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The Foreign Trade Aspects Of The Trade Act Of 1974, Part I

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THE FOREIGN TRADE ASPECTS OF THE TRADE ACT OF 1974

ROBERT M. CAMPBELL*

TABLE OF CONTENTS

	Page
Introduction	327
Detailed Discussion of the Trade Act	332
Title I—Negotiating and Other Authority	334
Chapter I. Rates of Duty and Other Trade Barriers	334
Section 101. Basic Authority for Trade Agreements	334
Section 102. Nontariff Barriers to and Other Distortions of Trade	335
Section 103. Overall Negotiating Objective	341
Section 104. Sector Negotiating Objective	342
Section 105. Bilateral Trade Agreements	342
Section 106. Agreements with Developing Countries ..	343
Section 107. International Safeguard Procedures	343
Section 108. Access to Supplies	343
Chapter 2. Other Authority	344
Section 121. Revision of GATT	345
Section 122. Balance of Payments Authority	372
Section 123. Compensation Authority	373
Section 124. Authority to Renegotiate Duties	374
Section 125. Termination and Withdrawal Authority ...	374
Section 126. Reciprocal Non-Discriminatory Treatment	376
Section 127. Reservation of Articles for National Security or Other Reasons	377
Chapter 3. Hearings and Advice Concerning Negotiations	377
Section 131. International Trade Commission Advice .	378
Section 132. Other Government Advice	379
Section 133. Public Hearings	379
Section 134. Prerequisites for Offer	379
Section 135. Advice from the Private Sector	379

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Chapter 4. Office of the Special Representative for Trade Negotiations	386
Chapter 5. Congressional Procedures with Respect to Presidential Actions	388
Chapter 6. Congressional Liaison and Reports	389
Chapter 7. United States International Trade Commission	390

II.**

Title II—Relief from Injury Caused by Import Competition ..	
I. Background	
II. Principle Objectives of Title II	
III. Principle Foreign Trade Aspects of Title II	
Title III—Relief from Unfair Trade Practices	
Chapter I. —Foreign Import Restrictions and Export Subsidies	
Section 301. Responses to Certain Trade Practices of Foreign Governments	
Chapter II. —Anti-Dumping Duties	
Chapter III.—Countervailing Duties	
Chapter IV.—Unfair Trade Practices	
Title IV—Trade Relations with Countries Not Presently Receiving Nondiscriminatory Treatment	
Title V—Generalized System of Preferences	
Table VI—General Provisions	

THE FOREIGN TRADE ASPECTS OF THE TRADE ACT OF 1974, PART I

The Trade Act of 1974¹ is a piece of major legislation which will have a substantial effect on the international trade of the United States for many years to come. The most immediate importance of this legislation is that it gives authority to a Special Trade Representative of the United States (STR) to participate in the current multi-lateral trade negotiations (MTN) under the General Agreement on Tariffs and Trade (GATT).² It also provides the Administration with

** The second part of this article will appear in 33 WASH. & LEE L. REV. No. 3, Summer 1976.

¹ Trade Act of 1974, Pub. L. No. 93-618, §§ 101-613, 88 Stat. 1978-2077 (Codified at 19 U.S.C. §§ 2101-2487, Supp. IV, 1975) [hereinafter cited as Trade Act, with section numbers corresponding to the session laws]. A full list of abbreviations is set out at the end of this article.

² General Agreement on Tariff and Trade (GATT), *done* October 30, 1947, 61 Stat.

broad authority to react to actions of foreign nations or entities which adversely affect or discriminate against the foreign trade of the United States. The Trade Act further instructs the Administration to attempt to revise GATT in major respects and makes federal assistance much more readily available to employees who become unemployed because of foreign imports. To a lesser extent it makes federal assistance available to businesses and communities who suffer from foreign imports. The Act also endeavors to remedy what is perceived by many as a social injustice—the restrictions by Communist countries on the emigration of Jews from those countries.

This article will attempt to:

- (1) discuss the legislative history of the Trade Act—a fascinating example of the interplay between the Congress and the Administration on a most critical subject;
- (2) compare the Trade Act with the Trade Expansion Act of 1962³ (hereinafter called “the 1962 Act”)—the most recent major legislation of the United States dealing with the same general subject matter;
- (3) discuss briefly the negotiability of certain of the objectives of the Trade Act; and
- (4) present a detailed discussion of the Trade Act.

INTRODUCTION

The statistics regarding U.S. trade and balance of payments contained in the Report of the Committee on Finance of the Senate on the Trade Act⁴ (the SFC Report) show clearly the deterioration of the United States balance of trade during the years 1965-74 (and particu-

43 (1947), T.I.A.S. No. 1700, 55-61 U.N.T.S. (January 1, 1948). The “authentic text” of GATT is not easily determined if one elects to start with the original agreement and work forward. This results in part from the number of textual amendments that have been made, in part from the extremely extensive “schedules of concessions,” a separate such schedule existing for each party, and in part from the fact that the number of contracting parties has increased from eight as of January 1, 1948 to eighty-three as of November 1, 1974. However, for purposes of this article the text of the general provisions of the General Agreement (that is, the general articles (article I through XXXVIII) and the annexes, exclusive of the schedules) will be sufficient. That text as published in March 1969 is set out at Volume IV, page 1, of GATT publication IV GATT, BASIC INSTRUMENTS AND SELECTED DOCUMENTS, 1 *et. seq.* (1969). No amendment to this general language has occurred since that text was developed. That text is also set out in J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 800 (1969) [hereinafter cited as JACKSON].

³ 19 U.S.C. 1801 *et seq.* (1970).

⁴ S. REP. No. 1298, 93d Cong., 2d Sess. 1231 (1974), reprinted at 1974 U.S. CODE CONG. & ADMIN. NEWS 7186 [hereinafter cited as SFC REPORT].

larly in the years 1970-74) as compared to the years 1960-64.⁵ The average annual U.S. balance of trade, for the years 1960-64, on the basis normally used in government statistics,⁶ was a surplus of \$5.4 billion. The average annual U.S. balance of trade for the years 1965-69 on the same basis declined to a surplus of \$3.1 billion; and in the period of January 1, 1970 to September 30, 1974, the balance of trade declined much more sharply to an average annual *deficit* of \$1.6 billion.

During the same period, the U.S. balance of payments on a liquidity basis, excluding "special drawing rights"⁷ allocations in

	5 U.S. TRADE AND BALANCE OF PAYMENTS, 1960-74								
	(In billions of dollars)								
	U.S. trade position				Trade balance			Balance of payments	
	Exports (X)		Imports (M)		C.i.f. (M) excluding foreign aid(X)			Official settle- ments	Basis balance
Total	Minus foreign aid	F.o.b.	C.i.f.*	F.o.b.	Liquidity**				
1960	19.7	18.0	15.1	16.3	4.6	1.7	-3.7	-3.4	-1.2
1961	20.2	18.5	14.8	16.0	5.5	2.5	-2.3	-1.3	(?)
1962	21.0	18.9	16.5	17.8	4.5	1.1	-2.9	-2.6	-1.0
1963	22.5	20.0	17.2	18.6	5.3	1.4	-2.7	-1.9	-1.3
1964	25.8	23.1	18.7	20.3	7.1	2.8	-2.7	-1.5	-1
1965	26.7	24.3	21.4	23.2	5.3	1.1	-2.5	-1.3	-1.8
1966	29.5	27.0	25.6	27.7	3.9	-7	-2.2	.2	-2.1
1967	31.0	28.5	26.9	28.8	4.1	-3	-4.7	-3.4	-3.7
1968	34.1	31.8	33.2	35.3	.8	-3.5	-1.6	-1.6	-1.9
1969	37.3	35.3	36.0	38.2	1.3	-2.9	-6.1	2.7	-3.6
1970	42.7	40.7	40.0	42.4	2.7	-1.7	-3.9	-9.8	-3.8
1971	43.5	41.7	45.6	48.3	-2.0	-6.6	-22.0	-29.8	-10.6
1972	49.2	47.5	55.6	58.9	-6.4	-11.4	-13.9	-10.4	-11.2
1973	70.8	69.4	69.5	73.2	1.7	-3.8	-7.8	-5.3	-9
1974:									
I	22.4		21.7	23.2	-7		-1.0	1.1	1.7
II	24.2	45.6	25.2	27.0	-9	-4.6	-6.2	-4.5	-2.7
III	25.0	24.7	27.1	29.0	-2.1	-4.3	***	NA	NA

*C.i.f. imports for the years 1960-66 are assumed to be roughly equivalent to 108.3 percent of f.o.b. imports in accordance with a Bureau of Customs—Tariff Commission—Bureau of Census study based on 1966 arrivals. For the years 1967-73 estimates are based on Bureau of Customs—Bureau of Census studies showing estimated freight and insurance charges to be 6.9 percent (1967), 6.3 percent

(1968), 6.1 percent (1969), 6.2 percent (1970), 6.1 percent (1971), and 5.9 percent for 1972 and 1973.

**The liquidity and official settlements deficits for 1966-7 excludes SDR allocations.

***Less than \$50 million.

⁵ U.S. Government statistics normally include foreign aid shipments as part of U.S. exports and normally show the value of imports on an f.o.b. foreign factory basis, rather than on a c.i.f. basis.

The SFC Report states the "most meaningful and accurate basis" of measuring trade "would include the cost of insurance and freight in the value of our imports and exclude the soft-currency and other foreign-aid-financed shipments from the value of our exports." (Emphasis added.) SFC Report, *supra* note 4, at 7. The table set forth in note 5, *supra*, shows the effect of these two adjustments, which is of course to reduce the trade surplus (or increase the trade deficit) in any given year.

⁷ Special drawing rights are the rights given to the members of the International Monetary Fund by a 1970 amendment. Each member is entitled to the special drawing right which is proportionate to its quota in the Fund. A member may utilize the SDR under certain conditions to reduce or eliminate its balance of payments' difficulties.

1966-73, worsened from a relatively small average annual deficit in the years 1960-64 of \$2.8 billion to a larger average annual deficit of \$3.4 billion in the years 1965-69, and soared to an average annual deficit of \$11.5 billion in the period between January 1, 1970, and September 30, 1974.

The position of the United States as the leader in world trade has been significantly eroded over this fifteen year period, and the positions of the EEC and Japan have significantly improved.⁸ During the last five years, the United States has been forced to devalue its currency several times, has imposed and removed tariff surcharges, has imposed and removed profit controls, and has imposed and removed export controls on various products in short supply.⁹

At the same time, the OPEC countries, by withholding supplies of petroleum and drastically increasing its price have greatly inflated the cost of imports to most of the developed and less developed countries of the Free World. In the views of most Western economists, these actions have greatly accelerated the inflation already prevalent in many Western countries. Other groups of commodity-producing countries, inspired by the tremendous success of the OPEC countries, have endeavored to apply their example to other commodities.

During the last ten year period, on the other hand, there have been several major developments which in the long run may prove to be most helpful to increased trade between the United States and Communist countries:

- (a) The United States has very substantially reduced its export controls on trade between the United States and almost all Communist countries (other than Vietnam, North Korea and Cuba);
- (b) The United States has concluded a trade agreement¹⁰ with the Soviet Union, but that agreement will not enter into force until the prescribed congressional procedure has been carried out;¹¹ and
- (c) Considerable progress has been made in developing trade with the People's Republic of China.

The initial declaration relating to a further round of multilateral trade negotiations (MTN) was issued at a meeting of the ministers

⁸ See *Tables and Statistical Material on U.S. Balance of Trade and Balance of Payments*, S. REP. No. 254, 93d Cong., 2d Sess. 15 (1974).

⁹ It is true that the U.S. balance of trade has sharply improved during the last two years, but this improvement occurred after congressional action on the Trade Bill.

¹⁰ 67 Department State Bull. 592 (1972).

¹¹ Trade Act, § 407(c)(2).

of the members of GATT held in Tokyo in September, 1973.¹² A Trade Negotiations Committee for the Tokyo round of negotiations met for the first time in October, 1973. It is composed of 64 countries who are members of GATT and of 19 non-members.¹³ As a result of the earlier "Kennedy" round of trade negotiations under GATT (1962-67), the average level of customs duties on nonagricultural products has been very substantially reduced for most of the major trading countries of the Free World. Granted that the "average" level of customs duties for any country is a difficult and complex calculation, it is generally accepted that as a result of the Kennedy round, the average level of customs duties of non-agricultural products (other than mineral fuels) for the four major trading groups were reduced to the following levels:¹⁴

United States	9.6%
EEC	8.1%
United Kingdom	10.6%
Japan	9.5%

"Average" duty levels do not, of course, accurately indicate the extent of protection where a country has a wide dispersion of duty rates. Although the Kennedy round resulted in substantial reductions in the highest duty rates, it is still fair to say that with the possible exception of Japan, the United States retains more high-level customs duty rates than any of the other major trading countries.

It is now generally believed that non-tariff measures (NTM), rather than customs duties, are the major barrier to international trade.¹⁵ Perhaps the simplest and most inclusive definition of an NTM is that given by Professor Stanley Metzger:

In general, all regulations of trade other than ordinary rates of duty imposed on ordinary classifications of articles valued according to customary methods can be considered nontariff barriers to the extent that they can be, and often are, used to

¹² GATT Press Release No. GATT/1134 (Sept. 14, 1973).

¹³ GATT Press Release No. GATT/1136 (Oct. 29, 1973).

¹⁴ See E. PREGG, *TRADERS AND DIPLOMATS* 208-211 (1970). The above percentages assumed that the tentative agreement on the elimination of the "American selling price" method of valuation would be approved by Congress. See notes 25-26, *infra*. This agreement was not approved by Congress, but this is not believed to affect the average rates to any substantial degree.

¹⁵ S. METZGER, *LOWERING NONTARIFF BARRIERS* 2 (1974).

interdict trade for protectionist purposes—to protect, in added degree, domestic industry against competitive imports.¹⁶

Thus, the United States and many of the other GATT members perceive an opportunity in this round of negotiations to negotiate for the elimination of many of the existing NTMs and to amend or supplement GATT so that its provisions will deal adequately with the rights and remedies of members of GATT as to the remaining NTMs. Despite the general agreement on this point, the negotiations will probably reach their highest level of tension and disagreement over these NTM's. What is to one nation a reasonable precaution, prompted by a desire to safeguard the health of its citizens, may appear to its trading partners as a major barrier to trade, with the "health" argument a transparent subterfuge.

Finally in analyzing the Trade Act, two other critical points, both relating to the attitude of the United States Congress to GATT, must be borne in mind:

(1) Congress has never been whole-heartedly in sympathy with GATT or in general with the negotiations carried out thereunder insofar as they related to the United States. Indeed, in six separate Trade Agreement Acts, including Section 121(d) of the Trade Act, Congress insisted upon the insertion of the following provision (or ones very similar to it): "The enactment of this Act shall not be construed to determine or indicate the approval or disapproval by the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade."¹⁷

(2) Specifically, many of the leaders of the present Congress have come to feel that the result of the most recent MTN (those carried out during the Kennedy round) was highly unfavorable to the United States.¹⁸

¹⁶ *Id.* at 7.

¹⁷ Trade Agreement Extension Act of 1951, § 10, 65 Stat. 75 (1951).

¹⁸ Consider, for example, the following paragraphs of the SFC REPORT, p. 15:

Twelve years have passed since the Congress enacted the Trade Expansion Act of 1962. A great amount of international economic history has occurred in the intervening years. In the opinion of the Committee, much of that history has been unfavorable to this country, largely because of the antiquated rules of the international trade and monetary systems and the related lack of genuine cooperation and reciprocity in international economic relations.

The Kennedy Round of trade negotiations brought about some of the largest tariff reductions in the history of the United States. Unfortunately, the Kennedy Round did not remedy fundamental inequities in the world trading system. There was no reform of the institutional

DETAILED DISCUSSION OF THE TRADE ACT

The Trade Act of 1974 found its inception in the Trade Bill forwarded by President Nixon to the Congress on April 10, 1973. This bill was introduced in the House of Representatives as H.R. 6767 by Mr. Wilbur Mills and others.¹⁹ The House Ways and Means Committee then proceeded to hold extensive hearings on the bill in May and June, 1973. These hearings elicited many proposed amendments, and the staff of the Committee prepared a listing of those amendments.²⁰ The report of the Committee (hereinafter referred to as "HWMC Report") recommended H.R. 10710 to the House.²¹ The Committee based its bill on the Administration Proposal, but it modified that proposal in many respects. One of the amendments introduced by the Committee which was to cause controversy and considerable delay was the provision to give the President authority to extend most-favored-nation treatment to a Communist country only if he determined that the country in question permitted its citizens the right to emigrate without payment of fees or taxes.

The House Ways and Means Committee had made a thorough study of the bill, and perhaps under more normal circumstances, the Senate Finance Committee would have accepted H.R. 10710 without making major amendments. However, circumstances which intervened between the issuance of the HWMC Report on October 10, 1973 and the issuance of the SFC Report on November 26, 1974 were far from normal.

The OPEC oil embargo, the dramatic increase in the price of oil, rampant inflation, critical shortages of many commodities, and other factors all combined to cause a major economic upheaval during this precise period of time. In addition, the United States had been almost completely unsuccessful in its efforts to obtain any concerted action from its major trading partners in Europe and the Far East in response to the oil embargo. Many of these countries sought to work out their individual solutions with one or more of the OPEC countries. It was therefore most natural and appropriate for the Senate Finance

structure, nor was there any significant progress in dealing with non-tariff barriers or distortions of international trade. Our trading partners, most notably the European Community, devised new ways to pursue protectionism, particularly in agriculture.

¹⁹ H.R. 6767, 93d Cong., 1st Sess. (1973). See H.R. Doc. No. 478, 93d Cong., 1st Sess. (1973) (This document also includes the Press Release issued at that time, the Message of the President, the Summary of the Bill, and a section by section analysis of the Bill).

²⁰ HOUSE WAYS AND MEANS COMMITTEE, BRIEFING PAPER NO. 8: LISTING OF AMENDMENTS PROPOSED TO H.R. 6767, 93d Cong., 1st Sess. (Comm. Print 1973).

²¹ H.R. REP. NO. 571, 93d Cong., 1st Sess. (1973) [hereinafter cited as HWMC REPORT].

Committee to make a fresh and intensive review of the proposed Trade Bill in light of these dramatic new circumstances. The Trade Act which has emerged is a lengthy document of ninety-nine printed pages as compared to the forty-two page Administration Proposal. In addition the Trade Act is, by necessity, complex, reflecting the sometimes conflicting desires of the Congress and the Administration, of "free traders" and protectionists, and of representatives of business and labor.

The Act is divided into six basic titles, as follows:

- I—Negotiating and Other Authority
- II—Relief from Injury Caused by Import Competition
- III—Relief from Unfair Trade Practice
- IV—Trade Relations with Countries Not Currently Receiving Nondiscriminatory Treatment
- V—Generalized System of Preferences
- VI—General Provisions.

These titles are basically the same as those contained in the Administration's Proposal but the Congress has altered the Administration's Proposal in major respects.

Statement of Purposes

The Statement of Purposes of the 1974 Trade Act²² (Section 2) may be summarized as follows:

- (i) to foster the economic growth of and full employment in the United States . . . ;
- (ii) to reduce or eliminate barriers to trade on a basis which assures "substantially equivalent competitive opportunities for the United States";
- (iii) to establish fairness and equity in international trade, including the reform of GATT;
- (iv) to provide adequate procedures to safeguard American industry and labor against unfair or injurious import competition, and to assist workers, firms and communities to adjust to changes in international trade flows;
- (v) to open market opportunities for United States commerce in nonmarket economies; and
- (vi) to provide fair and reasonable access to products of less developed countries in the United States market.

A comparison of the Statement of Purposes of the Trade Act with

²² 19 U.S.C. § 2102 (Supp. IV 1974).

that contained in the Administration Proposal brings out two significant differences. First, in the Trade Act Statement of Purposes, the emphasis in each paragraph, except the last, is on the benefits to be obtained for the United States. The wording of the Statement of Purposes included in the Administration's Proposal is much more general and stresses the advantages to be gained by all countries through elimination of barriers to international trade. Second, in the Trade Act Statement of Purposes, all references to the powers of the President are struck out. These differences in approach in the Statement of Purposes are but the harbingers of the many specific and substantial changes contained in the subsequent provisions of the Act, as compared to those of the Administration Proposal.

Title I—Negotiating and Other Authority
Chapter I. Rates of Duty and Other Trade Barriers
Section 101. Basic Authority for Trade Agreements.

Section 101 is the basic authority to negotiate and agree on the lowering of customs duties and is therefore one of the most important authorities granted to the President. It gives the President the authority to enter into trade agreements during a five year period and to modify or continue existing duties or duty-free status, or to impose additional duties as he deems necessary or appropriate to carry out these agreements. The Administration Proposal had requested this authority but without any limitation either as to decreases or increases. The Congress was unwilling, however, to give such broad authority, and the President's authority to decrease duties is limited to 40% of the rates in effect on January 1, 1975; but this limitation does not apply to items carrying a duty rate of 5% or less as of that date. Furthermore, the President may not increase duties more than the higher of (a) 50% above the rate in column 2 of the Tariff Schedules as in effect on January 1, 1975, (actually this is the rate in effect on July 1, 1934) or (b) a rate which is 20% *ad valorem* above the rate existing on January 1, 1975. These limitations are generally the same as those contained in the 1962 Act,²³ except that the authority in that Act to reduce duties extends to 50% (rather than 60%) of the then-existing rate. Furthermore, the authority to reduce duties under Section 101 of the Trade Act is subject to a complicated staging and rounding formula (set out in Section 109).²⁴

²³ 19 U.S.C. § 1821 (1970).

²⁴ The 1962 Act also continued a staging formula (19 U.S.C.A. § 1883) but it required staging over only a four year period.

The staging formula will not have a major effect as to most articles because the U.S. average duty rate has already been reduced to approximately 10%. Thus, the aggregate reduction on 10% items would be limited to 6%, and the staging requirement would limit the initial reduction to 3% with the remaining 3% reduction taking effect one year later. On the other hand, the staging requirement would have a substantial effect on an item bearing an *ad valorem* duty rate of 60% at January 1, 1975. The aggregate reduction possible would be 36%, but this would have to take place over at least a nine year period after the initial reduction.

Section 102. Nontariff Barriers to and Other Distortions of Trade

This Section states that Congress finds NTM's are reducing the growth of foreign markets for products of United States agriculture, industry, mining, and commerce, ". . . adversely affecting the United States economy, preventing fair and equitable access to supplies . . .," and urges the President "to take all appropriate and feasible steps within his power . . . to harmonize, reduce, or eliminate such barriers to . . . international trade." The President is also authorized to enter into trade agreements with foreign countries providing for the harmonization, reduction or elimination of NTM's' subject to express approval by the Congress of any such agreement.

This Section does not purport to give any general definition of NTM's. Indeed, except for the title of the Section, which specifically indicates that it deals with *nontariff* barriers, one could easily interpret the Section as including normal customs tariffs.²⁵ It seems clear, however, both from the title of the Section, and from the committee reports,²⁶ that the Section is intended to deal only with nontariff barriers or distortions.

In general, the opening subsection of Section 102 is quite similar to the comparable subsection of the Administration's Proposal, except that the Senate added the clause "preventing fair and equitable access to supplies." This Section, when compared to Sections 1821(a) and 1882(b)(1) of the 1962 Act, shows the much greater emphasis placed by the Trade Act on the need for dealing with NTM's during the present negotiations and arriving at an agreement satisfactory to Congress with respect to them.

At first glance, the basic authority for trade agreements set forth

²⁵ Section 601(a) defines "import restriction" as a limitation or exaction other than a duty but Section 102 does not use the phrase "import restriction."

²⁶ See SFC REPORT, *supra* note 4, at 22; HWMC REPORT, *supra* note 21, at 20.

in the 1962 Act appears to be worded broadly enough to cover not only trade agreements dealing with tariff barriers, but also non-tariff barriers. There was, however, considerable disagreement on this point after the 1962 Act was passed. Certain members of Congress took the position that the 1962 Act did not authorize the President to enter into any binding trade agreement dealing with the American Selling Price²⁷ method of valuation of imports or other non-tariff barriers to trade generally; and the STR agreed, at least with regard to the American Selling Price.²⁸

The procedure for obtaining the approval of Congress contained in the Trade Act differs in several respects with that contained in the Administration Proposal. The Administration Proposal had sought to obtain a complete delegation of authority from Congress to negotiate and agree upon certain types of NTM's,²⁹ as follows:

- (a) Customs methods of valuation (which would presumably have included American Selling Price);³⁰

²⁷ The "American Selling Price" method of valuation is explained briefly in note 30, *infra*.

²⁸ As a part of the Kennedy round negotiations, a special agreement on chemicals, Geneva Protocol to the General Agreement, *done* June 30, 1967, 19 U.S.T. 1, T.I.A.S. No. 6425, 620-629, U.N.T.S., was entered into providing for a reduction of European chemical duties if and when the Congress agreed to eliminate the American Selling Price valuation method. The Kennedy administration and succeeding administrations endeavored to obtain congressional implementation of this special agreement but the Senate Finance Committee refused to agree.

²⁹ Administration Proposal § 103(c) at 26.

³⁰ The "American Selling Price" (ASP) is a method of valuation provided for by 19 U.S.C. § 1402(a)(4), (g) (1970). It now applies to four types of products: certain benzoid chemicals, rubber-soled footwear, certain types of canned clams and wool-knit gloves. The basis of valuation of these products, when imported into the United States, is the wholesale price in the U.S. market of the U.S. domestic product that is like, similar to, or competitive with the foreign import. It is a type of customs valuation believed to be unique, and it has been bitterly attacked by our foreign trading partners over a long period of years. For a major review of the products subject to duty under the ASP formula, see *Report of the United States Tariff Commission to the Special Trade Representative for Trade Negotiations* July, 1966 TC Pub. 181 (1966). Two quite unusual aspects of the system are as follows:

(a) The ASP method of valuation does not apply to *all* imported products included under the general headings mentioned above simply because not all such products are similar to or competitive with products produced in the United States. However, a U.S. producer who suddenly goes into production of one of these previously unproduced products automatically "triggers" the application of the ASP method of valuation.

(b) The second highly unusual feature of ASP is that a U.S. manufacturer who increases the domestic price of his product in the United States may thereby increase the value for U.S. customs purposes of the imported products that is similar to or competitive with his own product, if the U.S. Customs official elects to select the product produced by the particular domestic manufacturer as the comparable product.

- (b) establishment of quantities on which custom assessments are made; and
- (c) requirements of marking of countries of origin.

The Administration Proposal also recommended a procedure (the so-called "veto procedure") under which a trade agreement dealing with other NTM's would go into force *unless* either house of Congress "vetoed" the trade agreement in question within 90 days after the President had submitted a copy of the Trade Agreement.³¹ The veto of the bill by either house would have required the vote of a majority of the authorized membership of the House in question.

The veto provision contained in the Administration Proposal was basically acceptable to the House Ways and Means Committee. The Senate Finance Committee, however, insisted that in areas as major and diverse as the NTM's, the agreements should be negotiated "*ad referendum*," with implementing bills enacted into law by action of both Houses.³²

Sections 102(c), (d) and (e) of the Trade Act show the very close cooperation which Congress is insisting must exist between Congress and the President in this area. First, in Section 102(c), the President is required, before he enters into any trade agreement dealing with non-tariff barriers, to consult with various committees of Congress. Secondly, Section 102(d) provides that whenever the President enters into such a trade agreement, he is required to submit the agreement, together with a draft of an implementing bill to the House and the Senate, and that the agreement shall come into force only if the provisions of Section 102(e) are complied with and the implementing bill submitted by the President is enacted into law. Finally, Section 102(e) provides that each such trade agreement shall enter into force with respect to the United States if and only if:

- (a) the President, not less than 90 days before he enters into the agreement, notifies the House and Senate of his intention to enter into such an agreement, and promptly thereafter publishes notice of such intention in the Federal Register, and

³¹ Congress has delegated authority subject to such a veto on a number of occasions in the past. Probably the best known example of this type of delegation is reorganization plans submitted by the President—disapproval by resolution of either house. 5 U.S.C. § 906 (1970). Other such delegations include the following:

- (a) Agreements with foreign countries supplementary to the Automotive Products Trade Agreement with Canada, 19 U.S.C. § 2012 (1970); and
- (b) Agreements for cooperation with other countries by the Atomic Energy Commission 42 U.S.C. § 2153 (1970).

³² See SFC Report, *supra* note 4, at 75 *et seq.*

(b) after entering into the Agreement, the President transmits to the House and Senate a document containing a copy of the agreement, together with

(1) a draft of an implementing bill, a statement of administrative action proposed to implement the agreement and an explanation as to how the implementing bill and administrative action change or affect existing law; and

(2) a statement of his reasons as to how the agreement serves the interest of the U.S. commerce; and

(c) the implementing bill is enacted into law.

Whether or not the proposed trade agreement dealing with NTM would, in the absence of the Trade Act, require changes in existing laws, the Trade Act requires that an "implementing bill," as defined in Section 151(b), be enacted.³³

Sections 102(c), (d) and (e) are extremely complicated and may offer some nice questions of interpretation unless the greatest care is taken in drafting the implementing bills. Suppose, for example, that an implementing bill is adopted, but in somewhat different form from the bill submitted by the President. Section 102(d) provides that the trade agreement is to go into force only if the implementing bill *submitted by the President* is enacted into law. Admittedly, the provisions of Sections 151-154 of the Trade Act are designed to assure that the bill as submitted by the President will be acted upon without amendment.

The administration was justifiably concerned that it would be difficult for it to negotiate and enter into trade agreements if the representatives of foreign countries had no assurance that the agreements would be acted upon by the U.S. Congress within some reasonable period of time. To meet this concern, Sections 151-154 were added to the bill. Section 151 recites that Sections 151-153, inclusive, are adopted as an exercise of the rule-making power of the House and Senate and contain the following principal provisions designed to ensure speedy action:

(a) the implementing bill is to be introduced into the House and Senate as soon as it is submitted by the President; the bill is then to be referred to the appropriate committee or committees;

³³ See Trade Act § 102(d); SFC REPORT, *supra* note 4, at 75.

- (b) no amendments to an implementing bill or an approval resolution will be in order;
- (c) the committees are to take action on the bill within 45 days after its introduction; and a vote on final passage is to be taken in each house within 15 days after it is reported by the committee (If the implementing bill is a revenue bill, the Senate is in effect given 30 days to act on the implementing revenue bill when received from the House).
- (d) Debate is limited, and a motion to proceed to the consideration of the bill is to be highly privileged;
- (e) generally similar provisions apply to concurrent resolutions authorizing order to approve the extension of nondiscriminatory treatment to products of third countries (principally the Communist countries).

As indicated above, the Trade Act makes no effort generally to define NTM's.³⁴ Types of NTM's, however, are discussed, explored and dealt with in a variety of agreements and treaties. One major difficulty with GATT is that it makes no comprehensive effort to deal with these nontariff barriers to trade, probably because of the extreme difficulty in reaching agreement. GATT does deal in one way or another with the following principal types of nontariff barriers to international trade:

- (a) internal taxes and regulations (Article III),
- (b) anti-dumping duties (Article VI),
- (c) countervailing duties (Article VI),
- (d) valuation for customs purposes (Article VII),
- (e) fees and formalities connected with importation and exportation (Article VIII),
- (f) marks of origin (Article IX),
- (g) quotas and other quantitative restrictions, either import or export (Article XI),
- (h) exchange arrangements (Article XI), and
- (i) subsidies (Article XVI)

However, the treatment given by GATT seems in some cases to be outdated and in other cases to be too limited in its scope. Furthermore, GATT does not deal specifically with some of the most important of the nontariff barriers; these include buy-national laws³⁵ and

³⁴ See text accompanying note 14 *supra*.

³⁵ In fact, GATT, art. III para. 8(a) provides that the "national treatment" to be afforded to imported goods "should not apply to laws governing the procurement by governmental agencies of products purchased for governmental purposes. . . ." *Id.*

policies, industrial standards,³⁶ and agreements³⁷ among principal exporting countries to maintain a high and uniform price on their exports of certain goods.

In a major effort to solve some of the problems relating to anti-dumping duties in 1967, the contracting parties to GATT entered into an agreement, commonly referred to as the "International Anti-Dumping Code," as an interpretation of the more summary treatment of anti-dumping contained in Article VI of GATT.³⁸

In 1969, more than twenty years after GATT went into effect, a group of trade experts from U.S., Europe and Japan listed six classes of restrictions or barriers as "clearly significant," as follows:

- (1) quantitative restrictions on imports;
- (2) buy-national laws;
- (3) anti-dumping regulations and countervailing duties;
- (4) customs valuation methods and procedures;
- (5) industrial standards affecting imported products;
- (6) government aids to industry giving domestic products an advantage over imports.³⁹

In order to avoid any possible misunderstanding as to whether a trade agreement which changes or removes ASP as a method of valuation for U.S. customs purposes requires congressional approval, the Senate added Section 102(g)(1) which provides that the term "barrier" includes "American selling price." Section 102(g) also provides that "distortion" includes a subsidy, and that "international trade," as used in this Section of the Trade Act, applies to trade in both goods and services.

Section 102 does not deal explicitly with the question of whether an agreement between major supplying countries which fix prices for their products is a nontariff barrier. Clearly, however, it seems that

³⁶ The wording of articles I and III of GATT is extremely broad and may be considered to include "industrial standards," but the question is certainly open to argument. See GATT, arts. I, III.

³⁷ Despite extensive discussions of provisions aimed at restrictive business practices of private parties, no provisions were included in GATT on this subject.

³⁸ GATT Appendix C, Agreement No. 103, also set out as Appendix to Chapter 16 of JACKSON, *supra* note 2.

³⁹ S. METZGER, *LOWERING NONTARIFF BARRIERS* vii (1974). This text discusses the existence within the United States of legislation or procedures which constitute nontariff barriers to trade and which may be classified under these six headings. It also discusses the legal and political feasibility of removing them or reducing their adverse effect on trade, but intentionally omits discussion of nontariff barriers to trade in agricultural products.

such an agreement would constitute an NTM. The question will surely be raised in the GATT negotiations—not only in regard to oil, but also, presumably, with respect to a host of other major products. The phrase included in Section 102(a) “preventing fair and equitable access to supplies” is no doubt intended to at least cover agreements which impose embargos or quantitative restrictions on supply. Other sections of the Trade Act,⁴⁰ dealing with access to supplies, refer to access to supplies at reasonable prices.

One further question arises: What is the relationship, if any, between the authority granted to the President in respect to tariff barriers (Section 101), and the authority granted to the President in respect to non-tariff barriers (Section 102)? The tariff authority granted to the President under Section 101, by its terms, requires no further approval by Congress. The nontariff authority granted by Section 102 requires advance notice and consultations with the Congress before the agreement is executed, and express approval of the agreement by both Houses of Congress after it is executed.

It appears that the President would be acting within his authority if he entered into a trade agreement dealing only with tariff barriers before any agreement with respect to the non-tariff barriers was negotiated. It seems highly unlikely, however, that this is a negotiating gambit which would appeal to the Administration. Furthermore, any such approach would probably arouse the antagonism of the Congress and make it even more difficult to obtain congressional approval of proposed agreements dealing with non-tariff barriers.

Section 103. Overall Negotiating Objective

The overall United States negotiating objective is stated to be:

- (a) to obtain more open and equitable access to markets and to harmonize, reduce or eliminate devices which distort trade or commerce, and
- (b) to the maximum extent feasible, negotiations relating to agricultural trade barriers shall be undertaken in conjunction with industrial barriers.

Congress was dissatisfied with the results of the negotiations during the Kennedy round insofar as agriculture was concerned, and views Section 103 as meaning that in the current negotiations, appro-

⁴⁰ See, e.g., § 108.

priate concessions are to be obtained for exports of U.S. agricultural products,⁴¹ as well as for exports of industrial products.

Section 104. Sector Negotiating Objective

A principal United States negotiating objective as set out in Section 104 is declared to be the obtaining, with respect to product sectors of manufacturing and the agricultural sector, competitive opportunities for United States exports to developed countries of the world equivalent to the competitive opportunities afforded in United States markets to the import of like or similar products. To achieve this objective, negotiations are to be conducted on the basis of product sectors of manufacturing. The STR is to identify appropriate product sectors of manufacturing.⁴² The negotiations in the Kennedy round were principally on a linear basis, *i.e.* customs duties for almost all products were decreased by a uniform percentage.

Section 105. Bilateral Trade Agreements

Another United States negotiating objective is to enter into bilateral trade agreements, each of which is to provide for mutually advantageous economic benefits, if the President determines "that bilateral trade agreements will more effectively promote the economic growth of, and full employment in, the United States." The approach to be compared to the bilateral trade agreement is, of course, the multilateral agreement with many countries with most-favored-nation clause. This type of agreement extends any concession made to one country to each country executing the multilateral trade agreement, whether or not that country has made any meaningful concessions of its own. The multilateral agreement with most-favored-nation clause is the cornerstone of GATT and of the Administration Proposal⁴³ as well as of the 1962 Act and previous trade acts. Despite the fact that Section 126(a) reaffirms, as a general principle, the most-favored-nation treatment approach, the title of Section 126, "Reciprocal Nondiscriminatory Treatment" and Section 126(b) and (c) as well as Section 105, indicate that the United States is *not* irrevocably wedded to the most-favored-nation multilateral agreement approach. The inclusion of this bilateral agreement as a negotiating objective stresses the belief of Congress that for each concession of the United States, there should be a reciprocal reduction of a trade

⁴¹ SFC REPORT, *supra* note 4, at 78-79.

⁴² The SFC Report indicates that the Committee considers steel, aluminum, electronics, chemicals, and electrical machinery to be product sectors. *Id.* at 79.

⁴³ See § 407 of Administration Proposal.

barrier,⁴⁴ and it gives the necessary authority to the President to pursue this approach through bilateral agreements if he deems it necessary.

In view of the obligation of the United States under Article I of GATT to make available to all contracting parties any concession with respect to customs duties granted by the United States to *any other country*, a question may be raised as to whether the authority to enter into bilateral trade agreements is a useful authority. The answer is two-fold. First, Article I of GATT applies by its explicit terms only to tariff and import tax concessions and related matters. Secondly, Section 105 could be considered a not-too-veiled warning that the United States might withdraw from GATT and proceed on a bilateral approach.

Section 106. Agreements with Developing Countries

Section 106 recites that a United States objective is to enter into trade agreements which promote the economic growth of both developing countries and the United States. This Section is not to be confused with Title V of the Trade Act ("Generalized System of Preferences") which gives authority to the President, subject to a number of conditions, to extend preferences, unilaterally, to certain imports from developing countries.⁴⁵

Section 107. International Safeguard Procedures

As previously indicated, a principal United States negotiating objective, as far as NTM's are concerned, is to work out internationally agreed rules and procedures permitting the use of temporary measures to ease adjustments to changes in domestic competitive conditions. Thus, Section 107 outlines the types of provisions which might be included in any such trade agreement dealing with NTM's.

Section 108. Access to Supplies

Another principal United States negotiating objective is to enter into trade agreements which assure the United States of fair and equitable access at reasonable prices to supplies of articles of commerce which are important to the economic requirements of the United States. No such provision was contained in either the Administration proposal or in the 1962 Act. Of course, the actions of the OPEC countries in October and December of 1973 and the ensuing crisis postdate both of those earlier documents.

⁴⁴ See SFC REPORT, *supra* note 4, at 80 (discussions of bilateral trade agreement).

⁴⁵ The SFC Report indicates that these agreements might include mutual access to supplies and technical agreements. *Id.*

Section 108 is an "objective" paragraph. It does not deal with possible remedial measures and thus makes no reference to cartel activity. The comments contained in the SFC Report on this Section, however, are clearly oriented to such activities.⁴⁶ Unfortunately, it is not clear from these comments whether Congress had in mind a general understanding "in principle" by the supplying countries which would not include any provision as to specific prices and/or quantities, or whether Congress was considering a full-fledged purchase and sale agreement, under which the United States would be obligated to purchase specific quantities of the commodities in question over specific periods at specific prices. On the whole, the language of the SFC Report⁴⁷ seems to indicate that the intent is to enter into formal, specific agreements, probably over a fairly long term.

Chapter 2. Other Authority

This Chapter of the Trade Act provides additional authority and directives to the President, in some aspects conforming to provisions contained in the Administration Proposal, but in other aspects adding authority or making explicit authority only given implicitly under the Administration Proposal.

The principal new subjects covered in this Chapter, as compared to the 1962 Act include:

- (a) the revision of GATT (Section 121);
- (b) authority to impose import surcharges and quotas when United States balance of payments problems require special measures (Section 122);
- (c) authority for the President, subject to certain restrictions, to enter into trade agreements with foreign countries in order to compensate⁴⁸ them for any increases in duty or imposition of quotas or other protecting devices employed by the President pursuant to the Trade Act which provide import relief for domestic industries injured by increased imports (Section 123); and

⁴⁶ *Id.* at 81-82.

⁴⁷ *Id.* at 84-85.

⁴⁸ At first glance the authority to enter into trade agreements providing "compensation" for import relief action taken by the United States pursuant to § 203 might seem inconsistent with the objective set out in § 107. In fact, however, § 107(b)(A) envisages that although the general objective is to provide a safeguard system which could be employed in specific instances without compensation, in other cases compensation would be required. Trade Act, *supra* note 1, §§ 203, 107.

(d) a requirement that as to any major industrial country who fails to make concessions in trade agreements entered into under the Trade Act which provide the United States with competitive opportunities in such country that are substantially equivalent to those extended by the United States to such country, the President shall recommend to the Congress legislation terminating concessions made with respect to rates of duty (Section 126) and that any legislation necessary to carry out trade agreements relating to non-tariff barriers not apply to such country. (Section 126).

None of these four sections were dealt with in the 1962 Act, and only two of these four, the balance of payments provision—Section 122 and the compensations provision—Section 123, were included in the Administration Proposal.

Section 121. Revision of GATT

A. Brief Description of GATT

It should be noted at the outset that GATT is an administrative agreement,⁴⁹ that it has never been approved by Congress, and that it became effective as of January 1, 1948.

⁴⁹ GATT is a multilateral agreement between the various participating countries, referred to as "the Contracting Parties." The cornerstone provision of GATT is contained in article I which, with certain exceptions, assures most favored nation treatment to all contracting parties in regard to customs duties and other charges imposed in connection with the importation or exportation of goods, and various related matters as enumerated therein. Any amendment to this article requires the approval of all contracting parties. GATT contains almost no provisions of an institutional nature relating to the administration of this complicated agreement. The reason for this important omission is that at the time GATT was being drafted, it was assumed that the International Trade Organization (ITO) would be organized, and that ITO would be the institution charged with the administration of GATT. For an excellent discussion of the initial drafting of GATT and its relation to the proposed ITO, see JACKSON, *supra* note 2, at 35-57. ITO was to have somewhat the same responsibilities in the field of international trade as the International Monetary Fund (IMF) does in the international monetary areas. ITO was never formed, in large part because the United States, its original proponent, finally rejected the concept.

As originally drawn up, GATT had twenty-three contracting parties (Australia, Belgium, Canada, France, Luxemburg, the Netherlands, the United Kingdom, the United States, Brazil, Burma, Ceylon, Chile, the Republic of China, Cuba, Czechoslovakia, India, Lebanon, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria and the Union of South Africa). This number had grown to 83 countries as of November 1, 1974, plus 2 countries (the Philippines and Tunisia) who have acceded provisionally to GATT. There are 17 other countries, now independent, to whose territories GATT was applied before their independence. Pending final decision as to their future com-

B. Types of revisions to be made in GATT.

The Trade Act directs the President to obtain amendments to trade agreements already entered into which would bring them into conformity with the "development of an open, nondiscriminatory and fair world economic system," and the Act then lists the following *specific* respects in which GATT itself is to be amended:

(1) *Decision-making procedures in GATT* (Section 121(a)(1)). Under the Trade Act, decision-making procedures are to be amended to more nearly reflect the balance of economic interests. The phrase "decision-making procedures" is a broad one. Presumably it could cover voting rights, the procedure for amendment of GATT, the votes required in connection with other matters, and the calling and holding of meetings of contracting members of GATT. GATT now provides that each contracting party shall have one vote at all meetings of the Contracting Parties.⁵⁰ The HWMC Report⁵¹ makes clear that

mercial policy, these countries maintain a de facto application of GATT. GATT Press Release No. GATT 1154 (Nov. 1, 1974).

While it is desirable in principle that a large number of countries become members of GATT, the group has now become so large that it is cumbersome in practice. In order to provide a much smaller and more practicable group, a "Consultative Group of Eighteen" was formed. GATT Press Release No. 1163 (July 11, 1975).

The U.S.S.R. and the People's Republic of China are not members of GATT. However, a number of Communist States are parties, including, Burma, Cuba, Czechoslovakia, Hungary, Poland, Romania, Sri Lanka, and Yugoslavia.

Ninety countries are participating in the "Tokyo round" of negotiations under GATT including twenty-one countries that are not members of GATT. These 21 countries include 5 members of OPEC (Algeria, Ecuador, Iran, Iraq and Venezuela) and several additional Communist countries.

Of the twelve full members of the Organization of the Petroleum Exporting Countries, only Indonesia, Kuwait and Nigeria are also contracting parties to GATT. Three additional full members of OPEC (Algeria, Qatar, and the United Arab Republic) are included in the 17 now-independent countries mentioned above to whose territories GATT was applied before their independence, and which maintain a de facto application of GATT. The remaining full members of OPEC (Ecuador, Iran, Iraq, Libya, Saudi Arabia, and Venezuela) are not parties to GATT.

Not all of the OPEC members participated in the oil embargo of 1973-74. Venezuela, Ecuador, Indonesia and Nigeria continued to export oil during the period of the embargo. The Arab countries participating in the oil embargo were Saudi Arabia, Kuwait, Abu Dhabi, Qatar, Bahrain, Egypt, Algeria, Libya and Syria. See New York Times, Mar. 19, 1974, at 1, col. 6; at 20, cols. 3-8. The embargo has been called "the Arab oil weapon" against Israel. J. PAUST & A. BLAUSTEIN, *The Arabs Oil Weapon—A Threat to International Peace*, 68 AM. J. INT'L L. 410 (1974).

For a discussion of OPEC and the Arab oil embargo written by one of their representatives, see J. AMUZEGAR, *OPEC in the Context of the Global Power Equation*, 4 DENVER J. INT'L L. & Policy 221 (1974).

⁵⁰ GATT, art. XXV, para. 3.

⁵¹ HWMC REPORT, *supra* note 20, at 26. The report points out that when GATT

this provision is one of those to be amended, perhaps by adding a weighted voting system⁵² or by providing for mediation panels.

Article XXX of GATT requires unanimous consent in order to change or amend any provisions of (a) Part I of GATT, and (b) Article XXX itself. Part I of GATT contains the clause setting out the requirement for "most-favored-nation treatment (MFN) and the Schedules of Concessions." Other amendments become effective upon vote of two-thirds of the members, but only in respect of those contracting parties which accept them. For example an amendment to the voting rights provision could go into effect if agreed to by two-thirds of the contracting parties, but any such amendment would not bind non-assenting contracting parties.⁵³

The general rule under GATT is that decisions of the Contracting Parties shall be taken by a majority of the votes cast.⁵⁴ There are, however, numerous exceptions to this general rule. First, any waiver of obligations under GATT requires a two-thirds majority of the votes cast, and the approval of more than one-half of the contracting parties.⁵⁵ Also, the accession of new members requires a two-thirds majority.⁵⁶ Finally, customs union or free-trade proposals which do not meet precisely the requirements of Article XXXIV, paragraphs 5 to 9 also require two-thirds majority.⁵⁷

Safeguard Provisions in GATT (Section 121(a)(2)). Article XIX of GATT is to be revised so that it constitutes a truly international safeguard procedure, taking into account all forms of import restraint actually used in response to actual or threatened injurious competition (This Section is repetitive of Section 107).

The existing Article XIX of GATT provides, in effect, that if a contracting party finds that its domestic industry is being seriously harmed by an increase in imports *resulting from a concession which*

was originally drawn up, most of the contracting parties (23 in number) had comparable economic interests and that the number of contracting parties had increased greatly. The SFC Report adds that the countries with the greatest economic interests have become a distinct minority. SFC Report, *supra* note 4, at 83.

⁵² Under the voting system used by the International Monetary Fund, for instance, each member has a vote which is proportionate to its quota in the Fund.

⁵³ A number of amendments to GATT have been accepted by two-thirds of the members—but not by all—with the result that some provisions of GATT are binding on all parties and some are not.

⁵⁴ GATT, art. XXV, para. 4. As a matter of practice, actions other than "decisions" are generally taken only after a majority vote, except of course where there is a specific provision. See JACKSON, *supra* note 2, at 122.

⁵⁵ GATT, art. XXV, para. 5.

⁵⁶ GATT, art. XXXIII.

⁵⁷ GATT, art. XXIV, para. 10.

it has given, that party may withdraw the concession or limit it. Certainly this seems a logical and appropriate remedy—remove the concession that causes the injury. Section 121(a)(2) of the Trade Act and others,⁵⁸ however, are *not* limited to injury resulting from a concession. The causal relationship found in Article XIX of GATT has been deliberately omitted in these Sections of the Trade Act. Section 203 of the Trade Act provides that if the President determines to provide import relief, he shall take one or more of the actions listed in such Section. Thus, to permit the President to apply all measures listed in Section 203 without being in conflict with GATT, the amendment to GATT should cover all of the following: (a) increase in duty; (b) tariff-rate quota;⁵⁹ (c) quantitative restrictions; and (d) orderly marketing arrangements. Furthermore, Section 107(b)(A) makes it clear that the amendment to GATT should permit the trade agreement to provide this relief, under some conditions, without having to compensate their trading partners or fear retaliation.

(3) *Extension of GATT to "conditions of trade" not presently covered by GATT* (Section 121(a)(3)). The best description of these additional "conditions of trade" is found in the HWMC Report; they include: agricultural practices⁶⁰ such as export subsidies, production subsidies, and variable protection at the borders; rules as to government procurement;⁶¹ and rules establishing product standards and marketing requirements.⁶² Some reference to private monopolistic or

⁵⁸ See Trade Act, *supra* note 1, §§ 201-203.

⁵⁹ A "tariff-rate quota" is a provision under which a certain quantity of a particular product may enter at a certain tariff rate, and all importations of that product in excess of the established quantity pay duty at a higher rate.

⁶⁰ GATT, art. XI, para. 2(c), which permits restrictions on import of agricultural products, was originally promoted and defended by the United States in an effort to protect its then existing elaborate price support program for agricultural commodities. Perhaps the primary concern of Congress at the present time in the agricultural field is the European Economic Community (EEC) variable levy which is calculated to make up the difference between the free-to-frontier price of imported products and the "threshold price" for the Community. The "threshold price" is set at a level that will bring the selling price of imported products up to the level of the "target price." The "target price," in turn, is the basic price for a product determined for the marketing center of the region having the least adequate domestic supply in the Community. 1 CCH COM. MKT. REP. ¶¶ 426.07, 426.11.

⁶¹ Similarly, the Federal Buy-American Act, 41 U.S.C. § 10a *et seq.* (1970), and those of a number of the separate states are, of course, vehemently challenged by our trading partners in GATT.

⁶² HWMC REPORT, at 26. These include, for example, standards masquerading as health standards which are in fact protective devices, some consumer protection standards, and various labelling requirements.

cartel practices might well have been included here.⁶³

(4) *Adoption of international fair labor standards and of public petition and confrontation procedures* (Section 121(a)(4)). The following quotation from the House Ways and Means Committee shows generally what this section of the Trade Act is intended to accomplish:

It (The Committee) believes that additional steps are needed which would lead to the elimination of unfair labor conditions substantially disrupting or distorting international trade. The GATT should seek to develop principles with respect to earnings, hours and conditions of employment of workers, and to adopt public petition and confrontation procedures. The committee recognizes that the GATT is an organization of sovereign states and that it would represent a radical change if private persons were to be permitted to appear before it or its instrumentalities to present grievances. It does believe, however, that, in this important area, an opportunity for affected individuals and groups, or at the very least, governments acting in their behalf, to make representations concerning labor conditions would be appropriate.⁶⁴

Although the wording of the clause in the Trade Act is not clear, it is believed that the phrase "public petitions and confrontation procedures" is intended to apply only to fair labor standards. This clause may result, in part at least, from testimony given before the SFC by the Honorable Claude Pepper, a member of the House of Representatives from Florida, which reads in part as follows:

I believe today that we should develop international fair labor standards which would enable developing countries to develop their own industry on the basis of rapidly expanding domestic markets. This would relieve the pressures to tap the high U.S. market based on the high earnings of American workers. It would help to restrain the flood of foreign imports that is threatening to destroy part of our great American market by destroying the jobs of millions of American wage-earners.⁶⁵

Mr. Pepper was formerly a member of the Senate Labor Committee

⁶³ For a discussion of private monopolies and restrictive business practices and their relation to GATT, see JACKSON, *supra* note 2, at 522 *et seq.*

⁶⁴ HMWC REPORT, *supra* note 21, at 27.

⁶⁵ *Hearings on H.R. 6367 Before House Comm. on Ways and Means, 93d Cong., 1st Sess. 4956 (1973).*

that developed the Federal Fair Labor Standards Act in the late 1930's.

Although Article 7 of the proposed ITO Charter⁶⁶ dealt with fair labor standards, GATT itself does not. It would constitute a substantial expansion in the functions of GATT if it were to venture into this field. Other international organizations have acquired a very considerable amount of expertise in this area,⁶⁷ but the development of international fair labor standards for the very large and diverse membership of GATT would certainly be a most demanding task.

The intent of Congress as to the nature of any clauses dealing with international fair labor standards is far from clear. It is possible, for example, that the Senate Finance Committee included this provision, even though it recognized that the STR would find it most difficult to effect any meaningful amendment to GATT in relation to fair labor standards, because it considered that the representatives of the Administration should constantly endeavor, in one way or another, to protect "the huge American market based on the high earnings of American workers" to quote from the Honorable Claude Pepper's testimony. Indeed, it is remotely possible that the Treasury Department might seize on this Section of the Trade Act if it were looking for some legislative peg on which to hang an argument that for countervailing duty purposes, extremely low labor costs in a given foreign country constituted a bounty or grant from the foreign government involved.⁶⁸

(5) *Revision of GATT with respect to the treatment of border adjustments for internal taxes* (Section 121(a)(5)). This is a highly complicated subject, and it seems probable that the United States will be fighting a lonely battle; at the very least, it will face very stiff opposition from the EEC and its member countries. The problem of border tax adjustments is a two-fold problem, involving, on the one hand, taxes on imports, and, on the other hand, refund of, or exemption from, domestic taxes on products that are exported.

⁶⁶ See note 98 *infra*. The INTERNATIONAL TRADE ORGANIZATION CHARTER (proposed) art. 7 reads in part, "The Members recognize that unfair labor conditions, particularly in production for export, create difficulties in international trade, and, accordingly, each Member shall take whatever action may be appropriate and feasible to eliminate such conditions within its territory."

⁶⁷ *E.g.*, The International Labour Organization. The Commission of the EEC also has somewhat the same task for its members.

⁶⁸ Conversely, if the United States Congress wished to adopt new legislation creating an incentive for United States industry to increase the export sales of its products, it might provide a production subsidy, citing the lower wages overseas as a valid justification for this subsidy.

(a) *Tax on Imports*

Let us suppose that country X places an internal turnover tax (in effect a gross receipts tax) of 10% on the sale of domestically produced widgets. If country X imports widgets from a third country, the interpretation generally given to the several articles of GATT⁶⁹ bearing on this matter is that Country X is permitted to collect customs duties and also to impose a turnover tax on the imported widget, just as it imposes this turnover tax on domestically produced widgets. However, under the terms of GATT, country X can impose this tax on the imported widgets *only* if the tax in question is imposed on the product itself, and not, let us say, on net income arising from its sale. On the other hand, the provisions of GATT dealing with the matter are not entirely clear; furthermore, at the present time, the turnover taxes have assumed a far greater importance than was the case at the time that GATT was negotiated. At that time customs duties were high and, generally speaking, the turnover taxes constituted less of a barrier to international trade. The United States follows precisely the same practice as to imported goods that are of a type which would be subject to an excise or sales tax if manufactured here.

(b) *Treatment of Exports*

Country X, as noted above, imposes a turnover tax of 10% on domestically produced widgets, but it exempts from, or grants a rebate of, this tax on all domestically produced widgets that are exported. Under the terms of GATT, the country to which the production in question is exported is not permitted to impose a countervailing or anti-dumping duty on the widget as a result of the above-described rebate or refund, because the tax remitted is "borne by the . . . product."⁷⁰

Despite the broad language of the U.S. countervailing duty statute,⁷¹ our courts have held for many years that the statute does not apply to exemptions from, or rebate of, taxes, if the tax in question is a tax imposed directly upon the product.⁷² The reasoning generally given for *not* countervailing against the rebate of such a tax is that a manufacturer or vendor who sells products domestically that are subject to this tax on the product "passes on" the tax to the domestic

⁶⁹ GATT, art. II, para. 2(a); art. III, para. 2; Havana Reports, U.N. Doc. ICITO 118, 63, at 44 (1948).

⁷⁰ GATT, art. VI, para. 4.

⁷¹ Tariff Act of 1930, 19 U.S.C. § 1303 (1970).

⁷² *American Express Co. v. United States*, 472 F.2d 1050, 1057-58 (C.C.P.A. 1973).

purchaser. Thus, when the goods are exported, and the tax is rebated or not collected, the theory is that the manufacturer simply quotes a price to his foreign purchaser which does not include the tax, and the manufacturer therefore makes the same profit on both his domestic sale and on his export sale.

The law in the United States seems to be precisely the same as the interpretation given to the existing provisions of GATT. Why then does Congress instruct the President to seek to modify the provisions of GATT on this point? The reason is, of course, that many of our trading partners (particularly those in Europe) rely to a very large extent upon turnover taxes, whereas the sales and excise taxes on products collected by the United States Federal Government represent only about 5.3% of the total budget receipts for 1974; and over one-half of this amount represented alcohol and tobacco taxes.⁷³ Furthermore, the turnover taxes imposed by many of our trading partners are substantial in amount. The following table⁷⁴ shows the rate of value-added taxes imposed as of the end of 1974 in France, Belgium, and Germany:

	<u>Reduced Rate</u>	<u>Intermediary Rate</u>	<u>Increased Rate</u>	<u>Normal Rate</u>
France	7%	17.6%	33-1/3%	20%
Germany	5.5%		None	11%
Belgium	6% and 14%		25%	18%

The average of the "normal" rates of VAT in these three countries is therefore about 16%, whereas we may assume that the average normal rate of sales or excise tax in the U.S. is about 4%. This is comprised principally of the use or sales taxes levied by the various states since there is no federal sales or turnover tax and there are federal excise taxes on only a limited group of articles.

In order to dramatize the situation, let us assume the following set of facts:

(1) A French manufacturer of widgets which are subject to the increased rate of VAT (33 1-3%) sells his widgets in the French market at a price of \$1.00 to which is added the VAT, making the amount paid by the retail customer \$1.33;

⁷³ See, the BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1976 332-34.

⁷⁴ Information as to rates taken from *Value-Added Taxation in Europe: 4 GUIDES TO EUROPEAN TAXATION*, published by the International Bureau of Fiscal Documentation [hereinafter cited as *Value Added Taxation in Europe*].

(b) A U.S. manufacturer sells widgets of the same design in the U.S. domestic market at \$1.20, plus the average sales tax of 4%, making the amount paid by the customer about \$1.25;

(c) The import duty is 10%, *ad valorem*, both in the United States and France, and shipping and insurance charges between the United States and France are \$.05 per widget, in each direction;

(d) The total costs of the U.S. manufacturer are about \$1.10 per widget and the costs of the French manufacturer are \$.90 per widget, 60% of the costs of each manufacturer being variable costs and the balance of such costs being fixed costs;

(e) Each manufacturer is selling about 75% of its capacity;

(f) Neither manufacturer is engaged in the export market;

(g) The U.S. manufacturer is considering an export program to France, and the French manufacturer is considering an export program to the U.S.

(h) Neither the French nor U.S. Governments impose sales, excise or VAT taxes on export sales.

What will be the position of each manufacturer?

(a) *The Position of a U.S. Manufacturer in Regard to Export to France.*

Let us assume that the U.S. manufacturer decides to offer his products in France at a price of \$.95 per widget after freight and insurance and French customs duties but before French taxes. The U.S. manufacturer is then faced with the following additional costs and taxes on an export sale:

Border tax adjustment	.313
Customs Duty	.082 ⁷⁵
Freight and Insurance	.05
	<hr/>
Total export costs	.445
Aggregate amount paid by French customer	1.263
Less: total export cost	.445
	<hr/>
Net revenue received by U.S. manufacturer	.818

Since the variable costs of the U.S. manufacturer are only 60% of his total costs of \$1.10 or \$.66 per widget, the export sale by the U.S. manufacturer at \$.818 would appear to leave him with an economic

⁷⁵ To simplify computations we have assumed that the French customs duties are assessed on the price at the foreign factory.

profit of \$.158 per widget. The French customer would pay, in total, about \$.07 less for a U.S. produced widget than for a French-produced widget. However, since the U.S. manufacturer would be making his export sales at about \$.38 per widget less than the price at which he would be selling his product in the U.S. market, he would be dumping, and under the EEC regulation, anti-dumping duties may be assessed against the widgets so imported up to the extent of the difference (\$.38) if material injury to industry is established.⁷⁶ If anti-dumping duties were assessed in the full amount, the economic profit would be completely wiped out.

(b) *The Position of the French Manufacturer in Regard to Export to the United States.*

Let us assume that the French manufacturer determines to offer his widgets for sale in the United States at a price (after freight and insurance and U.S. customs duties but before U.S. tax) that is \$.05 below the price of the U.S. manufacturer, or \$1.15.

The French manufacturer is faced with the following costs and taxes per unit on an export sale:

U.S. tax	.046
U.S. customs duty	.10
Freight and Insurance	.05
	Total export cost
	.196
	Aggregate amount paid by U.S. customer
	1.196
	Less: Total export costs
	.196
	Net Revenue received by
	French manufacturer
	\$1.000

Since net revenue received by the French manufacturer on the export sale is exactly the same (\$1.00) as the price charged by him on a domestic sale, the export sale would leave the French manufacturer with precisely the same profit as on his domestic sales, *i.e.*, an accounted profit of \$.10 and an economic profit of \$.46. Furthermore no anti-dumping duties would be assessed by the United States Government, because the price FOB factory in France would be the same for both the domestic sales and the sales to the United States. Finally, despite the fact that the aggregate amount paid by the U.S. purchaser is substantially less than the amount paid by the French purchaser (solely because of the rebate of the French VAT), under the

⁷⁶ EEC COUNCIL REG. 459/68 (April 5, 1968), arts. 2, 19; 1 CCH COM. MKT. REP. ¶ 3883 (1968).

current interpretation of the U.S. countervailing duty statute, no countervailing duties would be assessed against the imports. One can readily see, therefore, that the practical result of the GATT rules, no matter how beautifully supported by academic theory, is not acceptable to the U.S. Congress or U.S. industry or labor.⁷⁷

There are of course a variety of courses of action which might be taken to make the situation in regard to border-tax adjustments and countervailing duties more palatable to the United States. The United States could enact a federal value added tax. Since this tax would raise very substantial additional revenues,⁷⁸ it presumably would be accompanied by a lowering of other taxes, perhaps a substantial lowering of the federal corporate income tax.

There surely is no consensus on the effect on prices of the enactment of a value added tax as a replacement for all or a substantial part of the revenue raised by the corporate income tax. Some authors believe, however, that if the money supply grows no faster than it would in the absence of such a change, the imposition of a VAT cannot generally raise prices for any sustained period. Accordingly, if the aggregate amount paid by U.S. consumers for the domestic products they buy (including the amount of the VAT) remains unchanged, this substitution of the VAT for all or a part of the corporate income tax, under present laws, including GATT, would probably mean a growth in U.S. exports or an improvement in the U.S. balance of trade, and it would also mean that U.S. manufacturers would be in a better position to meet competition from the overseas manufacturers.⁷⁹

Another alternative would be for the foreign countries which depend so heavily on the VAT to shift their method of taxation away from VAT. In view of the great attachment of the EEC authorities to the VAT, the possibility of this shift occurring seems most remote. A third alternative would be that the provisions of GATT dealing

⁷⁷ For a very helpful analytical discussion of the law of GATT as it relates to border tax adjustments, see JACKSON, *supra* note 2, at 294-303. See also *Value Added Taxation in Europe*, *supra* note 68; C. McCLURE & N. TURE, *VALUE ADDED TAX: TWO VIEWS* (1972) [hereinafter cited as McCLURE & TURE].

⁷⁸ In the article *Economics of the Value Added Tax*, by Mr. Norman B. Ture, McCLURE & TURE, *supra* note 71, at 74, he estimates that the revenue raised by a federal value added tax would range from a high of \$7.6 billion *per percentage point* to a low of \$6.0 billion *per percentage point*, depending on the various goods and economic activities which might be excluded from the tax, e.g. food, medical and other health services, rent on low-to-medium income housing, educational services. Mr. Ture points out that in 1971 a 5-6% VAT would have generated the same revenues as the federal corporation income tax.

⁷⁹ McCLURE & TURE, *supra* note 77, at 86, 92.

with border tax adjustments would be modified so that countries, such as the United States, which derive much of their tax revenue from income taxes instead of excise or VAT taxes would be permitted to impose income taxes as well as sales or excise taxes.⁸⁰ In this approach, if developed fully, the U.S. companies which export part of their products would be granted export credits against one or more direct taxes (perhaps against the corporate income tax). Similarly, goods imported into the United States would be subjected not only to any indirect taxes imposed by the federal or state governments on U.S. produced goods, but also to some portion of the direct taxes borne by companies producing U.S. produced goods. A major problem with this approach, both in connection with exports and imports, is the difficulty of ascertaining what proportion of the corporate income tax paid by a company relates to a particular product.⁸¹ Furthermore, our trading partners are sure to reply that they, as well as the United States, also impose substantial corporate income taxes, and that any new formula to be developed must also take this into account.

A compromise approach, not dealing fully with the problem, might be to amend GATT so as to provide that if a country, such as the United States, which depends principally on direct taxes, elects to exempt exported goods from certain of the U.S. direct taxes, the importing country would not be permitted to impose countervailing duties in respect of either the direct or the indirect taxes that are remitted in respect of the export sales. However, under this compromise, imports to the United States would not have to pay any border taxes in respect of the U.S. direct tax. This would assist U.S. industry in its export sales and would eliminate the imposition of countervailing duties by the foreign countries; on the other hand, the imported

⁸⁰ This is the approach which the Congress might have in mind. See SFC REPORT, *supra* note 4, at 84. It would impose a substantial task on the taxing authorities of the importing countries. For example, the U.S. taxing authorities will already be levying taxes on income resulting from the resale of the products in question in the United States. Under this approach, the U.S. tax authorities would be asked also to collect an income tax (or a tax in lieu of an income tax) on the profits made by the foreign seller on his sale of the U.S. imports. It would be very difficult for the U.S. authorities to establish the amount of such profits.

⁸¹ In the export field, several countries (which exempt the profits made on the sale of exported goods from their corporate income tax) have approached this problem by providing that the corporate income tax before tax related to exports shall be determined by multiplying total corporate income before tax related to the sale of goods by the following fraction: revenue arising from export sales divided by revenue arising from total sales. However, this approach does not solve the problem of allocating the tax among various exported products.

goods (which have been subjected to corporate income tax at some rate in their home countries) would not be subjected to yet another corporate income tax in the United States. Since the suggested compromise does not give the countries which rely primarily on income taxes quite a full loaf (*i.e.* no border tax adjustments on imported goods are to be made in respect of income taxes), it would be appropriate that such countries would be permitted under the amended GAT (if they desired) to give the credit for direct taxes on all sales of exported goods only to companies whose sales of exported goods in the year in question exceeded the average annual sales of exported goods during a shifting base period, or some other fair and practicable approach designed to increase exports.⁸² If such a compromise approach were adopted, it would logically follow that the provisions of the Internal Revenue Code relating to the Domestic International Sales Corporation ("DISC") would be repealed.

(6) *Revision of GATT balance of payments provision.* (Section 121(a)(6). Article XII of GATT permits any contracting party "notwithstanding the provisions of paragraph 1 of Article XI," in order to safeguard its balance of payments position, to "restrict the quantity or value of merchandise permitted to be imported" subject to certain restrictions set forth in the Article. Article XI, paragraph 1, forbids any prohibition or restriction other than duties, taxes, or other charges, whether through quotas or import licenses on the importation of any product. Thus, the cross reference to Article XI seems to make it reasonably clear that the permission given by Article XII was directed to quantitative restrictions only. Whether the permission to impose quantitative restrictions also covers by implication the less drastic remedy of additional duties or customs surcharges is a matter of some debate. A change in GATT such as this may be fairly easy to negotiate. Several of the contracting parties have indeed imposed temporary customs surcharges in the last few years.⁸³

⁸² In drafting the present DISC legislation, it is believed that the Administration and Congress were concerned that the modest incentive created by that statute would be regarded as contrary to GATT. Accordingly, the DISC legislation was drafted so that it applied to *all* export sales of *all* companies, rather than providing, for example, that only companies who increased their export sales would be eligible for this benefit. The Administration was able to argue that the legislation was not an export subsidy because the purpose of the legislation was not to *increase* exports, but only to place U.S. exporters on a basis of equality with foreign exporters. If the approach suggested by the text were adopted, the United States might now argue that the new law, although clearly a measure to increase exports, should be permitted under an amended GATT because any country taking this approach would still not be on terms of complete equality with VAT countries for the reasons stated in the text.

⁸³ These countries include the United States—36 Fed. Reg. 15724 (1971), *surcharge terminated* 36 Fed. Reg. 24201 (1971)—Great Britain and Denmark.

(7 and 8) *Improvement of provisions of GATT and other international agreements governing access to supplies of food, raw materials and manufactured products, and concerted action against export cartels* (Section 121(a)(7) and (8)). This provision, as well as the following portions of Section 121(a), were added to the bill by the Senate Finance Committee. In its report, the Committee recognized that reaching an agreement of this sort with developing, producing countries may be difficult. The Committee desires these negotiations to deal with "monopolistic behavior" by producing countries and also to provide for sanctions against "nations which significantly injure the international community by denying fair and equitable access to suppliers at reasonable prices." The inclusion of this clause, as well as Section 108 of the Trade Act, emphasizes the importance which Congress attaches to this matter.

Article XI of GATT, which, with certain important exceptions, forbids quantitative restrictions, applies by its terms to export restrictions, as well as to import restrictions. The restriction on exports is, however, subject to numerous qualifications:

- (a) Article XI(2): temporary restrictions on export of food-stuffs or other products "essential to the exporting party," and restrictions necessary for the classification, marking or grading of commodities in international trade;
- (b) Article XX(g): exhaustible mineral resources; and
- (c) Article XXI: the security exception.

Taken together, these exceptions greatly weaken the protection in GATT against export restrictions. Only one complaint has been filed which is based on an export restriction.

The wording of Section 121(a)(7) is certainly consistent with Article XX, paragraph j, of GATT, which provides, subject to certain exceptions, that nothing in GATT shall prevent the adoption of measures "essential to the acquisition or distribution of products in general or local short supply." This same paragraph continues as follows: "Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products." Thus, the position favored by the United States is *permitted* by GATT. Indeed, the clause set forth above seems to be a backhanded way of declaring that all contracting parties are entitled to a fair share of the international supply of the products in question. If the countries are entitled to this share, then logically, the producing countries that are parties to GATT must be obligated to supply it. The difficulty, however, in this line of reasoning is that the phrase "international supply" may be

read as meaning "the portion of the goods in question which the producing countries are ready to offer in international trade." Furthermore, as noted above, Article XX(g) would seem very helpful to the OPEC countries if they simply wished to ration their exports of oil to *all* countries in order to conserve their supplies.

The decision of a single country acting unilaterally, to decrease its export sales of a strategic commodity, such as oil, probably could be easily justified under the security exception or under Article XX. An agreement between a group of countries to fix prices would seem to be harder to justify under the security exception. Furthermore, a full-fledged agreement between a number of producing countries to withhold sale of their goods and/or to fix the prices to be charged for their goods seems to be much more aggressive in nature and to be inconsistent with their obligations under GATT. Perhaps the situation here resembles the U.S. antitrust doctrine—a single company refusing to deal, with no ancillary restraints, does not violate the law. A group of companies agreeing to fix prices or to withhold production would most assuredly offend.

A major problem, of course, in solving the access to oil problem through negotiations under GATT is that the major producers of oil for export are not members of GATT.⁸⁴ On the other hand, a number of the important oil exporting countries⁸⁵ (with the prime exception of Saudi Arabia) will be participating in the Tokyo round of negotiations. Furthermore, GATT has had some part, though far from a central one, in connection with a number of the international commodity agreements.⁸⁶ A limited agreement on world grains⁸⁷ was negotiated as part of the Kennedy round negotiations. The impetus for this agreement came from the developing countries, however, so that its provisions, which in some respects represent concessions to the developing countries, may well be totally unacceptable as a model for an international multilateral oil supply agreement. One solution to the oil shortage of the developed countries might be the buffer stock.⁸⁸

⁸⁴ See note 49 *supra*.

⁸⁵ These countries include Algeria, Iran, Iraq, Tunisia, Ecuador, Indonesia, Nigeria, and Venezuela. See GATT Press Release No. GATT/1154 (Nov. 1, 1974).

⁸⁶ See JACKSON, *supra* note 2, at 726, ¶ 27.4.

⁸⁷ Final Act Authenticating the Results of the 1964-67 Conference, GATT Doc. L/2813 (1967); and a related "memorandum of Agreement," GATT Doc. L/2814 (1967).

⁸⁸ The buffer stock approach is of course not a new one as far as the United States Government is concerned. The U.S. strategic stockpile of various metals and commodities established at the start of World War II is an important example. 50 U.S.C. § 98 *et. seq.* (1970). Although intended primarily as a security measure, the United States government has used, or threatened to use, the stockpiles from time to time in order to maintain price stability. For a discussion of buffer stocks in economic terms, see H.

This approach, which is frequently discussed as one of the principal methods of price stabilizations, has the further major advantage, from the point of view of the consuming country, that it also assures availability of supply, at least for a temporary period. Furthermore, if the buffer stock approach is used by a large proportion of major consumers, it could well tend to assure substantial supplies over a considerably longer period, even if we assume no agreement as to sharing of resources by the consuming countries. This seems probable because the producing countries, if they were faced with the probability of a low level of shipments over a protracted period of time, might well be unwilling to embark upon a program of reduced production and/or higher prices.

According to newspaper reports, Japan has begun to acquire a buffer reserve stock in addition to normal storage supplies, sufficient to meet the country's need for a limited period of time. Here in the United States, the Administration proposed legislation calling for a buffer stock of one billion barrels of oil,⁸⁹ and Congress subsequently provided for such a stock.⁹⁰

(9) *Procedures for regular consultations among countries and procedures to adjudicate commercial dispute* (Section 121(a)(9)). GATT requires that representatives of the contracting parties meet from time to time⁹¹ for the purpose of carrying out provisions of GATT which require their joint action. These sessions have been held on a roughly annual basis, the thirtieth session taking place in November, 1974.⁹² Other GATT meetings include meetings of the Council, of the various committees, and of working parties. The emphasis to be applied on the wording of Section 121(a)(9) is on the word "regular."

GERHARD, *Commodity Trade Stabilization Through International Agreements* 28 L. & CONTEMP. PROB. 276, 282 (1963) [hereinafter cited as GERHARD]; W. SCHMIDT, *The Case Against Commodity Agreements*, 28 L. & CONTEMP. PROB. 513, 514 (1963).

⁸⁹ The examples of buffer stocks cited above (*i.e.* the United States and Japan) are of course examples of unilateral action. However, Gerhard concludes that the multi-country buffer stock scheme "would have to provide for a central agency acting as a 'speculator' in the commodity market concerned." GERHARD, *supra* note 83, at 283. This type of approach might fit in well with the guaranteed "minimum price" approach for the OPEC oil producing countries put forward by Secretary of State Kissinger. A jointly owned buffer stock perhaps would be more easily salable, as a political matter, because its price stabilization actions (which would tend to benefit all consuming countries) could result in substantial losses if the trend of price is downwards. From a security point of view, the jointly owned and administered buffer stock would present problems, but the physical buffer stock could be stored or warehoused in the various consuming countries in proportion to their participation.

⁹⁰ Pub. L. No. 94-163 (Dec. 22, 1975).

⁹¹ GATT, art. XXV.

⁹² GATT Press Release No. GATT/1113 (Oct. 25, 1974).

This paragraph also recommends "procedures to adjudicate commercial disputes among countries." GATT contains a number of provisions for resolution of disputes;⁹³ however, as a number of authors have pointed out, these provisions are strongly slanted toward conciliation by consultation and negotiation.⁹⁴ The thrust of the Trade Act, as indicated by the word "adjudicate," is toward a more formal, more decisive procedure. It is interesting, and perhaps ironic, to note that a number of revisions in GATT urged by Section 121(a) would have been covered by the Charter of ITO if the United States Congress had not rejected that organization. Consider, for example, Articles 92-97 of ITO⁹⁵ which provide a considerably different procedure for settlement of disputes than that set forth in GATT, including reference of disputes to the International Court of Justice.

(10) *Reciprocity and Nondiscrimination including the elimination of "special preferences" and "reverse preferences"* (Section 121(a)(10)). The terms "special preference" and "reverse preference" are not defined in GATT or by other generally accepted sources. However, the meaning of "special preference" seems fairly clear. If, for instance, A, one of the contracting parties to GATT, extended a tariff treatment to B, a non-member of GATT, which was more favorable than the tariff treatment extended by A to contracting parties of GATT, "special preference" would be present.

The meaning of reverse preference is not so clear. It does appear, though, that the EEC adopts a restrictive definition of this phrase, as follows: Assume that B, in return for the concession described above, extended tariff treatment to the goods of A which was more favorable than the tariff treatment extended by B in respect of such goods to certain other contracting parties of GATT, and B also *agreed* with A that B would *not* extend this preference to such other countries. EEC considers that a reverse preference is the more favorable treatment extended by B to A *coupled* with an agreement on the part of B *not* to extend the same preference to others. It appears probable that the United States, on the other hand, will take the position that a reverse preference exists when B extends tariff treatment to the goods of A which is more favorable than the tariff treatment extended by B in respect of such goods to other contracting parties of GATT,

⁹³ GATT, arts. XIX, XXII, XXIII, XXV.

⁹⁴ H. STEINER & D. VAGTS, *TRANSNATIONAL LEGAL PROBLEMS*, 1156-57 (2d Ed. 1975).

⁹⁵ The Final Act of the United National Conference on Trade and Employment was held in Havana and signed by 53 countries March 24, 1948. The signing simply authenticated the text of the agreement but did not commit the governments to ratify. C. WILCOX, *A CHARTER FOR WORLD TRADE* 49 (1949). The text of the Charter is reprinted at 227.

whether or not B further agrees with A that B will not extend this preference to such other countries.

The SFC report does not elaborate as to which countries or regional groups that are members of GATT give special preferences and receive reverse preferences. No doubt many, if not all, of the contracting parties give preferences and receive reverse preferences. GATT recognized the existence of certain preferences in force at the time it was originally signed.⁹⁵ Furthermore, Article XXIV of GATT provides, in effect, an automatic regional exception for customs unions and free trade areas that comply with the provisions of this article. It seems probable, however, that the Senate Finance Committee had in mind the tariff, quota, and other arrangements involved in the arrangements between the EEC and a large group of developing countries, many of these located in Africa. From the inception of the Rome Treaty,⁹⁷ the EEC had contemplated a special relationship between the EEC and those overseas areas which were then or had been colonies or otherwise specially related.

Thus, the EEC⁹⁸ at first extended special preferences to 18⁹⁹ independent states, all located in Africa and formerly linked with France, Belgium, and Italy, known as the "associates." Mauritius was added to this group in 1973. Somewhat more limited arrangements were concluded by the EEC with Kenya, Uganda, Tanzania, Morocco and Tunisia in 1969. Prior to Great Britain joining the European Community, the EEC extended preferences to a rather limited number of countries or territories¹⁰⁰ outside of Africa. All of these relationships were scheduled to terminate as of January 31, 1975.

In the negotiations leading up to Great Britain joining the EEC. one of the major problems that had to be solved was the relationship of the various members of the British Commonwealth to Great Britain after it became a member of the EEC. A further vital question, not settled for some years, was the relationship between the developing countries of the British Commonwealth and the other members of the EEC. The recommendations of the Commission of the EEC on

⁹⁵ See GATT, art. I, para. 2 & Annexes A-F.

⁹⁷ See Rome Treaty, art. 131-36.

⁹⁸ Much of the information set out below has been summarized from EUROPEAN ECONOMIC COMMUNITY, EUROPEAN DEVELOPMENT AID: HOW THE EUROPEAN COMMUNITY IS HELPING THE DEVELOPING COUNTRIES (1972).

⁹⁹ These states are Chad, Niger, Mali, Mauritania, Upper Volta, Senegal, Dahomey, Togo, Ivory Coast, Central African Republic, Cameroun, Gabon, Congo Brazzaville, Congo Kinshasa (now Zaire), Rwanda, Burundi, Somalia, and Madagascar.

¹⁰⁰ These include Comoro Islands, French Afar and Issa Territory, French Polynesia, New Caledonia, Martinique, Guadeloupe, Netherlands Antilles, Guyana, Surinam, Wallis and Fortuna, St. Pierre and Miquelon, Southern and Antarctic Territories, and Reunion.

this important subject to the Council of the EEC were summarized in a press release issued by the EEC on April 30, 1973.¹⁰¹ This memorandum also contained the recommendations of the Commission with regard to the relationship which should exist after January 31, 1975, between the EEC, on the one hand, and, on the other hand, the developing countries mentioned and the developing countries of the British Commonwealth. After extensive negotiations, a new convention, known as the "Lome Convention," was signed in Lome, the capital of Togo, on February 28, 1975. The agreement covers a total of 46 developing countries, including 21 members of the British Commonwealth in Africa, the Caribbean, and the Pacific. The Convention must be ratified by each member of the EEC and by two-thirds of the developing countries before it goes into effect.¹⁰²

The special preferences and reverse preferences thus established differ somewhat as between the countries and territories but in regard to the African countries and territories, the following generally¹⁰³ summarizes these agreements:

Preferences and Reverse Preferences in effect as of January 31, 1975.

(A) *Preferences:* The EEC permits products of the African states listed above to enter the EEC free of duty, except for agricultural products which are generally permitted to enter at a favorable duty as regards products from third countries, but not duty-free. In general, no quotas are imposed.

(B) *Reverse Preferences.* EEC products enter the African countries¹⁰⁴ free of customs duties, and of quotas, except as needed to meet their development requirements. Citizens and conferences of the EEC have the right of free establishment in the African countries. Prior to the Lome Convention, the EEC enjoyed reverse preferences because the African countries were not permitted to extend to third

¹⁰¹ Reprinted in CCH COMM. MKT. REP. ¶ 9558 (1973).

¹⁰² The forty-six countries are as follows: Bahamas, Barbados, Botswana, Burundi, Cameroon, Central African Republic, Chad, Congo, Brazzaville, Dahomey, Equatorial Guinea, Ethiopia, Fiji, Gabon, Gambia, Rhana, Grenada, Guinea, Guinea-Bussau, Ruyana, Ivory Coast, Jamaica, Kenya, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mauritius, Niger, Nigeria, Rwanda, Senegal, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Togo, Tonga, Trinidad, Uganda, Voltaic Republic, Western Samoa, Zaire, Zambia. As of January 20, 1976, seven member states of the European Communities have ratified the Lome Convention and 38 of the 46 ACI countries have ratified it, CCH COMM. MKT. REP., *Environment News*, Issue No. 366, at 3 (January 20, 1976).

¹⁰³ The listing is correct for the 18 countries mentioned in note 99, *supra*. Somewhat more restricted preferences are granted to the other five African countries listed above.

¹⁰⁴ Togo, Burundi, and Congo Kinshasa (now Zaire) give the EEC no preferential duty.

countries the same concessions they extended to the EEC.

Preferences and Reverse Preferences under the Lome Convention.

The summary of the memorandum from the Commission to the Council contained in the press release referred to above states that:

The memorandum answers a frequent American reservation concerning Yaounde II when it recommends that acceptance by the Associates of the mutual free trade area proposal should "not entail any obligation to grant preferences to the Community." The Associates would retain complete tariff autonomy in their relations with third countries.

The Commission clearly recommends in its 1973 memorandum to the Council that under the new arrangements, EEC products would be given entry free of customs duties by the associate countries. The press release announcing the plans for signature of the Lome Convention¹⁰⁵ states that the ACP countries will give the EEC no "reverse preferences" but will give them most-favored nation treatment and will not discriminate between EEC member states. Ninety-six percent of farm products from the ACP countries will enter the EEC free of customs duties, and the remaining four percent will receive EEC preferential treatment. Presumably all products from the ACP countries other than farm products will enter the EEC free of customs duties. At the time that the Lome Convention was signed, the British Commonwealth tariff preference system was, of course, in existence. As a result of the Convention, each of the nine member countries of the EEC will be entitled (as a minimum) to the same preferences as Great Britain was entitled to. Until a copy of the Lome Convention is published, one cannot be sure whether the products from the EEC will enter the associate countries free of customs duties as recommended by the Commission in 1973. If not, it would seem that the arrangement could hardly qualify as a free trade area or customs union area under GATT. It seems clear, however, that the EEC will no longer require the associates to agree that they will not extend to other countries the preferential terms that they extend to the EEC.

Under the Lome Convention, the EEC will be obligated to increase substantially the financial existence extended to the associate countries over the five-year term of the agreement. The aggregate aid to be extended will amount to units of account (U.A.) totalling 3.390

¹⁰⁵ Background note from the European Community Information Service, No. 6/1975, revised; reprinted in 2 CCH COMM. MKT. REP. ¶ 9715 (1975). In a further announcement, the EEC agreed to put into effect on July 1, 1975, on a unilateral basis, the provisions of the Convention relating to trade even though the Convention had not then been signed by two-thirds of the parties. 2 CCH COMM. MKT. REP. ¶ 9757 (1975).

billion (equivalent at the present time to about U.S. \$4.07 billion), broken down as follows:

Grants	U.A.	2.1 billion
Special loans		.430 billion
Loans from the European Investment Bank		.39 billion
Equity capital		.095 billion
Export stabilization fund		.375 billion
Total		3.390 billion

Of these forms of aid, the export stabilization fund is possibly of the greatest interest in terms of trade. This fund will be set aside to aid countries heavily dependent on the export of certain raw materials and agricultural items¹⁰⁵ by protecting against price and production-level fluctuations. It is summarized as follows:

When receipts drop by a certain percentage, countries can request compensation. The mechanism triggering the fund will operate sooner for the poorest countries, which will not have to reimburse the fund. In principle, certain ACP associates states must repay these earnings when the price rise.¹⁰⁷

Furthermore, as part of the Lome Convention, a purchase and sale agreement in respect of sugar was negotiated. Its terms are also summarized in the above-mentioned press release; it is to continue for a minimum of seven years.

Until a much more detailed and rigorous analysis is made of the provisions of the Convention, it is impossible to say with any certainty whether its provisions are inconsistent with GATT. In the past, the EEC has justified the preferences it extended to the African countries on the ground that these countries constituted a "customs union" with the EEC, an exception to the most-favored-nation requirement of GATT. However, the following general statements show how the Lome Convention compares with its predecessor agreement:

Favorable Aspects

(1) The EEC has at least omitted the contractual aspect of the reverse preference.

Unfavorable Aspects

(1) The number of countries receiving and giving preferences has been greatly increased.

(2) The existence of the export stabilization fund, which is administered in large part by the EEC, might result in trade being diverted from its normal channels.

¹⁰⁶ The products affected include peanuts, cocoa, coffee, cotton, coconuts, palm nuts and kernels, hides and skins, timber products, bananas, tea, raw sisal, and iron ore.

¹⁰⁷ 2 CCH COMM. MKT. REP. ¶ 9715 (1975).

The ACP countries which will be entitled under the Convention to preferences in regard to trade with the EEC, can, as a practical matter, be expected to object either to the removal of those preferences or to the enlargement of the preference granted by the EEC so that it extends to all other countries.¹⁰⁸ However, if the broadening of the tariff preference by the EEC to all developing countries were a part of a scheme under which a *general* preference, in respect to manufactured and semi-manufactured products, were extended by all the industrialized members of GATT to all the developing countries, the interest of at least some of the African countries would possibly be advanced. It should be noted that the GATT Declaration, issued on September 14, 1973, relative to the current round of trade negotiations stressed the importance of "securing additional benefits for the international trade of developing countries." Indeed, concern for the trade of developing countries, and for the particular problems of the least-developed among the developing countries, is perhaps the major specific concern set out in the GATT declaration. Thus, the general concept of making available to *all* developing countries the preferences now extended to *certain* of the developing countries would seem to be generally in accord with the concern expressed above. It is not entirely clear as to how the EEC would react to a broadening of preferences, but in general it is believed that they would be opposed. The summary of the Commission Report to the Council seems to make it reasonably clear that the Lome Convention and its predecessor conventions are regarded by the EEC as a method of increasing EEC trade with the associates.¹⁰⁹

(11) *Revisions of GATT Necessary to Define the Forms of Subsidies to Industries Producing Products for Export and Forms of Subsidies to Attract Foreign Investment Which Will Be Acceptable Internationally* (Section 121(a)(11)).

Although GATT contains no provision generally defining the term "subsidy," Article XVI, para. 1, of GATT requires a contracting party to notify GATT if it maintains any subsidy, including any form of income or price support, which operates . . . "to increase exports of any product from, or reduce imports of any product into, its terri-

¹⁰⁸ The EEC Commission made exactly this point with regard to the African associates in its 1973 memorandum to the Council.

¹⁰⁹ See, e.g., the following statement in the commission's report to the Council: "[T]he Community will have to take steps to revitalize and improve the commercial content of the Association, unless it wishes to see a large part of its commercial importance whittled away, with the additional risk that within 15 years the Association will have ceased to be a framework for an effective overall policy of cooperation in the development field." 2 CCH COMM. MKT. REP. ¶ 9558 (1973).

tory." However, the wording of paragraph 1 (which is the only portion of Article XVI which deals with subsidies operating to reduce imports) only obligates the party giving the subsidy to "discuss" with the party seriously prejudiced "the possibility of limiting the subsidy." Furthermore, Article III 8(b) of GATT, which is concerned with national treatment being accorded to imported products, specifically permits the payment of subsidies exclusively to domestic producers. Accordingly, it seems probable that Congress intentionally limited¹¹⁰ Section 121(a)(11) of the Trade Act to export subsidies and to subsidies given to attract foreign investment, omitting any mention of subsidies which operate generally to reduce imports.

The 1960 GATT working party stated that a list of eight practices were generally agreed to be subsidies, but noted that this list was not exhaustive.¹¹¹ Article XVI, paragraph 4, of GATT¹¹² proscribes export subsidies on any products other than primary products; but as to primary products, Article XVI, paragraph 3 is much weaker. It provides that contracting parties should "seek to avoid" export subsidies on primary products, and if such subsidies are granted by any party, it shall not result in the contracting party "having more than an equitable share of world trade in that product. . . ."

A general definition of "subsidy" which was developed in 1965 by the staff of the Joint Economic Committee of the United States Congress is set out below.¹¹³ This general language, although well drafted,

¹¹⁰ The SFC Report speaks broadly of the necessity for developing improved rules relating to "subsidies." In particular "the concept of an internationally acceptable export subsidy" should be defined and "comparable" treatment should be given to primary and non-primary products. The word "comparable" is certainly not clear. Does it mean that the phrases "primary products" and "non-primary products" should be defined? Or does it mean that the same rules as to acceptable subsidies should apply to both primary products and non-primary products? SFC REPORT, *supra* note 4, at 85. Probably the latter is intended, the SFC being opposed to the differential treatment accorded by GATT, Article XVI, §B to export subsidies on primary products as compared to non-primary products.

¹¹¹ GATT 9th Supp. BISD 185, 186-87 (1961); *reprinted in* JACKSON, *supra* note 2, at 385.

¹¹² Only 17 of the major trading countries in GATT have agreed to this provision. See STAFF OF SUBCOMMITTEE ON TRADE OF THE HOUSE COMM. ON WAYS & MEANS, 94th Cong., 1st Sess., BACKGROUND AND STATUS OF THE MULTINATIONAL TRADE NEGOTIATIONS 27 (1975).

¹¹³ "A subsidy is an act by a governmental unit involving either (1) a payment, (2) a remission of charges, or (3) supplying commodities or services at less than cost or market price, with the intent of achieving a particular economic objective, most usually the supplying to a general market a product or services which would be supplied in as great quantity only at a higher price in the absence of the payment or remission of charges. Government loans made at lower than market rates of interest or at rates below the cost of funds to the government and government insurance provided at lower than private insurance premium rates may also appropriately be

does not seem to cover some of the specific practices listed by the GATT working party referred to above. Probably the optimum approach to the problem from the point of view of amending GATT would be a general definition, plus a listing, stated to be illustrative and not all-inclusive, of a number of specific practices agreed to fall within the definition.¹¹⁴

The second portion of paragraph 3 appears to contemplate agreement by the contracting parties to GATT that certain subsidies or inducements may be given by the contracting parties to attract foreign investment and that these subsidies would be declared (a) not to be contrary to GATT and (b) not to give rise to the imposition of countervailing duties by importing countries. Any such subsidies must, however, be "consistent with an open, nondiscriminatory and fair system of international trade." Depending of course, on the breadth of the definition of export subsidies, this paragraph, insofar as it relates to the United States, might well result in a substantial amendment to the countervailing duty law¹¹⁵ as it goes much further than the specific amendments to the law which are set forth in Section 331 of the Trade Act.

Certainly, if a government desires to induce industry to build factories in a given area of its country, or to induce industry to make investments which will result in increased exports, it usually will not wish to limit these subsidies to foreign investment only. Any such legislation could well arouse substantial objections from local sources of capital. It is, of course, possible that the Trade Act is phrased as it is because Congress believed that any broad agreement as to permissible investment subsidies would be difficult to reach, and that it might be somewhat easier if the field were narrowed by limiting it to subsidies or incentives given to attract foreign investment. Developed countries do give incentives to attract industry to particular areas that are for one reason or another industrially undeveloped (Italy, for its southernmost area; Canada, for its maritime provinces). The developing countries, however, are the countries most prone to giving incentives to attract industry. For many of the developing countries, their lack of capital means that any investment will need to be primarily foreign investment.

Congress may not expect a listing of specific sorts of subsidies that

considered as subsidies." STAFF OF JOINT ECONOMIC COMMITTEE, SUBSIDY AND SUBSIDY-EFFECT PROGRAMS OF THE U.S. GOVERNMENT, 89th Cong. 1st Sess, 39 (1965).

¹¹⁴ This approach has been recommended by the United States Government to the Trade Negotiations Committee working group of GATT. BACKGROUND AND STATUS OF THE MULTINATIONAL TRADE NEGOTIATIONS, *supra* note 112, at 28.

¹¹⁵ 19 U.S.C. § 1303 (1975 Supp.).

would be acceptable. It is more probable that Congress might have had in mind a listing of circumstances which would justify the granting of subsidies. One example which jumps to mind is, of course, the subsidies given to attract investment to a portion of a country which is industrially handicapped in comparison with other areas, either because of distance from markets, distance from suppliers, inadequate labor supply, lack of good transportation facilities, or the like. If the subsidies do no more than offset these initial disadvantages, and if the subsidies are to be phased out over some reasonable period, the subsidies seem to have a certain equity in their favor. It is believed, for example, that the United States Treasury Department may have some internal ground rules to the effect that if a foreign subsidy does no more than offset a clearly demonstrable and quantifiable disadvantage, countervailing duties would not be assessed.

The imposition of countervailing duties by one government against imports from another country which subsidizes the production or exportation of such products always involves international political considerations. If agreement could be reached as to the propriety of certain types or forms of subsidies, these political problems could be reduced.

(12) *Revision of GATT in order to establish within GATT "an international agreements" [sic] on articles (including footwear)* (Section 121(a)(12)). This paragraph was added by the committee on conference without explanation of exactly what was intended. Despite the imprecision of the language, a reasonable interpretation seems to be that GATT should be further amended so as to provide for or include an "orderly marketing agreement" which would limit the importation of footwear¹¹⁶ and perhaps other articles into the United States. Both the 1962 Act¹¹⁷ and the Trade Act¹¹⁸ permit the President to enter into "orderly marketing agreements."¹¹⁹ Problems which have arisen since the 1962 Act under the textile orderly marketing agreements may have inspired the additional provisions in this subsection of the Trade Act relative to institutionalized mechanisms for the settlement of disputes, and for a surveillance body to monitor

¹¹⁶ It is interesting to note that the only article of merchandise mentioned in the entire Trade Act is "footwear." That article is mentioned twice, in this section and in § 331(a) non-rubber footwear."

¹¹⁷ 19 U.S.C. § 1982 (1970).

¹¹⁸ Trade Act § 203(a)(4).

¹¹⁹ See, e.g., "Long-term Agreement Regarding International Trade in Cotton Textiles" and the Extending Protocol, UNTS 471/296 and GATT Document No. GATT L/2892.

shipments of such articles.

Does the recital of the Trade Act of the various ways in which the United States Government wishes to have GATT changed strengthen or weaken the position of the STR in the negotiations lying ahead?

The initial position of the Administration was to request a very broad negotiating authority. In his message to Congress supporting this request, the President did indeed explain in rather general terms, some of the negotiating goals of the Administration; but the goals as expressed were not nearly so detailed nor so extensive as those set forth in the Trade Act. As previously pointed out, many of the recommended revisions of GATT, as contained in the Trade Act, were not even mentioned in the President's message or in the Administration Proposal. Congress, however, insisted on detailing the aspects in which GATT should be revised and apparently was willing to give the Administration authority to negotiate *only* if these precise goals were set forth in the Trade Act itself. Certain of the proposed revisions of GATT are set forth in Section 121, but there are a number of other substantive provisions of the Trade Act which would also require amendments to GATT, including Section 102 (NTB's), Section 122 (Balance of payments authority), Title II, Sections 202 and 203, and Title V¹²⁰ (Generalized System of Preferences).

These various United States objectives as set forth in the Trade Act are far more detailed and extensive than (a) those set forth in the Tokyo Declaration¹²¹ and (b) those advanced to date by the EEC.¹²² No categorical answer can be given as to whether the position of the STP is strengthened or weakened by the detailing of these goals in the Trade Act. However, the following observations can be made with regard to the matter:

¹²⁰ Perhaps a waiver could be obtained from GATT in respect of Title V, without any amendment of GATT.

¹²¹ GATT Document No. GATT/1136 (Oct. 29, 1973).

¹²² For the negotiating mandate approved by the Council of the EEC in 1973, see the background note from the European Community Information Service No. 17/1973, reprinted in CCH COMM. MKT. REP. ¶ 9588 (1973); it is expected that the EEC will revise this negotiating mandate now that the U.S. Trade Act has been passed.

Arguments in Favor of Setting Forth the Goals

(1) Since many of the U.S. objectives are not contained in the Tokyo Declaration, it may be necessary to revise that declaration in order to permit the negotiations to cover these points. If so, the setting forth of these points in a concrete manner in the Trade Act is a prerequisite for an orderly handling of the issues.

(2) The fact that the President is directed by the Trade Act to accomplish these amendments to the GATT can be said to strengthen the position of the STR in the negotiations. He is in a position, when challenged on a particular issue, to say that this is a matter of policy of the United States Government clearly set forth in his negotiating authority.

Arguments Against Setting Forth the Goals

(1) In many negotiating situations, a negotiator often believes that it is *not* desirable for him to set forth, at the outset of the negotiations, each and every one of the goals or objectives which he hopes to achieve. He will, by this disclosure, perhaps prematurely forewarn the other negotiators enabling them to advance their goals at the expense of his goals.

(2) Obviously, since a rather substantial number of goals are set forth in the Trade Act as to the revision of GATT, some of these goals will be much more important to the interests of the United States than the others. The natural effect of detailing all of these objectives in the Act may well be to cause the STP to endeavor to negotiate *some* changes or improvements with regard to *each* goal, whereas if the list of objectives were not so full and detailed, the STP would be free to concentrate on those objectives considered most important to the interests of the United States.

(14) *Provisions of Section 121(b), (c), and (d).*

Section 121(b) directs the President, to the extent feasible, to enter into trade agreements with foreign countries embodying the various provisions set forth in Section 121(a). Section 121(c) provides that if the implementation of any such trade agreement will change any provision of federal law¹²³ (including a material change in an administrative rule), the agreement shall take effect only if the appropriate implementing legislation is enacted by Congress, unless Congress has delegated authority to implement the agreement. The implementing legislation may be submitted to Congress under Section 151 of the Trade Act, which is designed to assure speedy legislative action on the proposed bill. Finally in Section 121(d), Congress

¹²³ This provision (which requires submission to Congress *only* if the implementation of the trade agreement will change any provision of federal law or a material change in a rule) seems to conflict with Trade Act § 102 (which apparently requires submission of *any* trade agreement dealing with non-tariff barriers to Congress whether or not the implementation of the trade agreement will require any change in federal law). Certainly many of the provisions of Trade Act § 121(a) deal with non-tariff barriers.

authorizes the appropriation of funds annually that are necessary to enable the United States to bear its share of the expenses of GATT but retains its aloof position in regard to GATT by stating that this appropriation of funds by Congress does not imply "approval or disapproval by the Congress of all articles of the General Agreement on Tariffs and Trade."

Section 122. Balance of Payments Authority

Subsection (a) of Section 122 provides that if fundamental international payments problems (such as a large and serious U.S. balance of payments *deficit*) require special import measures, the President shall either:

- (a) impose a temporary import surcharge, not to exceed 15% *ad valorem*,
- (b) impose temporary quotas, or
- (c) impose both a temporary import surcharge and a temporary quota.

Quotas are to be imposed only (a) if permitted by international trade or monetary agreements to which the United States is a party, and (b) only to the extent the imbalance cannot be dealt with by an import surcharge. If the President determines that the imposition of these import restrictions is contrary to the public interest of the United States, he may refrain from imposing the restrictions but shall inform Congress of his decision and consult with congressional advisers.

On the other hand, subsection (b) provides that if the President determines that fundamental international payment problems (such as a large and persistent U.S. balance of payments *surplus*) require special import measures to *increase* imports, the President is authorized:

- (a) to temporarily reduce customs duties on any article (but not more than 5% *ad valorem*), or (b) to suspend quotas or to increase the amount of goods importable under quota.

In general, the import restrictions and the import liberalizing actions are to be applied in a broad and non-discriminatory fashion. However, under Section 122(d), the President is authorized to impose import restriction measures against one or more countries having large or persistent balance of payments surpluses, and to exempt all other countries from the import restrictions.¹²⁴

¹²⁴ In view of the fact that the United States in 1975 had a large balance of

The President is urged to seek modification of international agreements aimed at allowing the use of surcharges in place of quantitative reduction as a balance of payments adjustment measure. This clause reaffirms, in the broad context of all international trade agreements, the policy set forth in Section 121(a)(6) as applicable to GATT. Neither the 1962 Act nor the Tariff Act itself included any provision which clearly and explicitly gave the President the authority to impose an import surcharge if monetary conditions made such an imposition desirable. President Nixon did impose a temporary import surcharge in 1971,¹²⁵ relying on certain generally worded provisions of the Tariff Act and of the 1962 Act. The Customs Court has recently held, however, that the President did not have authority under those acts to impose this surcharge.¹²⁶ Section 122(a) and (d) seem to require amendment of GATT.

Title IV of the Administration Proposal contained provisions to remedy the apparent lack of authority referred to above and to authorize the President to take discriminatory action against a country which has large or persistent balance of payment surpluses.

Section 123. Compensation Authority

This Section permits the President to enter into a trade agreement in order to provide compensation to a foreign country if the President has extended import relief under Section 203 and the import relief has adversely affected the foreign country in question. Section 123(b) provides that no rate of duty may be decreased below a rate which is 70 percent "of the existing rate of duty" and further provides that the new concessions shall be reduced and terminated according to substantially the same time schedule applicable to the import relief. Subsection (d) provides, however, that new concessions to be granted as compensation shall be granted under the general authority delegated under Section 101 "until such authority terminates."¹²⁷ The 1962 Act contained no section dealing specifically with compensation; the President relied on Section 201¹²⁸ of that Act to provide compensation. Section 123 of the Trade Act, even after the modifica-

payments surplus, we can expect other countries to raise this point against us, and, indeed, France has already done so.

¹²⁵ Presidential Proclamation No. 4074, 36 Fed. Reg. 15724 (1971).

¹²⁶ *Yoshida Int'l, Inc. v. United States*, 378 F. Supp. 1155 (Ct. Cust. 1974).

¹²⁷ The intent seems to be that the President is not to use the "emergency authority" until he has exhausted the general authority given by Section 101, and is not to enter into any compensation agreement after the five year period set out in Section 101 has elapsed. See SFC REPORT, *supra* note 4, at 90.

¹²⁸ 19 U.S.C. § 1821 (1971); see SFC REPORT, *supra* note 4, at 89.

tions made by the Congress, seems to give the President substantial additional authority beyond that granted by the 1962 Act.

Section 124. Authority to Renegotiate Duties

This subsection, which permits additional trade agreements to be negotiated in the 2 year period following the five year period authorized by Section 101, is designed principally to permit the orderly correction of various small errors, omissions, or inconsistencies which are almost certain to occur in the negotiation of any agreements so detailed and so complicated as the multilateral tariff negotiations.¹²⁹ The authority is also desirable as it permits changes due to a change in circumstances. No such provisions was included in the 1962 Act; but the Administration's proposal was accepted by the Congress, the authority being limited by Section 124(b) and (c).

Section 125. Termination and Withdrawal Authority

Section 125 requires that any trade agreement entered into under the provisions of the Trade Act shall be subject to termination or withdrawal at the end of a period of not more than three years, and thereafter it is terminable on six months notice. The President is also authorized to terminate in whole or in part any proclamation made under the Trade Act. Up to this point, the Section is identical in substance to Section 255 of the 1962 Act.¹³⁰

The 1962 Act does not give the President explicit authority to raise tariffs pursuant to the rights or obligations of the United States under international trade agreements whenever the United States suspends or withdraws concessions or terminates the agreement. Under the 1962 Act, the only authority given to the President in this regard was the general authority contained in Section 255(b) and Section 201(a)(2). Probably in order to prevent future litigation (such as the *Yoshida International* case¹³¹ in the balance of payments area), the Administration Proposal requested specific authority to raise tariffs in this situation.¹³² The Administration Proposal also requested that the President be given authority to maintain existing rates of duties after a trade agreement is terminated,¹³³ citing the potential problem when Venezuela announced its intention to cancel its bilateral trade

¹²⁹ See SFC REPORT, *supra* note 4, at 91.

¹³⁰ Act of Oct. 11, 1962, Pub. L. 87-794, § 255, 76 Stat. 880 (1962).

¹³¹ See note 126 *supra*.

¹³² See Administration Proposal § 402(a).

¹³³ See *Id.*, § 402(b).

agreement with the United States.¹³⁴ In such event, without the proposed provision, it could have been argued that customs duties on oil imported from Venezuela would have risen automatically to the much higher preagreement rate.

In subsections (c), (d), (e), and (f), of this Section Congress gives the Administration the authority which it had requested, but subject to certain limitations. Under subsection (c), when the U.S. takes the initiative and withdraws, suspends, or terminates concessions, the President is authorized to increase duties (not above the level permitted by Section 101(c) of the Trade Act, or to impose other import restrictions. Under subsection (d), when a *foreign* country takes the initiative and withdraws, modifies, or suspends concessions granted to the United States under trade agreements without granting due compensation, the President is authorized to withdraw substantially equivalent concessions and to increase duties (without any specified limit) or impose other import restrictions in order to effect adequate compensation. Subsection (e) provides that notwithstanding the termination of any trade agreement or the withdrawal of the United States from such an agreement, these existing duties or other import restrictions shall continue in effect for one year unless the President specifically provides by proclamation that "such rates" shall be restored to the pre-existing level. The President is to inform Congress, within 60 days after termination of, or withdrawal from, a trade agreement, as to what *rates of duty* he considers appropriate for the future for the articles covered by the termination or withdrawal. Public hearings are to be held by the President as to action taken or to be taken under subsections (c), (d), and (e).

One question which may arise under subsection (e) is whether the President has the right to provide by proclamation that import restrictions, as well as customs duties, shall be restored to the level at which they would be but for the agreement. Another question is whether subsections (d) and (e) are mutually exclusive.¹³⁵ Both of these questions are as yet unanswered.

¹³⁴ *Id.* at 98.

¹³⁵ The authority given to the President by § 125(e) is clearly more limited and precise than the authority given to him under § 125(c) or (d).

Section 126. Reciprocal Non-Discriminatory Treatment

The Administration Proposal contained a most-favored-nation clause,¹³⁶ identical in substance to that¹³⁷ of the 1962 Act, which stated that unless otherwise provided by the Trade Act, any duty or other import restriction or duty-free treatment proclaimed in carrying out any agreement under the Trade Act should apply to products of all foreign countries. The Ways and Means Committee accepted the Administration Proposal substantially as written, pointing out that the most-favored-nation principle was the cornerstone of GATT.¹³⁸ Section 126(a) retains intact the most-favored-nation clause, but the Senate Finance Committee, by adding Sections 126(b), (c), and (d), has qualified the most-favored-nation principle. The Senate Finance Committee believed, however, that the "unconditional" most-favored-nation principle had led in the past to one-sided agreements. It pointed out that under the multi-lateral negotiations, it has been possible for countries to take almost no meaningful part in the negotiations, making no concessions as to their own tariff barriers or non-tariff barriers, while at the same time, as a result of the most-favored-nation principle, they receive a multitude of concessions.¹³⁹ The Committee believed that a major industrialized country should not receive benefits from the United States unless it has extended reciprocal concessions, or "reciprocal non-discrimination."¹⁴⁰

Thus, Section 126(b) requires the President to determine, *after* the conclusion of all negotiations under the Trade Act or at the end of the five-year period beginning on the date of enactment, whichever is earlier, whether any major industrial country has failed to make concessions under trade agreements entered into under the Trade Act "which provide competitive opportunities for the commerce of the United States in such country substantially equivalent to the com-

¹³⁶ See Administration Proposal § 407.

¹³⁷ See 1 U.S.C. § 1881 (1971).

¹³⁸ See HWMC REPORT, *supra* note 21, at 35.

¹³⁹ SFC REPORT, *supra* note 4, at 94.

¹⁴⁰ In effect, the SFC Report seems to say that the United States should return to the "conditional" most-favored-nation approach which the United States had followed for a number of years prior to 1924. In that year the United States and Germany entered into an agreement containing an "unconditional" most-favored-nation clause. The effect of that clause is considered in *John T. Bill Co. v. United States*, 104 F.2d 67 (C.C.P.A. 1939). The opinion sets out a communication from Secretary of State Charles E. Hughes to the Chairman of the Senate Foreign Relations Committee in relation to the most-favored-nation clause. *Id.* at 71-73. This communication is an admirable statement of the background of that clause and the reasons for supporting it.

petitive opportunities, provided by the United States. . . .” “Major industrial countries” are defined to include Canada, Japan, the EEC, each member state of the EEC, and other countries designated by the President. If the President determines that reciprocal concessions have not been made by one of these major industrial countries, he is to recommend to the Congress, under subsection (c), legislation providing for the withdrawal or non-applicability of concessions made by the United States to such country, either in whole or in part.

It seems that whether or not one agrees in general with the concept of “reciprocal nondiscriminatory treatment,” the *ex post facto* aspect of subsections (b) and (c) are extremely unfortunate. From the standpoint of our trading partners, this clause will probably seem an arbitrary and high-handed approach. In effect, it says that the United States, after it has negotiated for several years and signed a formal agreement, intends to review all that has gone before and determine whether it has made a good deal with respect to each major industrialized country. If not, the United States will opt out, despite the fact that the agreements have been signed. A provision requiring the President to review the agreements as negotiated before signing or authorizing the signing of the agreements, to ascertain whether the requirement of reciprocal non-discriminatory treatment is met, would seem to be a much more reasonable approach to the problem.

Section 127. Reservation of Articles for National Security or Other Reasons

In general, Section 127 continues in effect the provisions of Section 232 of the 1962 Act. The 1962 Act is supplemented by a paragraph in Section 127(b)¹⁴¹ which provides that the President shall reserve from negotiations seeking a reduction in duties or other import restrictions under the Trade Act any article while there is in effect with regard to such article an action taken under Section 203 of the Trade Act or Sections 232 and 351 of the 1962 Act.

Chapter 3—Hearings and Advice Concerning Negotiations

The Administration Proposal in dealing with hearings and advice followed very closely the provisions¹⁴² of the 1962 Act, except that the enactment of the Federal Advisory Committee Act¹⁴³ in 1972 caused

¹⁴¹ The comparable provision of the 1962 Act was Act of Oct. 11, 1962, Pub. L. 87-794, § 225, 76 Stat. 876.

¹⁴² *Id.*, §§ 221-24, 76 Stat. 874-75.

¹⁴³ Act of Oct. 6, 1972, Pub. L. 92-463, 86 Stat. 770, *enacting* 5 U.S.C. App. I (Supp. IV 1975).

the Administration to propose certain exemptions from the provisions of that Act. Partly as a result of various amendments made by Congress in other portions of the Trade Act, and partly as a result of the desire of Congress to assure that the private sector be given a greater opportunity to communicate its views to the STR, Congress substantially expanded these provisions of the Administration Proposal.

Section 131. International Trade Commission Advice

Because the functions of the old Tariff Commission are substantially expanded by the Trade Act, Congress changed the Commission's name to the "United States International Trade Commission."¹⁴⁴ Under the provisions of Section 131, the President is required to publish and furnish the Commission with lists of articles which may be considered for a change in tariff or excise tax treatment. The Commission is then required, within 6 months, to advise the President of the probable economic effect of these changes, both on the U.S. industries concerned and on consumers. The "effect on consumers" is a change from the Trade Expansion Act of 1962. The Commission may also include a recommendation as to the desirability of a "staging" period longer than the minimum required by Section 109(a) and is required to make investigations and furnish advice to the President, as required by him, in regard to the probable economic effect of modifications of non-tariff barriers. This is an example of the expansion in function of the Commission.¹⁴⁵ Section 13(d) details the steps to be followed by the Commission and the matters to be covered in the advice furnished by the Commission to the President pursuant to (b) or (c). The Commission is required, in preparing its advice, to hold public hearings. In 1975, for the first time the Commission elected to hold public hearings throughout the country in order to give the public a better opportunity to attend and participate in the hearings.

¹⁴⁴ The change in name is formally accomplished by § 171; the expansion of the functions of the Commission will be discussed under § 171. It is referred to in the Trade Act as the "International Trade Commission," or "the Commission," but to avoid any possibility that it be regarded as an international body representing a group of countries, the International Trade Commission prefers to be known by its full title, the "United States International Trade Commission."

¹⁴⁵ The 1962 Act, Act of Oct. 11, 1962, Pub. L. 87-794, 76 Stat. 876, required the President to advise the Commission of articles as to which there might be a change in tariffs "or other import restrictions." (emphasis added). However, the great increase in emphasis in the Trade Act on nontariff barriers to trade will surely mean that the Commission's functions in this area will be expanded.

Section 132. Other Governmental Advice

The President is required to seek information and advice with respect to the proposed international agreements from the Departments of Agriculture, Commerce, Defense, Interior, Labor, State and the Treasury, and from the STR.

Section 133. Public Hearings

The President is required to appoint an agency which is to hold public hearings so as to afford "any interested person" an opportunity to present his views as to the articles which are or should be under consideration for a change in tariff treatment. Pursuant to this authority, the President designated the Office of the STR to hold the public hearings.

Section 134. Prerequisites for Offer

The President is authorized to make an "offer"¹⁴⁶ for change in tariff treatment or import restrictions with respect to a particular article only after he has received a summary of the public hearings to be held under Section 133 and advice from the Commission. If the Commission has not furnished advice within the 6-month period referred to above, the President may proceed to make an offer.

Section 135. Advice from The Private Sector

This Section has been greatly expanded from the brief treatment contained in Section 241(b)¹⁴⁷ of the 1962 Act. The 1962 Act provided for a single advisory committee with 30 to 45 members. The Trade Act provides a much more elaborate group of committees:

- (a) An "Advisory Committee for Trade Negotiations" to provide "overall policy advice" to be composed of not more than 45 individuals, including representatives of government, labor, industry, agriculture, small business, service industries, retail-

¹⁴⁶ The Administration Proposal states that "offer" is used here in the sense of a "formal offer," acceptance of which would bind the United States to include such a concession in a trade agreement, and that the Section would not prevent the STR from beginning informal negotiations before receipt of advice from the Commission. Administration Proposal at 70.

¹⁴⁷ Act of Oct. 11, 1962, Pub. L. 87-794, § 241(b), 76 Stat. 878. Pursuant to that subsection, President Johnson issued an Executive Order establishing a "Public Advisory Committee on Trade Negotiations," Exec. Order No. 11, 143, 3 C.F.R. 181 (1964-65), amended by Exec. Order No. 11,159, 3 C.F.R. 211 (1964-65).

ers, consumer interests, and the general public is required. The inclusion of representatives from "small business, service industries, retailers, and consumer interests" is a change from the 1962 Act.

(b) The President is *authorized* also to appoint general policy advisory committees for industry, labor, and agriculture, respectively.

(c) The President is *required* to establish "such industry, labor or agriculture product sector advisory committees" as he determines to be necessary for negotiation of the trade agreements under Sections 101 or 102. The Act does not specify the number of sector committees to be appointed.¹⁴⁸ The committees are to deal with both tariff adjustments and NTM's affecting international trade. Recall that Section 102(g)(3) states that for purposes of that Section international trade includes "service industries." Service industries are understood to include insurance, banking and transportation.¹⁴⁹ These product sector committees are to meet before and during negotiations, at the call of the STR, to provide policy advice on negotiations and technical advice and information on negotiations on particular products, both domestic and foreign.

Section 135(e)(1) and (2) requires that the Advisory Committee for Trade Negotiations, each appropriate policy advisory committee, and each product sector advisory committee furnish *two* sets of reports. The first set of reports is to be furnished "at the conclusion of negotiations for each trade agreement entered into under the Act." It may be intended that this report be furnished prior to the execution of the Trade Agreement in question, but this seems doubtful.¹⁵⁰

The first set of reports from the Advisory Committee for Trade Negotiations and from the policy advisory committees are to be furnished to the President, the STR, and to Congress, and are to include an "advisory opinion" as to whether and to what extent each agreement promotes the economic interests of the United States. The first set of reports from the product sector committees are to be furnished

¹⁴⁸ HWMC REPORT, *supra* note 21, at 38, states, however, that no more than "30 or so" of these sector committees need be established. In fact, twenty-six product sector advisory committees have been established.

¹⁴⁹ SFC REPORT, *supra* note 4, at 102.

¹⁵⁰ The House Conference Report, H. CONF. R. 1644, 93d Cong., 2d Sess. 30 (1974), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7375, in describing this section of the Act, states that each committee is "to meet at the conclusion of each trade agreement entered into under the Act" (emphasis added), which would perhaps indicate that the reports are intended to deal with the completed agreement.

to the same recipients and are to include an advisory opinion as to whether each trade agreement provides for equity and reciprocity within the product sector.

The second set of reports is to be furnished to Congress by each of the above-mentioned committees at the end of the five year period starting with the date of the enactment of the Trade Act. Each such report is to include much the same sort of advisory opinions as set forth above, but these reports are to deal with *all* of the trade agreements entered into under the Trade Act, taken as a whole.¹⁵¹

There are three types of "confidential information" which the Trade Act attempts to protect. These include (a) meetings of the general policy advisory committees and of the product sector advisory committees dealing with the negotiating objectives of the United States Government in relation to trade agreements, (b) information submitted in confidence by the private sector, and (c) information submitted in confidence by employees or officials of the United States to any of the advisory committees. In order to appreciate these provisions, it is necessary to consider not only the provisions of the Trade Act itself, but also those of the Federal Advisory Committee Act¹⁵² and of the Freedom of Information Act.¹⁵³

The Federal Advisory Committee Act, enacted in 1972, was passed, partly as a housekeeping measure, in an effort to keep track of and to prevent the proliferation of advisory committees.¹⁵⁴ In addition, this Act was to assure that, subject to certain exceptions, federal advisory committee meetings would be open to the public, that information submitted to or prepared for or by each federal advisory committee would be open to the public, that the committees would maintain records of their meetings which also would be open to the public,

¹⁵¹ Since it appears that both sets of committee reports are perhaps to be prepared only *after* the trade agreements are signed, one may appropriately speculate as to their usefulness to the STR. Since Congress will be reviewing each trade agreement dealing with NTM's, it appears that the first set of reports might be available to it before it is required to act on the agreement. Insofar as the STR is concerned, it is possible that Congress required these reports in an effort to make sure that the STR gave due consideration to each of the various recommendations put forth by the committees. After all, if the person responsible for adopting or refusing a recommendation knows that he will be required to publish the reasons for *not* accepting the recommendation, he is apt to think twice before disregarding any such recommendations. Section 135(i) provides that the report to be furnished by the President under § 163 shall include a report on the consultations with the advisory committees and the reasons for not accepting advice or recommendations.

¹⁵² 5 U.S.C. App. 1 (Supp. IV 1975).

¹⁵³ 5 U.S.C. § 552 (Supp. IV 1975).

¹⁵⁴ 5 U.S.C. App. I (Supp. IV 1975). It is a bit ironic that this single piece of legislation—the Trade Act, *supra* note 1—will set up approximately 37 advisory committees.

and that copies of reports of committees, and background material, where appropriate, be sent to the Library of Congress.¹⁵⁵ Both Congress¹⁵⁶ and the Administration¹⁵⁷ recognized that specific reference to that Act should be made in the Trade Act.

The Freedom of Information Act, enacted in 1967, was passed in an effort to assure that "agencies" of the United States would act openly,¹⁵⁸ publishing the rules under which they operate, both procedural and substantive, final opinions made in the adjudication of cases, and statements of policy and interpretations which have been adopted by the Agency. Subsection (b) of Section 552 provides, however, that the Section does not apply to matters that are "(1) specifically required by Executive Order to be kept secret in the interest of the national defense or foreign policy; . . . (3) specifically excepted from disclosure by statute; (4) trade secrets and commercial or financial information obtained from a person and privileged or confidential . . ." Sections 553 (Rulemaking) and 554 (Adjudications) amplify the provisions of Section 552, but Section 553 excepts foreign affairs functions of the United States and Section 554 exempts matters involving the conduct of foreign affairs functions. Perhaps in view of the provisions of Section 552(b) and the above-mentioned provisions of Sections 553 and 554, the Administration and the Congress seem to have concluded that Section 552 would not require disclosure of the matters now under consideration, and that therefore no specific reference to the Freedom of Information Act need be made.

Section 135(f) of the Trade Act provides that the Federal Advisory Committee Act shall apply to the Advisory Committee for Trade Negotiations and to all other advisory committees established under Section 135. A major exception is that the meetings of these other advisory committees (the general policy advisory committees and the product sector advisory committees) which are determined¹⁵⁹ by the President or his designee as likely to deal with the negotiating objectives or bargaining positions of the United States in the trade agreement negotiations shall be exempt from subsections (a) and (b) of Sections 10 and 11 of the Federal Advisory Committee Act.¹⁶⁰

¹⁵⁵ 5 U.S.C. App. I §§ 10, 11, 13 (Supp. IV 1975).

¹⁵⁶ SFC REPORT, *supra* note 4, at 103.

¹⁵⁷ Administration Proposal, § 112(b).

¹⁵⁸ 5 U.S.C. § 552(a)(1) (1971) and (2) (Supp. IV 1975).

¹⁵⁹ The SFC Report states that it is anticipated that "one determination could be issued for all future meetings on that subject." SFC REPORT, *supra* note 4, at 103.

¹⁶⁰ Section 10 relates to open meetings, public notice and public participation. Section 11 provides for public availability of documents—copies of transcripts of advisory committee meetings.

Section 10(a)(1) and (3) of the Federal Advisory Committee Act provides that meetings of these committees are to be open to the public and interested persons shall be permitted to appear before and file statements with the committees. Section 10(d) provides, however, that Sections 10(a)(1) and (3) are *not* to apply to any such meeting if the President or the head of the agency determines that the meeting is concerned with matters listed in Section 552(b) of Title 5, referred to above. Section 10(d) also provides, however, that if such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities, consistent with the policy of Section 552(b) of Title V. Thus, even as to meetings of the Advisory Committee for Trade Negotiations, an executive order could possibly be issued directing that certain of its meetings were not to be open to the public and that interested persons were not free to attend these meetings.¹⁶¹ Furthermore, Section 10(b) of the Federal Advisory Committee Act requires that subject to Section 552 of Title 5, records, reports and minutes of the advisory committees be open to public inspection. Section 10(c) requires that detailed minutes of each meeting of each advisory committee be kept and that they contain a complete and accurate description of matters discussed and conclusions reached.

Several important points in respect to Section 135 and the Federal Advisory Committee Act should be noted. Since the provisions of the Federal Advisory Committee Act are to apply to the Advisory Committee for Trade Negotiations¹⁶² it surely would be unwise, in the absence of a protective executive order, for that committee to consider any matters, the disclosure of which would compromise the negotiating objectives or bargaining positions of the United States in the multilateral trade negotiations because its meetings are open to the public and the minutes of its meetings and documents submitted to this committee are required to be furnished to the public. Furthermore, as indicated above, even if an Executive Order were to be issued, it seems possible that a court would find that Congress had impliedly removed the general power of the President or his designee

¹⁶¹ *But cf.* *Nader v. Dunlop*, 370 F. Supp. 177 (D.D.C. 1973). In this case the court held that the Cost of Living Council could not by Executive order close all or substantially all of its meetings to the public.

Furthermore, the fact that the Trade Act specifically provides that the Federal Advisory Committee Act *should* apply to the Advisory Committee for Trade Negotiation may well be considered to prevent the President or his designee from issuing an Executive Order providing for confidentiality.

¹⁶² Trade Act § 135(f)(1).

under Section 10(d) of the Federal Advisory Committee Act to make exceptions to this situation by Executive Order.

The exception provided in Section 135(f) in connection with general policy advisory committees and product sector advisory committees applies only to *meetings* of these committees. Thus it would be unwise for these committees to act by letters since they might not fall within the exception. Furthermore, the exception does *not* mention Section 13 of the Federal Advisory Committee Act which provides that subject to Section 552 of Title 5, the Director of the Office of Management and Budget shall provide eight copies of each report prepared by an advisory committee to the Library of Congress, and when appropriate, "background papers prepared by consultants." However, Section 552(b)(3) provides that Section 552 shall not apply to matters that are "specifically exempted from disclosure by statute." Probably a court would hold that in the light of Section 552(b)(3), Section 13 would not be applicable to the reports of these committees, at least as to those portions of the reports dealing with the negotiating objectives or bargaining positions noted in the exception to Section 135(f) of the Trade Act.

Section 135(g)(1)(A) and (B) of the Trade Act deals with information submitted in confidence by the private sector. Section 552(b)(4) of Title V provides that that Section shall not apply to trade secrets and commercial or financial information obtained from a person and privileged or confidential. The effect of Section 135(g)(1)(A) and (B) is that "trade secrets and commercial or financial information which is privileged or confidential" submitted in confidence by the private sector is to be disclosed only to officers and employees of the United States designated by the STR, to certain members of Congress and to certain members of the staffs of the two congressional committees concerned, and *not* to any of the advisory committees. "Other information" submitted in confidence by the private sector is to be disclosed to the persons described above and to the appropriate advisory committees.

It should be noted that Section 552(b)(4) provides that that Section does not apply to matters that are "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The quoted language is almost identical with that contained in Section 135(g)(1)(A), and the effect of this appears to be that "other" information submitted in confidence by the private sector is *not* within the exemption of Section 552(b)(4). Thus, any such "other" information submitted in confidence by the private sector and presented, either by the private sector or by officials or employees

of the United States, to the Advisory Committee for Trade Negotiations seems to be subject to the full disclosure provisions of the Federal Advisory Committee Act. The provisions of Section 135(f)(2) do not apply to this committee, and the information is not within the exemption of Section 552(b)(4). Accordingly, it would seem advisable that members of the private sector submit such "other" confidential information only to the general policy advisory committees or to the product sector advisory committees or to officials or employees of the United States, with the understanding that such information will not be passed on to the Advisory Committee for Trade Negotiations. In view of the foregoing situation, the private sector may be tempted to characterize all or most of the information submitted by it in confidence as either "trade secrets" or as "commercial or financial information which is privileged and confidential," to the maximum extent that these characterizations may reasonably be employed; unfortunately, the effect of this designation would be to make it unavailable to the advisory committee concerned.

Section 135(g)(2) provides that information submitted in confidence by officers or employees of the United States to *any* of the advisory committees established under Section 135(b) and (c), including the Advisory Committee for Trade Negotiations, shall not be disclosed, except as provided in rules issued by the STR, and the Secretary of Labor, Commerce or Agriculture, as appropriate, after consultation with the policy advisory committees and the product sector committees. The Section also provides, however, that the rules to be established shall, to the maximum extent feasible, permit "meaningful consultation by members of the advisory committees with persons affected by the proposed trade agreements." The STR is to inform the advisory committees of significant issues and developments, both before and during negotiations. Furthermore, although the STR is not bound by the advice or recommendations of the advisory committees, the STR is to inform the committees "of failures to accept such advice or recommendations," and the President is required to include in his annual report to Congress a report of the STR stating the reasons for not accepting the advice or recommendations.¹⁶³ Section 135(j) also directs the President, entirely apart from the advisory committees, to provide an opportunity for informal

¹⁶³ This provision of the Trade Act is generally consistent with the more general requirement set forth in the Federal Advisory Committee Act § 6 (Supp. IV 1975), which requires the President to inform Congress stating "his proposals for action or his reasons for inaction, with respect to the recommendation contained in the public report" of the advisory committee in question.

submission, on a confidential basis by interested parties, of data and policy recommendations.

In summary, it can be said that if the STR and his staff fully implement the provisions of this Chapter, they will no doubt receive a torrent of advice and information from many diverse and conflicting sources. It is to be devoutly hoped that after complying with these elaborate provisions, the STR and his staff will have sufficient time and opportunity left to digest the advice and information furnished to them, to develop coherent, logical and effective negotiating objectives, and to establish the methods by which these objectives are to be pursued.¹⁶⁴

Chapter 4. Office of the Special Representative for Trade Negotiations

Under the Trade Act, the STR will continue to have the same rank (ambassador extraordinary and plenipotentiary) as under the 1962 Act. However, Congress expanded substantially the other provisions of the 1962 Act with respect to his position, organization, and responsibilities, as follows:

- (a) *Office of STR*: the STR will be the head of the office of the STR. That office is established by the Trade Act as a part of the Executive Office of the President. (Sec. 141(a))¹⁶⁵
- (b) *Two Deputy STR's*: the STR is to have two Deputy STR's, each having the rank of ambassador. The STR and his two Deputies are to be appointed by the President, with the advice and consent of the Senate. (Section 141(b)(1) and (2)).
- (c) *Responsibilities*: Under the 1962 Act, the only responsibilities especially assigned to the STR was to act as the chief representative of the United States in negotiations under the Trade Agreement subchapter of that act and to serve as chief of the interagency organization established under 19 U.S.C.A. 1872. Under the Trade Act, the STR retains these responsibilities, but new responsibilities are added by the Trade Act, and

¹⁶⁴ Most of these advisory committees have already been established, with notice of their appointment appearing in the *Federal Register*, but the top advisory committee, the "Advisory Committee for Trade Negotiations" had not been selected as of August 15, 1975.

¹⁶⁵ See Exec. Order No. 11, 846, 40 Fed. Reg. 14291 (1975), setting out the responsibilities and authorities of the STR and creating the Trade Policy Committee, the interagency committee provided for in § 242 of the 1962 Act as amended by § 602(b) of the Trade Act, *supra* note 1.

he is now to have direct relations with Congress, as well as with the President. His chief responsibilities are:¹⁶⁶

- (i) acts as chief representative of the United States for each trade negotiation under Title I of the Trade Act (which encompasses the first seven chapters of the Trade Act) and under Section 301 of the Trade Act (which deals with actions to be taken to provide relief from injury caused by import competition).
- (ii) Reports directly to, and is responsible to, the President and Congress with respect to trade programs under the 1962 Act, the Trade Act, and Section 350 of the Tariff Act of 1930.¹⁶⁷
- (iii) Advises the President and Congress with respect to NTB's, international commodity agreements, and other matters which are related to the trade agreements, and
- (iv) Makes reports to Congress with respect to the matters described in paragraphs (i) and (ii) above.

The objective of Congress in making these changes is clearly stated by the HWMC Report:

[Y]our committee, in establishing the Office of the Special Trade Representative, is reaffirming its belief that a strong and independent office, headed by a Government official reporting directly to the President and responsible to the Congress, is the best means of assuring that in trade policy matters the United States is speaking with one strong voice on behalf of the executive branch and that positions taken accurately reflect the intent of Congress.¹⁶⁸

The amendments in respect to the position and responsibilities of the STR, like those in respect of the Commission, show the desire of the Congress to obtain a more direct supervisory position in relation to the trade agreements program than it has previously had.

¹⁶⁶ Exec. Order No. 11,846, 40 Fed. Reg. 14291 (1975), sets out in much greater detail the responsibilities of the STR. A review of that order is desirable (a) as establishing the many tasks to be performed by the STR and (b) as a cross-study of the wide range of subjects dealt with by the Trade Act.

¹⁶⁷ 19 U.S.C. § 1351 (1971).

¹⁶⁸ HWMC REPORT, *supra* note 21, at 40.

Chapter 5: Congressional Procedures with respect to Presidential Actions

In discussing Section 102 of the Trade Act, it was pointed out that that Section provided that any trade agreement dealing with NTM's would take effect only if an "implementing bill" is enacted into law. As pointed out in the earlier discussion, the Administration Proposal had requested broad authority in regard to NTM's, and had also recommended that the Trade Act permit a trade agreement dealing with NTM's to go into effect unless vetoed by either house of Congress within a given period. The Administration supported this request by arguing that our trading partners would be unwilling to enter into prolonged negotiations with the United States in regard to NTM's if they could reasonably expect (a) that Congress would insist, as a condition of its approval, upon a large number of amendments in a trade agreement already negotiated by the STR, and/or (b) that the consideration and approval of any such trade agreement by the United States Congress would mean very substantial delay. The Administration's "veto" proposal was an effort to meet both of these points.

The House went along with the "veto" approach contained in the Administration Proposal, but the Senate considered that this approach would constitute an improper delegation of legislative authority by Congress. However, Section 151 of the Trade Act does attempt to protect against any effort to amend the proposed trade agreement by Congress, and to assure that both Houses of Congress will take action upon the proposed implementing bill within a specified period of time.¹⁶⁹ Section 151 also deals with congressional action in regard to commercial agreements with countries not currently receiving non-discriminatory treatment.¹⁷⁰

Section 152 deals with any congressional resolution disapproving the action taken by the President in regard to import relief from injury caused by import competition or disapproving actions taken by the President in response to foreign restrictive trade practices or export subsidies if these actions are taken against any foreign country *other* than the country improving the restrictive trade practice or granting the export subsidies.

¹⁶⁹ A somewhat similar provision was included in one of the earlier trade agreement acts. Act of Aug. 20, 1958, Pub. L. 85-686, § 6, 72 Stat. 676 (1958). Bills or resolutions which are given the benefit of this "special handling" are sometimes called "procedurally privileged."

¹⁷⁰ This subject is dealt with in detail in Title IV of the Trade Act, *supra* note 1.

Finally, Section 153 deals with any congressional resolution relating to the extension of the waiver authority granted to the President under Section 402 of the Trade Act dealing with trade relations with countries not currently receiving nondiscriminatory treatment. The President is granted authority¹⁷¹ to waive, during the period of eighteen months beginning on the date of enactment of the Trade Act, certain provisions of the Trade Act in relation to the countries specified above; but if he wishes to extend the waiver beyond this period, the extension of the waiver must be submitted to Congress for approval.¹⁷²

Chapter 6. Congressional Liaison and Reports

Section 243 of the 1962 Act provided that the President should appoint, upon the recommendation of the respective presiding officer of each House of Congress, two members of the House Ways and Means Committee and two members of the Senate Finance Committee, who shall be accredited as members of the United States delegation to the negotiations. The Administration Proposal would have retained this Section in effect.¹⁷³ Congress, however, wished to expand the number of members and clarify their role.

Section 161 of the Trade Act provides that the number of Congressional advisors be expanded from four to ten, five from each of the committees above noted, who are to be accredited by the President, upon the recommendation of the presiding officer of each House, as "official advisors to the United States delegation to international conferences, meetings and negotiation sessions relating to trade agreements."¹⁷⁴ The STR is required to keep each official advisor currently informed as to U.S. negotiating objectives, status of negotiations, and of any proposed changes in domestic law which may be recommended to Congress to carry out the trade agreements. The chairman of each of these two committees may designate additional members of the committee and of its staff who shall have access to the information provided to the official advisors.

Section 162 requires the President to transmit to each House of

¹⁷¹ Trade Act, *supra* note 1, § 402(c)(1).

¹⁷² *Id.* § 402(d).

¹⁷³ No specific mention is made in the Administration Proposal to this § 243 but § 706 of the Administration Proposal (relative to other laws) would not have repealed or amended § 243, thus leaving it in effect.

¹⁷⁴ This wording does not clearly indicate whether the "official advisors" are to attend the negotiating sessions and other meetings, but the HWMC Report, indicates that it is expected that they will attend. HWMC REPORT, *supra* note 21, at 43.

Congress a copy of each trade agreement as soon as it comes into force, together with a statement¹⁷⁵ of his reasons for entering into the agreement, bearing in mind the advice furnished by the Commission, pursuant to Section 131 of the Trade Act. Furthermore, as under the 1962 Act, the President is required to submit an annual report to Congress in regard to the trade program. However, the list of subjects to be covered in this report under Section 163(a) of the Trade Act is much more extensive and detailed than the list set forth in Section 402 of the 1962 Act, again showing the desire of Congress to be kept more completely informed than in the past in regard to the foreign trade programs and agreements. Finally, the Commission is to make a "factual" report annually on the operation of the Trade Agreements Program (This is a carry-over provision from the 1962 Act, Section 402).¹⁷⁶

*Chapter 7. United States
International Trade Commission*

As previously indicated, the former Tariff Commission has been renamed "the United States International Trade Commission." Furthermore, the Trade Act has expanded the functions of the Commission¹⁷⁷ and has strengthened the independence of the Commission by making the following changes:

¹⁷⁵ The SFC Report amplifies the information to be contained in the statement. The statement must:

- (i) give a factual discussion of the benefits of the agreement;
- (ii) give specific information regarding tariff and nontariff barriers which may remain in each product sector of manufacturing and in agriculture; and
- (iii) state the success in meeting negotiating objectives.

SFC REPORT, *supra* note 4, at 114. The HWMC Report stresses the oversight responsibilities of the House Ways and Means Committee, indicating that:

(a) the committee will hold frequent meetings of the full committee, to be briefed on the progress of negotiations and trade policy, by its own staff, by a representative of the executive branch, and by its official advisors;

(b) it desires that the President's annual report, referred to below, be furnished by March 31, and the Committee plans to hold public hearings on the report; and

(c) the Commission is to give priority to its own annual reports (see below).
HWMC REPORT, *supra* note 21 at 43.

¹⁷⁶ 19 U.S.C. § 1803(b) (1970).

¹⁷⁷ Examples of some of the added responsibilities of the Commission are:

(a) Substantially increased responsibility under § 337 of the Tariff Act of 1930 including (i) the determination of whether an unfair trade practice has been used in the course of importing articles and (ii) passing upon the validity of patents for purposes of determining whether to make relief available under § 341 of the Trade Act in the case of unfair import practices.

(a) *Chairman and Vice Chairman.* Previously, the President had designated the Chairman and Vice Chairman each year. Under the Trade Act, the most senior members become Chairman and Vice Chairman for a term of eighteen months (Section 172(b)(2)).

(b) *Term in office.* Previously, the commissioners were appointed for six year terms and might be reappointed. Under the Trade Act, the time of each incumbent commissioner is extended for varying periods, ranging from 18 months to 4 years, but no commissioner who has served for more than five years (excluding service before the enactment of the Trade Act) is eligible for reappointment. Commissioners appointed after the date of enactment of the Trade Act are to serve for a period of nine years, but those appointed to fill vacancies only serve out the predecessor's term. (Section 172(a)).

(c) *Budget.* The Commission is to have an independent budget, not subject to revision by the President (Section 175).

(d) *Representation in Court Proceedings and Authority to Apply for Subpoenas.* Under the amendments contained in the Trade Act, the Commission is to be represented in all judicial proceedings by attorneys who are employees of the Commission, or at the request of the Commission, by the Attorney General of the United States (Section 174) Similarly, the Commission is now permitted to apply directly for the issuance of subpoenas, rather than requesting the Attorney General to do so.

In addition to the above changes, the Trade Act requires that the report to be made annually by the Commission to Congress is to be

(b) Increased responsibility in regard to hearings under the Anti-dumping Act in regard to injury (§ 321).

(c) Responsibility to inquire into damage to industry resulting from bounties or grants when the goods admitted are free of regular customs duties (§ 322).

(d) Responsibility in regard to import relief hearings (§ 201). The Commission had somewhat the same responsibility under the 1962 Act, but the fact that under the Trade Act, it will be much easier to establish a case that justifies import relief will make the Commission's task vastly more important. Many more cases will be brought, and it appears that it will be up to the Commission to determine whether adjustment assistance will provide sufficient relief, or whether to recommend that administrative import relief be given.

(e) Monitoring of East-West Trade (§ 410). Trade Act, *supra* note 1.

expanded so as to list all votes taken by the Commission during the year, showing those voting in the affirmative, those in the negative, and those not voting.¹⁷⁸

Finally, in an effort to increase the prestige of the Commission and aid in attracting able individuals, the positions of the members of the Commission and that of its Chairman were moved to a higher level on the Executive Schedule.

¹⁷⁸ The Senate-passed version of the bill required that the number of members of the Commission be increased from six to seven, one reason given for the increase being that in the recent past, the votes in the Commission had frequently resulted in a tie. This provision was deleted in conference, "with an understanding that the commissioners shall, to the maximum extent feasible, avoid tie votes." H.R. CONF. 1644, 93d Cong., 3d Sess. 33 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7378.

LIST OF ABBREVIATIONS

Administration Proposal	Trade Bill of 1973 as forwarded by President Nixon to the Congress on April 10, 1973 with related documents
ASP	American Selling Price method of valuation
Commission	United States International Trade Commission
GATT	General Agreement on Tariffs and Trade
HWMC Report	Report of the Committee on Ways and Means of the House of Representatives on the Trade Act
MTN	Multilateral trade negotiations
NTM's	Nontariff barriers to or dis- tortions of international trade
OPEC	Organization of Oil Exporting Countries
SFC Report	Report of the Committee on Finance of the Senate on the Trade Act
STR	Special Trade Representative of the United States
the Trade Act	Trade Act of 1974
U.A.	Units of Account
VAT	Value Added Tax
1962 Act	Trade Expansion Act of 1962

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