."[17] In effect, the revised statutory enforcement program was to be a direct analogue of the far-flung GATT/MTN procedures, plus the means for redress of all other possible violations of our trade rights.

Senate Consideration

During the July 10-11, 1979 public hearings held by the Senate Finance Committee's Subcommittee on International Trade, statements by witnesses and

Subcommittee members emphasized the need for vigorous enforcement of the entire range of U.S. trade rights. The statement by Senator Ribicoff, used as an overall introduction to this chapter, illustrates the general tone and tenor; (1) U.S. enforcement efforts will be the key to maintenance of our rights as well as the continuation of an open international trading system and (2) close Congressional scrutiny of USG performance is an absolute necessity.

The subsequent Senate Report on the bill provided additional evidence of the resolve for vigorous enforcement and also furnished a significantly clarified (read: expanded) interpretation of the types of services included. The Report stated that "the President would have clear authority to pursue U.S. rights under any trade agreement and to respond to any act, policy or practice."[18] On services, the Committee noted that "the coverage of services within the term 'commerce' includes all services associated with international trade, not just the provision of services with respect to international trade in merchandise...for example, the provision of broadcasting, banking and insurance services across national boundaries."[19]

Enforcement Provisions of the Trade Agreements Act of 1979

Title IX (Section 901 - "Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Practices") of the Trade Agreements Act, as enacted on July 26, 1979, made the following additions to the original section 301 procedures:

1. the President was authorized to initiate a proceeding solely on his own initiative (i.e., without waiting for a petition) in response to a foreign action, policy, etc.;

2. a complex and phased series of deadlines was established for STR and Presidential consideration of and action on private sector petitions: (a) within 45 days after receipt, STR must decide whether or not to act on a petition and publish its decision, supporting rationale, etc. in the Federal Register; (b) if an investigation is begun, STR must immediately request consultations with the country concerned; (c) re cases under investigation, the STR must make a recommendation for action to the President generally within 7-12 months after initiation or within 30 days following completion of a trade agreement's dispute-settlement procedures; (d) the President must decide whether or not to take action within 21 days of receipt of STR's recommendation and publish the decision in the Federal Register;

3. section 301 cases initiated under the 1974 Trade Act but which remained outstanding were given an extension of 12 months (i.e., 7/26/80);

4. STR and the other agencies concerned were required to give extensive information and advisory assistance to potential petitioners.

Policy Observations

Among the various factors which led to these significant Congressional revisions in the section 301 mandate and procedures were (1) the desire to take advantage of the wide-ranging results of the MTN to develop a more activist precedent setting international dispute-settlement system and, in

doing so, mold section 301 into the direct domestic analogue; (2) the widely-held view that U.S. initiative and example in the enforcement area, in effect, would establish the limits of the permissible in the conduct of international trade policy, thus maintaining our role as primary guardian of an equitable trading system; (3) a perceived need to increase vigilance and ability to enforce our trade rights in light of the considerable U.S. concessions made during the MTN; (4) the emerging consensus that, given the increased importance of trade to the national well-being, issues of trade rights enforcement require close and continuing participation/scrutiny by the Congress and the private sector; (5) Congressional desire to overcome weaknesses perceived in Executive Branch performance under original section 301 provisions, particularly long delays in several cases; and (6) favorable Legislative Branch consideration of persistent efforts by services industries (e.g., insurance and broadcasting) to make section 301 an effective channel for their issues.

The implications of the Trade Agreements Act amendments for the Executive Branch policy official were considerable, especially with regard to the new deadlines for action and the anticipation of activist enforcement. While the statutory requirement for increased notification of and participation by domestic interests did add substantially to operational responsibilities and workload, they did not constitute a major problem since, inter alia, a considerable amount of such liaison had been carried out informally in the past. The question regarding service industries was more compelling, since it involved an even broader mandate for initiatives in a relatively uncharted substantive area.

However, the major concern stemmed from the explicit, detailed statutory deadlines for STR decision and Presidential determination combined with the basic array of ascending uncertainty regarding the avenues for and likely outcome of U.S. enforcement efforts within the GATT/Codes context. As was noted in Chapter II, the use of a flexible, graduated strategy of enforcement efforts, combining a staged series of both informal bilateral and formal GATT actions, could prove more effective but also more time-consuming. To the extent that the new section 301 deadlines were not facilitated by a parallel increase in the scope and pace of international dispute-settlement activities, U.S. policy officials likely would face one or more of the following problems: (1) reductions in the options and/or timing inherent in a graduated strategy, thus leading to possible adverse effects on the prosecution and outcome of cases; (2) disputes with Congressional and private sector interests re delays; or (3) in particularly sensitive cases, heightened domestic pressure for recourse to unilateral action.

The twelve-month deadline placed on non-trade agreement cases (i.e., mainly bilateral, non-GATT/Codes participant or service issues) also could raise problems, though in this instance the lack of widely-accepted norms and/or absence of appropriate venue or leverage would be the likely stumbling blocks to early results. Finally, as can be observed in the following chapter, the one-year limitation on cases which remained outstanding from the original section 301 period (1974-79) placed a considerable strain on the interagency decision-making process.

V.

TRADING RIGHTS CASES UNDER CURRENT ENFORCEMENT RULES

To date, there have been 14 section 301 cases investigated under the amended section 301 provisions of the Trade Agreements Act. Since not all these cases provided notable policy implications, we will limit our examination to a brief review of (1) selected cases which, being carried over from the original Trade Act period, were given a Congressional extension to July 26, 1980; (2) two important cases in the services area; and (3) two cases, with significant international and domestic ramifications, which remain open.

A. CASES UNDER JULY 1980 DEADLINE

EC Subsidization of Malt Exports (301-5): Filed in November 1975, the petition alleged that these EC subsidies had caused a loss of U.S. export markets in Japan and other countries. U.S. officials viewed the case as an excellent example of how EC subsidies could quickly undercut competitors in world markets. Given the sensitivity of agricultural policy to the EC and the multilateral acceptance of subsidization of primary products, the U.S. objective became containment of the adverse effects of such subsidies through (1) continued bilateral pressure and, subsequently, (2) the MTN's Subsidies Code which provided a more regularized dispute-settlement regime. The Congressional deadline facilitated STR termination of this case (January 1980) despite widespread domestic apprehension about such EC practices.

EC Variable Levy on Sugar Added to Canned Foods (301-7): This March 1976 petition challenged the separate EC variable levy assessed on the sugar added (i.e., non natural) in canned fruits and juices. The EC advised the U.S. that the MTN was the most appropriate forum for discussions on the issue and subsequently agreed to fix the levy at a uniform 2% ad valorem. STR terminated the case in July 1980, despite the petitioner's continued objection to the method for determining the applicability of the levy. The EC's desire to address the issue in the MTN appears to be an attempt to keep it, and the CAP, out of any possible dispute-settlement forum and also an attempt to extract U.S. concessions for any modification. STR's decision to terminate the case, despite the complainant's objection, could be attributed to the approach of the Congressional deadline as well as a belief that (1) the major problem had been ameliorated and (2) objections to technical methodology were best handled outside the section 301 context.

Canadian TV Advertising Restrictions (301-15): This August 1978 case alleged that a provision of the Canadian Income Tax Act unreasonably burdened U.S. commerce since it (1) denied Canadian companies any tax credit for advertising time purchased from U.S. broadcasters for commercials aimed at the Canadian market and (2) resulted in a $20-25 million annual loss in such purchases from U.S. broadcasters situated near the border. While all agreed that the Canadian practice was discriminatory, several considerations effectively limited U.S. options. Prospective retaliation against a comparable value of Canadian merchandise exports might run afoul of our GATT-bound concessions to Canada, with the Canadians subsequently obtaining GATT support for compensatory U.S. concessions or counter-withdrawals (retaliation) of their own. Given the lack of targets of equivalent value in Canadian services but faced with strong Congressional interest in the case and the statutory deadline, policy officials

were left with proposing mirror-image U.S. tax legislation whose effect on Canadian broadcasters, at best, would be in the $2-3 million range (i.e., about 10 cents on a dollar of U.S. injury). Even this action is not certain, since Congress may not support a selective tax liability increase in the current political/economic climate.

EC Export Subsidies on Wheat (301-16): This November 1978 petition alleged that this EC subsidy was causing a displacement of U.S. exports to a number of third-country markets (e.g.; Brazil, Morocco, Poland, Egypt, Sri Lanka). In 1979-80 informal discussions were held with the EC, with both sides agreeing to monitor trade flows, exchange information and consult re any further problems in world wheat trade. STR terminated the case on July 24, 1980 (i.e., 2 days before the statutory deadline) in light of this bilateral progress. Faced with EC sensitivity re agriculture, strong Congressional support of U.S. farm interest and the deadline, our policy officials chose informal consultations in an attempt to achieve better consideration/management of a potentially explosive trade issue.

Argentine Marine Insurance Restrictions (301-18): The May 1979 complaint challenged an Argentine law requiring that marine insurance on exports and imports be placed with a local insurance company when the risk of loss was borne by the Argentine participant in the transaction. Argentine officials claimed the law merely formalized a widely-accepted business practice (i.e., the risk bearer's right to choose the placement of insurance) and expressed surprise that Argentina would be singled out since equivalent regulations existed in many developing countries. Following several bilateral discussions, Argentina agreed to participate in multilateral negotiations aimed at eliminating restrictive insurance practices, but only if a significant number of other developing countries also took part. On this basis, STR suspended the case on July 25, 1980. The STR action on this case demonstrates notable ingenuity; interagency research had disclosed over 30 examples of equivalent legislation in various countries, thus raising the specter of a like number of separate section 301 cases. Faced with Argentine resolve, a persistent U.S. industry, notable Congressional interest and the statutory deadline, policy officials opted to focus on the broader need for multilateral lowering of restrictions and, in the process, gain Argentine agreement to participate in any such endeavor. (However, given the lack of international consensus in this area, an effective multilateral negotiation is not likely to be a near-term eventuality.)

B. OTHER SERVICES INDUSTRIES CASES

Russian Marine Insurance Restrictions (301-14): The October 1977 petition alleged that the USSR maintained an unreasonable commercial practice through its insistence that all trade contracts include terms which, in effect, made certain that the related marine insurance would be placed with INGOSSTRAKH, the Soviet state insurance monopoly. In June 1978 the President made an official determination that the Soviet practice was unreasonable and he instructed STR to obtain an expeditious settlement. The USSR then called for further bilateral talks which resulted in an April 1979 accord laying out of procedures for a more equitable sharing of marine insurance placements. The case, now under indefinite suspension, represented the first use of a Presidential determination which, combined with public discussion of possible U.S. retaliation, led to a comparatively rapid settlement. The case also is the only one, to date, which addresses non-market economies' commercial restrictions.

South Korean Insurance Restrictions (301-20): This November 1979 petition alleged discrimination against an American insurance company's operations in Korea through government restrictions which (1) denied access to the marine insurance market, (2) limited participation in most forms of fire insurance and (3) failed to allocate reinsurance business on the same basis as that available to local firms. The case caused intensive interagency discussion regarding several jurisdictional issues. Questions were raised regarding (1) inclusion of local fire and other commercial risk insurance, rather than just insurance more closely associated with international trade; (2) the viability of the petitioner's basing actions on a broadly-gauged FCN treaty; (3) whether Korean actions should be judged against the traditional trade principle of most-favored-nation (MFN-requires similar treatment for all foreign countries but not necessarily equality with local interests) or the more exacting "national treatment" standard (identical treatment of domestic and foreign entities) which is generally related to foreign investment and lacks truly international consensus; and (4) the possible precedential nature of the case. There is no evidence that interagency consensus was reached on these issues; no basis of action was ever announced, no finding of unjustifiable (illegal) or unreasonable ever made and no claim of an "immutable precedent" has been pronounced. Nevertheless, given strong Congressional interest and the statutory deadline, the case was the subject of intensive bilateral consultations, though its practical resolution (termination: December 1980) came about through a unilateral Korean program aimed at increasing competition in the local insurance market over a four year period.

C. KEY CONTINUING CASES

EC Export Subsidies on Wheat Flour (301-6): This November 1975 petition alleges that the subsidies violate GATT by enabling the EC to gain a more-than-equitable share of the world market for wheat flour. Subject to earlier bilateral and MTN discussions, the case was shifted to formal GATT Article XXII consultations on July 24, 1980 (i.e., two days before expiration of the statutory deadline). The troublesome and significant nature of this issue centers on (1) strong industry and Congressional pressure to institute a formal GATT/Subsidies Code complaint; (2) the sensitivity of the CAP, in general, and specific considerations which increase the importance of this case for the EC; (3) ancillary factors which question the clear-cut nature of any GATT complaint (e.g., difficult to show direct cause-and-effect); and (4) growing Congressional objection to what is seen as an Executive Branch attempt to circumvent the statutory deadline by last-minute resort to GATT consultation (Article XXII) rather than formal dispute-settlement (Article XXIII). If the current GATT consultations do not reach a satisfactory settlement in the near future, U.S. policy officials will be faced with the following choices: (1) suggest to the Congress some unilateral retaliatory action such as U.S. mirror-image subsidies (unpalatable for international and domestic reasons); (2) initiate a formal GATT/Subsidies Code complaint (despite problems inherent in the case, itself, and effects on EC relations); or (3) terminate the case on such grounds as lack of sufficiently suasive argumentation (risking a storm of domestic protest).

EC Mediterranean Preferences (301-11): This November 1976 petition alleged that EC preferential import duties (40-100% below regular rate) on citrus products from a number of Mediterranean countries (e.g., Morocco, Tunisia, Israel, Egypt, Algeria, Jordan, Syria, Lebanon) violated the MFN principle of the GATT and negated previous tariff concessions to the U.S. During the MTN the U.S.

attempted unsuccessfully to at least reduce the margin of preferences by obtaining a reduction in the duties applying to all other supplies and, in accordance with a July 1980 Presidential determination, has initiated formal GATT Article XXII consultations with the EC. A range of factors have led to a 5-year impasse: (1) strong Congressional interest and a domestic industry adamant upon taking whatever remedial measures are needed; (2) the key importance of its "Mediterranean Policy" to the EC; (3) the difficulty in pinpointing the magnitude of injury suffered; (4) a GATT majority now composed of developing countries unlikely to be opposed to preferences for LDC's and (5) the past history of GATT consideration of such preferences which demonstrated a inability to decide the question of GATT consistency. Since U.S. willingness to continue along the Article XXII consultation course has now come under Congressional attack as not meeting the legislative timing requirements, U.S. policy officials soon may be forced to decide whether (1) to move to a formal GATT/Subsidies Code complaint; (2) to terminate the case on the basis of technical shortcomings or apparent lack of clear-cut GATT rights; or (3) to obtain a Presidential determination that, despite the validity of the issues raised, our overall national interests preclude taking action in this sensitive region of the world. Each of these options poses potentially serious adverse repercussions.

Policy Overview

In order to provide an overview of U.S. enforcement efforts under the revised system it will be necessary not only to examine their contributions in those areas used for earlier cases (i.e., process - contributions to enforcement; precedent - new efforts matching expanded perception of trading rights, and techniques - new methods/devices) but also to consider the effects, if any, of the major Trade Agreements Act revisions (Presidential authority to initiate cases, statutory deadlines, expanded role for services) and any parallel developments in the international dispute settlement area.

In the area of process, the improved access of domestic parties to enforcement channels proved particularly beneficial to representatives of the service industries (e.g., insurance and broadcasting cases) and also to agricultural interests who brought several cases involving long-standing issues (e.g., EC preferences and subsidy practices). While it is impossible to say that the domestic process was primarily responsible for energetic USG enforcement efforts, the very existence, comprehensibility and accessibility of the system did constitute a significant step forward. With regard to precedent, several of the cases demonstrated a USG willingness to tailor enforcement to the exigencies of the specific situation. In the EC malt subsidies case, the U.S. decided to settle for an elimination of a particular practice rather than continuing to seek an end to an overall system or policy; while in the EC sugar variable levy case, policy officials terminated a case rather than extend section 301 into the area of technical disputes. Among the "firsts" recorded in this period were the initial focus on non-market economy restrictions (USSR Marine Insurance), a broad view of services capable of being addressed (Korean Insurance) and, less successfully, attempts to come to grips with defining what is an equitable share of the world market or what is excessive subsidization (EC Wheat Flour Subsidies) and what is an unjustifiable preferential trading agreement (EC Mediterranean Preferences).

Not surprisingly, the area of techniques underwent a parallel expansion. In the EC Wheat Subsidies cases, the U.S. stressed informal, bilateral cooperation

for joint management of potentially explosive issues, while in the USSR Marine Insurance dispute an artful combination of a Presidential "shot across the bows" and murmurings of specific retaliation led to resolution. The Malt Subsidies and Argentine Insurance issues were handled by referral to multilateral venues (the Subsidies Code and projected international negotiations respectively). In the Canadian Broadcasting investigation, official bilateral efforts were blended with industry-to-industry talks and final recourse made to a "mirror image" proposal for adoption by the U.S. Suspension-pending-subsequent-review was utilized in the Argentine and Russian cases, while a full mix of informal talks, MTN bargaining and formal GATT consultations have been employed in the EC Wheat Flour Subsidies and Mediterranean Preferences ones.

With regard to the revisions made by the Trade Agreements Act, while no actions were taken on the President's initiative, the expanded definition of services subject to enforcement proceedings had a substantive effect in relation to U.S. efforts in the Canadian Broadcasting and Korean Insurance cases. The statutory deadlines also had notable impact in several instances, providing the final impetus for terminating some cases (EC, Malt Subsidies and Levies on Sugar Added) even where the petitioner would have preferred continuation. Despite the lack of solid evidence, some observers believe that the impending deadline in several cases may have added pressure that was not conducive to the measured, reasoned approach required. Of course, the current issue of proper interpretation of the statutory deadline with regard to Article XXII consultations (specifically in the continuing EC Wheat Flour Subsidies and Mediterranean Preferences cases) also has important implications for future enforcement efforts.

A search for parallel, facilitating developments in the international dispute settlement process gives rise to some serious concerns. Since the conclusion of the MTN and passage of the Trade Agreements Act in 1979, there has been little evidence to sustain the expectation of a more activist, precedent-setting approach in the multilateral arena. Some knowledgable observers contend that it will take more time for the changes stemming from the MTN to work themselves out through a measured growth of confidence-building and cautious international case law development. Others, however, are becoming increasingly anxious and wonder if the requisite policital will and momentum can or will be achieved. In either case, it is apparent that the longer the ambitious and demanding domestic enforcement process remains out of synchronization with the international system the greater will be the pressures and frustrations felt by U.S. policy officials and the more intense will be the temptation to "go it alone." In short, a domestic "analogue" of what might become an ineffective international enforcement system could not be expected to meet the high expectations of its creators nor could it operate indefinitely under the significant requirements and conditions placed upon it at a time of greater expectations.

VI.
PRESENT STATUS AND RECOMMENDATIONS

Current Perceptions

The current view of concerned Congressional members is that both the international and section 301 procedures are not working well and certainly

not as originally intended. The general feeling persists that there are a number of problems, some amenable to domestic legislative action but others which are endemic to the international process, including:

1. the perceived lack of an international consensus regarding meaningful use of the GATT/Codes dispute-settlement machinery; i.e., an absence of "political will" on the part of other countries to utilize the MTN-improved machinery;

2. the lack of tangible, practical results from the domestic section 301 procedures in key cases, including continued delays despite the statutory deadlines (e.g., the time-consuming recourse to Article XXII consultations in the EC Mediterranean Preferences and Wheat Flour Subsidies cases described in Chapter V), unproductive proposed "remedies" (in the Canadian TV Advertising case, submission of proposed "mirror image" legislation of questionable utility and introduced too late in the session for floor action), and lingering suspicions re "sacrifice" of trade interests for debatable foreign policy reasons; and

3. concerns regarding the attitudes and tendencies of the U.S. private sector, including a lack of faith in the likely effectiveness of the GATT/Codes settlement process and Executive Branch support of their cause; the tendency of U.S. industry not to confront foreign governments (don't embarrass or alienate those who can retaliate subtly on business) but seek to adapt and "make do"; as well as the general absence of commitment to exports which is exemplified here as a reluctance to devote the necessary time and effort to removal of discriminatory restrictions on market opportunities.

While this view contains a realistic assessment that inhibiting factors go well beyond section 301 operations and that some may not prove amenable to legislative remedies, there is no evidence that Congress has lost interest in possible remedial actions. In fact, the Trade Subcommittee of the House Ways and Means Committee is currently planning to hold hearings in the near future on the operations of the trade agreements program in the post-MTN era, with trading rights enforcement likely to be a key agenda item. The Senate Finance Committee's Subcommittee on International Trade has requested an Executive Branch report on the domestic and international enforcement of trading rights (operations and results), with exploratory hearings and resultant legislative proposals possibly following thereafter. Thus, the shortcomings perceived in both the international and domestic aspects of trade rights enforcement are seen by important Congressional interests as sufficiently worrisome to require further review and consideration of remedial action, whether of a legislative or policy nature.

Recommendations for U.S. Policy Officials

The following are some recommendations in selected areas for consideration by these policy officials in their attempt to achieve demonstrable improvements in the system:

(1) Greater Recourse to the International Dispute Settlement Process - The international system must be perceived to be effective (i.e., results-producing) if it is ever to become so. The adoption of such a policy does not mean the U.S. must deluge the GATT and Codes' mechanisms with case after case. Notable contributions can be made by (a) strong U.S. support in GATT and Code bodies for action on and timely resolution of issues raised by other participants - in short, support for an activist approach in each channel; (b) actual joining in on those cases in which we share a common interest with the complainant (as Australia, Argentina and others have done in the past) and (c) by adopting a less forebearing posture regarding interminable informal or formal (Article XXII) consultations on U.S.-generated issues and moving more rapidly to formal dispute settlement. The adoption of such an activist role could, in itself, lead to a more timely resolution of issues even on an informal basis, since our perceived willingness to move ahead could well lead to earlier out-of-court settlements which themselves would buttress respect for the formal process. Of course, such vigorous action should still be used judiciously and would take some time to produce tangible results on a broader scale, but it could contribute to achieving the requisite respect for and confidence in the international system.

(2) Establishment of Clearer Section 301 Jurisdictional Parameters - Other than in those limited areas sufficiently defined by the Congress, the section 301 process has tended to operate on an ad hoc basis when considering what issues fall within its purview. (Some observers contend that, under such a procedure, jurisdiction could become a function of Congressional and private sector pressures.) Consideration should be given to developing more precise and well-reasoned guidelines covering jurisdiction in the gray areas. (For example, does the term "trade agreements" encompass the more generally based FCN treaties or other international compacts; is "discrimination" judged against an MFN or a more exacting "national treatment" norm; do investment issues fall within the meaning of "commerce"?) The resulting interpretive guidelines could not only provide more consistency and predictability for domestic interests and foreign countries but also serve to identify substantive areas of potential section 301 action for which preparatory efforts toward international consensus-building might be required (e.g., recent initiatives in the services area).

(3) Comprehensive Efforts Regarding International Trade In Services - As noted in earlier sections of this study, the lack of an acceptable international focal point or commonly accepted standards/norms faced U.S. policy officials with significant problems (e.g., Argentine Marine Insurance case) when attempting to carry out the strong Congressional mandate with regard to services associated with international trade. In order to remedy this situation, the Executive Branch has launched a series of initiatives aimed at achieving increased international coordination and cooperation in this area and also aimed at securing a much closer domestic industry-government dialogue. Since the entire area of international trade in services remains one of the least affected by multilateral consensus, these efforts should be pursued and strengthened. For example, the current OECD committee-level pilot studies of selected service industries (banking, insurance, construction and engineering, etc.) problems should be expanded and supplemented by a comprehensive Council mandate; while parallel, but more preliminary, work in the GATT on identification of services closely related to merchandise trade should proceed in a pragmatic manner. Domestic coordination should be pursued through meaningful work programs in the

formal advisory committees (e.g., STR's Service Policy Advisory Committee and Commerce's Industry Sector Advisory Committee on Services) as well as a continuing dialogue with other industry elements and appropriate Congressional interests. In this manner, domestic interests can play a role in shaping international efforts, a major means of defusing potentially volatile trade rights enforcement issues.

(4) Improved Relations with the Private Sector - To some degree, such improvement can only be realized through the demonstrated improvement of the overall enforcement system which is the focus of all these recommendations; while in another sense such improvement will never be complete since, in the real world, some domestic interests would not be satisfied unless all enforcement efforts were instantaneous and totally successful. However, this recommendation addresses the need for an improved industry-government relationship running the entire gamut of commitment, support and counselling. The Executive Branch must be perceived as committed to effective trading rights enforcement efforts and, as such, willing and able to provide the necessary support and guidance to industry. The provisions of the Trade Agreements Act are replete with requirement for USG informational and counselling assistance to potential petitioners as well as the mandate to seek advice from both formal advisory committees and all other "interested parties". But no legislation can or does indicate the tone, attitude and implicit nature of such contacts which can be either pro forma items on a "must do" checklist or real information- and problem-sharing sessions. While not a guarantee of instant success and private sector response, an honest and continuing effort of confidence-sharing and confidence-raising could contribute to a broader private sector understanding of U.S. opportunities and limitations; a sine qua non for at least greater acquiesence in, if not support of, U.S. enforcement policy.

(5) Improved Coordination with the Congress - Much of what was said with regard to relations with the private sector is also relevant here. While different responsibilities and interests as well as traditional Executive-Legislative tensions account for a notable level of mutual misgivings, there remains a not inconsiderable amount of suspicion and misconception which could be reduced through a relationship less marked with posturing, manuevering, obfuscation and don't-tell-'em-until-you-have-to tactics. Since the Congress will demonstrate little confidence or empathy until it is convinced of Executive Branch "best efforts" under a candidly outlined (limitations and all) and well-documented program, it would behoove policy officials to include actions along the lines of all these recommendations, or some similar comprehensive approach, in what has become inevitably closer and more continuous Congressional scrutiny. No one should doubt the cost, in terms of resources and effort expended, of such improved coordination; however, no one should doubt the significantly greater substantive and other costs inherent in Congressional action stemming from a lack of confidence in Executive Branch commitment and/or performance.

(6) Statutory Deadlines - While a major concern of many operating officials, this factor has been left till last since the possible need for remedial action depends upon developments in the other areas addressed. The primary problem with the deadlines is not that they cause added work and pressure (which they do) but that they do not reflect the realities of the current international dispute-settlement mechanism and, consequently, have been the major operational source of Executive-Legislative dispute. While there will be continuing

difficulty re rapid action in the non-trade agreements area (e.g., non-GATT/Codes issues, services, etc.) with its absence of institutions and norms, the major cause of the perceived delinquency had been that the international dispute-settlement process has not progressed apace of Congressional anticipation as reflected in requirements placed on the domestic analogue, section 301 as amended. If there is international improvement and an activist approach adopted by the U.S., there is a good chance that the reinvigorated enforcement system can operate within the statutory time span, at least in most cases. If there is no such reinvigoration, then the deadline question will be handled within whatever policy alternative is chosen: (a) more unilateral action - should present few timing problems since we are the sole agent; (b) acquiesence in the lagging international system - leads to at least implicit acceptance of missed deadlines; (c) new Congressional legislation - time limits would be revised to reflect the content/thrust of whatever the legislation might entail. Consequently, the recommendation here is not to confuse the symptom (domestic deadline problems) with the cause (international systemic problems); primary focus should be directed to the overall issue and a similarly broad series of measures taken to resolve the larger issue.

The "Bottom Line" - A Matter of Estimate

This case study began with a passing reference to the genesis of support for international regulation of trade; a logical, dispassionate estimate that the costs of such regulation (e.g., loss of some national freedom of action) were lower than the likely costs of continuing a system where each nation could follow its own narrow national interest indiscriminately (or perhaps we should say "discriminatorily"). As with other areas of domestic and international affairs, the direction of international trade policy remains based on a system of weighing anticipated costs and benefits (political, social and economic). For the last half of this century the United States has been the major proponent of the "rule of law and equity" in international trade, primarily due to the estimate that we had much more to gain in an effective international trading system. Today, however, those who disagree with that cost estimate are garnering support from considerable changes in the domestic economic and global competitive situations as well as the failure of other countries to fully support the estimate which they too share, though perhaps only for public consumption. There is no longer in this country an almost reflexive support for our traditional posture; critics contend that other countries' justifications of their "special needs and circumstances" have made such exceptions the rule, rather than proving it. Signs point to a near-term re-examination of the estimate, a new and very, very hard look at costs and benefits in a world with proliferating economic flash points and a retrenching domestic economy. No logical, dispassionate observer would estimate the likely outcome of that estimate at the moment.

GATT Article XXII

CONSULTATION

1. Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding such representations as may be made by another contracting party with respect to any matter affecting the operation of this Agreement.

2. The Contracting Parties may, at the request of a contracting party, consult with any contracting party or parties in respect of any matter for which it has not been possible to find a satisfactory solution through consultations under paragraph 1.

GATT Article XXIII

NULLIFICATION OR IMPAIRMENT

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under the Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of

(a) the failure of another contracting party to carry out its obligations under this Agreement, or

(b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(c) the existence of any other situation,

the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of this Article, the matter may be referred to the Contracting Parties. The Contracting Parties shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The Contracting Parties may consult with contracting parties, with the Economic and Social Council of the United Nations and with any other appropriate inter-governmental organization in cases where they consider such consultation necessary.

If the Contracting Parties consider that the circumstances are serious enough to justify such action, they may authorize the contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than 60 days after such action is taken, to give written notice to the Executive Secretary to the Contracting Parties of its intention to withdraw from this Agreement and this withdrawal shall take effect upon the 60th day following the day on which such notice is received by him.

Date.

TITLE III—RELIEF FROM UNFAIR TRADE PRACTICES

CHAPTER 1—FOREIGN IMPORT RESTRICTIONS AND EXPORT SUBSIDIES

19 USC 2411.

SEC. 301. RESPONSES TO CERTAIN TRADE PRACTICES OF FOREIGN GOVERNMENTS.

(a) Whenever the President determines that a foreign country or instrumentality—

(1) maintains unjustifiable or unreasonable tariff or other import restrictions which impair the value of trade commitments made to the United States or which burden, restrict, or discriminate against United States commerce,

(2) engages in discriminatory or other acts or policies which are unjustifiable or unreasonable and which burden or restrict United States commerce,

(3) provides subsidies (or other incentives having the effect of subsidies) on its exports of one or more products to the United States or to other foreign markets which have the effect of substantially reducing sales of the competitive United States product or products in the United States or in those other foreign markets, or

(4) imposes unjustifiable or unreasonable restrictions on access to supplies of food, raw materials, or manufactured or semimanufactured products which burden or restrict United States commerce,

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

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

(B) may impose duties or other import restrictions on the products of such foreign country or instrumentality, and may impose fees or restrictions on the services of such foreign country or instrumentality, for such time as he deems appropriate.

For purposes of this subsection, the term "commerce" includes services associated with the international trade. "Commerce."

(b) In determining what action to take under subsection (a), the President shall consider the relationship of such action to the purposes of this Act. Action shall be taken under subsection (a) against the foreign country or instrumentality involved, except that, subject to the provisions of section 302, any such action may be taken on a nondiscriminatory treatment basis.

(c) The President in making a determination under this section, may take action under subsection (a)(3) with respect to the exports of a product to the United States by a foreign country or instrumentality if—

(1) the Secretary of the Treasury has found that such country or instrumentality provides subsidies (or other incentives having the effect of subsidies) on such exports;

(2) the International Trade Commission has found that such exports to the United States have the effect of substantially reducing sales of the competitive United States product or products in the United States; and

(3) the President finds that the Antidumping Act, 1921, and section 303 of the Tariff Act of 1930 are inadequate to deter such practices. 19 USC 160. 19 USC 1303.

(d)(1) The President shall provide an opportunity for the presentation of views concerning the restrictions, acts, policies, or practices referred to in paragraphs (1), (2), (3), and (4) of subsection (a).

(2) Upon complaint filed by any interested party with the Special Representative for Trade Negotiations alleging any such restriction, act, policy, or practice, the Special Representative shall conduct a review of the alleged restriction, act, policy, or practice, and, at the request of the complainant, shall conduct public hearings thereon. The Special Representative shall have a copy of each complaint filed under this paragraph published in the Federal Register. The Special Representative shall issue regulations concerning the filing of complaints and the conduct of reviews and hearings under this paragraph and shall submit a report to the House of Representatives and the Senate semi-annually summarizing the reviews and hearings conducted by it under this paragraph during the preceding 6-month period. Complaints, review. Hearings. Publication in Federal Register. Report to Congress.

(e) Before the President takes any action under subsection (a) with respect to the import treatment of any product or the treatment of any service—

(1) he shall provide an opportunity for the presentation of views concerning the taking of action with respect to such product or service,

(2) upon request by any interested person, he shall provide for appropriate public hearings with respect to the taking of action with respect to such product or service, and

(3) he may request the International Trade Commission for its views as to the probable impact on the economy of the United States of the taking of action with respect to such product or service.

If the President determines that, because of the need for expeditious action under subsection (a), compliance with paragraphs (1) and (2) would be contrary to the national interest, then such paragraphs shall not apply with respect to such action, but he shall thereafter promptly provide an opportunity for the presentation of views concerning the action taken and, upon request by any interested person, shall provide for appropriate public hearings with respect to the action taken. The President shall provide for the issuance of regulations concerning the filing of requests for, and the conduct of, hearings under this subsection.

19 USC 2412.

SEC. 302. PROCEDURE FOR CONGRESSIONAL DISAPPROVAL OF CERTAIN ACTIONS TAKEN UNDER SECTION 301.

(a) Whenever the President takes any action under subparagraph (A) or (B) of section 301(a) with respect to any country or instrumentality other than the country or instrumentality whose restriction, act, policy, or practice was the cause for taking such action, he shall promptly transmit to the House of Representatives and to the Senate a document setting forth the action which he has so taken, together with his reasons therefor.

(b) If, before the close of the 90-day period beginning on the day on which the document referred to in subsection (a) is delivered to the House of Representatives and to the Senate, the two Houses adopt, by an affirmative vote of a majority of those present and voting in each House, a concurrent resolution of disapproval under the procedures set forth in section 152, then such action under section 301(a) shall have no force and effect beginning with the day after the date of the adoption of such concurrent resolution of disapproval, except with respect to the country or instrumentality whose restriction, act, policy, or practice was the cause for taking such action.

Ante, p. 2004.

CHAPTER 2—ANTIDUMPING DUTIES

SEC. 321. AMENDMENTS TO THE ANTIDUMPING ACT OF 1921.

(a) Section 201 of the Antidumping Act, 1921 (19 U.S.C. 160), is amended—

(1) by striking out "United States Tariff Commission" in subsection (a) and inserting in lieu thereof "United States International Trade Commission (hereinafter called the 'Commission')", and by striking out "said" each place it appears in such subsection; and

(2) by striking out subsections (b) and (c) and inserting in lieu thereof the following:

"(b)(1) In the case of any imported merchandise of a class or kind as to which the Secretary has not so made public a finding, he shall, within six months after the publication under subsection (c)(1) of a notice of initiation of an investigation—

"(A) determine whether there is reason to believe or suspect, from the invoice or other papers or from information presented to him or to any other person to whom authority under this section has been delegated, that the purchase price is less, or that the exporter's sales price is less or likely to be less, than the foreign market value (or, in the absence of such value, than the constructed value); and

Tax Revision Act of 1979), the first sentence of the eighth paragraph of section 311 of the Tariff Act of 1930 (19 U.S.C. 1311) shall be applied as if such first sentence did not include the phrase "at an exterior port".

(b) REMOVAL OF REFERENCE TO RECTIFICATION TAXES.—Effective January 1, 1980, the second proviso to the last paragraph of section 311 of the Tariff Act of 1930 is hereby repealed.

TITLE IX—ENFORCEMENT OF UNITED STATES RIGHTS

SEC. 901. ENFORCEMENT OF UNITED STATES RIGHTS UNDER TRADE AGREEMENTS AND RESPONSE TO CERTAIN FOREIGN PRACTICES.

Chapter 1 of title III of the Trade Act of 1974 (19 U.S.C. 2411) is amended to read as follows:

"CHAPTER 1—ENFORCEMENT OF UNITED STATES RIGHTS UNDER TRADE AGREEMENTS AND RESPONSE TO CERTAIN FOREIGN TRADE PRACTICES

"SEC. 301. DETERMINATIONS AND ACTION BY PRESIDENT.

"(a) DETERMINATIONS REQUIRING ACTION.—If the President determines that action by the United States is appropriate—

"(1) to enforce the rights of the United States under any trade agreement, or

"(2) to respond to any act, policy, or practice of a foreign country or instrumentality that—

"(A) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

"(B) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce;

the President shall take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of such act, policy, or practice. Action under this section may be taken on a nondiscriminatory basis or solely against the products or services of the foreign country or instrumentality involved.

"(b) OTHER ACTION.—Upon making a determination described in subsection (a), the President, in addition to taking action referred to in such subsection, may—

"(1) suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with the foreign country or instrumentality involved; and

"(2) impose duties or other import restrictions on the products of, and fees or restrictions on the services of, such foreign country or instrumentality for such time as he determines appropriate.

"(c) PRESIDENTIAL PROCEDURES.—

"(1) ACTION ON OWN MOTION.—If the President decides to take action under this section and no petition requesting action on the matter involved has been filed under section 302, the President shall publish notice of his determination, including the reasons for the determination in the Federal Register. Unless he determines that expeditious action is required, the President shall provide an opportunity for the presentation of views concerning the taking of such action.

"(2) ACTION REQUESTED BY PETITION.—Not later than 21 days after the date on which he receives the recommendation of the Special Representative under section 304 with respect to a petition, the President shall determine what action, if any, he will take under this section, and shall publish notice of his determination, including the reasons for the determination, in the Federal Register.

"(d) SPECIAL PROVISIONS.—

"(1) DEFINITION OF COMMERCE.—For purposes of this section, the term 'commerce' includes, but is not limited to, services associated with international trade, whether or not such services are related to specific products.

"(2) VESSEL CONSTRUCTION SUBSIDIES.—An act, policy, or practice of a foreign country or instrumentality that burdens or restricts United States commerce may include the provision, directly or indirectly, by that foreign country or instrumentality of subsidies for the construction of vessels used in the commercial transportation by water of goods between foreign countries and the United States.

"SEC. 302. PETITIONS FOR PRESIDENTIAL ACTION.

"(a) FILING OF PETITION WITH SPECIAL REPRESENTATIVE.—Any interested person may file a petition with the Special Representative for Trade Negotiations (hereinafter in this chapter referred to as the 'Special Representative') requesting the President to take action under section 301 and setting forth the allegations in support of the request. The Special Representative shall review the allegations in the petition and, not later than 45 days after the date on which he received the petition, shall determine whether to initiate an investigation.

"(b) DETERMINATIONS REGARDING PETITIONS.—

"(1) NEGATIVE DETERMINATION.—If the Special Representative determines not to initiate an investigation with respect to a petition, he shall inform the petitioner of his reasons therefor and shall publish notice of

the determination, together with a summary of such reasons, in the Federal Register.

"(2) AFFIRMATIVE DETERMINATION.—If the Special Representative determines to initiate an investigation with respect to a petition, he shall initiate an investigation regarding the issues raised. The Special Representative shall publish the text of the petition in the Federal Register and shall, as soon as possible, provide opportunity for the presentation of views concerning the issues, including a public hearing—

"(A) within the 30-day period after the date of the determination (or on a date after such period if agreed to by the petitioner), if a public hearing within such period is requested in the petition; or

"(B) at such other time if a timely request therefor is made by the petitioner.

"SEC. 303. CONSULTATION UPON INITIATION OF INVESTIGATION.

"On the date an affirmative determination is made under section 302(b) with respect to a petition, the Special Representative, on behalf of the United States, shall request consultations with the foreign country or instrumentality concerned regarding issues raised in the petition. If the case involves a trade agreement and a mutually acceptable resolu-

tion is not reached during the consultation period, if any, specified in the trade agreement, the Special Representative shall promptly request proceedings on the matter under the formal dispute settlement procedures provided under such agreement. The Special Representative shall seek information and advice from the petitioner and the appropriate private sector representatives provided for under section 135 in preparing United States presentations for consultations and dispute settlement proceedings.

"SEC. 304. RECOMMENDATIONS BY THE SPECIAL REPRESENTATIVE.

"(a) RECOMMENDATIONS.—

"(1) IN GENERAL.—On the basis of the investigation under section 302, and the consultations (and the proceedings, if applicable) under section 303, and subject to subsection (b), the Special Representative shall recommend to the President what action, if any, he should take under section 301 with respect to the issues raised in the petition. The Special Representative shall make that recommendation not later than—

"(A) 7 months after the date of the initiation of the investigation under section 302(b)(2) if the petition alleges only an export subsidy covered by the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General

Agreement on Tariffs and Trade (relating to subsidies and countervailing measures and hereinafter referred to in this section as the 'Subsidies Agreement');

"(B) 8 months after the date of the investigation initiation if the petition alleges any matter covered by the Subsidies Agreement other than only an export subsidy;

"(C) in the case of a petition involving a trade agreement approved under section 2(a) of the Trade Agreements Act of 1979 (other than the Subsidies Agreement), 30 days after the dispute settlement procedure is concluded; or

"(D) 12 months after the date of the investigation initiation in any case not described in subparagraph (A), (B), or (C).

"(2) SPECIAL RULE.—In the case of any petition—

"(A) an investigation with respect to which is initiated on or after the date of the enactment of the Trade Agreements Act of 1979 (including any petition treated under section 903 of that Act as initiated on such date); and

"(B) to which the 12-month time limitation set forth in subparagraph (D) of paragraph (1) would but for this paragraph apply;

if a trade agreement approved under section 2(a) of such Act of 1979 that relates to any allegation made in the petition applies between the United States and a foreign country or instrumentality before the 12-month period referred to in subparagraph (B) expires, the Special Representative shall make the recommendation required under paragraph (1) with respect to the petition not later than the close of the period specified in subparagraph (A), (B), or (C), as appropriate, of such paragraph, and for purposes of such subparagraph (A) or (B), the date of the application of such trade agreement between the United States and the foreign country or instrumentality concerned shall be treated as the date on which the investigation with respect to such petition was initiated; except that consultations and proceedings under section 303 need not be undertaken within the period specified in such subparagraph (A), (B), or (C), as the case may be, to the extent that the requirements under such section were complied with before such period begins.

"(3) REPORT IF SETTLEMENT DELAYED.—In any case in which a dispute is not resolved before the

close of the minimum dispute settlement period provided for in a trade agreement referred to in paragraph (1)(C) (other than the Subsidies Agreement), the Special Representative, within 15 days after the close of such period, shall submit a report to Congress setting forth the reasons why the dispute was not resolved within the minimum period, the status of the case at the close of the period, and the prospects for resolution. For purposes of this paragraph, the minimum dispute settlement period provided for under any such trade agreement is the total period of time that results if all stages of the formal dispute settlement procedures are carried out within the time limitations specified in the agreement, but computed without regard to any extension authorized under the agreement of any stage.

"(b) CONSULTATION BEFORE RECOMMENDATION.—Before recommending that the President take action under section 301 with respect to the treatment of any product or service of a foreign country or instrumentality which is the subject of a petition filed under section 302, the Special Representative, unless he determines that expeditious action is required—

"(1) shall provide opportunity for the presentation of views, including a public hearing if requested by any interested person;

"(2) shall obtain advice from the appropriate private sector advisory representatives provided for under section 135; and

"(3) may request the views of the International Trade Commission regarding the probable impact on the economy of the United States of the taking of action with respect to such product or service.

If the Special Representative does not comply with paragraphs (1) and (2) because expeditious action is required, he shall, after making the recommendation concerned to the President, comply with such paragraphs.

"SEC. 305. REQUESTS FOR INFORMATION.

"(a) IN GENERAL.—Upon receipt of written request therefor from any person, the Special Representative shall make available to that person information (other than that to which confidentiality applies) concerning—

"(1) the nature and extent of a specific trade policy or practice of a foreign government or instrumentality with respect to particular merchandise, to the extent that such information is available to the Special Representative or other Federal agencies;

"(2) United States rights under any trade agreement and the remedies which may be available under that agreement and under the laws of the United States; and

"(3) past and present domestic and international proceedings or actions with respect to the policy or practice concerned.

"(b) IF INFORMATION NOT AVAILABLE.—If information that is requested by an interested party under subsection (a) is not available to the Special Representative or other Federal agencies, the Special Representative shall, within 30 days after receipt of the request—

"(1) request the information from the foreign government; or

"(2) decline to request the information and inform the person in writing of the reasons for the refusal.

"SEC. 306. ADMINISTRATION.

"The Special Representative shall—

"(1) issue regulations concerning the filing of petitions and the conduct of investigations and hearings under this chapter;

"(2) keep the petitioner regularly informed of all determinations and developments regarding his case under this section, including the reasons for any undue delays; and

"(3) submit a report to the House of Representatives and the Senate semiannually describing the petitions filed and the determinations made (and reasons therefor) under section 302, developments in and cur-

rent status of each such proceeding, and the actions taken, or the reasons for no action, by the President under section 301.".

SEC. 902. CONFORMING AMENDMENTS.

(a) ELIMINATION OF CONGRESSIONAL PROCEDURES.—Chapter 5 of title I of the Trade Act of 1974 is amended as follows:

(1) Section 152(a) is amended—

(A) by amending paragraph (1)(A) to read as follows:

"(A) a concurrent resolution of the two Houses of the Congress, the matter after the resolving clause of which is as follows: 'That the Congress does not approve the action taken by, or the determination of, the President under section 203 of the Trade Act of 1974 transmitted to the Congress on .', the blank space being filled with the appropriate date; and";

(B) by striking out "paragraph (3)," in paragraph (1)(B) and inserting in lieu thereof "paragraph (2),";

(C) by striking out paragraph (2); and

(D) by redesignating paragraph (3) as paragraph (2).

(2) Section 154 is amended by striking out "302(a)," in subsection (a); and by striking out "302(b)," in subsection (b).

(b) TABLE OF CONTENTS.—The table of contents of the Trade Act of 1974 is amended by striking out

"CHAPTER 1—FOREIGN IMPORT RESTRICTIONS AND EXPORT SUBSIDIES

"Sec. 301. Responses to certain trade practices of foreign governments.
"Sec. 302. Procedure of or congressional disapproval of certain actions taken under section 301.";

and inserting in lieu thereof the following:

"CHAPTER 1—ENFORCEMENT OF UNITED STATES RIGHTS UNDER TRADE AGREEMENTS AND RESPONSE TO CERTAIN FOREIGN TRADE PRACTICES

"Sec. 301. Determinations and action by President.
"Sec. 302. Petitions for Presidential action.
"Sec. 303. Consultation upon initiation of investigation.
"Sec. 304. Recommendations by the Special Representative.
"Sec. 305. Requests for information.
"Sec. 306. Administration.".

SEC. 903. EFFECTIVE DATE.

The amendments made by sections 901 and 902 shall take effect on the date of the enactment of this Act. Any petition for review filed with the Special Representative for Trade Negotiations under section 301 of the Trade Act of 1974 (as in effect on the day before such date of enactment) and pending on such date of enactment shall be treated as an investigation initiated on such date of enactment under section 302(b)(2) of the Trade Act of 1974 (as added by section 901 of this Act) and any information developed by, or submitted to, the Special Representative before such date of enactment under the review shall be treated as part of the information developed during such investigation.

FOOTNOTES

[1]World Trade and the Law of the GATT, John H. Jackson, The Bobbs-Merril Co., Inc., New York, 1969; p. 2.

[2]Ibid., p. vii.

[3]Ibid., p. 526.

[4]Ibid., p. 166.

[5]Report of the Senate Finance Committee on H.R. 10710, the Trade Reform Act of 1974, United States Senate, Ninety-Third Congress, U.S. Government Printing Office, 1974; p. 166.

[6]Public Hearings before the Committee on Ways and Means on H.R. 6767, The Trade Reform Act of 1973, Parts 1 through 15; U.S. House of Representatives, Ninety-Third Congress, U.S. Government Printing Office, 1973; Part 2, pp. 348-349.

[7]Report of the House Committee on Ways and Means on H.R. 6767, The Trade Reform Act of 1973, U.S. House of Representatives, Ninety-Third Congress, U.S. Government Printing Office, 1973; p. 65.

[8]Ibid., p. 67.

[9]Ibid., p. 66.

[10]Report of the Senate Finance Committee on H.R. 10710; pp. 163-164.

[11]Report of the House Committee on Ways and Means on H.R. 6767; p. 65.

[12]Ibid., p. 65.

[13]Robert Hudec, "Retaliation Against 'Unreasonable' Foreign Trade Practices; The New Section 301 and GATT Nullification and Impairment;" Minnesota Law Review, Vol. 59; University of Minnesota Law School; Minneapolis, Minn.; 1975; pp. 461-539.

[14]Hearings before the Subcommittee on International Trade of the Committee on Finance on S-1376; United States Senate, Part 1 and 2, U.S. Government Printing Office, Part 1, p. 4.

[15]Trade Agreements Act of 1979 - Statements of Administrative Action; House Document No. 96-153; Part II; Ninety-Sixth Congress, First Session; U.S. Government Printing Office; June 1979; pp. 532-533.

[16]Hearings before the Subcommittee on Trade of the Committee on Ways and Means, Serial 96-13, Part 1 and 2, U.S. Government Printing Office; 1979; Part 1, p. 12.

[17] Report of the House Committee on Ways and Means on the Trade Agreements Act of 1979, U.S. House of Representatives; Ninety-Sixth Congress, First Session; U.S. Government Printing Office; 1979; p. 172.

[18] Report of the Committee on Finance on S-1376, United States Senate; Ninety-Sixth Congress, First Session; U.S. Government Printing Office; 1979; p. 232.

[19] Ibid., p. 237.

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- Mary Jane Wignot, Professional Staff, Trade Subcommittee, Committee on Ways and Means.

U.S. Senate

- Jeff Lang, Professional Staff, Subcommittee on International Trade, Committee on Finance.

Office of the U.S. Trade Representative, Executive Office of the President

- Frederick L. Montgomery. Deputy U.S. Trade Representative for Interagency Coordination.

- Jeanne Archibald, Chairman of the Interagency Section 301 Committee, Office of the General Counsel also former member of the Professional Staff, Trade Subcommittee, House Committee on Ways and Means.

U.S. Department of Commerce, Bureau of International Economic Policy and Research

- Judith A. Davis, Trade Advisory Center, Commerce Member of Interagency Section 301 Committee.
- Ann C. Ryder, Director, Trade Advisory Center.
- Bennett Marsh, Acting Director, General Commercial Policy Division, Office of Trade Policy.
- Kenichi Kuwabara, International Economist, General Commercial Policy Division, Office of Trade Policy.