

MTN STUDIES

6

PART 1.

Agreements Being Negotiated at the Multilateral Trade Negotiations in Geneva—U.S. International Trade Commission Investigation No. 332-101

Analysis of Nontariff Agreements
Introduction and Overview of Legal Issues
Subsidies, Countervailing Duty Measures Agreement

A Report Prepared at the Request of the
COMMITTEE ON FINANCE
UNITED STATES SENATE
RUSSELL B. LONG, *Chairman*

SUBCOMMITTEE ON INTERNATIONAL TRADE
ABRAHAM RIBICOFF, *Chairman*



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UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20438

JUN 15 1979

Honorable Russell B. Long
Chairman, Committee on Finance
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is in response to your request of August 9, 1978, with respect to the impact upon the U.S. economy of the implementation of the tariff and nontariff agreements negotiated at the Multilateral Trade Negotiations (MTN). Specifically, you requested the Commission to--

- I. Analyze MTN nontariff measure (NTM) codes and agreements to determine the domestic industrial and agricultural sectors which would be significantly affected by each NTM code.
- II. Determine the overall effect of NTM codes and agreements on certain trade-sensitive industrial and agricultural sectors.
- III. Determine the probable economic effects on U.S. industry, labor, and consumers as a result of: (a) reduction or modification of U.S. rates of duty and (b) reduction or modification of foreign rates of duty made by MTN participants.

The results of the Commission's investigation on the MTN agreements and its advice as to the probable economic effects of the implementation of these agreements are contained in a series of report volumes submitted herewith. These reports are the official Commission documents and supersede the staff draft papers submitted to the Committee staffs during February 1979.

It is the Commission's understanding that the Committee may be considering the publication of these reports. Therefore, it should be pointed out that in the interest of providing the Committee with the most comprehensive and meaningful analysis and probable effects advice, report volumes prepared for parts II and III of the investigation contain business confidential material received under a pledge of confidentiality made to

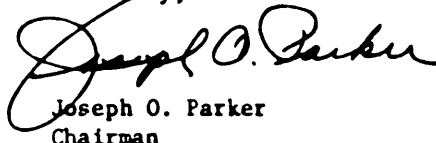
the business sources providing it. Should the Committee require non-confidential versions of these reports, the Commission would be happy to provide them.

The Commission's report volumes do not contain coverage of (1) the Arrangement Regarding Bovine Meat or (2) commercial counterfeiting, a topic on which no final MTN agreement was developed. The Arrangement Regarding Bovine Meat establishes an information and consultation mechanism to monitor the world market situation and to identify "possible solutions" to serious imbalances in the world market. Since the arrangement is purely informational and consultative, it has no economic consequences. Moreover, U.S. adherence would require no changes in U.S. statutes, regulations, or administrative procedures.

It should also be noted that the United States has negotiated a series of bilateral arrangements with supplying countries which are not a part of the Arrangement Regarding Bovine Meat. These are discussed in the Commission's Industry/Agriculture Sector Analysis.

Please continue to call on us whenever we can be of assistance to you.

Sincerely,



Joseph O. Parker
Chairman

Enclosure

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FOREWORD

This document represents legal analysis of draft agreements negotiated at the Multilateral Trade Negotiations in Geneva under the auspices of the General Agreement on Tariffs and Trade. It was prepared as part of an investigation requested by the Senate Committee on Finance and the House of Representatives Committee on Ways and Means and instituted by the Commission on September 1, 1978 (Investigation No. 332-101, 43 F.R. 40935, of Wednesday, September 13, 1978), as to the effect on U.S. trade and industry of the adoption of agreements to be concluded in Geneva.

This study is being transmitted in accordance with a request by the Finance Committee in April 1979.

As noted throughout the reports some of the agreements are incomplete and the status of signing of all of them remains open to the questions of whether domestic legislatures (including the United States Congress) will approve all or any of them and whether additional signatories will appear. At present, we are informed by the Administration that a proces-verbal has been initialed by 24 countries. It provides as follows:

PROCES-VERBAL

The Chairman has drawn up the following text of a Proces-Verbal on the basis of discussions with delegations.

1. Having participated in the Multilateral Trade Negotiations, the representatives of the Government and the EEC Commission agree that the texts listed below in respect of which they have signed the present Proces-Verbal embody the results of their negotiations. They acknowledge that the texts may be subject to rectifications of a purely formal character that do not affect the substance or meaning of the texts in any way except as otherwise indicated in the text on tariff negotiations.
2. These representatives agree that by signing the present Proces-Verbal they indicate their intention to submit the relevant texts or legal instruments to be formulated on the basis of the said texts for the consideration of their respective authorities with a view to seeking approval of, or other decisions on, the relevant texts or instruments in accordance with appropriate procedures in their respective countries. Representatives may indicate that their signature evidences their intention to seek approval or decision.
3. Representatives may indicate that their signature to the present Proces-Verbal relates only to certain of the texts listed below which they will specify.

4. It is appreciated that some delegations participating in the Multilateral Trade Negotiations may not be in a position to sign the present Proces-Verbal immediately in relation to all or certain of the texts listed below. They are invited to do so at their earliest convenience.

5. It is recognized that representatives of least-developed countries participating in the multilateral trade negotiations may need time to examine the results of the negotiations in the light of paragraph 6 of the Tokyo Declaration before they can sign the Proces-Verbal.

6. The representatives signing the present Proces-Verbal agree that the work on safeguards referred to in paragraph 3(d) of the Tokyo Declaration should be continued within the framework and in terms of that Declaration as a matter of urgency, taking into account the work already done, with the objective of reaching agreement before 15 July 1979.

7. Texts (k) and (l) are the result of negotiations only amongst the representatives of certain governments identified in the documents.

8. The representatives have taken note of the statements made in relation to various texts at the TMC meeting of 11 April 1979 as contained in MTN/P/5.

Texts

- | | |
|---|--|
| (a) Agreement on Technical Barriers to Trade | MTN/WTM/W/192/Rev.5 |
| (b) Agreement on Government Procurement | MTN/WTM/W/211/Rev.2 and
Add.1 |
| (c) Agreement on Interpretation and Application
of Articles VI, XVI and XXIII of the
General Agreement on Tariffs and Trade | MTN/WTM/W/236 and Corr.1 |
| (d) Arrangement on Bovine Meat | Annex to MTN/ME/8 |
| (e) International Dairy Arrangement
(i)
or
(ii) | MTN/DP/8, Annexes A and B

MTN/DP/8, Annex C |
| (f) Agreement on Implementation of Article VII
of the General Agreement on Tariffs and
Trade
(i)
or
(ii) | MTN/WTM/W/229/Rev.1

MTN/WTM/W/229/Rev.1
as amended by
MTN/WTM/W/222/Rev.1 |

(g) Agreement on Import Licensing Procedures	MTN/WTM/W/231/Rev.2
(h) Multilateral Agricultural Framework	MTN/27
(i) Texts prepared by Group "Framework"	MTN/FR/W/20/Rev.2
(j) Tariff Negotiations	MTN/26/Rev.1
(k) Agreement on Trade in Civil Aircraft prepared by a number of delegations	MTN/W/38, Corr.1 and Add.1
(l) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade prepared by a number of delegations	
(i)	MTN/WTM/W/232, Add.1/ Rev.1 Add.2 and Corr.1
or	
(ii)	MTN/WTM/W/232, Add.1/ Rev.1 Add.2 and Corr.1 as amended by MTN/WTM/W/241/Rev.1

COUNTRY X

<u>Representative</u>	<u>In relation to</u>
Representative A	All texts

COUNTRY Y

<u>Representative</u>	<u>In relation to</u>
Representative B	Texts (a), (c)

The attachments to the proces verbal have been initialed as follows:

(A) Standards: U.S., EC-9*, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain, Hungary, Czechoslovakia, Bulgaria.

(B) Government Procurement: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, and Argentina (with reservation).

*"EC-9" is the European Community.

- (C) Subsidies/CVD: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina (with reservation), Spain (with reservation), Hungary, and Bulgaria.
- (D) Meat: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Hungary, and Bulgaria.
- (E) Dairy: DC version* was initialled by U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain (with reservation), and Bulgaria. Hungary initialled dairy with no designation whether it was DC or LDC version. There were no known signatories to the LDC version.
- (F) Customs Valuation: DC version was initialled by U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, and Bulgaria. Argentina and Spain initialled the LDC version. Hungary and Czechoslovakia initialled the valuation attachment with no indication whether it was DC or LDC version.
- (G) Licensing: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain (with reservation), Hungary, and Bulgaria.
- (H) Agriculture Framework: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain, Hungary, Czechoslovakia.
- (I) Group Framework: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain, Hungary and Czechoslovakia.
- (J) Tariff Negotiations: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Hungary, Czechoslovakia, and Bulgaria.
- (K) Civil Aircraft: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, and Switzerland.
- (L) Antidumping: DC version was initialled by U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, and Spain. Hungary and Czechoslovakia initialled the antidumping attachment without designating DC or LDC version. There were no known signatories to the LDC version.

*"DC version" is the developed country version of the Arrangement on Dairy.
 "LDC version" is the less developed country version.

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INTRODUCTION AND OVERVIEW OF LEGAL ISSUES

Purpose of This Study

The purpose of this 11-volume study is to present a legal analysis of the agreements negotiated at the 1974-79 Multilateral Trade Negotiations of the General Agreement on Tariffs and Trade (GATT), other than the agreements on changes in import duties. Since the committees of Congress have called upon the Commission to analyze "the effects on U.S. industrial and agricultural sectors of nontariff barrier agreements" (letter from Chairman Long to Commission Chairman Parker dated August 9, 1979), it was necessary first to undertake a legal analysis of the agreements. The Commission submits the legal analysis now both to support its economic studies and as a general service to the Congress.

The format of the legal study is, first, this "Introduction and Overview," and then 10 separate studies, one for each of the 10 groups of agreements negotiated by the Executive branch. The separate studies have a consistent format, which is as follows: an executive summary, an introduction, and a provision-by-provision legal analysis of the agreement at issue. 1/ The reader can find a legal discussion of any provision of these agreements by finding the provision in the table of contents of the volume in

1/ For certain of the studies, namely, customs valuation and agricultural products, an economic impact analysis has been completed and is incorporated therein.

this study relating to the agreement in question. The studies are intended to be used as reference documents in this way, not mainly as narrative papers.

The Introduction and Overview, besides introducing the study, discusses the overall legal and policy impact of the agreements upon the international system of trade regulation and upon existing United States laws.

Background

The current Tokyo round of Multilateral Trade Negotiations (MTN) resulted from a meeting of the trade ministers of about 100 countries in Tokyo in September 1973. The authority of the President to negotiate and, in some cases, to enter into and even to implement agreements, which had expired in 1967, 1/ was renewed in the Trade Act of 1974 (Public Law 93-618 (Jan. 3, 1975), 88 Stat. 1978-2076) in order to allow United States participation in the Tokyo round.

In August 1978, when it appeared likely that the end of these extraordinarily complex negotiations was in sight, the Finance Committee of the Senate and the Committee on Ways and Means of the House requested the Commission, pursuant to section 332 of the Tariff Act of 1930, 2/ to undertake several studies of the agreements then still under negotiation. 3/ One of the studies was to inform the Congress on the import and export trade impact

1/ The Trade Expansion Act of 1962, Pub. L. No. 87-794.

2/ Section 332 provides broadly for trade studies at the request of committees of the Congress, the Congress itself and the President by the Commission.

3/ Some agreements are still under negotiation -- see the "Status of the New Agreements," p. 5.

of the so-called non-tariff barrier agreements -- which we have taken to be those agreements other than import duties concession agreements -- negotiated at the Tokyo round. The Commission directed at the beginning of the study that its General Counsel's Office was to undertake to interpret the authentic texts for the Commission economic staff reporting to Congress. The result is this study. On January 4, 1979 (44 F.R. 1932), the President announced his intention to enter into several such agreements, and on April 12, 1979, a proces-verbal (see the Foreword) was in fact initialed by 24 countries, including the United States, concerning several such agreements.

This study can be useful in two functions now to be performed by the Congress. First, under the Trade Act of 1974, the President may proclaim new tariff rates negotiated at the Tokyo round, but as to the other agreements, he has no explicit Trade Act authority to give those agreements the effect of United States law. As to the latter, the Trade Act requires the President to submit an "implementing bill" that includes a statement of "administrative action proposed to implement" the agreements. Congress may not--under the Trade Act--amend the bill; it may only approve or disapprove it. Trade Act sections 102, 151.

While in a few cases an international agreement requires a more or less obvious change in domestic law if the agreement is to be accepted meaningfully, there are in many areas numerous implementation alternatives that the Executive branch considered in consultations that have occurred in the months since the President announced his intention to enter into the agreements. For example, there is the question of what domestic authorities are to do with respect to countries that export to the United States but did

not sign the agreements. While we do not have an administration implementing bill in hand as this study is being prepared (May 15, 1979), the Commission is generally aware of the consultation process and therefore these studies discuss implementation alternatives that appear to be under more or less active consideration.

Second, Congress has to decide whether to accept the agreements at all. The Trade Act was intended to enable United States negotiators to achieve the harmonization, reduction, or elimination of trade "barriers," as well as a reform of the General Agreement on Tariffs and Trade, the main international trade agreement of the United States. But the "barrier" agreements cannot even become an international obligation of the United States, much less work a change in domestic law, without the "approval" (to use the terms of the Trade Act) of the Congress. Since the agreements are both "barrier" and "reform" agreements for which it appears the Executive branch will seek approval, they require approval to have international effect.

In deciding whether these agreements should be approved, there are, of course, many issues relating to the specifics of the individual agreements, which we have dealt with in the separate studies. Approval is not, however, merely the sum of the pluses and minuses of the various provisions. The agreements are being offered as a "package," and the case must be examined that their whole is greater than the sum of their parts. Thus, some "overview" of the agreements is necessary.

As we will show, the existing General Agreement, which dates back to 1947, was itself a kind of trade "reform" agreement, with rules extending well beyond the tariff-reducing matters it is famous for. But the General

Agreement is not regarded as successful in these "nontariff" matters. In this Overview, we have described the present GATT system and analyzed the relationship between the new agreements and the existing General Agreement. It is left for the reader to conclude what effects disapproval or approval by the Congress would have, but we have expressed some of our own tentative conclusions as well. Our overview, which follows, is in two parts. The first discusses the agreements and the second discusses implementation of the agreements.

A Note on the Status of the New Agreements

At the time this study was prepared (May 15, 1979), the MTN was not completed, although most of the nontariff measures agreements that are the subject of this study were complete. We do not have a complete text of reservations. Further negotiations are expected in June or July of 1979.

Commission access to basic information on the negotiations, including instructions to delegations, informal drafts, reports of and to advisory committees, and the actual texts themselves (which are released in a series by the GATT Secretariat) has not always been smooth. Through close staff-level coordination with the Office of the Special Representative for Trade Negotiations (STR), we have timely received texts prepared by the GATT Secretariat. The Chairman of the Commission and Ambassador Wolff of STR worked out rules for Commission access to the advisory committees in November 1978. The Commission staff is an observer at Trade Policy Staff Committee meetings of STR. But the Commission has no regular—and certainly no large--staff at the U.S. mission to the MTN in Geneva. The result has been that the Commission's access to events occurring in these dynamic and complex negotiations is substantially delayed.

PART I

Legal Overview of the New Agreements

The "Nontariff measures agreements" or "codes" as GATT reform.

The MTN is concerned with two categories of subject matter, which are changes in (or elimination of) current duties on products imported into countries that are contracting parties to the General Agreement on Tariffs and Trade (the agreement is hereafter referred to as the "General Agreement," to distinguish it from the organization that arises out of the agreement, which we call "GATT"); and agreements on other subjects. This study concerns the agreements on other subjects.

A general characterization of these "other" agreements is almost impossible because the subjects covered are many; even the phrase "nontariff" is misleading, since some of the agreements deal with matters directly related to duties, such as the basis upon which duties are calculated. 1/ The basic

1/ In 1976, the staff of the Senate Committee on Finance prepared a report that said the following regarding nontariff measures:

In very general terms, nontariff measures are those policies of national governments which are intended to protect domestic markets from imports through nontariff means, for example, quotas, and onerous customs procedures. In addition, nontariff measures include domestic policies which, intentionally or unintentionally, result in the cost of national programs being imposed on foreign nations or foreign persons rather than on the citizens of government of the country establishing the program. Examples of the latter kind of nontariff measure are export subsidies, regional development incentive programs, government procurement restrictions, product standards, environmental standards, and packaging and labeling requirements. The attempt to harmonize all these policies, or at least establish rules for the implementation of policies in the future so that their impact on international trade will be taken into consideration, is at the core of the current Multinational Trade Negotiations

(footnote continued)

idea of these agreements is to improve upon the existing system of international trade relations other than by lowering tariffs. The topics of the agreements reflect specific subjects of concern that have become evident during the operation of the General Agreement, 1/ which entered into force in

(footnote continued)

"United States International Trade Policy and the Trade Act of 1974," Committee Print dated January 29, 1974 (94th Cong., 2d sess.) (Hereafter, "Senate Staff Report") at 15-16.

In a report of March 14, 1973, entitled "Customs Valuation" to the Committee on Finance of the Senate, the Tariff Commission reported as follows (at 122)--

The practice of some commentators on international trade is to label only the rate as a "tariff" barrier, and to regard the customs valuation standard as a "nontariff" barrier. The identification of the valuation standard as a "nontariff" barrier is rarely explained and is usually not well founded. Ambiguity and undue complexity in valuation standards can slow the determinations of the duty that is to be levied and impede customs clearance, but the complaints--as with the ASP system--are usually most concerned with the impact of the value standard on the levels of duty assessed. It follows that for ad valorem duties, the "tariff" barrier inevitably is the combined effect of the rate times the customs value--whatever the collateral effects of the valuation system.

1/"During 1975, the Trade Negotiations Committee (TNC), the overall coordinating body for the GATT negotiations, created six working groups to coordinate various aspects of the negotiations. The six groups have spent the past year collecting and analyzing data, sharpening issues, and generally performing the technical work which must precede substantive negotiations. The groups and their responsibilities are briefly summarized below:

1. Nontariff Measures.--The Nontariff Measures (NTM) Group has worked to identify and select significant nontariff barriers to international trade appropriate for negotiation. The barriers which are selected will be considered by four NTM subgroups:
 - (a) A quantitative restrictions and import licensing subgroup which will consider quantitative restrictions and import licensing procedures; (b) a technical barriers to trade subgroup which will consider standards, packaging and labeling, and marks of origin; (c) a customs subgroup which will consider customs valuation, import documents, customs nomenclature, and customs procedures; and (d) a subsidies subgroup which will consider the related issues of subsidies and countervailing duties.

(footnote continued)

1947. It is therefore almost impossible to understand the agreements fully on their own; their provisions take on meaning only when we contrast and compare them with existing law, international agreement, and actual practice.

Throughout this study, we have attempted to identify the historical roots of the concern that led to negotiations on the subjects of these agreements.

Since virtually all the international trade obligations of the United States with respect to non-Communist countries are contained in the General Agreement, 1/ the new agreements represent an attempt mainly to improve upon practice under the General Agreement. In fact, the General Agreement has a provision dealing with virtually all the subjects covered by

(footnote continued)

2. Tropical Products Group.-The Tropical Products Group was established to carry out negotiations on products grown in tropical climates which are primarily of interest to less developed countries, for example, cocoa, coffee, tea, and bananas . . .
3. Tariffs Group . . .
4. Agriculture Group . . .
5. Sectors Group . . .
6. Safeguards Group.-The Safeguards Group is concerned with measures taken by countries to protect their economies from imports which cause market disruption or injury to industries by import competition."
 . . . Senate Staff Report at 16-18.

1/ 55 UNTS 194, signed at Geneva October 30, 1947.

This agreement now consists of 38 articles and three other parts: General annexes; schedules of tariff concessions that have been incorporated by reference in the agreement; and a series of subsidiary agreements relating to a variety of subjects that have been the subject of negotiation over the years. Article II:I provides "the Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement." Part I contains two articles, art. I, "General Most-Favoured-Nation Treatment," and art. II, "Schedules of Concessions." Under similar language in Article XXXIV, the annexes are made part of the Agreement. The United States concessions schedule is "XX." One important trade obligation of the United States that appears both in the agreement and elsewhere is "most-favored-nation treatment" as to some subjects, which occurs in treaties of the United States as well as the General Agreement.

the new agreements. 1/ Obviously, therefore, one way to evaluate the economic effect of the new agreements is to question whether economic affairs will change as a result of U.S. approval of the agreements.

1/ Part II of the General Agreement (Arts. III-XXIII) contains most of the nontariff barrier provisions. The titles of the articles show the topics covered:

Article III	National Treatment on International Taxation and Regulation
Article IV	Special Provisions relating to Cinematograph Films
Article V	Freedom of Transit
Article VI	Antidumping and Countervailing Duties
Article VII	Valuation for Customs Purposes
Article VIII	Fees and Formalities connected with Importation and Exportation
Article IX	Marks of Origin
Article X	Publication and Administration of Trade Regulations
Article XI	General Elimination of Quantitative Restrictions
Article XII	Restrictions to Safeguard the Balance of Payments
Article XIII	Nondiscriminatory Administration of Quantitative Restrictions
Article XIV	Exceptions to the Rule of Nondiscrimination
Article XV	Exchange Arrangements
Article XVI	Subsidies
Article XVII	State Trading Enterprises
Article XVIII	Governmental Assistance to Economic Development
Article XIX	Emergency Action on Imports of Particular Products
Article XX	General Exceptions
Article XXI	Security Exceptions
Article XXII	Consultation
Article XXIII	Nullification or Impairment

The original Executive branch provision-by-provision analysis of the General Agreement described Part II as "Non-Tariff Trade Barriers." The basic principles enunciated in these provisions virtually occupy the field of nontariff barriers. (Department of State Analysis, at 196-98; quoted matter in this footnote is from this source.)

(1) National treatment. Internal commodity taxes and "regulations" are required by Article III to be applied to imported articles the same as to domestically-produced articles, so that, supposedly ". . . any protection given to the form of measures applied openly against imports."

(footnote continued)

Our 10 separate legal studies represent the most apparent way to attack this question, by detailed analysis of the new agreements and comparison with existing General Agreement provisions and practice. We have not attempted to set down overall conclusions as a result of this detailed analysis, because we never had complete information.

(footnote continued)

(2) Freedom of transit. Article V prohibits special transit duties and requires regulations of mere transit to be reasonable.

(3) Limited Use of "Unfair" trade practice measures. Article VI recognizes the need for antidumping and countervailing duties to offset export dumping and subsidization, but lays down rules confining the duties to circumstances where they are justified and to formulas for maximum amounts. Article XVI, moreover, provides that if a subsidy increases exports or reduces imports of a product, and it thereby causes "serious prejudice" to the trade of a CONTRACTING PARTY (the technically accurate name of a signatory to the General Agreement), then the two states should discuss the matter.

(4) Fair Methods of valuation. Since valuing goods is the basis of all ad valorem rates of duty, Article VII regulates valuation, providing principles to avoid arbitrariness and induce predictability.

(5) Fair administration of formalities. Supplementary customs charges and customs formalities are in some cases barred and in others discouraged except as necessary in Article VIII. An example of such charges is a requirement to pay for special services such as inspection. Article IX "provides for nondiscriminatory treatment in the application of requirements for the marking of imported products to indicate their origin," and for cooperation in reasonable enforcement of such regulations. Article X "is designed to assure full publicity and fair administration in the matter of laws and regulations affecting foreign trade." Parties are specifically permitted to undertake many kinds of regulation, such as regulation necessary to protect morals, health, and so on, provided such regulations are not undertaken as "a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction, or international trade." Article XX.

(6) Limited Use of Quotas. A quota is an official act prescribing the maximum quantity of an article that may be imported or exported during a specified period. Articles XI-XV "represent the establishment of an agreed policy . . . to avoid the use of quotas for normal protective purposes and to eliminate their use for other, extraordinary purposes (such as to safeguard the balance-of-payments) when the conditions making them necessary have ceased to exist."

As this study progressed, however, it became evident that there were strands running through all these agreements of both problems and solutions that were common. These strands also have antecedents in the General Agreement and ought to be considered as a separate subject, which might be called GATT reform, in deciding on the economic impact of the agreements.

The first strand is that each new agreement contains provisions for resolution of disputes that arise under that agreement. This is remarkable, since the General Agreement has an integral disputes resolution process; one would think from the creation of new disputes settlement provisions that the existing GATT system was not working satisfactorily, and, indeed, many in the United States feel that way. But, in fact, the new provisions work only a few changes in the existing system. We have therefore asked ourselves whether and to what extent disputes resolution under the new agreements will be any more satisfactory than under the General Agreement.

Second, most of the new agreements contain fairly detailed requirements of procedural regularity (called "transparency," a term that suggests governments acting openly), notwithstanding that national treatment and procedural regularity are also already provided for to some extent in the General Agreement. Article III of the General Agreement ("National Treatment") provides for "treatment no less favourable than that accorded to like products of national origin. . . ." Article X of the General Agreement provides for publication of regulations and impartial administration of laws. Again, the question is whether new agreement provisions will improve the operation of the existing principles.

Finally, the new agreements are apparently to be signed by fewer than all the contracting parties to the General Agreement, and they are not to be offered as amendments to the General Agreement or a waiver from it. Given that the General Agreement -- and, in fact, United States law -- contain a principle of extending certain benefits obtained by one GATT member to all ("most-favored-nation treatment"), will limited signing of the new agreement derogate from this principle, and with what overall effect?

We discuss these three questions in the following pages.

1. Disputes Resolution.

Disputes resolution refers to the process by which questions that arise during the operation of an international agreement are resolved. Disputes resolution is important because it establishes the ultimate remedies available in the event that the agreement is not working the way the parties thought it would. Every new agreement negotiated at the MTN except the so-called Framework Agreements, which are supposed to improve existing GATT structures including disputes resolution, contains its own separate disputes resolution procedure. This suggests the importance of the subject.

There exists no simple structure under the General Agreement into which disputes may be channeled; rather, it contains a multitude of provisions for consultation and/or adjustment of concessions which are related to specific obligations. The primary disputes resolution mechanism, however, and the focus of both Congressional concern and the Framework Agreements (volume 10), is the process afforded by articles XXII and XXIII. These provisions are discussed below more fully in our report on the Framework Agreements, but a brief description is given here, followed by a comparison of the dispute settlement provisions found in the other codes.

A primary goal expressed throughout GATT is the settlement of disputes between the involved parties alone without resort to formal adjudicatory procedures. Thus, besides seventeen other obligations in the General Agreement to consult in specific circumstances, articles XXII and XXIII provide for consultations affecting the operation of the Agreement as a whole. Article XXII requires that "sympathetic consideration" and an opportunity to consult be afforded by any party to another "with respect to any matter affecting the operation of this Agreement." Article XXIII is more specific; it provides first for consultations where a party believes a benefit to which it is entitled is nullified or impaired, or an objective of the Agreement is being impeded, as a result of conduct by another party or "the existence of any other situation." Failing settlement in these consultations, the complaining party may appeal to the Contracting Parties for an investigation leading to appropriate recommendations and rulings, possibly including suspension of obligations. ^{1/} Consultations under article XXII fulfill the article XXIII consultation prerequisite to retaliation.

^{1/} The text of Article XXIII provides in full:

Article XXII

Nullification or Impairment

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

- (a) the failure of another contracting party to carry out its obligations under this Agreement, or
- (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- (c) the existence of any other situation,

(footnote continued)

There have been less than one hundred formal complaints tabled in the three decades of GATT; most were in the first fifteen years and in only one case has retaliation been authorized. ^{1/} The breakdown in the dispute settlement procedures has been attributed to many factors, including:

- (1) the opportunity for delay caused by faulty procedures and foot-dragging tactics;
- (2) inadequate personnel, resources, and fact-finding procedures;

(footnote continued)

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

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(c) of the Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate inter-governmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

^{1/} Netherlands v. United States, GATT, 1st Supp. BISD 32 (1953).

- (3) the uncertain role of the panels;
- (4) the lack of means to reconsider an erroneous decision;
- (5) the lack of definition for nullification and impairment;
- (6) the implementation of the procedures is too unstructured and subject to political manipulation;
- (7) countermeasures are ineffective, or worse, counterproductive in that a chain of retaliatory conduct may be initiated or the complainant may harm itself more by removal of concessions from the nation to which they are directed;
- (8) lack of definition of the types of issues for which dispute settlement procedures are appropriate; and
- (9) a fundamental change in the consensus of beliefs surrounding the structure and purpose of the Agreement. 1/

The current round of negotiations has not attempted to address these criticisms by introducing structural changes into the GATT. Rather, dispute settlement problems are approached in two ways -- by "solidifying" procedures through the Framework Agreement (that is, agreeing on a text that simply recites what is existing Article XXIII practice), and by constructing dispute settlement procedures in the individual codes tailored specifically to the problems likely to arise there.

Disputes resolution is a political matter, as evidenced by the fact that no rule, either in the new agreements or in the existing General Agreement, prevents two countries from entering into a settlement of a dispute that is itself contrary to the normative rules of the underlying agreement. In fact, under most of the new agreements, in order for disputes resolution to

1/ See Jackson, "The Crumbling Institutions of the World Trade System," 12 J. World Trade Law 93.

result in sanctions against a country (the sanctions are ordinarily the suspension in whole or in part of benefits accruing to the country under the agreement), there must be a decision or several decisions by a "Committee of Signatories" composed of the signatories of that particular agreement. The agreements do not generally state what vote is necessary for a committee to take action concerning an alleged violation (except procedural decisions, such as referring matters to panels of experts).

As an important signatory, the United States will occasionally have the political power at least to disallow settlements to take effect. It can perhaps use this power to protest settlements that embody principles contrary to the underlying rules of the agreement at issue. In this sense, the United States has some power to enforce the agreement. On the other hand, since the disputes resolution process is political, the United States will occasionally have to rely upon other countries to vote with the United States on issues arising under the agreements that are vital to United States interests. In the latter situation, there will be an incentive for the Executive branch of the United States Government to negotiate expedient settlements, because to prosecute formal dispute settlement to a conclusion may appear in any given case to risk the entire agreement. For these reasons, the real impact of these agreements upon international practice depends upon what might be called the political aspect of disputes resolution. The outcome of this process is difficult to predict, because the political basis for the new agreements is uncertain.

Two factors would seem to augur well for adherence to the rules created by the new agreements. First, the agreements are in the main, it can be said, as much an explanation and repetition of rules presently set forth in the General Agreement as they are new undertakings. This suggests to us that, to the extent existing provisions have been re-adopted, those provisions have some renewed vitality simply by virtue of the newness of these undertakings. Second, for the next several years, the facts of international trade are likely to have a rather close relationship to the understandings represented by the new agreements; whereas, after 8 or 10 years, the changes in commercial practices are likely to be great enough that these agreements will become progressively less relevant to events and, for that reason, less adhered to. Finally, it is also possible that the new agreements are so vague--there are many uncertainties in them and they are, after all, compromises--that they really represent not reinvigorated agreement but a serious watering-down of the General Agreement and, thereby, a poor basis for international discipline. In short, we are unable to say on the basis of legal analysis whether the disputes resolution process is at all likely to enforce the new agreements in any sense. It may, however, affect the ability of the United States to exercise its rights under Section 301 of the Trade Act of 1974.

The new agreements do institutionalize existing disputes resolution procedures. The ideas of expert panels and of time limits, now a matter of a somewhat undependable GATT practice, are in writing. Rights to procedure have been created that did not exist before. This at least limits procedural issues as obstacles to the disputes resolution process.

2. National Treatment and "Transparency."

National treatment is the concept that foreign goods receive treatment equal to that given domestically-produced goods. The General Agreement contains provisions that are supposed to provide guarantees of national treatment, 1/ but the Trade Act of 1974 -- as well as the legislative history of that statute -- is replete with the disappointment of the Congress on this subject. 2/

In effect, the United States extends many procedural rights to citizens of its trading partners without complete reciprocity. The requirements of the Fifth Amendment of the United States Constitution, which

1/ Article III.

2/ Section 103, entitled "Overall Negotiating Objective," provides --
The overall United States negotiating objective under section 101 and 102 shall be to obtain more open and equitable market access and the harmonization, reduction, or elimination of devices which distort trade or commerce. To the maximum extent feasible, the harmonization, reduction, or elimination of agricultural trade barriers and distortions shall be undertaken in conjunction with the harmonization, reduction, or elimination of industrial trade barriers and distortions.

The Senate report on the Trade Act contains this comment (among others) on the subject:

Standards -- that is, laws, regulations specifications and other requirements with respect to the properties or the manner, conditions, or circumstances under which products are produced or marketed -- may also be highly discriminatory. A classic example of a discriminatory standard involves a European organization called the European Committee for Coordination of Electrical Standardization (CENEL). As this arrangement developed it virtually excluded U.S. products from the European market. According to the Special Trade Representative, the CENEL Agreement affects \$1 billion in U.S. exports. The European Community is expanding its rules-of-origin requirements to cover many more products. IF diplomatic efforts and trade negotiations fail to bring about equity and reciprocity for U.S. commerce, the acts and barriers described above should be subject to retaliation. ("The Trade Act of 1974," S. Rep. 93-1298, 93d Cong., 2d Sess. (hereinafter, S. Rep. 93-1298) at 164.)

provides for due process before any person may be deprived of life, liberty or property, works so as to guarantee certain procedural minima to importers and aliens, such as a hearing, in judicial or quasi-judicial proceedings relating to the imports into the United States. 1/ Although most proceedings relating to importation are exempt from the Administrative Procedure Act, 2/ many proceedings of the United States that are open equally to procedures of imported products and domestically produced products involve rights extended equally to all persons, alien and citizen, such as notice, hearings, judicial review and so forth. Since reciprocity has been the political basis of United States trade policy since at least 1934, when the "reciprocal trade agreements program" began, this imbalance is a major deficiency of relations under the General Agreement. Again, the importance of the problem is reflected in the fact that most of the new agreements contain provisions for procedural regularity and openness.

1/ Henkin, Foreign Affairs and the Constitution (The Foundation Press, Inc., 1972) at 255-257.

2/ The Administrative Procedure Act (APA) appears at 5 U.S.C. 551, et seq. It provides for, among other things, certain procedures in "rule making," and in "adjudication" by agencies of the United States. The provisions on adjudication are applicable only as "required by statute to be determined on the record after opportunity for an agency hearing. . . ." Most United States statutes concerning importation contain no reference to the APA and are thus thought to be exempt from the adjudicatory requirements of it. The United States Antidumping Act, 1921, 19 U.S.C. 160(d)(3), is explicitly exempt from these provisions, while the unfair importation law, section 337 of the Tariff Act of 1930, is explicitly subject to these provisions, 19 U.S.C. 1337(c). The APA also applies to many actions of the United States that have an impact upon compliance with these new agreements, particularly where the government acts after importation. Government procurement and administration of standards are usually subject to the APA, for example. See, for example, 49 U.S.C. 1655 (general applicability of APA to Dept. of Transportation); 15 U.S.C. 1912(e) (APA procedures for bumper standards).

We have evaluated these procedural provisions in the individual studies to which each of them relates. Overall, there are at least two legal points worth mentioning. First, the new provisions (which are sometimes called provisions of "transparency" to suggest procedural openness) may reflect a reinvigoration of the existing obligations. They are so generally distributed throughout the negotiations that taken as a whole the package of new agreements can be said to represent a major undertaking of procedural regularity.

Second, however, it is not clear how "transparency" can be enforced. As we have said (p. 16), in most cases violation of one of these new agreements is not a basis for retaliation or other remedies -- nullification and impairment is the condition for that. So it is reasonable to ask how will "transparency" be enforced? Obviously, diplomatic consultation may be inadequate, especially where time is of the essence, because by the time procedural clarity is accomplished, business opportunities may have passed. Moreover, procedural regularity is not likely to be worth the political effort necessary to successful disputes resolution. In effect, whether reciprocity in procedural matters is restored by those agreements depends upon good faith implementation of these obligations.

3. Unconditional Most-Favored-Nation (MFN) Treatment versus Conditional Most-Favored-Nation Treatment.

To the extent the new codes derogate from the General Agreement, they present signatories with the difficulty of agreeing to do something that, if actually accomplished, may bring them into dispute resolution at the

GATT. 1/ There actually are several provisions of this nature. The most obvious would have been a selectivity provision in the Safeguards Code. This provision would have allowed discrimination in derogation of Article I of the General Agreement. Other possible points of conflict are as follows:

- (1) Permitting the use of foreign testing by signatories but not by nonsignatories under the Standards Code.
- (2) Applying an injury standard to signatories, but denying that benefit to nonsignatories of the Subsidy/Countervailing Duty code. 2/

This possibility by itself is probably not as serious as it sounds. We have no way of calculating the risk of a formal dispute arising out of a nonparty's objections to action consistent with a new code but in derogation of their rights under the General Agreement. The ultimate result of such process can, of course, be a suspension of concessions under Article XXIII.

Even if conditional MFN treatment does not result in a flurry of disputes at GATT, the overall impact of such limited agreements may be harmful to GATT, because less than all the membership gets the benefits. This is not necessarily harmful to the United States, however, if new organizations are

1/ We have been informally advised, and see no reason at present to doubt, that no decision has been made on whether to integrate the new agreements formally with the existing General Agreement. Several procedures exist for this purpose under the General Agreement, including amendment and waiver.

Another variety of the problem we are discussing here, which does not relate to GATT reform but is a reasonable concern, is the impact of denying unconditional most-favored-nation treatment available to certain treaty partners under other outstanding international agreements.

2/ This problem may not be so striking as the others listed, since United States inconsistency with the requirement for an injury test in Article VII is excused by the Protocol of Provisional Application of the General Agreement.

created out of these new codes that perform better than GATT. Section 121(b) of the Trade Act of 1974 provides that "to the extent feasible," the President is to enter into separate agreements with like-minded countries. If conflict with GATT were the problem, the United States could, ultimately, decide in dispute settlement whether suspension of concessions by a complainant was worth the risk of an unfavorable result.

a. The background: unconditional MFN

The policy of selectively extending trade benefits represents a significant policy decision for the United States as well as for GATT. The Trade Act provides that "any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this title (Title I of the Trade Act) shall apply to products of all foreign countries, whether imported directly or indirectly." 1/ This is the embodiment of a principle, basic in United States trade policy, of "most favored nation" treatment, i.e., reduced tariffs negotiated by the United States with one country are automatically extended to like products of other countries unless the other country is expressly excluded from the benefit. The principle has been reflected in United States external commercial relations since 1923 2/ and is presently reflected in many United States treaties. 3/ It has been a requirement of United States law since 1934. In international practice, the

1/ Section 126(a) of the Trade Act of 1974.

2/ GATT Studies, #9, "The Most-Favored-Nation Provision," 131, 135. See the Tariff Act of 1922.

3/ I.e., Treaty of Friendship, Commerce & Navigation (Denmark), 12 UST 909 at 921-22 (October 1, 1951) (re financial transfers); Treaty of Friendship, Commerce & Navigation (Japan), 4 UST 2065, 2074 (Aug. 9, 1953).

idea is called "unconditional" MFN, to distinguish it from the practice of extending benefits to those nations, but only those nations, that have provided adequate compensation, that is, reciprocal benefits, which is called "conditional" MFN.

In addition to the provision of MFN in Article I of the General Agreement, the General Agreement also contains special MFN provisions for transit, marks of origin, state trading, quotas, the allocation of quotas, and nontariff prohibitions and restrictions.

Notwithstanding this generality of MFN, there are many instances in which MFN is not required, either in United States law 1/ or in the General Agreement. In the United States, this is because the United States law also embodies the idea of reciprocity. Reciprocity has been a tenet of United States law since the first reciprocal trade agreements authority in the Reciprocal Trade Agreements Act of 1934. 2/

Under section 126 of the Trade Act, the President must determine at the close of the MTN whether any "major industrial country" (defined as Canada, EC and member States, Japan and any other designated by the President -- section 126(d)) --

"has failed to make concessions under trade agreements entered into under this Act which provide competitive opportunities for the commerce of the United States in such country substantially equivalent to the competitive opportunities, provided by concessions made by the United States

1/ Section 401 of the Trade Act, denies MFN treatment to certain products in column 1 of the Tariff Schedules of the United States, i.e., products imported from Communist countries.

2/ An act to amend the Tariff Act of 1930, Part III, 48 Stat. 943, P.L. 73-316.

When and if the President makes this determination, he must recommend to the Congress that the concessions previously made be either terminated or denied and that no NTB-implementing legislation apply to such countries (See infra. p. 27 on the requirements of implementing legislation). Also, section 102(f) of the Trade Act provides that President "may recommend" to the Congress that the implementing law "apply solely to the parties to" nontariff codes "if such application is consistent with the terms of such agreement."

The General Agreement also anticipates some breaks in the MFN policy. For one thing, Article I is limited to--

customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, . . . the method of levying such duties and charges, . . . all rules and formalities in connection with importation and exportation, and . . . all matters referred to in paragraphs 2 and 4 of Article III (regarding national tax treatment and general legal national treatment).

The General Agreement permits discrimination in the application of quotas justified on balance-of-payments grounds (Article XIV); in responding to dumping and subsidies (Article VI); in retaliation for nullification and impairment (Article XXIII:2); and for security reasons. There are also explicit waivers of Article I:1 for certain pre-existing preferences (such as the United States preference for the Philippines and the British Commonwealth preferences) and the few customs unions that meet certain criteria. Finally, "Even though a practice is inconsistent with a GATT obligation, redress under the provisions of Article XXIII is allowed only if 'nullification and impairment' occurs." 1/

1/ Jackson, World Trade and the Law of GATT, (Bobbs-Merrill Co., Inc., 1969) at 540.

b. Conditional MFN in the negotiations.

There seems to have been in this negotiation a desire not to reform the General Agreement by amendment. The reason for this is of course the huge consensus required for amendment--two-thirds or in some cases unanimity. 1/ There is a rich history of changes in, as well as elaboration of, the General Agreement by means other than amendment, such as decisions by a majority (Art. XXV); side agreements for which there is no provision in the General Agreement; and waivers. For example, the Generalized System of Preferences (in tariffs, for undeveloped countries) is the subject of a waiver. There are several multilateral agreements negotiated by less than all (and even less than two-thirds of) the GATT contracting parties that are "in force," that is, that affect in some way obligations set out in the General Agreement, and that are the subjects of neither waivers nor amendments. They are--

1. Agreements Regarding Subsidy Obligation of Article XVI:4 (extension of standstill provisions) 2/

1/ One exception to this general reluctance to amend the General Agreement may be the negotiation of framework agreements. As the discussion of GATT framework was proposed by less developed countries, consensus on the results may be broad enough to allow formal amendment.

2/ There are six such agreements. The first was a "Declaration" extending the standstill. It contained this provision on entry into force:

4. This Declaration shall enter into force on the day on which it will have been accepted by the Governments of Belgium, Canada, France, the Federal Republic of Germany, Italy, Japan, the Kingdom of the Netherlands, the United Kingdom of Great Britain and Northern Ireland, and the United States of America.

This was extended by proces-verbal dated Nov. 22, 1958, and Nov. 10, 1959. There was a Declaration "giving effect to the provisions of Article XVI:4" on Nov. 19, 1960, which was to enter into force when signed by a different list of countries, as well as a Declaration on standstill on the same date. These Agreements obviously changed Article XVI:4 by extending a ban against expanding, or introducing new, nonprimary product subsidies from December 31, (footnote continued)

2. Cotton Textile Agreement
3. Agreement on Implementation of Article VI of GATT (International Antidumping Code).
4. Memorandum of Agreement on World Grains Arrangement.

Thus, there is a precedent for negotiating "side" agreements that are inconsistent with the General Agreement without adverse consequences. However, unlike past "side" agreements, the new codes may be viewed as rising to the level of nullification or impairment of General Agreement benefits to nonsignatories.

Thus, the new agreements present the possibility of a significant change in the operation of the General Agreement, regardless of whether derogations from unconditional MFN are permitted by the General Agreement in the areas where derogations may occur.

(footnote continued)

1957 to future dates. The "giving effect" declaration purported to declare that Article XVI:4 would come into force when certain (not all) contracting parties signed it. The companion extension of standstill subjected the abolition or reduction of nonprimary subsidies to annual review by the Contracting Parties, even though it was an act of less than the whole membership. In short, this history shows an agreement not in conflict with the basic direction of the General Agreement, even though it was inconsistent with the terms of the the General Agreement, that put signatories of the agreements technically in violation of the General Agreement to the extent they took advantage of the declarations.

Part II

Congressional Approval and Implementation of the Codes

Trade Act Provisions

A study of approval and implementation of the new codes begins with the Trade Act of 1974, since trade agreements represent an area of cooperation between Congress and the Executive. 1/ The Trade Act represents a delegation of authority to the President to negotiate and enter into international agreements; in some cases to create a binding international commitment; and in one case—duty changes—to create domestic law. Like all delegations, this one must have limitations in order to be constitutional. 2/

The Trade Act distinguishes between agreements entered into under section 101 and those entered into under section 102. The general understanding is that section 101 agreements are tariff agreements that are implemented by proclaiming modifications or continuance of duties or duty-free status; whereas section 102 agreements are nontariff barrier agreements that are implemented and indeed are approved by Congress. This distinction

1/ The cooperation is evident from the Executive's foreign affairs functions Art. II, Sec. 2, and the congressional power in foreign commerce and taxation, Art. I, Sec. 8, cls. 1 and 3. The United States Court of Customs and Patent Appeals has held that ". . . no undelegated power to regulate commerce, or to set tariffs, inheres in the Presidency." United States v. Yoshida, 526 F2d. 560 (CCPA 1975).

2/ See Federal Energy Admin. v. Algoquin SNG, Inc., 426 U.S. 548 (1976), in which the court found no threat of unconstitutionality in section 232(b) of the Trade Expansion Act of 1962, as amended, because of the limits that statute placed upon presidential power to restrain imports for reasons of national security.

is not entirely clear in theory 1/ but as a practical matter, the Executive branch does not purport to undertake the new codes except pursuant to section 102.

Under section 102 (and several related sections including section 121) there are three prerequisites to these agreements having any legal impact.

First, the President must conform to the requirements of his delegation. For example, he must have consulted with industry and other agencies of government before entering or proposing to enter into the agreements. Since we assume--and we have no evidence to the contrary--that these requirements have been or will be followed with respect to all section 102 agreements (and section 121 agreements, if they are different) submitted to the Congress, we do not discuss these requirements here. 2/

1/ The President's authority under section 101 would at first blush appear broad enough to encompass entering into nontariff agreements. He may enter into trade agreements under section 101(a)(1), that promote the purposes of the Act (which include harmonizing, reducing and eliminating barriers to trade -- sec. 2(2)) when he determines that existing duties or "other import restrictions" (defined as "a limitation, prohibition, charge, and exaction other than a duty imposed on importation or imposed for the regulation of importation -- section 601(2)) are unduly burdening and restricting the foreign trade of the United States. Under such authority, Part II of the General Agreement was entered into. (59 Stat. 410, P.L. 79-129, July 5, 1945). Moreover, such a legislatively authorized agreement would be the law of the land. See infra, p. 56, n.2.

Moreover, certain of the new codes, especially the code on customs valuation, pertain directly to tariffs, and therefore are arguably (even in the presence of section 102) within the President's section 101 agreement-entering authority. Section 101 has no proclaiming authority, however, for anything but duties themselves, so the provisions of codes that require legislative enactment must be implemented by Congress.

2/ The requirements, in summary, are as follows --

- (1) Presidential determination - Section 102(b).
- (2) Congressional consultation - Section 102(d) (90 day notice)
Section 102(c) (general
consultation).

(footnote continued)

The remaining conditions precedent are the subjects of this Part. They are the requirements necessary to create international obligations of the United States under section 102 or section 121 and requirements necessary to make these agreements a matter of domestic law.

Congress obviously wanted to distinguish between creating international obligations and creating domestic law. The phrase "enter into force" is commonly used to express the time at which international obligations arise. As to creating international obligations, the Trade Act states--

(a section 102) agreement shall enter into force with respect to the United States only if the provisions of subsection (e) are complied with and the implementing bill submitted by the President is enacted into law. 1/

The word "effective" is usually used to suggest the time that domestic obligations (law) arise, as in section 125 of the Trade Act ("Termination and Withdrawal"), which provides that trade agreements shall be subject to

(footnote continued)

- | | |
|--|--|
| (3) Public Notices and Consultation | - Section 102(e) (90 day notice)
Sections 131(a), 133 (consultation during negotiations)
Section 135(a) and -- (j) (general opportunity for commentary). |
| (4) Agency consultation | - Section 132 (see also 131(c), consultations with the ITC, which was not required). |
| (5) Provisions required in agreements | - Section 125 (withdrawal and termination). |
| (6) Transmission of material to Congress | - Section 102(d) and --(e), section 151. |

1/ Subsection (e) sets forth requirements of notice and publication of intention to sign agreements, transmission of various documents to the Congress, and enactment of an implementing bill.

termination or withdrawal ". . . not more than 3 years from the date on which the agreement becomes effective." (Emphasis supplied.) See also section 212(c).

On the other hand, Congress plainly wanted to be able to limit by legislation United States implementation of these section 102 agreements, even if it permitted the agreements to enter into force internationally. The Trade Act has several provisions:

section 102(a)--

Nothing in this subsection shall be construed as prior approval of any legislation which may be necessary to implement an agreement concerning barriers to (or other distortions of) international trade.

section 121(c)--

. . . and if the implementation of such agreement will change any provision of Federal law (including a material change in an administrative rule), such agreement shall take effect with respect to the United States only if the appropriate implementing legislation is enacted by the Congress unless implementation of such agreement is effected pursuant to authority delegated by Congress. . . . Nothing in this section shall be construed as prior approval of any legislation necessary to implement a trade agreement entered into under this section. 1/

Thus, Congress wanted to be able to control separately (1) whether and when an international obligation would arise under a section 102 agreement and (2) whether, when, and the extent to which a United States domestic obligation--a law--would be changed to reflect the international obligation. The mechanism for accomplishing this dual result is called an "implementing bill" under

1/ Referring to agreements under section 121, which deals with "GATT Revision." Under section 121(b), to the extent revision of the General Agreement is not "feasible", then the President is to establish the same principles with "like minded foreign countries or instrumentalities." S. Rep. 93-1298 at 85.

section 102 ("implementing legislation" under section 121). The purpose of this Part is to set forth general principles we feel ought to apply to this legislation.

1. Undertaking International Obligations.

The process by which it is proposed that the United States would undertake international obligations expressed in the section 102 agreements is by a provision of the implementing bill "approving" the section 102 agreement(s). Section 151(b)(1)(A). (Such approval is possible but not mandatory under section 121.) It is understood that the agreements will be voted up or down (S. Rep. 93-1298 at 107), which means, in addition to the parliamentary idea that section 102 implementing bills are unamendable, that Congress will not attempt to approve only part of an agreement. The scope of approval will therefore be no less than agreement-by-agreement. 1/

No approval provision or language is specified in the law. In section 151(b)(3) there is set out the language of an approval resolution

1/ The Trade Act does not appear to take account of the fact that at times in the past, Congress has insisted on reservations to international agreements, which the Executive has then negotiated. See, 14 Whiteman, Digest of International Law 239 (regarding the joint resolution of July 1, 1947, 61 Stat. 214, 22 U.S.C. 289, for the constitution of the International Refugee Organization, whereby Congress authorized the President to accept membership in the Organization with reservations that were incorporated in the U.S. instrument of acceptance). Reservations are a part of such General Agreement history, but it is possible that any particular reservation would undo the new codes. At this writing, the Executive branch has not asked for or been advised to obtain reservations.

Moreover, while the implementing bill will be -- absent a change in the rules -- unamendable, legislative history such as committee reports are of course changeable. Since this history is often an interpretive guide for agencies and courts, it is an important part of the legislative process that remains unchanged by section 151.

evidently applicable to section 405 bilateral commercial agreements (i.e., with countries not previously extended MFN treatment). This provision is as follows:

That the Congress approves the extension of nondiscriminatory treatment with respect to the products of ----- transmitted by the President to the Congress on ----- . (The first blank space being filled with the name of the country involved and the second blank space being filled with the appropriate date.)

The following are some other examples of approval provisions:

On August 4, 1947, there was approved, by joint resolution of the Congress (61 Stat. 756), an executive agreement between the United States and the United Nations for establishing the permanent United Nations headquarters in the United States. The resolution provided a series of introductory clauses stating the basis of the action (such as: "Whereas Article 28 . . . of the Charter . . . contemplate(s) the establishment of a seat for the permanent headquarters of the Organization . . .") and the full text of the agreement, as well as this language of approval.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is hereby authorized to bring into effect on the part of the United States the agreement between the United States of America and the United Nations regarding the headquarters of the United Nations, signed at Lake Success, New York, on June 26, 1947 (hereinafter referred to as the "agreement"), with such changes therein not contrary to the general tenor thereof and not imposing any additional obligations on the United States as the President may deem necessary and appropriate, and at his discretion, after consultation with appropriate State and local authorities, to enter into such supplemental agreements with the United Nations as may be necessary to fulfill the purposes of the said agreement: Provided, That any supplemental agreement entered into pursuant to section 5 of the agreement incorporated herein shall be submitted to the Congress for approval.

On October 13, 1975, President Ford signed into law a joint resolution approving the United States proposal for an early warning system in Sinai, P.L. 94-110, 89 Stat. 512, 22 U.S.C. 2441 Note. The approval resolution also has introductory matters, and it then provides -- 1/

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the President is authorized to implement the "United States Proposal for the Early Warning System in Sinai": Provided however, That United States civilian personnel assigned to Sinai under such proposal shall be removed immediately in the event of an outbreak of hostilities between Egypt and Israel or if the Congress by concurrent resolution determines that the safety of such personnel is jeopardized or that continuation of their role is no longer necessary. Nothing contained in this resolution shall be construed as granting any authority to the President with respect to the introduction of United States Armed Forces into hostilities or into situations wherein involvement in hostilities is clearly indicated by the circumstances which authority he would not have had in the absence of this joint resolution.

"Sec. 2. Any concurrent resolution of the type described in the first section of this resolution which is introduced in either House of Congress shall be privileged in the same manner and to the same extent as a concurrent resolution of the type described in section 5(c) of Public Law 93-148 (section 1514(c) of Title 50, War and National defense) is privileged under section 7 of such law (section 1516 of Title 50).

"Sec. 3. The United States civilian personnel participating in the early warning system in Sinai shall include only individuals who have volunteered to participate in such system.

"Sec. 4. Whenever United States civilian personnel, pursuant to this resolution, participate in an early warning system, the President shall, so long as the participation of such personnel continues, submit written reports to the Congress periodically, but no less frequently than once every six months, on (1) the status, scope and anticipated duration of their participation, and (2) the feasibility of ending or

1/ The proposal entered into force on October 13, 1975, 26 UST 2271, 2278.

reducing as soon as possible their participation by substituting nationals of other countries or by making technological changes. The appropriate committees of the Congress shall promptly hold hearings on each report of the President and report to the Congress any findings, conclusions, and recommendations.

"Sec. 5. The authority contained in this joint resolution to implement the 'United States Proposal to implement the Early Warning System in Sinai' does not signify approval of the Congress of any other agreement, understanding, or commitment made by the executive branch."

Since Congress intended to distinguish between creating international obligations and changing domestic law, the approval provision should state that approval is for the purpose of permitting the agreement to enter into force with respect to the United States in accordance with the terms of the agreement; that no domestic law or practice is thereby changed except as specifically provided in the bill or in future legislation; that no private rights of action arise from approval except as specifically enacted; and that implementation of an agreement does not authorize courts or agencies to use the agreements to interpret U.S. law except as specifically provided. Failure to do this when approval is given may give the international agreement the force of U.S. law. See *infra* p. 56, n.2.

As a practical matter, if Congress wants to disapprove certain provisions of but not all of an agreement, it may best be able to do so by failing to implement part or all of the agreement, rather than disapproving it. This power to refuse to implement arises under the implementing provisions of section 102(e) and 151 (see also section 121(c)). Under the disputes resolution provisions of most of the codes, when and if this action resulted in (1) the United States acting contrary to the code and (2) a

signatory bringing this action up as a complaint, then the United States would have to be prepared to defend. Ultimately the result of this process, under various codes, ranges from retaliation--meaning other countries withdrawing similar concessions--to renegotiation of the underlying code.

This chain of events suggests a provision in the implementing legislation providing for discretion in the President whether to defend any complaint or, in the alternative, take action that would bring the United States into compliance.

There are a number of points in the new codes where failure to implement is an option, and insofar as Congress wants to lessen the adverse international impact of having not implemented, it can simply give the Executive a delegation to override the general rule for reasons of the national economic interest.

A more complex situation arises when and if Congress approves an agreement and implements it to some extent but not entirely. Then the question is whether to permit private persons, agencies and courts to use the international agreement to interpret domestic law. This is now the normal course in some areas, such as tariff classification issues, but not where Congress has made a specific direction, as in the case of the 1968 International Antidumping Code.

Termination of and withdrawal from agreements approved under Trade Act sections 102 and 151 is apparently provided for by section 125(d) of the Act:

Whenever any foreign country or instrumentality withdraws, suspends, or modifies the application of trade agreement obligations of benefit to the United States without granting

adequate compensation therefor, the President, in pursuance of rights granted to the United States under any trade agreement and to the extent necessary to protect United States economic interest . . . may--

(1) withdraw, suspend, or modify the application of substantially equivalent trade agreement obligations of benefit to such foreign country or instrumentality

The President must provide for hearings in his action under section 125(d). The section does not, however, provide for withdrawal of rights arising under an implementing bill now to be enacted, and therefore in order to be able to have the effect contemplated by Trade Act section 125, the implementing bill might well have some provision authorizing the President to change the countries entitled to the benefit of the new law. In the alternative, where a change of law is necessary in the future, the President can recommend the change to Congress. We note that, unless section 125 is changed, Congress will have no role in termination of or withdrawal from trade agreements, even though it does have a role in entry into force of such agreements. 1/

2. Implementing International Obligations.

Assuming that the new codes are all approved, then the main issue is how to implement the provisions of the codes. One possibility is to revise existing regulations, as distinguished from existing statutes. Where the statute does not contravene the new agreement, but a regulation issued pursuant to the statute does, then only the regulation need be amended. The Executive branch has proposed to send to the Congress, after the agreements have been signed, "whatever legislation and administrative actions may be

1/ To a certain extent, Trade Act section 301(a)(A) is also a withdrawal provision. See, infra, p. 38.

needed to implement the agreements in the United States." (Notice of Intention To Enter into Trade Agreements, 44 F.R. 1932 (January 8, 1979).)

Legislation to implement the new agreements is either necessary or possible. The "necessary" enactments are matters that may only be accomplished by statutes and that follow so logically from the act of approval that to fail to make them would be inconsistent with approval. It might be a reservation that would abrogate the whole agreement. The necessary enactments are those explicitly contemplated by the new agreement, such as creating a national inquiry point for standards inquiries under the Standards Code, or those that resolve a direct and reasonably unavoidable conflict between a new agreement provision and a provision of United States law. A list of necessary changes, as well as other possible changes, is attached as Appendix B. The discussion of these changes, which are only required in connection with implementation of specific new agreements, is in the separate studies of the agreements.

Aside from "necessary" changes, there are a number of legislative possibilities that occur in connection with implementation of the new agreements. One legislative alternative in the face of these proposals is to do nothing; another is to enact in legislation that is not subject to the "fast track" of section 151(b) of the Trade Act; and a third alternative is to consider adding the legislation to the section 151(b) implementing bill. We have no general recommendation as to which of these alternatives to take, but we discuss all "possible" changes for the sake of convenience as if they were intended to be part of the implementing bill.

Several such "possible" provisions are, by the nature of this project, general, because they relate to overall principles of these agreements. To a great extent, these subjects correspond to the overview we presented earlier in this volume on the new agreements as GATT reform. In the following pages, we discuss possible changes in the President's existing authority to retaliate for unreasonable or unjustifiable trade practices of foreign countries, which is an essential element of U.S. participation in the disputes resolution process under the new agreements. We also discuss implementation of conditional MFN; creating special authority to act contrary to the new agreements; and judicial review.

(a) Revisions of the President's authority to retaliate. The new codes set up a new system resolving disputes (described supra p. 12). If we assume that Congress will have the obligation to approve or disapprove all the codes under section 121, and that the bill is a vote on approval of the whole new system, then approval will necessarily imply a willingness to see whether the new disputes settlement rules will work. They are the critical element of the new system. In this situation, the legislative problem will be whether existing law is adequate to make the new system work.

i. Background: the problem

A United States exporter of goods to another country signatory to the new agreements has two channels of remedy when he find himself denied the benefits of the agreements. He can either complain to the foreign government that denied him the benefit, or he can complain to his own government, which can complain for him to the government involved. The first method involves

litigation of some kind under foreign law. The utility of this channel is that the exporter has some control of the litigation, and the disadvantage is that he may have very little power to obtain a satisfactory remedy from his point of view. The procedural "transparency" provisions of the new agreements are an attempt to deal with the effectiveness of this channel. Of course, no legislation in the United States has any legal force as to foreign governments.

The other channel can be the subject of legislation. Creating an apparatus to decide whether exporters' claims under the new agreements are meritorious -- and therefore deserving of United States intervention in the form of action by this Government against the offending foreign government -- requires several elements. There must be an adequate staff of trained personnel to evaluate claims to determine whether they are meritorious and to prosecute meritorious claims in whatever international forums are provided for in the underlying agreement (in this case, the disputes settlement mechanism under the new agreements). This requires authorization and appropriation of necessary funds and adequate statutory authority. There must also be a jurisdiction to screen exporters' claims, and there must be authority to take retaliatory or other appropriate action against foreign governments that do not reasonably accord with the practice or outcome of the international disputes settlement procedure.

Recent experience under existing disputes resolution mechanisms suggests that the present structure in this field is widely regarded by exporters as unsatisfactory, for reasons we show below.

For example, for the United States the gist of the bargaining in the agreement on export subsidies in the Subsidies/Countervailing Measures Code appears to have been undertaking an obligation not to take unilateral action

against other signatories under section 301 of the Trade Act of 1974 in return for a list of proscribed export subsidies applying to industrial and mineral products and an obligation to avoid disrupting the prices and displacing the trade of other signatories in export markets for agricultural products. If that is true, then the United States may at present be unable fully to give its exporters the benefits of the new agreements, because it is unable (or unwilling) to prosecute their claims against foreign governments for breach of trade agreements in international forums, including, if necessary, taking appropriate retaliatory action.

In the area of international dispute settlement, an important distinction is between a statutory scheme for retaliation against a violation (or, in this use, "nullification and impairment") of an international agreement and laws authorizing responses to specific trading difficulties. The first is a response to the actions of a government, but the second is a response to a commercial practice, generally a practice that is "unfair competition" by the reigning consensus. For example, in the dumping field, the United States may under the Antidumping Act, 1921, impose a special dumping duty to counter the practice of dumping. This is not a form of "retaliation;" it is the exercise of an international right of the United States arising out of the General Agreement to counter an unfair practice. In contrast, if another country imposes antidumping duties against a United States export in a way that is contrary to an international undertaking of that country to the United States, then there is an alleged violation of the international agreement. If the offending country will not correct its error,

then retaliation is in order. A separate "retaliatory" statute is the kind of law we are discussing here.

One United States statute--the United States countervailing duty law--clouds this distinction because it is always used to respond to a practice that is considered unfair, namely, subsidization of exports, but the practice is an act of a foreign government. 1/ The countervailing duty statute is thus a "retaliatory" statute in the sense we are using it in this section. 2/

If the Congress were to approve the entire package of new codes, it is arguable -- as we have said previously -- that this action represents a commitment to the disputes settlement mechanisms the codes embody; domestic exporters may indeed be led to believe that the new codes should be supported

1/ The United States law has a provision for countervailing against private subsidies, but it is never used.

2/ We do not include section 201 of the Trade Act of 1974, which implements Article XIX of the General Agreement, as such a law because it is not a response to disputes. "Escape clause" action may result in disputes, for which the President has negotiating authority as to U.S. actions in section 123 of the Trade Act (compensating authority) and section 203(a)(4) (which provides for his negotiating "orderly marketing agreements"). Section 125(d) is the Presidential authority to implement domestic actions pursuant to U.S. rights under trade agreements in the event of suspension or withdrawal of concessions. The authority is rarely used because other countries so rarely use Article XIX against the United States. Instead, section 301 of the Trade Act is evidently used, even though it relates only to "unjustifiable or unreasonable" acts of countries. See infra p. 43.

This distinction is demonstrated by the "Cattle War," an affair in which Canada purported to take Article XIX action. The United States responded with trade restrictions, and reported to GATT that its action was under Article XIX:3, providing compensation rights. But its domestic action was pursuant to section 252(a) of the Trade Expansion Act of 1962, the predecessor of section 301 of the Trade Act, and a retaliation statute, which required a finding of violation of international commitments. The latter was justified in the domestic proclamation by citing an alleged violation of Article VI of the General Agreement, which was never reported. See Hudec, "Trade Retaliation," 59 Minn. L. Rev. 461, 536-7 (1975).

for this reason, since substantively the codes improve export opportunities only marginally compared with provisions that are already in provisional effect under Part II of the General Agreement. (For example, transparency, a central feature of several of the codes, is provided for in Article X.) For this reason, Congress may want to examine existing law to see whether it gives the United States maximum benefit from the new disputes resolution machinery. This seems particularly important if, as we have suggested in Part I of this Overview, approval is based upon a supposition that the main, and perhaps only, benefit of the new codes is to reinvigorate the existing GATT. An active litigation will, presumably, either show the codes as failures or, if it results in improving compliance, make it evident that the new agreements are worth having. It is at least inconsistent to approve all the new agreements and then not do everything possible to make them work for exporters.

(ii) Statutes providing for retaliation

An obscure and never-used provision of the law, apparently supplanted by the general retaliatory authority discussed below, permits the President to impose new or additional duties and, in some cases, exclude articles, for "discriminatory" practices of foreign governments. The International Trade Commission, under this law, is to keep itself informed on such matters and advise the President. Apparently, this provision, section 338 of the Tariff Act of 1930, 19 U.S.C. 1338, has been overshadowed by more recent enactments, section 252 of the Trade Expansion Act of 1962 and its successor, section 301 of the Trade Act.

Section 301 is the principal tool for United States retaliation. It provides that, whenever the President determines that a foreign government is engaging in any of four actions in violation of or inconsistent with trade agreement obligations, he "shall take all appropriate and feasible steps within his power to obtain the elimination of" these practices, including withdrawing trade concessions or imposing new duties or fees. The four foreign government practices are that the country or instrumentality --

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

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

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

(4) imposes unjustifiable or unreasonable restrictions on access to supplies of food, raw materials, or manufactured or semimanufactured products which burden or restrict United States commerce. . . . 1/

Under the law, "any interested party" can file a complaint with the STR. Hearings and presentation of views are provided for (sections 301(d)(2) and 301(e)(2) (hearing) and 301(d)(1) and 301(e)(1) (presentation of views)).

1/ The Senate Report on the Trade Act of 1974 states, "In section 301 'unjustifiable' refers to restrictions which are illegal under international law or inconsistent with international obligations. 'Unreasonable' refers to restrictions which are not necessarily illegal but which nullify or impair benefits accruing to the United States under trade agreements or which otherwise discriminate against or burden U.S. commerce." S. Rep. 93-1298 at 163.

STR may ask the International Trade Commission for "views as to the probable impact in the economy of the United States of taking action." The law specifically provides that action may be taken selectively (against only the country "involved") or on a nondiscriminatory basis, but that, if action is taken nondiscriminatorily, then the Congress can disapprove and the action shall thereafter remain in force only as to the country involved. 1/

The STR proceeding, if it can be called that, is hardly a remedy in any traditional sense. The STR is only required to "conduct a review" (the statutory phase) of the complaint and report summaries of the proceedings every 6 months. Remarkably few complaints have been filed under section 301, considering the number of complaints exporters expressed to the Commission when it studied nontariff barriers in 1974. 2/ There were six section 301 petitions filed in 1975, five in 1976, three in 1977, and one in 1978 (through December 1, 1978.) 3/ A substantial number of these have been unresolved for 2 years.

On the other hand, over the years, the United States has brought a number of complaints arising out of section 301 and its predecessor statute to the GATT, and has had some success. 4/ The success has been achieved mainly

1/ When enacted, this provision was potentially in conflict with the General Agreement; for example, under it, the President could provide a remedy for subsidies arguably inconsistent with Article VI. Campbell, "The Foreign Trade Aspects of the Trade Act of 1974, Part II, 33 W & L Law Rev. 632, 654 (1976).

2/ "Trade Barriers: Report to the Committee on Finance," U.S. Tariff Commission (TC Publication 665, April 1974), Part I, Vol. 4.

3/ 20th Annual Report on the Trade Agreements Program - 1975, 42; 21st Annual Report on the Trade Agreements Program - 1976, 46-47.

4/ 17th Annual Report of the President on the Trade Agreements Program - 1972, 22-23; -- 1973, 20, 23. See also 1973 House Hearings on the Trade Reform Act of 1973 at 419-21.

by means of settlements, "without such independent aid or stimulus from the GATT legal machinery." 1/ Nevertheless, the process has worked to some extent. 2/

Actual retaliatory action other than negotiation and settlement under section 301 has been rare. 3/ In those cases where dispute settlement procedures were found necessary, somewhat lengthy periods of time appear to have elapsed (compared with the time consumed by domestic import relief and unfair practice investigations). For example, STR has reported that in Docket No. 301-4, "National Cannery Association," the complaint was filed September 25, 1975, and the work of the GATT panel (which had been delayed because of the reassignment from Geneva of two panel members) was completed in May 1978. Subsequently, "in June of 1978 the EC discontinued use of the minimum import price mechanism (one of two practices reportedly complained of), switching to a system of production subsidies." (Letter from STR, *supra*, n. 1, p. 49, at 3.) In Docket No. 301-5, "Great Western Malting Co.," the complaint was

1/ Hudec, "Trade Retaliation," *supra* (n. 2, p. 50) at 513.

2/ See, for example, "Termination of Section 301 Review," 43 F.R. 8876 (March 3, 1978), wherein STR states, ". . .the United States instituted a complaint against Japan under the dispute settlement provisions of (the General Agreement). Discussions with Japan continued during processing of the United States GATT complaint. As a result of these conversations, Japan has agreed to make adjustments satisfactory to the United States."

3/ The only case under section 301 actually to reach a determination of action other than mere negotiation appears to be "Soviet Marine Insurance Practices," 43 F.R. 25212 (June 9, 1978), establishing an interagency committee to study possible ways to achieve the elimination of practices the President found to be an unreasonable burden and restriction on U.S. commerce. See generally, letter from the Special Representative for Trade Negotiations (Amb. Strauss) to the Speaker of the House of Representatives, August 2, 1978, reviewing action under section 301(d)(2) for the six-month period ending June 30, 1978, and prior reports to the Congress on section 301 activity -- Committee Print, WMCP 95-51 (95th Cong., 1st Sess., September 13, 1977); Committee Print, WMCP 95-9 (95th Cong., 1st sess., February 4, 1977).

received on November 13, 1975, and as of June 30, 1978, it had been determined that the most appropriate forum for discussion of the issue involved was the MTN, "where these discussions are now being actively pursued." Id. at 3. In some cases, however, the delay has been more in the GATT process than in the United States Government process. Docket No. 301-8, "National Soybean Processors Association and American Soybean Association," a complaint received by STR on March 30, 1976, resulted, according to STR, in Article XXIII(2) consultations on April 2, 1976. As of June 30, 1978, a final panel report had been adopted with "findings favorable to the United States" and the offending system "was terminated." We are unable to say at this time whether the delays obviously being experienced result from the GATT process, the United States process, or both. 1/

(iii). Possible Legislation.

Assuming approval of the new agreements, the subject of disputes resolution will presumably become a more active area of United States trade policy, at least as to complaints. The Congress might want to consult with the Executive branch on adequacy of present staff to undertake such a program. Of course, complaints against the United States are also likely to increase (perhaps depending on the nature of United States implementation of the new agreements), and again it might be desirable to consult STR on the adequacy of staffing to handle this work.

1/ We have made a chart showing the time consumed in section 301 proceedings (Appendix C).

A number of ideas are possible. Some of these are--

1. Establishing procedure like section 338, with complaints filed at the Commission or some other agency that makes recommendations to the President as to which claims are meritorious. The President would then decide whether to prosecute or reject claims.

2. Increasing authorization and appropriation for the disputes prosecution function.

3. Making consistency with international obligations explicitly a factor in deciding whether and when to retaliate.

4. Placing time limits upon section 301 proceedings. 1/

We discuss in our study on the subsidy/countervailing duty agreement why we see no conflict in having both the countervailing duty law and an international disputes resolution law; having both depends on the proposed "two track" international subsidy/countervailing duty system.

Care has to be taken in stating here, as anywhere in the implementing bill, the degree to which the President will consider international obligations. So far as we know, the provision permitting selectivity in section 201 has not been litigated, but a similar provision in the old section 252(c) (stricken in section 301), requiring the President to

1/ As appendix C suggests, placing time limits upon negotiations is a more restrictive step than placing time limits on the domestic proceedings that lead to the decision as to whether a complaint is meritorious. Thus, Congress may want to place a time limit upon STR's section 301 decision on whether to file an international action, but forbear placing a time limitation upon STR's conclusion of the disputes resolution process. The latter overall time limit, if adopted, should take account of the time limits placed upon disputes resolution under some but not all of the new agreements and of special provisions on temporary or "provisional" measures by signatories.

have "due regard" for international obligations, was read by a court of appeals to allow the President to apply a remedy on an MFN basis, even though the remedy was, under the law, supposed to be selective. See United States v. Star Indus., Inc., 462 F.2d 557 (C.C.P.A. 1972). The exact Congressional purpose should be in the law, such as that the President must consider (but is, perhaps, not in any circumstance bound to follow) international obligations.

The improvement of retaliatory procedures leads naturally to consideration of the extent to which enactments are desirable on the general subject of United States participation in the GATT or the committees of signatories created under the various codes. For example, we have suggested in our study on Standards that the Congress should consider whether the inquiry point that must be established to provide information on United States standards should be expanded to receive, process and perhaps even make recommendations as to whether to prosecute the complaints of United States exporters against signatory governments as international claims. Similarly, under the Subsidy/Countervailing Duty Agreement, Chap. 1:1-3, signatory governments are required to provide certain information on the extent of United States subsidies on request. A central "inquiry point" might be given statutory authority to carry out this responsibility.

(b) Implementation of conditional MFN.

At this point, it appears that the United States will probably not give the benefits of the new codes to nonsignatories. Implementing the new

agreements on this basis means carefully working out when existing law will apply only to signatories of new agreements.

Section 126(a) of the Trade Act provides --

Except as otherwise provided in this Act or in any other provision of law, any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this title shall apply to products of all foreign countries, whether imported directly or indirectly.

Since none of the new agreements (except the agreement on aircraft--see the separate study of this subject) provides for a level of duty, no amendment of section 126(a) is required as to duties; however, the section also provides for unconditional MFN with respect to "other import restriction(s)." This phrase is defined in Trade Act Section 601 as follows:

(2) The term "other import restriction" includes a limitation, prohibition, charge, and exaction other than duty, imposed on importation or imposed for the regulation of importation. The term does not include any orderly marketing agreement.

This phrase appears first to have been used in the original 1934 trade agreements authority. 1/ Evidently, the Executive relied on this phrase to negotiate such "nontariff" matters as Part II of the General Agreement and the International Antidumping Code. Thus, it may be desirable as a matter of domestic law to consider providing in the implementing bill for the termination or denial of benefits under the new agreements for countries that do not enter into one or all of them. 2/

1/ An act to amend the Tariff Act of 1930, Public Law 73-316, adding section 350 of that law.

2/ It is arguable that even the "other import restriction" language of section 126 does not apply to these new agreements, since they cannot be (to use the language of the section) "proclaimed", but must be approved and enacted under section 102. We are uncertain on the point, since many parts of the new agreements can be undertaken with mere approval, no new enactments being necessary.

Under section 102(f) of the Trade Act, the President may "recommend to Congress in the implementing bill . . . that the benefits and obligations of such agreement apply solely to the parties to such agreement, if such application is consistent with the terms of such agreement." See also section 126(b) and (c), which permits the President to determine that a "major industrial country" 1/ has failed to make concessions in the MTN "which provide competitive opportunities for the commerce of the United States in such country substantially equivalent to the competitive opportunities" provided by the U.S. concessions. The President may then, either by country or by article, recommend that Congress deny a benefit or not apply new MTN agreements. Legislation denying the benefits or some of them to certain countries is plainly possible.

Notwithstanding this fact, placing the subjects of these agreements on a conditional MFN basis may be contrary to existing treaty and executive agreement obligations of the United States. See infra p. 60. We have also previously discussed the problem of the inconsistency of such law with respect to the General Agreement, where the unconditional MFN obligations are limited to certain subjects, only some of which are likely to fall within the scope of the agreements.

One solution to these dilemmas would be to leave the law as it is, which would allow the President to recommend denying unconditional MFN treatment to nonsignatories when conditions warranted. He could, in making

1/ Defined in section 126(d) of the Trade Act as Canada, the European Economic Community, the individual countries of the Community, Japan, and other countries designated by the President.

such recommendations, state the extent to which the recommendation conflicted with existing MFN obligations. Another solution would be to set up a system similar to the one now applicable to Communist countries (see title 4 of the Trade Act), which would deny unconditional MFN treatment on the subjects of the new agreements to nonsignatories, subject to a power in the President to grant them the benefits of the new agreements under stated conditions. Thereafter, the President's decisions could be subject to a Congressional override.

A similar problem is the impact of implementing legislation on the Protocol of Provisional Application, the instrument by which the General Agreement was "provisionally" brought into force. The Protocol provides that domestic law extant before the date of signing the General Agreement--October 30, 1947--may continue notwithstanding that it is inconsistent with the General Agreement. The countervailing duty law, the Buy American Act and other statutes of which amendment is possible in light of the new agreements were enacted before October 30, 1947. But since the new agreements contain no "grandfather" provision like the one in the Protocol, nor are they apparently to be legally "related" to the General Agreement, 1/ there are no grandfather rights. Thus, laws amended for the benefit of new agreement signatories do not have the grandfather benefit of the Protocol, and therefore countries that are parties to the General Agreement may be entitled to benefits of the new law, even if they did not sign the new agreement. In the the case of subsidies, the problem is rather serious, because the General Agreement

1/ That is, they are not expected to be a GATT decision, the subject of a GATT waiver, or an Article XIX "safeguard" action, much less an amendment to the General Agreement.

requires an injury test from which the United States is relieved by the Protocol; the new subsidy/countervailing duty^o agreement also requires this test. To implement the injury test by amending the existing United States statute may make denying this benefit to GATT signatories difficult, even though they do not sign the new agreement.

One response to this situation would be to add to but not otherwise change existing law. A combination of creating a new law for new agreement signatories and leaving the old law on the books for all others would probably be a successful way to retain the grandfather benefit. The countervailing duty law was amended in 1974 to extend its coverage to nondutiable items, at which time an injury test was added for only these items. The theory was that there was previously no law on these items. (S. Rep. 93-1298 at 185.) Evidently, no claim that the United States thereby gave up its grandfather rights has yet succeeded in receiving GATT approval. It is therefore at least possible that amendments to "grandfathered" laws, which leave the old law on the books, but partially ineffective, will solve this problem.

Finally, conditional MFN legislation raises rules of origin issues. Since conditional MFN means that a product imported from some countries are entitled to certain benefits while the same product from another country is not, it is possible that cases will arise under laws affected by the new agreements in which the product was partially made in one country that is entitled to the benefit and partially made in countries that are not entitled to that benefit. Rules for deciding whether the benefit applies in such cases are called "rules of origin."

Under the new agreements, the problem presented under rules of origin is that many of the benefits are procedural: a signatory to the subsidy/countervailing duty code is entitled to an injury determination on dutiable U.S. imports, but a nonsignatory is not.

One type of rule of origin is used by the U.S. Customs Service to prevent circumvention of tariff rates or other customs laws by manufacturers which transship their products through a third country to an importing nation in order to take advantage of a preferential trading arrangement between the latter two countries, or which otherwise conceal the country of origin of their product. Present United States rules, including rules pertaining to marking requirements and implementation of the GSP, 1/ embody the concept of "substantial transformation," which is essentially that the country in which the last major change in the nature of the goods was made, producing a new and different article, is the country of "origin."

This concept may be unsatisfactory to accomplish the purpose of conditional MFN in the new agreements. Countries that refuse to sign a new agreement may, under the substantial transformation rule, obtain a benefit by manufacturing in violation of the agreement (for example, with an export subsidy) a product that is later subject to substantial transformation in a signatory state.

1/ Marks of origin, 19 U.S.C. secs. 304, 1202 (1976) (19 CFR 134.1(d)(1), 134.34(h), 134.35 (1978)); Generalized System of Preferences, 19 U.S.C. 2461 et seq. (1976) (19 CFR 10.171-178 (1978)). See also Minwood Industries, Inc. v. United States, 313 F.Supp. 951 (Cust. Ct. 1970) (marks of origins); 10 Cust. Bull. 176, T.D. 76-100 (1976) (GSP).

One solution to this problem might be to administer the current rules of origin laws and regulations in a way which would substantially accomplish the intent of those laws, even though this might mean that goods arriving from signatory countries do not receive full benefits of the new agreements. Disputes resolution would presumably decide whether this was appropriate in particular cases.

The current U.S. rules of origin regulations pertain to two specific statutes -- marks of origin and implementation of the GSP 1/ -- and therefore would not be applicable to the operation of the current agreements. Any implementing legislation may need to include a general rule of origin provision applicable to all the new agreements, or such a provision may need to be included individually for implementation of particular codes. However, those requirements may create secondary problems; for example, it will become necessary in administering the codes to obtain reliable information on country of manufacture. At present, we can make no further legislative recommendations on rules of origin. We suggest instead close consultation with the agencies administering the affected laws to see what is needed to best effect the purpose of the laws.

1/ The United States countervailing duty law, section 303 of the Tariff Act of 1930 (19 U.S.C. 1303), provides that whenever a foreign country pays or bestows a bounty or grant upon certain articles, then a countervailing duty shall be assessed regardless of --

. . . whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise. . . .

(c) Authority to act contrary to the codes.

The codes obviously anticipate that at times it may be necessary to act contrary to their provisions. There may be a feeling at the time an implementing bill is considered that it would be desirable to not fully implement the new codes, leaving the resolution of actual conflicts to the disputes resolution machinery. As we have suggested in connection with the individual codes, a useful device may in some cases be one whereby the President (or other appropriate official) has discretion either to undertake action contrary to a code or refuse to take action contrary to a code obligation, depending on the bias of the law. Such prerogatives exist in present law. For example, under the present United States law for escape clause actions, the President may refuse to take an action recommended by the International Trade Commission if that refusal is in "the national economic interest." At the other extreme, section 301 provides that retaliatory action be taken on an unconditional MFN basis in accordance with the General Agreement, except that the President may take selective retaliatory action in his discretion.

(d) Judicial review.

The purpose of this section is to consider and advise upon whether and how to prescribe judicial effect for the new codes. Under section 102, only Congress can allow a section 102 agreement to enter into force by "approval." And under all possible delegations in the Trade Act, there is not intended to be any domestic law impact without further legislation. 1/

1/ Section 102(2) provides --

Nothing in this subsection shall be construed as prior approval of
(footnote continued)

Nevertheless, it would be prudent to state precisely the legal effect of these agreements. For one thing, these agreements when approved may be enforceable in the courts. 2/ Yet, in many cases, Congress and the

(footnote continued)

any legislation which may be necessary to implement an agreement concerning barriers to (or other distortions of) international trade.

Section 121(c) provides --

If the President enters into a trade agreement which establishes rules or procedures, including those set forth in subsection (a), . . . and if the implementation of such agreement will change any provision of Federal law (including a material change in an administrative rule), such agreement shall take effect with respect to the United States only if the appropriate implementing legislation is enacted by the Congress unless implementation of such agreement is effected pursuant to authority delegated by Congress. . . . Nothing in this section shall be construed as prior approval of any legislation necessary to implement a trade agreement entered into under this section.

2/ Without more, it is likely that Congressional approval, when required for an agreement to enter into force, makes an international agreement that is self-executing the law of the land enforceable in the Federal Courts. See generally, 14 Whiteman, Digest of Int'l L. (1970) 237-239. In the case of the MTN agreements, our research suggests that the legislative process specified under the Trade Act of 1974 would convince the courts of the United States not to allow the agreements, absent express statute, to serve as a basis for court action for the following reasons:

The question of judicial enforceability turns on whether the agreement in question is in any respect "self-executing":

The extent to which an international agreement establishes affirmative and judicially enforceable obligations without implementing legislation must be determined in each case by reference to many contextual factors: the purpose of the treaty and the objectives of its creators, the existence of domestic procedures and institutions appropriate for direct implementation, the availability and feasibility of alternative enforcement methods, and the immediate and long-range social consequences of self- or non-self-execution. . . .

People of Saipan v. Dept't of Interior, 502 F.2d 90 (9 Cir., 1974), holding that a trusteeship agreement that provided the United States would, inter alia, "regulate the use of natural resources" and "protect the inhabitants against the loss of their lands and resources" gave the inhabitants of the trust territory rights upon which they could individually sue in the High Court of the Trust Territory. Id. at 99. See also, Diggs v. Richardson, 555 F.2d 848 (D.C. Cir. 1976), citing with approval the concurring opinion in
(footnote continued)

executive may at first blush want to avoid the difficulty of implementing the codes -- the Congress wanting to keep the law as is and the Executive believing a new code works no change. They should consider such inaction carefully. For example, the Safeguards code would contain substantive standards for safeguard actions that are similar to and even modeled upon, but different from, United States law. If Congress did not want the new code to predominate in a court action on U.S. safeguard action, the safest course would be to enact priority legislation to that effect.

Several issues should be immune to judicial review except for failure to act at all. These are primarily issues that relate to when the new

(footnote continued)

People of Saipan. The concurring opinion holds that although the Trust Agreement was not self-executing, "a series of actions all ultimately founded upon Congressional authority have so executed the Agreement that its provisions may now properly be regarded as judicially enforceable. Thus, the Agreement was approved by the President pursuant to a joint resolution of Congress. . .and implemented by Executive orders promulgated pursuant to Congressional authority. . . ." Id., People of Saipan at 103. A treaty providing for most-favored-nation treatment has been held by the United States Court of Customs and Patent Appeals to have been "self-executing, requiring no legislation other than its own enactment, so far as any matter here involved was concerned." John T. Bill Co. v. United States, 104 F.2d 67 (C.C.P.A. 1939) (quoted matter at 73). The Court there held that the unconditional most-favored-nation clause in the treaty required extending MFN to the products from the foreign country, even though the foreign country was not extending the same rate to the United States. The "self-executing" language -- which is mandatory in form (each party "shall" extend. . .) -- is too lengthy to quote here. It appears Id. at 69.

Of course, most important in considering whether "the context" (See People of Saipan, above) in the case of these agreements is a factor that suggests they are not intended to be self-executing is the provisions of the Trade Act. Sections 102 and 121 make it clear that no agreement negotiated under authority of those sections is to have domestic impact without enabling law. The question in the text arises largely in connection with provisions where no change of law is "necessary" (as we have defined it, supra p. 37), but a change in administrative practice can be effected by administrative action under existing authority.

agreements apply. For example, it seems to us that the United States should avoid allowing foreign persons to sue in Federal court for a Federal agency's failure to give that company a benefit arising under the code. Such a decision would presumably be made because the rules of origin created by the U.S. Congress would hold that the foreign company's exports did not originate, legally, in a signatory and therefore--under the theory of conditional MFN--were not entitled to code benefits. Rather than the agency making that decision in each case, however, it may be better policy to require Federal agencies to obtain authoritative guidance from a central authority--such as STR--as to whether particular countries are entitled to a code's benefits. This system should probably apply to government procurement, but it is probably less desirable in countervailing duties, where the Treasury Department has administered a rule of origin to determine which country has been paying a bounty or grant for many years.

Assuming that judicial review provisions are desirable, they will unfortunately probably be different as to each code area. Congress has in the past used a number of formulations to deal with different specific situations. In 1951, Congress amended section 22(f) of the Agricultural Adjustment Act to state --

No trade agreement or other international agreement heretofore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this section. 1/

In 1947, Congress passed a joint resolution authorizing the United States to accept membership in the International Refugee Organization, with the provision that --

1/ 65 Stat. 75 (1951).

The President is hereby authorized to accept membership for the United States in the International Refugee Organization (hereinafter referred to as the "Organization"), the constitution of which was approved in New York on December 15, 1946, by the General Assembly of the United Nations, and deposited in the archives of the United Nations: Provided, however, That this authority is granted and the approval of the Congress of the acceptance of membership of the United States in the International Refugee Organization is given upon condition and with the reservation that no agreement shall be concluded on behalf of the United States and no action shall be taken by any officer, agency, or any other person and acceptance of the constitution of the Organization by or on behalf of the Government of the United States shall not constitute or authorize action (1) whereby any person shall be admitted to or settled or resettled in the approval thereof by the Congress, and this joint resolution (22 U.S.C.S. 289-289d) shall not be construed as such prior approval, or (2) which will have the effect of abrogating, suspending, modifying, adding to, or superseding any of the immigration laws or any other laws of the United States.

Similarly, Public Law 90-634 (October 24, 1968), 82 Stat. 1347, 19

U.S.C.A. 160 Note, provides--

(a) Nothing contained in the International Antidumping Code, signed at Geneva on June 30, 1967, shall be construed to restrict the discretion of the United States Tariff Commission in performing its duties and functions under the Antidumping Act, 1921 (sections 160 to 171 of this title) and in performing their duties and functions under such Act the Secretary of the Treasury and the Tariff Commission shall--

(1) resolve any conflict between the International Antidumping Code and the Antidumping Act, 1921, in favor of the Act as applied by the agency administering the Act, and

(2) take into account the provisions of the International Antidumping Code only insofar as they are consistent with the Antidumping Act, 1921, as applied by the agency administering the Act. 1/

Review provisions should specify courts of review for code-related actions. Now, if a matter can be the subject of a protest to U.S. Customs Service actions, jurisdiction is generally in the U.S. Customs Court and the

1/ 61 Stat. 214, 22 U.S.C. 289.

Court of Customs and Patent Appeals, (see SCM Corp. v. United States, 450 F. Supp. 1178 (Cust. Ct. 1978) and J.C. Penney Co. v. United States, 439 F.2d 63 (2d Cir. 1971), but where no protest is possible, review is in the United States district courts. (See Sneaker Circus v. Jimmy Carter, et al., 566 F. 2d 396 (2d Cir. 1977) and Talbot Co. v. Simon, 539 F.2d 221 (D.C. Cir. 1976).) This situation may not be satisfactory. Uniform interpretation is critical to many schemes. It may be desirable to have customs questions reviewed in the Customs Court, but other actions, such as the claim of a frustrated foreign bidder on a government contract or a foreigner's challenge to an environmental regulator's refusal to accept foreign testing in accordance with the Standards code, are matters that perhaps ought to be reviewed in the courts or agencies that ordinarily review the actions of those bodies. 1/ We have set out specific suggestions for such jurisdictional ideas in the chapters relating to each code, along with our thoughts on necessary implementation.

CONCLUSIONS

The new MTN agreements are at present in an uncertain legal state. They will exist (if actually signed) alongside the General Agreement, in many cases restating it and in some cases even derogating from it. If they reform the international system of GATT in any general way, it may be mainly by reinvigorating previous General Agreement provisions.

1/ This process is not always logical. Under the Clean Air Act, review of National Standards, which may be relevant to implementation of the Standards agreement, is in the United States Court of Appeals for the District of Columbia, while jurisdiction to review local standards is in the United States Court of Appeals for the circuit where the affected air quality control region is located.

Implementation of the new agreements will require attention not only to specific requirements arising from the new agreements, but also overall policy implications of the agreements. The principal policy implication is the need to create an adequate United States ability to take advantage of the disputes resolution process created by the new agreements. It will also be desirable to define the legal impact of the new agreements in United States litigation, such as whether and what private rights they create under United States law.

APPENDIX A

SEC. 101. BASIC AUTHORITY FOR TRADE AGREEMENTS.

(a) Whenever the President determines that any existing duties or other import restrictions of any foreign country or the United States are unduly burdening and restricting the foreign trade of the United States and that the purposes of this Act will be prompted thereby, the President--

(1) during the 5-year period beginning on the date of the enactment of this Act, may enter into trade agreements with foreign countries or instrumentalities thereof; and

(2) may proclaim such modification or continuance of any existing duty, such continuance of existing duty-free or excise treatment, or such additional duties, as he determines to be required or appropriate to carry out any such trade agreement.

(b)(1) Except as provided in paragraph (2), no proclamation pursuant to subsection (a)(2) shall be made decreasing a rate of duty to a rate below 40 percent of the rate existing on January 1, 1975.

(2) Paragraph (1) shall not apply in the case of any article for which the rate of duty existing on January 1, 1975, is not more than 5 percent ad valorem.

(c) No proclamation shall be made pursuant to subsection (a)(2) increasing any rate of duty to, or imposing a rate above, the higher of the following:

(1) the rate which is 50 percent above the rate set forth in rate column numbered 2 of the Tariff Schedules of the United States as in effect on January 1, 1975, or

(2) the rate which is 20 percent ad valorem above the rate existing on January 1, 1975.

SEC. 102. NONTARIFF BARRIERS TO AND OTHER DISTORTIONS OF TRADE.

(a) The Congress finds that barriers to (and other distortions of) international trade are reducing the growth of foreign markets for the products of United States agriculture, industry, mining, and commerce, diminishing the intended mutual benefits of reciprocal trade concessions, adversely affecting the United States economy, preventing fair and equitable access to supplies, and preventing the development of open and nondiscriminatory trade among nations. The President is urged to take all appropriate and feasible steps within his power (including the full exercise of the rights of the United States under international agreements) to harmonize, reduce, or eliminate such barriers to (and other distortions of) international trade. The President is further urged to utilize the authority granted by subsection (b) to negotiate trade agreements with other countries and instrumentalities providing on a basis of mutuality for the harmonization, reduction, or elimination of such barriers to (and other distortions of) international trade. Nothing in this subsection shall be construed as prior approval of any legislation which may be necessary to implement an agreement concerning barriers to (or other distortions of) international trade.

APPENDIX A--Continued

(b) Whenever the President determines that any barriers to (or other distortions of) international trade of any foreign country or the United States unduly burden and restrict the foreign trade of the United States or adversely affect the United States economy, or that the imposition of such barriers is likely to result in such a burden, restriction, or effect, and that the purposes of this Act will be promoted thereby, the President, during the 5-year period beginning on the date of the enactment of this Act, may enter into trade agreements with foreign countries or instrumentalities providing for the harmonization, reduction, or elimination of such barriers (or other distortions) or providing for the prohibition of or limitations on the imposition of such barriers (or other distortions).

(c) Before the President enters into any trade agreement under this section providing for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade, he shall consult with the Committee on Ways and Means of the House of Representatives, the Committee on Finance of the Senate, and with each committee of the House and the Senate and each joint committee of the Congress which has jurisdiction over legislation involving subject matters which would be affected by such trade agreement. Such consultation shall include all matters relating to the implementation of such trade agreement as provided in subsections (d) and (e). If it is proposed to implement such trade agreement, together with one or more other trade agreements entered into under this section, in a single implementing bill, such consultation shall include the desirability and feasibility of such proposed implementation.

(d) Whenever the President enters into a trade agreement under this section providing for the harmonization, reduction, or elimination of a barrier to (or other distortion of) international trade, he shall submit such agreement, together with a draft of an implementing bill (described in section 131(b)) and a statement of any administrative action proposed to implement such agreement, to the Congress as provided in subsection (e), and such agreement shall enter into force with respect to the United States only if the provisions of subsection (e) are complied with and the implementing bill submitted by the President is enacted into law.

(e) Each trade agreement submitted to the Congress under this subsection shall enter into force with respect to the United States if (and only if)--

(1) the President, not less than 90 days before the day on which he enters into such trade agreement, notifies the House of Representatives and the Senate of his intention to enter into such an agreement, and promptly thereafter publishes notice of such intention in the Federal Register;

(2) after entering into the agreement, the President transmits a document to the House of Representatives and to the Senate containing a copy of such agreement together with--

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

APPENDIX A--Continued

(B) a statement of his reasons as to how the agreement serves the interests of United States commerce and as to why the implementing bill and proposed administrative action is required or appropriate to carry out the agreement; and

(3) the implementing bill is enacted into law.

(f) to insure that a foreign country or instrumentality which receives benefits under a trade agreement entered into under this section is subject to the obligations imposed by such agreement, the President may recommend to Congress in the implementing bill and statement of administrative action submitted with respect to such agreement that the benefits and obligations of such agreement apply solely to the parties to such agreement, if such application is consistent with the terms of such agreement. The President may also recommend with respect to any such agreement that the benefits and obligations of such agreement not apply uniformly to all parties to such agreement, if such application is consistent with the terms of such agreement.

(g) For purposes of this section--

(1) the term "barrier" includes the American selling price basis of customs evaluation as defined in section 402 or 402a of the Tariff Act of 1930, as appropriate;

(2) the term "distortion" includes a subsidy; and

(3) the term "international trade" includes trade in both goods and services.

SEC. 121. STEPS TO BE TAKEN TOWARD GATT REVISION; AUTHORIZATION OF APPROPRIATIONS FOR GATT.

(a) The President shall, as soon as practicable, take such action as may be necessary to bring trade agreements heretofore entered into, and the application thereof, into conformity with principles promoting the development of an open, nondiscriminatory, and fair world economic system. The action and principles referred to in the world economic system. The action and principles referred to in the preceding sentence include, but are not limited to, the following--

(1) the revision of decisionmaking procedures in the General Agreement on Tariff and Trade (hereinafter in this subsection referred to as "GATT") to more nearly reflect the balance of economic interests,

(2) the revision of article XIX of the GATT into a truly international safeguard procedure which takes into account all forms of import restraints countries use in response to injurious competition or threat of such competition,

(3) the extension of GATT articles to conditions of trade not presently covered in order to move toward more fair trade practices,

(4) the adoption of international fair labor standards and of public petition and confrontation procedures in the GATT,

(5) the revision of GATT articles with respect to the treatment of border adjustments for internal taxes to redress the disadvantage to countries relying primarily on direct rather than indirect taxes for revenue needs,

APPENDIX A--Continued

(6) the revision of the balance-of-payments provision in the GATT articles so as to recognize import surcharges as the preferred means by which industrial countries may handle balance-of-payments deficits insofar as import restraint measures are required,

(7) the improvement and strengthening of the provisions of GATT and other international agreements governing access to supplies of food, raw materials, and manufactured or semi-manufactured products, including rules and procedures governing the imposition of export controls, the denial of fair and equitable access to such supplies, and effective consultative procedures on problems of supply shortages,

(8) the extension of the provisions of GATT or other international agreements to authorize multilateral procedures by contracting parties with respect to member or nonmember countries which deny fair and equitable access to supplies of food, raw materials, and manufactured or semi-manufactured products, and thereby substantially injure the international community,

(9) any revisions necessary to establish procedures for regular consultation among countries and instrumentalities with respect to international trade and procedures to adjudicate commercial disputes among such countries or instrumentalities,

(10) any revisions necessary to apply the principles of reciprocity and nondiscrimination, including the elimination of special preferences and reverse preferences, to all aspects of international trade,

(11) any revisions necessary to define the forms of subsidy to industries producing products for export and the forms of subsidy to attract foreign investment which are consistent with an open nondiscriminatory, and fair system of international trade, and

(12) consistent with the provisions of section 107, any revisions necessary to establish within the GATT an international agreements on articles (including footwear), including the creation of regular and institutionalized mechanisms for the settlement of disputes, and of a surveillance body to monitor all international shipments in such articles.

(b) The President shall, to the extent feasible, enter into agreements with foreign countries or instrumentalities to establish the principles described in subsection (a) with respect to international trade between the United States and such countries or instrumentalities.

(c) If the President enters into a trade agreement which establishes rules or procedures, including those set forth in subsection (a), promoting the development of an open, nondiscriminatory, and fair world economic system and if the implementation of such agreement will change any provision of Federal law (including a material change in an administrative rule), such agreement shall take effect with respect to the United States only if the appropriate implementing legislation is enacted by the Congress unless implementation of such agreement is effected pursuant to authority delegated by Congress. Such trade agreement may be submitted to the Congress for approval in accordance with the procedures of section 151. Nothing in this section shall be construed as prior approval of any legislation necessary to implement a trade agreement entered into under this section.

APPENDIX A--Continued

(d) There are authorized to be appropriated annually such sums as may be necessary for the payment by the United States of its share of the expenses of the Contracting Parties to the General Agreement on Tariffs and Trade. This authorization does not imply approval or disapproval by the Congress of all articles of the General Agreement on Tariffs and Trade.

APPENDIX B

List of "necessary" and "other" changes of U.S. law discussed in this study--

NOTE: "Necessary" changes may in law, regulation or practice of the United States and are defined as changes--

- a. specifically contemplated by a new agreement, or
- b. needed because a new agreement provision conflicts with an existing statutory provision or regulation and, in our opinion, cannot under any reasonably persuasive interpretation of either the agreement of the affected law be read otherwise than as a conflict.

"Other" changes are ones that, in our judgment, may be considered in the preparation of an implementing bill, and therefore deserve discussion in this study.

Government Procurement Code

Necessary changes:

- (1) The Buy American Act, 41 U.S.C. sections 10a-10d (1976), as implemented by Executive Orders 10582 and 11051, generally requires that products procured for public use within the United States and construction contracts for public works in the United States must originate in domestic sources if certain price differential criteria are satisfied -- i.e., foreign bids are increased by 6 percent generally, 12 percent if the low domestic bidder is a small or minority-owned business, and 50 percent if the purchase is made by the Department of Defense ;
- (2) Department of Defense Appropriations Act :
 - (a) Pub. L. No. 94-212, 90 Stat. 153 (1976), sections 709, 723, and 729 (the "Berry Amendment"), prohibit the purchase from foreign sources of certain items, including stainless steel flatware, food, shoes, textiles, clothing and certain specialty metals;
 - (b) Pub. L. No. 90-500, 82 Stat. 849 (1968), section 404, prohibits the purchase or lease of foreign busses by the Department of Defense;
 - (c) Pub. L. No. 94-212, 90 Stat. 53 (1976), tit. IV, (the Byrnes-Tollefson Amendment") prohibits the purchase of vessels or major components, including hulls or superstructures, from foreign sources;

APPENDIX B--Continued

(3) GSA appropriations act restrictions:

- (a) Pub. L. No. 95-81, 91 Stat. 354 (1977), section 506, generally prohibits the purchase of stainless steel flatware from foreign sources;
- (b) Pub. L. No. 94-91, 89 Stat. 441 (1975), section 505, (see also 41 C.F.R. section 5A.6.104-50(b) (1977)) mandates a 50% value differential discriminating against foreign suppliers as an alternate to the Buy American Act in some circumstances pertaining to handtools and measuring instruments procured by GSA;

(4) Prison-made Goods, 18 U.S.C. section 4124 (1976), imposes a preference for prison-made goods which satisfy procurement requirements;

(5) Blind and Other Handicapped-made Goods, 41 U.S.C. section 48 (1976), imposes a preference for such goods which satisfy procurement requirements;

(6) Small Business Programs:

- (a) 15 U.S.C. sections 631-44 (1976), including recent amendments found in Pub. L. No. 95-507, 92 Stat. 1757 (1978), mandates a preference for small and minority businesses bidding on government contracts, and is the authority for the small business set-aside program;
- (b) 41 U.S.C. section 252(b) (1976) is an additional declaration of Congressional policy favoring small businesses in procurement;
- (c) 22 U.S.C. section 2352 (1976) requires the President to take certain steps guaranteeing direct opportunities for small businesses to bid on contracts abroad financed by AID funds;

(7) Preferences for United States carriers:

- (a) 10 U.S.C. section 2631 (1976) generally requires that only U.S. vessels be used to transport supplies procured by the armed forces, when transport is by sea;
- (b) 46 U.S.C. section 1241(b)(1) (Supp. V 1975), requires that at least 50% of the gross tonnage of goods procured by the U.S. must be transported on U.S.-flag vessels if the goods are to be shipped by sea and if the vessels offer a fair price; 22 U.S.C. section 2353 (1976) modifies 46 U.S.C. section 1241(b)(1) (1976) with regard to procurement effected under certain foreign aid laws;

APPENDIX B--Continued

- (c) The International Air Transportation Fair Competitive Practices Act of 1974, Pub. L. No. 93-623, 89 Stat. 2102 (1978), requires that where possible all federal agencies and government contractors use U.S. flag air carriers for international transportation of property, which includes property subject of a procurement contract;
- (8) 46 U.S.C. Section 292 (Supp. V 1975) prohibits dredging in the United States by foreign-built vessels, unless they are documented as U.S. vessels;
- (9) 46 U.S.C. sections 1155 and 1176 (1976) provide that ships authorized to be constructed under the Merchant Marine Act must be built in American shipyards with American materials, and ship operators generally must use American materials for subsistence items;
- (10) Foreign aid restrictions, 22 U.S.C. section 2354 (1976), condition the procurement of foreign supplies with foreign aid funds upon several findings by the President, including the unlikelihood of potentially adverse impacts on the U.S. economy;
- (11) AMTRAK Appropriations Act, Pub. L. No. 95-421, 92 Stat. 923 (1978), which allows only domestic procurement of products costing more than \$1,000,000;
- (12) 15 U.S.C. section 637(e) (1976), 41 U.S.C. sections 5, 252(c) and 253 (1976), and 41 C.F.R. 1-2 (1976), generally set forth advertising requirements for procurements;
- (13) 41 U.S.C. section 253(b) (1976) requires public bid openings and awards to be based on advantage to the government. In addition, 41 C.F.R. 1-1.1004, 1-2.404-3, -2.408(a) and 1.3.103(b) (1976) set forth requirements for notification of awards;
- (14) 41 C.F.R. sections 1-9.100 et seq. (1977) set forth conditions of government patent rights arising from research and development contracts;
- (15) The Freedom of Information Act, 5 U.S.C. section 552(b) (1976), contains an exemption for internal agency deliberations;
- (16) The following statutes provide that buy-American conditions must be placed on the various types of grants to state and local governments which they authorize:

APPENDIX B--Continued

- (a) Public Works Employment Act of 1977, Pub. L. No. 95-28, section 103 91 Stat. 116 (1977) (the previous version was 42 U.S.C. section 6705(f)(1)(A-B) (West Supp. 1978), provides for a strong buy-American preference in connection with procurements for construction projects authorized under it;
 - (b) Work Relief and Public Works Appropriation Act of 1938, 52 Stat. 809, section 401, amended the Rural Electrification Act of 1936, (7 U.S.C. section 903 (1976)), to add a buy-American provision with respect to loans made under the latter statute;
 - (c) Clean Water Act of 1977, 33 U.S.C.A. section 1293 (West supp. 1978) provides a buy-American provision for construction projects authorized under it; and
 - (d) Surface transportation Assistance Act of 1978, Pub. L. No. 95-599, 92 Stat. 2689, section 401 (1978), sets forth a buy-American preference for construction projects authorized under it;
- (17) The Buy Indian Act, 25 U.S.C. section 47 (1976), (see 41 C.F.R. section 14H-3.215-70 (1977) provides that "so far as may be practicable. . . purchases of the products of Indian industry may be made in open market in the discretion of the Secretary of the Interior;" thus, the provision has a Buy-American effect where used.

Regulations:

- (1) Labor Surplus Area Concerns, found, for example, in 15 U.S.C.A. section 644(d) (West Supp. 1978) 2/ FFR section 1-1.800 et seq., (41 C.F.R. Ch. 1 (1977)), which establish a set-aside policy for procurements in labor surplus areas (see also 29 C.F.R. sections 8.1 et seq. (1977) and Defense Manpower Policy No. 4, 32A C.F.R. Ch. 1, part 134 (1977)); and
- (2) Minority business set-aside programs, as found, for example, in FFR sections 1-1.13 et seq., 1-7.103-12, -7.202-28, -7.402-33, 41 C.F.R. 1-1.13 (1977), (see also Executive Orders 11458, 11158 and 11625), 42 U.S.C.A. section 6705(f)(2) 92 Stat. 1957 (1978), (West Supp. 1978) and Pub. L. No. 95-507) which mandate a preference for or require a certain percentage of contracts to be awarded to minority-owned firms, which by definition exclude foreign suppliers.

APPENDIX B--Continued

Safeguards Code

To the extent the Safeguard Code has been agreed upon, there do not appear to be any necessary changes to U.S. laws. However, depending on final removal of brackets and compromises on selectivity, coverage of export restraint measures, and special provisions for developing countries, some or all of the following changes may be desirable:

<u>U.S. Law</u>	<u>Subject</u>	<u>Code Chapter</u>
201(b)(1)	Safeguard measures only in circumstances provided for in Article XIX	General Provision
201(b)(1)	Criteria for invocation of safeguard action	1
201(b)(3)	Definition of domestic industry	1(4)
203(h) & (i)	Duration - annual review - liberalization	3
201 or new	Special findings for selective safeguard measures	4
Sec. 204 of Agricultural Adjustment Act	VRA's after injury finding	4Bis
202(a)(1) and 203(b)(2) (reasons for President refraining from providing relief)	Consultations and dispute settlement	5 & 6
301(e) or new	U.S. industry request for review of safeguard measures abroad	5 & 6
New	Annual report to Committee	6
201-203, including 203(f)(2) (suspension of GSP) may require modification	Special Treatment for LDCs	8

APPENDIX B--Continued

Subsidies/Countervailing Measures
(MTN/NTM/W/210, December 19, 1979)

Necessary Changes in U.S. Law

<u>U.S. Law</u>		<u>Code</u>
19 U.S.C. 1303	"material" injury investigations	IA1
19 U.S.C. 1303	initial 30-day reasonable basis inquiry as in 19 U.S.C. 160(c)(2)	IA4
19 U.S.C. 1303	provisional measures for dutiable imports	ID1, 2, 3, 4
19 U.S.C. 1303 19 U.S.C. 160, et seq	imposing duties only from the date of finding a threat of injury - <u>Timkin case</u>	IE3
19 U.S.C. 1303 19 U.S.C. 160	factors to consider in the injury determination; definition of regional markets; price assurances for regional markets	IF2, 3, 4, 5 6, 7, 8, 9
19 U.S.C. 2411	special & differential treatment for LDCs	V

Other Changes in U.S. Law

19 U.S.C. 160	"material" injury	
19 U.S.C. 1303 19 U.S.C. 160	price assurances	IC5-7
19 U.S.C. 1303 19 U.S.C. 160	revocation of outstanding injury determinations	IC8
19 U.S.C. 1337	specifically carve out pricing jurisdiction	VIII1
19 U.S.C. 2411(a)(3)	adverse effect-reduced sales	IIB4
19 U.S.C. 2411(a)(1)	adverse effects	IIB4

APPENDIX B--Continued

Standards

<u>U.S. Code</u>	<u>Subject of necessary change, modification and addition</u>	<u>MTN Code</u>
New	- prohibit use of new tech. regs., stds., & cert. sup. which will obstruct int'l trade unnecessarily.	2.1, 7.1
New	- instruct appropriate agencies to use in the future; (a) int'l stds. where appropriate; (b) tech, regs. & stds. based on performance, not design, where appropriate;	2.2 2.4
New	(c) nondiscriminatory acceptance of & procedures for products for testing; (d) unobstructive administrative procedures for testing, etc.	5.1 5.2 & .3
New	- participation in: (a) int'l/reg'l standardizing groups.	2.3, 9.1
New	(b) Committee on Technical Barriers to Trade	13
New	- notification through GATT of proposed tech. regs., stds., & cert. sep. (a) give notification	2.5.2
New	(b) receive notification	10.4
New	- determine and implement what "best efforts" obligation consists of, as to: (a) state & local government	3.1, 6, 8
New	(b) private standards group	4, 6, 8, 10.2
New	(c) int'l/reg'l stds groups	2.9, 9.2-.4
New	- establish inquiry point	10.1
New	- authorize mechanism(s) to provide technical assistance when requested	11
New	- complaints regarding code violations (a) making complaints	14
New	(b) receiving & handling complaints	

APPENDIX B--Continued

<u>U.S. Code</u>	<u>Subject of other change, modification and addition</u>	<u>MTM Code</u>
5 U.S.C. 553(d) APA	- "reasonable time" between publication & enforcement of a tech. reg. or cert. sep. (change would be unnecessary if 553(d)(3) were used, <u>i.e.</u> , 30 days changed to reasonable time for the circumstances.)	2.8
New	- determining what special and differential treatment means in this context and pursue resulting policy	12

APPENDIX B--Continued

General Amendments

<u>U.S. Code Citation</u>	<u>Subject Matter</u>	<u>Code Provision</u>
A. <u>Necessary</u>		
1. 19 U.S.C. 2136 (TA 126)	Reciprocal nondiscriminatory natory treatment--uncondi- tional MFN.	n/a*
B. <u>Desirable</u>		
1. 19 U.S.C. 2411 (TA 301)	Retaliation for foreign country practices.	Frameworks & other disputes settlement provisions
2. 19 U.S.C. 1514/1516 and other similar provisions.	Judicial review of agency decisions on MFN Code subjects.	n/a
3. Appropria- tions bills.	Negotiating authority; increasing agency responsibilities.	

* Section 126 of the Trade Act, 19 U.S.C. 2136, provides that the President must "recommend," under certain circumstances, termination of MFN; codes at present mostly contemplate benefits extended only to signatories.

APPENDIX C

Section 301 Cases

<u>Complainant</u>	<u>Date Filed</u>	<u>Status on June 30, 1978</u>	<u>Developments Subsequent to June 30</u>
<u>No. 301-1:</u> <u>Delta Steam-</u> <u>ship Lines:</u>	July 1, 1975	Accord reached with Guatemala. Complaint withdrawn on June 29, 1976.	None.
<u>No. 301-2:</u> <u>United Egg</u> <u>Producers</u>	1975	Agreement reached with Canada. Case terminated on March 4, 1976.	None.
<u>No. 301-3:</u> <u>Seymour</u> <u>Foods,</u> <u>Inc.</u>	Aug. 7, 1975	No hearing held. Practice under discussion in MTN.	None.
<u>No. 301-4:</u> <u>National</u> <u>Canners</u> <u>Assoc.</u>	Sept. 25, 1975	Minimum import price mechanism case. STR public hearings held on Nov. 17, 1975. Sec. 301 Committee recommended formal action under GATT. Consultations under Art. XXIII(1) of GATT held on March 29, 1976, with EEC. No satisfactory resolution being made, issue was referred to GATT under dispute settlement provisions of Art. XXIII(2). Work of GATT panel was completed in May 1978. Report favorable to U.S. will be transmitted to contracting parties in fall of 1978. Meanwhile, the EEC in June of 1978 discontinued use of minimum price mechanism and switched to production subsidies.	None.
<u>No. 301-5:</u> <u>Great Western</u> <u>Malting Co.</u>	Nov. 13, 1975	To be discussed at MTN.	None.
<u>No. 301-6:</u> <u>Millers Na-</u> <u>tional</u> <u>Federation</u>	Dec. 1, 1975	To be discussed at MTN.	None.

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Section 301 Cases

<u>Complaint</u>	<u>Date Filed</u>	<u>Status on June 30, 1978</u>	<u>Developments Subsequent to June 30</u>
<u>No. 301-7:</u> <u>National Can-</u> <u>ners Assoc.</u>	Mar. 30, 1976	To be discussed at MTN.	None.
<u>No. 301-8:</u> <u>National Soy-</u> <u>bean Pro-</u> <u>cessors</u> <u>Assoc. and</u> <u>American Soy-</u> <u>bean Assoc.</u>	Mar. 30, 1976	STR hearings held on June 22, 1976. Consultations with EEC initiated on Apr. 2, 1976, under GATT Art. XXIII(1). This failed to resolve the issue and it was submitted as a dispute under Art. XXIII(2). GATT Panel met in February-May of 1977. A final report was favorable to the U.S. Meanwhile, the EEC's practices were terminated.	None.
<u>No. 301-9:</u> <u>Charles C.</u> <u>Rehfeldt</u>	Mar. 15, 1976	Hearing held on May 18, 1976. U.S. was informed by Embassy of Republic of China that the offending surcharges would be removed on or about July 1, 1977.	None.
<u>No. 301-10:</u> <u>American Iron</u> <u>and Steel</u> <u>Institute</u>	Oct. 6, 1976	STR hearing held on Dec. 9, 1976. Recommendation sent from STR to the President in late 1977. On Jan. 18, 1978, the President decided to discontinue the 301 review because he believed there was not sufficient justification for the claim.	None.
<u>No. 301-11:</u> <u>Comm. and</u> <u>California-</u> <u>Arizona</u> <u>Citrus</u> <u>League,</u> <u>Texas Ci-</u> <u>trus Mutual,</u> <u>Texas Ci-</u> <u>trus Ex-</u> <u>change</u>	Nov. 12, 1976	Hearings held Jan. 25, 1977. Under discussion at MTN.	None.

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Section 301 Cases

<u>Complainant</u>	<u>Date Filed</u>	<u>Status on June 30, 1978</u>	<u>Developments Subsequent to June 30</u>
<u>No. 301-12</u> <u>George F.</u> <u>Fisher,</u> <u>Inc.</u>	Feb. 14, 1977	STR hearing held on Mar. 29, 1977. GATT dispute settlement panel created under Art. XXIII(2) in fall of 1977. Before the panel made its report discussions with the Japanese produced satisfactory adjustments and the case was terminated on Mar. 3, 1978.	None.
<u>No. 301-13:</u> <u>Tanners Coun-</u> <u>cil of</u> <u>America</u>	Aug. 4, 1977	STR hearings held Oct. 11, 1977. Notification made to Japan in June of 1978 that U.S. intends to make a formal complaint to GATT although no complaint has been filed. Meanwhile, bilateral discussions have continued.	None.
<u>No. 301-14:</u> <u>American In-</u> <u>stitute of</u> <u>Marine</u> <u>Under-</u> <u>writers</u>	Nov. 10, 1977	STR hearings held Mar. 7, 1978. Report submitted to President in May 1978. On June 9, 1978, the President determined that the practices constituted an unreasonable burden and restriction on U.S. commerce. A committee was set up to develop information and options for action under section 301.	None.
<u>No. 301-15:</u> <u>Certain U.S.</u> <u>Television</u> <u>Licensees</u>	Aug. 29, 1978	None. Filed after June 30.	STR hearings set for Nov. 29, 1978 (43 FR 49861, Oct. 25, 1978).
<u>No. 301-16:</u> <u>Great Plains</u> <u>Wheat, Inc.</u>	Nov. 2, 1978	None. Filed after June 30.	STR hearings set for Feb. 15, 1979 (43 F.R. 59935, Dec. 22, 1978).

FOREWORD

This document represents staff analysis of agreements negotiated at the Multilateral Trade Negotiations in Geneva under the auspices of the General Agreement on Tariffs and Trade. The report was prepared as part of an investigation requested by the Senate Committee on Finance and the House of Representatives Committee on Ways and Means and instituted by the Commission on September 1, 1978 (Investigation No. 332-101, 43 F.R. 40935, of Wednesday, September 13, 1978), as to the effect on U.S. trade and industry of the adoption of agreements to be concluded in Geneva.

The studies are being transmitted in response to a request by the Senate Committee on Finance in April 1979.

The report is based upon the Agreement concerning Subsidies and Countervailing Duty Measures (identified by the GATT secretariat as MTN/NTM/W/236) and the Agreement concerning proposed revision of the International Antidumping Code (identified by the GATT Antidumping Committee as COM.AD/W/90). Both documents were agreed to by initialing on April 12, 1979. Certain background documentation has been made available to the staff of the Commission by the Trade Policy Staff Committee of the Office of Special Representative for Trade Negotiations.

As noted throughout the reports some portions of the agreements are incomplete and the status of all of them will depend upon whether domestic legislatures (including the United States Congress) will approve them and whether other nations will sign them. We are informed by the Administration that a proces verbal has been initialed by 24 countries. The attachments to the proces verbal have been initialed as follows:

(A) Standards: U.S., EC-9*, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain, Hungary, Czechoslovakia, Bulgaria.

(B) Government Procurements: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina (with reservation).

(C) Subsidies/CVD: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina (with reservation), Hungary, and Bulgaria.

(D) Meat: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Hungary, and Bulgaria.

* "EC-9" refers to all Members of the European Community.

(E) Dairy: DC version was initialed by U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain (with reservation), and Bulgaria. Hungary initialed the Agreement with no designation whether it was DC or LDC version. There were no known signatories to the LDC version.

(F) Customs Valuation: DC version was initialed by U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, and Bulgaria. Argentina and Spain initialed the LDC version. Hungary and Czechoslovakia initialed the valuation attachment with no indication whether it was DC or LDC version.

(G) Licensing: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain (with reservations), Hungary, and Bulgaria.

(H) Agriculture Framework: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain, Hungary, and Czechoslovakia.

(I) Group Framework: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Spain, Hungary, and Czechoslovakia.

(J) Tariff Negotiations: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, Argentina, Hungary, Czechoslovakia, and Bulgaria.

(K) Civil Aircraft: U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, and Switzerland.

(L) Antidumping: DC versions was initialed by U.S., EC-9, Japan, Canada, Australia, New Zealand, Sweden, Switzerland, Austria, Finland, Norway, and Spain. Hungary and Czechoslovakia initialed the antidumping attachment without designating DC or LDC version. There were no known signatories to the LDC version.*

* "DC version" is the developing country version of the Arrangement on Dairy. "LDC version" is the less-developed country version.

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2. Agreements concerning Subsidies/Countervailing Duty Measures and proposed revision of the International Antidumping Code

Summary of Analysis

The Subsidies/Countervailing Measures Code, represented by the agreement initialed in Geneva, Switzerland, on April 12, 1979, represents an attempt among potential signatories to the Code to standardize procedures for countervailing duty investigations, to require consultations with signatories concerning subsidy practices, and to establish dispute settlement procedures within a Committee composed of signatories to the Code. The Code does not purport to amend GATT Article VI (countervailing duties), GATT Article XVI (subsidies), or GATT Article XXIII (dispute settlement), but "interprets" these provisions, providing guidelines for their application.

Although the Code is an attempt to breathe life into current GATT provisions by establishing "interpretive guidelines" for consultation, conciliation, and dispute settlement mechanisms of the Committee of Signatories, it both relies on several concepts in the GATT document and introduces new concepts into both the Code and into the administration of national countervailing duty investigations. From the frame of reference of the "GATT reform mandate" in section 121 of the Trade Act of 1974, the Code establishes a Committee of signatories and procedures for consultation, conciliation and dispute settlement within the Committee in addition to creating procedural obligations in the administration of national countervailing duty programs.

Signing the Code necessitates amending the U.S. countervailing duty statute to provide for an injury test and applying an injury test to all outstanding countervailing duty orders of the Treasury Department which affect the products of other Code signatories. Other domestic laws which would be affected by adherence to the Code are section 301 of the Trade Act of 1974 and section 337 of the Tariff Act of 1930, as amended. Discretion to enforce section 301 against the subsidy practices of other signatories is limited by the obligation to obtain authorization for "countermeasures" from the Committee of Signatories. The application of section 337 to the prices of products exported by signatories maintaining subsidies affecting those products would be unauthorized because of the provisions of the Code limiting official action to measures contemplated in the Code. The Code commits a signatory to employ enforcement measures only in accordance with the strictures of the document. The only U.S. legislation contemplated in the Code consists of the countervailing duty statute and section 301.

The principal features of the Code are as follows:

Countervailing duties.--Duties may be imposed to offset that amount of any subsidy on imports which result in threatened or actual material injury to the domestic industry producing competitive products. Additional authority for countervailing duties is provided for agriculture to protect support programs in addition to producers.

GATT subsidy rules.--Where a subsidy practice causes or threatens "serious prejudice" to the interests of the United States or results in "nullification or impairment" of the benefits of GATT membership, the United States can request dispute settlement procedures and if the resolution is favorable, receive authorization from the Committee of Signatories to take countermeasures against the subsidizing nation, presumably under section 301 of the Trade Act of 1974.

The proposed revision of the International Antidumping Code would harmonize the obligations concerning the conduct of antidumping investigations under GATT Article VI with those provided under the subsidy/countervailing duty measures code for the conduct of countervailing duty investigations. The proposed revisions also contain a dispute settlement mechanism for exporting nations in the event that importing nations apply antidumping procedures which are inconsistent with the International Antidumping Code.

2.0 Introduction

Subsidies may adversely affect U.S. producers in several ways: 1) subsidized imports may capture their share of domestic markets; 2) subsidized exports from other countries may capture the export markets of U.S. producers in a third country; and 3) subsidized products may frustrate exports to the markets of the subsidizing country. Export subsidies have been considered trade distorting and condemned as a "beggar-thy-neighbor" practice since the 1930's. 1/ With the rise of the welfare state, however, other subsidies primarily designed to protect employment have resulted in indirect incentives to exports and barriers to import competition. 2/ Such subsidies include: government financing of wages, research and development, loans for investment or to cover operating deficits, and so forth. The maintenance of indirect subsidy programs may result in artificially stimulating production to the degree that they result in both import substitution and exports. 3/ Although GATT Articles VI (countervailing duties) and XVI (subsidies) were intended to provide for the regulation of subsidy practices in international trade, this has not taken place. The Subsidies/Countervailing Measures Code is an attempt to provide "interpretive guidelines" to begin the regulation of subsidy practices in international trade through consultations and conciliation negotiations within the Committee of Signatories and the formal procedures for dispute settlement.

The following sections introduce the subject of each of the parts in the Subsidy/Countervailing Measures Code. The emphasis in the next section is the description of the background concepts to the provisions of the Code. An analysis of the specific provisions of each Article of the Code is provided in the Provision-By-Provision Analysis section of this paper beginning on page 11.

1/ Joan Robinson, "Beggars-My-Neighbor Remedies for Unemployment" (1935), in Collected Economic Papers, Volume IV (1973), p.229.

2/ Melvyn B. Kraus, The New Protectionism: The Welfare State and International Trade (1978).

3/ Harald B. Malmgren, "International Order for Public Subsidies" (1977).

Part I Application of Article VI (countervailing duties)

Implementation of the provisions of Part I would affect substantive provisions in U.S. law. The United States would be required to adopt an injury provision for U.S. producers competing with imported dutiable merchandise in a countervailing duty statute and conform the administration of that injury provision with the provisions of the GATT Article VI and Part I of the Code. This amendment would represent a change in policy as well as a change in the administration of the United States countervailing duty statute. Previous U.S. policy in the area of dutiable merchandise 1/ has been that U.S. firms cannot compete effectively with the subsidy resources of a foreign government. Even if a particular industry is injured only marginally by subsidized imports, individual members of that industry were considered to have a legitimate right to protest, for they are losing business which they would normally obtain under the economic principle of comparative advantage. 2/

The United States has not been obligated to implement the GATT Article VI "injury requirement" in its countervailing duty statute with respect to dutiable merchandise because that legislation pre-dated the GATT and is subject to a grandfather clause in the Protocol of Provisional Application. In the case of duty-free merchandise, the United States legislated an injury test, the operative language of which is identical to that in the Antidumping Act, 1921. The United States imposes countervailing duties more frequently than any of its trading partners.

1/ The Trade Act of 1974 expanded the scope of the countervailing duty statute to include duty-free imports. An injury provision was legislated for cases involving duty-free imports.

2/ Marks and Malmgren, "Negotiating Nontariff Distortions to Trade," 7 Law & Pol. Int'l Bus. 327, 347 (1975).

The failure to negotiate a countervailing duty code along with the International Antidumping Code during the multilateral trade negotiations ending in 1967 (the Kennedy Round) has been attributed to the smaller number of cases brought under the U.S. countervailing duty statute at that time. 1/ A code on countervailing duty practices had been proposed by the Nordic countries during the Kennedy Round, 2/ and the United States responded with support for a code provided that it also dealt with the problem of subsidies, the underlying trade distortions which give occasion to the response in the form of countervailing duty measures. The negotiations collapsed over the issue of whether the Common Agricultural Policy of the European Economic Community (EEC) was to be considered as an import supplanting subsidy. 3/ The EEC, Canadian, and Japanese criticism of the U.S. failure to implement an injury test more than 30 years after becoming a contracting party (i.e., member-signatory) to the GATT and U.S. dissatisfaction with the present GATT Article XVI provisions were "linked" in the Tokyo Round subsidy/countervailing duty measure negotiations. Indeed, it was the intention of the Congress to link the negotiation of these issues. Section 303(d) of the countervailing duty statute, as amended by section 331(a) of the Trade Act of 1974, provides:

1/ Kenneth W. Dam, The GATT: Law and International Economic Organization (1970), at 178.

2/ Harald B. Malmgren, International Economic Peacekeeping in Phase II (1972), at 104.

3/ See Malmgren (1972) at 122-131, cited in Marks and Malmgren, "Negotiating Nontariff Distortions to Trade," of Law & Pol Int'l Bus. (1975).at 345-346, n. 82. and subject text:

It is the sense of the Congress that the President, to the extent practicable and consistent with United States interests, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

To assist such negotiations, the Congress authorized the Secretary of the Treasury to waive the imposition of countervailing duties during the four-year period January 3, 1975, through January 3, 1979, if the Secretary determined that:

- A. adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise; (and)
- B. there is a reasonable prospect that . . . successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and
- C. the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations . . . 1/

It was the extension of this waiver authority which the EEC had linked to a willingness to continue the negotiation of a subsidy/countervailing measures code during fall of 1978. 2/

The provisions of Part I of the Code also requires amendment of the U.S. countervailing duty legislation to authorize injury investigations for all outstanding products of signatories which are subject to countervailing

1/ 19 U.S.C. 1303(d)(2)(a)-(c).

2/ The structure of U.S.-Canadian trade, however, suggests that even if the multilateral negotiations had failed, a bilateral agreement with Canada might have been possible. Both the federal and regional Canadian governments . . . use a wide range of assistance measures to promote balanced regional and industrial growth." Nearly three-fourths of Canada's trade is with the United States. See, Pestieau, Subsidies and Countervailing Duties: The Negotiation Issues (1976) at 2.

duties but which had not been subject to an investigation to determine whether their importation resulted in injury to U.S. producers. Finally, legislation may be necessary to provide for the termination of investigations where the effect of the complained-of subsidy on the petitioning industry is determined not to be injurious.

Part II: Application of Article XVI (subsidies) and Article XXIII
(nullification and impairment)

The United States has long held that the present provisions of GATT Article XVI do not adequately regulate the use of subsidies in international trade. National accounts data collected by the Organization for Economic Cooperation and Development indicate that the United States subsidizes less than its trading partners and that its subsidy levels have decreased in recent years while the subsidy levels in other major trading countries has increased. ^{1/} The treatment of industrial and agricultural products is not comparable. Although there is a prohibition against export subsidies which have certain effects, there has been no definition of an export subsidy. Prohibited export subsidies are couched in two very vague concepts--"dual pricing" in the case of industrial products, terminology which is not defined, and export subsidies that result in "more than an equitable share of world trade" for the subsidizing country in the case of agriculture. No guidelines exist under Article XVI to distinguish domestic--rather than export--subsidies which may have the effect of leading to either import substitution or the

^{1/} See, "Levels and Patterns of Subsidization in Several Major Trading Countries" prepared by the Office of Economic Research, U.S. International Trade Commission, at page A-5 of the Appendix A to this report.

stimulation of exports. Although GATT Article XXIII procedures are available for these latter types of subsidies, Article XXIII attempts to resolve problems among members in cases which do not necessarily involve violations of Article XVI obligations. The results of dispute settlements under Article XXIII have been ad hoc and have not resulted in guidelines for subsidy practices under Article XVI (or otherwise) even though there have been many Article XXIII disputes concerning subsidy practices.

The Code redefines the concept of more than an "equitable share of world trade" in the case of agriculture and may be interpreted as having abandoned the dual pricing requirement in the case of industrial products. The Code also requires that the Committee of Signatories authorize any countermeasures. This commitment would limit resort to section 301 of the Trade Act of 1974 for retaliation against Code signatories.

The theory of conflict resolution under GATT Article XXIII has been to provide contracting parties with conciliation and resolution opportunities in connection with the trade-related concessions a party had negotiated under the aegis of the GATT; e.g., binding tariffs on certain products. For example, assume a country that had historically granted a duty concession on a certain product with another contracting party to the GATT, concerning which product the country later either increased or introduced a domestic production subsidy, which operated to protect its producers of the product in question from competition with the exports of the product from the other contracting party. Within the framework of Article XXIII the subsequent subsidization had the effect of "nullifying or impairing" the anticipated benefit accruing to the prejudiced party who had bargained for the duty reduction. Other examples

of nullification and impairment exist where a GATT dispute panel finds that contracting party has violated its obligations under the GATT and when a contracting party imposes quantitative restrictions on the products of another contracting party outside of the provisions of the GATT which authorize such restrictions.

Part III: Developing countries

One of the themes in the Tokyo Round of negotiations has been the reliance on export subsidies by less-developed countries. Another is the necessity for import substitution measures by less-developed countries. The justification for the first is the need to earn foreign exchange, and for the second is the need to create domestic processing and manufacturing industries in the process of industrialization. The Code provides "special and differential" treatment to less-developed country signatories.

Part IV: State-controlled economy countries

There is no agreed-upon methodology for quantifying a transfer of resources to a particular industry in a nonmarket economy within the context of providing guidelines for subsidy practices or countervailing duty measures. Part IV authorizes any reasonable basis in the national legislation of signatories for determining either the existence or the amount of subsidy for products from such countries.

Part V: Committee of signatories

Part V creates a Committee of the Signatories of the Code. The Committee would review the operations of the provisions of the Code much as the GATT AntiDumping Committee currently reviews the provisions of the International AntiDumping Code. Specifically, the Committee would police the

imposition of countervailing duty measures undertaken by signatories under Part I and determine the issues of "serious prejudice" and "nullification and impairment" in complaints brought under Part II. In addition, the Committee would provide a forum for consultations concerning obligations under each of those Parts. If the Committee is successful in applying the proposed guidelines in the Code for subsidy matters and countervailing duty actions, the development of a GATT "case law" approach to subsidy issues may become possible.

Part VI: Application of Article XXIII (dispute Settlement)

A basic objective of the GATT is the settlement of disputes between the contracting parties without resort to formal adjudicative procedures. GATT Articles XXII and XXIII provide for consultations affecting the operation of the GATT as a whole. Article XXII requires that "sympathetic consideration" and an opportunity to consult be afforded by any party to another "with respect to any matter affecting the operation of this Agreement." Article XXIII is more specific; it provides first for consultations, where a Contracting Party believes a benefit to which it is entitled is nullified or impaired, or an objective of the GATT is being impeded, as a result of conduct by another party or "the existence of any other situation." Failing a negotiated settlement during consultations, the complaining party may appeal to the Contracting Parties for a panel investigation leading to appropriate recommendations, ruling, and possible authorization of countermeasures, including the withdrawal of GATT obligations.

The GATT has authorized countermeasures or retaliation only once ^{1/} although many complaints have been tabled under Article XXIII. The dispute settlement procedure of the GATT has broken down because of dilatory tactics, a lack of disciplined factfinding procedures, the lack of a definition of the concept of nullification and impairment, and an evolution from an original OECD type of membership to one with a large number of LDC's. In addition, the EEC network of over forty associated developing countries can politically "insulate" themselves from any Article XXIII vote which would have the effect of approving countermeasures.

The Code shifts Article XXIII authority to authorize countermeasures from the contracting parties to a Committee of Code Signatories. The Code also establishes guidelines for panel selection to minimize opportunities for political manipulation and establishes strict time frames for the procedural sequence of consultation, conciliation efforts, and dispute settlement. Whether the EEC will be able to control the voting results in the Committee itself, however, is not yet apparent.

Part VII: Final provisions

Chapter VIII provides that no specific action against the subsidy of another signatory is permissible unless it is taken "in accordance with the provisions of the GATT, as interpreted by this. . .Code." This provision could limit the applicability of section 301 of the Trade Act of 1974 and section 337 of the Tariff Act of 1930, as amended, against the subsidy practices and the subsidy-influenced prices of exports from the Code signatories.

^{1/} Dispute involving the Netherlands and the United States, 1st Supp. BISD 32 (1953).

Provision-By-Provision Analysis

Preamble

2. PRM Text, Preamble

**Agreement On Interpretation And Application Of
Articles VI, XVI and XXIII Of The General
Agreement On Tariffs And Trade***

The signatories ^{1/} to this Agreement,
Noting that Ministers on 12-14 September 1973 agreed that the Tokyo Round of Multilateral Trade Negotiations should, inter alia, reduce or eliminate the trade restricting or distorting effects of non-tariff measures, and bring such measures under more effective international discipline;

Recognizing that subsidies are used by governments to promote important objectives of national policy;

Recognizing also that subsidies may have harmful effects on trade and production;

Recognizing that the emphasis of this Agreement should be on the effects of subsidies and that these effects are to be assessed in giving due account to the internal economic situation of the signatories concerned as well as to the state of international economic and monetary relations;

Desiring to ensure that the use of subsidies does not adversely affect or prejudice the interests of any signatory to this Agreement, and that countervailing measures do not unjustifiably impede international trade, and that relief is made available to producers adversely affected by the use of subsidies within an agreed international framework of rights and obligations;

^{1/} The term "signatories" is hereinafter used to mean parties to this Agreement.

* This Agreement has been prepared and advanced by the delegations of Austria, Brazil, Bulgaria, Canada, Columbia, European Communities, Finland, Hungary, Japan, Mexico, Norway, Poland, Sweden, Switzerland, United Kingdom on behalf of Hong Kong, the United States and Yugoslavia.

Taking into account the particular trade, development and financial needs of developing countries;

Desiring to apply fully and to interpret the provisions of Articles VI, XVI and XXIII of the General Agreement ^{1/}, (hereinafter referred to as "the General Agreement" or "GATT") only with respect to subsidies and countervailing measures and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;

Desiring to provide for the speedy, effective and equitable resolution of disputes arising under this Agreement. . .

2. PRM.1 Interpretation, Preamble

The preamble sets forth the intention of the signatories to provide an international framework of rights and obligations with respect to the use of subsidies which could adversely affect the international trade interests of other signatories.

Part I Application of Article VI of the General Agreement

2.1.0 Part I Introduction

Part I of the code is concerned with procedures to be followed by signatories in the conduct of countervailing duty investigations. These provisions include requirements for the contents of written requests petitioning the initiation of an investigation, requirements for the submission of information in confidence to the investigating authorities, and requirements to consult with the signatories whose subsidized exports are

^{1/} Wherever in this Agreement there is reference to "the terms of the Agreement" or the "articles" or "provisions of this Agreement" it shall be taken to mean, as the context requires, the provisions of the General Agreement as interpreted and applied by this Agreement.

subject to investigation. All the determinations of the investigating authority are required to include a statement of reasons in enough detail to enable other signatories to judge whether the terms of the code had been complied with. Finally, all signatories are required to report each determination to a Committee of Signatories ^{1/} in addition to reporting to the Committee semiannually on all of the countervailing duty actions taken in the preceding six-month period.

Part I

Article 1 Application of Article VI of the General Agreement

2.1.1(1) Text, paragraph 1

Signatories shall take all necessary steps to ensure that the imposition of a countervailing duty ^{2/} on any product of the territory of any signatory imported into the territory of another signatory is in accordance with the provisions of Article VI of the General Agreement and the terms of this Agreement.

2.1.1(1).1 Interpretation

Article 1 provides that any imposition of a countervailing duty against the products of another signatory of the Code must be taken in compliance with both the terms of GATT Article VI and the provisions of this Code. Article 1 commits a signatory to provide an injury test in its national countervailing duty legislation and to adhere to GATT provisions concerning border tax adjustments. These issues are discussed in more detail on the following page.

^{1/} The Committee of Signatories is established in Part V of the Code.

^{2/} The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of off-setting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise, as provided for in Article VI:3 of the General Agreement.

Part IArticle 2 Domestic procedures and related matters2.1.2(1) Text, paragraph 1

1. Countervailing duties may only be imposed pursuant to investigations initiated 1/ and conducted in accordance with the provisions of this Article. An investigation to determine the existence, degree and effect of any alleged subsidy shall normally be initiated upon a written request by or on behalf of the industry affected. The request shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount; (b) injury within the meaning of the Article VI as interpreted by this Agreement 2/ and (c) a causal link between the subsidized imports and the alleged injury. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above.

2.1.2(1).1 Interpretation, paragraph 1

Paragraph 1 provides (that a countervailing duty investigation ". . . shall normally be initiated upon a written request on behalf of the industry affected," or ". . . in special circumstances . . ." the national authorities responsible for conducting such investigations. Presumably, the use of the term "normally" indicates that other groups such as workers or communities are not precluded from filing complaints. 3/ The term "normally" is also found in

1/ The term "initiated" as used hereinafter means procedural action by which a signatory formally commences an investigation as provided in paragraph 3 of this Article.

2/ Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of Article 6.

3/ See, e.g., "Petition for Issuance of a Countervailing Duty Order Pursuant to Section 303, Tariff Act of 1930, with respect to Motor Vehicle Radiators and Motor Vehicles Produced In and Exported from Canada with the Benefit of a Bounty or Grant." Submitted on Behalf of The Industrial Committee of Paducah, Kentucky, March 29, 1965.

Article 5 of the International Antidumping Code with reference to the initiation of investigations. Antidumping investigations have been initiated upon the petitions of unions. Article 5(a) of the proposed revision of the International Antidumping Code contains the last two sentences of paragraph one. See, Appendix B. at page B-7.

The first requirement of a written request is that it ". . . include sufficient information of the . . . existence of a subsidy." The term subsidy is not itself defined in the code, although the term is used in connection with government subsidies throughout the code. Although an investigation into nongovernment subsidies has never been conducted under the U.S. countervailing statute, the law does refer to a bounty or grant by a person, partnership, association, cartel, or corporation . . ." 1/.

The second requirement of a written request is that it ". . . shall include sufficient evidence of . . . injury with the meaning of Article VI as interpreted by this Arrangement . . . GATT Article VI:6 (a) provides that:

No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

The "material injury" language of GATT Article VI:6 (a) is not present in either the U.S. antidumping statute, the Antidumping Act, 1921, as amended, or the provision for countervailing duty measures for duty-free merchandise, Section 303 (b) of the Tariff Act of 1930, as amended. Although the use of the term "material" in the International Antidumping Code 2/ was criticized in

1/ 19 U.S.C. 1303(a)(1).

2/ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (1967), 19 U.S.T. 4348, T.I.A.S. No. 6431.

Senate hearings, 1/ the problem may merely be one of definition; in a report to the Senate Finance Committee on the International AntiDumping Code, the (then) U.S. Tariff Commission reported that "The injury test has always been whether the imports at less than fair value were causing or threatening to cause material injury, i.e., any injury which is more than de minimis." 2/

The third requirement of a complaint is that it "shall include sufficient evidence of . . . a causal link between the subsidized imports and injury." Without any elaboration, this requirement would require that such causation be identifiable; i.e., the presence of subsidized imports and injury was not coincidental.

The U.S. countervailing duty law does not refer to subsidies but, rather to "any bounty or grant." The terminology "bounty or grant" is not defined in either the statute or the regulations of the Department of the Treasury. 3/ As Feller suggests, "The best guide for determining what measures are regarded as bounties or grants can be found in the administrative precedents." 4/ Marks and Malmgren have distilled categories of bounties or grants from Treasury's administrative precedents: 5/

1/ U.S. Cong. Senate Hearings before the Committee on Finance, International Antidumping Code, 90th Cong., 2nd Sess., June 27, 1968 (committee print). More recently, in the Finance Committee's report on the bill which became the Trade Act of 1974, the Committee discussed the language again in connection with the Antidumping Act, 1921, follows: "The term 'injury' which is unqualified by adjectives such as 'material' or 'serious' . . ." Report No. 93-1298 (to accompany H. R. 10710), 93d Cong., 2d Sess., at 180 (1974).

2/ Report of the U.S. Tariff Commission to the Senate Finance on S. Cong. Res. 38, reprinted in U.S. Cong., Hearings before the Sen. Com. on Finance, International Antidumping Code, 11-12.

3/ 19 C.F.R. 159. 41. et. seq.

4/ Feller, Countervailing Duties, in Surrey and Wallace (eds.), A Lawyer's Guide to International Business Transactions (2d ed. 1977), Pt. I, at 124-125.

5/ Marks and Malmgren, 348-350.

1. Straight subsidies benefiting exports, where it is established directly or by clear implications that the payments being made have the effect of improving the international competitiveness of such exports;
2. rebates upon the exportation of indirect taxes; e.g., excise or consumption taxes, where the rebate exceeds the amount of the tax originally assessed;
3. multiple exchange rate systems involving a preferential rate for exports; and
4. rebates upon exportation of indirect taxes, where the tax paid was not directly related to product exported or components thereof. 1/

Another category of subsidy frequently subject to investigation under the countervailing duty statute consists of export financing at preferential rates.

The code would make it explicit that the United States accept GATT provisions exempting remissions of certain indirect product taxes upon exportation from the meaning of subsidy in both Articles VI and XVI. Although the administrative practice of the Treasury Department conforms to the GATT provisions, the discretion of that department is currently the subject of litigation. 2/

Part I

Article 2 Procedures prior to the initiation of an investigation

2.1.2.(2-3) Text, paragraphs 2-3

2. Each signatory shall notify the Committee of Signatories 3/ (a) which of its authorities are competent to initiate and conduct

1/ Citation omitted.

2/ U.S. Steel v. United States, United States Customs Court, Court No. 76-2-00456. The Supreme Court decision in Zenith v. United States, 437 U.S. 443 (1978), appears, however, to have doomed this challenge to the remission of value-added taxes.

3/ As established in Part V of this Agreement and hereinafter referred to as the Committee.

investigations referred to in this Article and (b) its domestic procedures governing the initiation and conduct of such investigations.

3. When such authorities are satisfied that there is sufficient evidence to justify initiating an investigation, the signatory or signatories the products of which are subject to such investigation and the exporters and importers known to the investigating authorities to have an interest therein and the complainants shall be notified and a public notice shall be given. In determining whether to initiate an investigation, the investigating authority should take into account the position adopted by the affiliates of a complainant party 1/ which are resident in the territory of another signatory.

2.1.2(2-3).1 Interpretation, paragraphs 2-3

Paragraph 2 requires that a signatory notify the Committee of Signatories of its procedures for conducting countervailing duty investigations and of its national authorities "competent to initiate" such investigations. A similar provision in the International Antidumping Code indicated that the term "authorities" should be interpreted to mean ". . . authorities at an appropriate, senior level." 2/

Paragraph 3 provides that when the national authority determines the request for an investigation to be sufficient, the signatory or signatories concerned and all known interested parties shall be notified. A similar provision is found in Article 6(f) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-9. More significant, however, is the provision that a public notice shall be given. Paragraph 15, infra, requires that notification of "preliminary and final findings" shall include a statement setting forth the basis upon which the

1/ For the purpose of this Agreement "party" means any national or juridical person resident in the territory of any signatory.

2/ Article 2 (e), footnote 1.

determination was reached. The language in paragraph 3 indicates that there is a requirement that notification concerning the sufficiency of requests for investigations issue but, that if a signatory chooses to publish such a notification, there is no requirement that it include a statement of the reasons the request was judged to be sufficient or insufficient. One of the U.S. objectives in the Subsidy/Countervailing Measures negotiation is to bring ". . . international rules and U.S. countervailing practices into conformity with each other." ^{1/} To achieve such harmonized practices, it is important that each signatory conduct investigations which are similar procedurally. For the United States to have knowledge of the determinations of other signatories it would be advantageous to use mandatory language to require the publication of reasons for such determinations.

Part I

Article 2 Simultaneous consideration of subsidy and injury

2.1.2(4) Text, paragraph 4

4. Upon initiation of an investigation and thereafter, the evidence of both a subsidy and injury caused thereby should be considered simultaneously. In any event the evidence of both the existence of subsidy and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation and (b) thereafter during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

2.1.2(4).1 Interpretation, paragraph 4

Paragraph 4 provides that the evidence of both the existence of a subsidy and injury shall be considered simultaneously prior to the institution

^{1/} Trade Policy Staff Committee Position Paper for Bilateral/Plurilateral Discussions on Subsidies and Countervailing Duties, document 77-44 (October 21, 1977) at 2.

of an investigation and, later, after a preliminary finding of a subsidy. A nearly identical provision is found in Article 5(b) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-7. Presumably, a preinstitution review would be limited to an examination of the information supplied in the request for an investigation and whatever other information was available to the national authorities at the time of the request. It is most unlikely that a burdensome "pre-investigation" investigation is contemplated.

The U.S. countervailing duty statute does not provide for "provisional measures" (i.e., suspension of liquidation, bonding, estimated duties). If the statute is amended to authorize provisional measures, presumably the injury investigation would begin at the point a preliminary determination of a "bounty or grant" is currently made under the U.S. countervailing duty statute.

With regard to the simultaneous consideration of injury "on a date not later than the earliest date. . .provisional measures may be applied," amendment of the current statute could authorize the application of provisional measures after the preliminary determination of the Treasury Department that a "bounty or grant" existed. Assuming that the "injury" investigation would be conducted by the U.S. International Trade Commission, the initiation of this phase of the investigation prior to the conclusion of the Treasury Department's final "bounty or grant" determination could effectively negate the value of a public hearing on the issue of a causal link between the subsidy and the injury. An effective public hearing opportunity on the issue of causation would require that the amount of the subsidy found

to exist at the time of the preliminary determination would not be changed substantially after interested parties presented their views on the causation of injury, if any, to the U.S. International Trade Commission. This requirement might also be unrealistic inasmuch as it could result in preventing the Treasury Department from changing erroneous information. In brief, simultaneous investigations could prove more burdensome to both participants and government agencies than would separate investigations in an immediate sequence.

Part I

Article 2 Access to information used in investigation and opportunity to present views

2.1.2(5-7) Text, paragraphs 5-7

5. The public notice referred to in paragraph 3 above shall describe the subsidy practice or practices to be investigated. Each signatory shall ensure that its authorities afford all interested signatories and interested parties 1/ a reasonable opportunity, upon request, to see all relevant information that is not confidential (as indicated in paragraphs 6 and 7 below) and that is used by the authorities in the investigation, and to present in writing, and upon justification orally, their views to the investigating authorities.

6. Any information which is by nature confidential or which is provided on a confidential basis by parties to an investigation shall, upon cause shown, be treated as such by the investigating authorities. Such information shall not be disclosed without specific permission of the party submitting it. 2/ Parties providing confidential information may be requested to furnish non-confidential summaries thereof. In the event such parties indicate that such information is not susceptible of summary, a statement of reasons why summarization is not possible must be provided.

1/ Any "interested signatory" or "interested party" shall refer to a signatory or a party economically effected by the subsidy in question.

2/ Signatories are aware that in the territory of certain signatories disclosure pursuant to a narrowly-drawn protective order may be required.

7. However, if the investigating authorities find that a request for confidentiality is not warranted and if the party requesting confidentiality is unwilling to disclose the information, such authorities may disregard such information unless it can otherwise be demonstrated to their satisfaction that the information is correct. 1/

2.1.2(5-7).1 Interpretation, paragraph 5-7

The gist of the provisions of these paragraphs is to provide "transparency" to countervailing duty investigations for the governments and private parties caught up in or otherwise interested in an investigation. In effect this is an attempt to harmonize procedures based upon the U.S. model including, apparently, considerations required by the U.S. Freedom of Information Act.

The provision in paragraph 5 that any notice concerning the initiation of an investigation shall adequately describe the subsidy practice or practices to be investigated requires that a public notice be issued. In terms of the United States having knowledge of the investigations of other signatories, it would be helpful for any notice to describe the nature of injury alleged by the industry requesting an investigation.

The second sentence in paragraph 5 ensures that all interested parties will have access to all "non-confidential" information used by the authorities conducting the investigation and will be given an opportunity to present their views orally and in writing to the investigating authorities. The provisions of paragraph 5 are also found in the provisions of Article 6(a)-(b) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-8.

1/ Signatories agree that requests for confidentiality should not be arbitrarily rejected.

Paragraphs 6 and 7 concern the submission of material the submitter wishes the investigating authorities to treat confidentially. There appears to be a distinction made between information submitted by a foreign government which is considered politically sensitive and information submitted by commercial enterprises, the public release of which would cause competitive injury to the submitter. It is very unlikely that material which is considered politically sensitive can be characterized in a meaningful "non-confidential" summary. On the other hand, sensitive business statistics may be rendered non-confidential by using ranges of numbers or by using descriptive adjectives instead of numbers. The provisions of paragraphs 6 and 7 are found in Article 6(c) and 6(d), respectively, of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-8.

2.1.2(8) Text, paragraph 8

8. The investigating authorities may carry out investigations in the territory of other signatories as required, provided they have notified in good time the signatory in question and unless the latter objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a firm and may examine the records of a firm if (i) the firm so agrees and (ii) the signatory in question is notified and does not object.

2.1.2(8).1 Interpretation, paragraph 8

Paragraph 8 provides for authorities conducting countervailing duty determinations to obtain the permission of the appropriate government should they wish to conduct investigations in the territory of another signatory. Similarly, the paragraph provides that the authorities may carry out investigations on the premises of a firm from which data is sought if they have the permission of the firm. The reference to firms, presumably, means foreign firms. Compulsory process would be available for firms within the

national jurisdiction. Provisions similar to those in paragraph 8 are found in Article 6(e) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-8.

Part I

Article 2 Reliance on the best information available.

2.1.2(9) Text, paragraph 9

9. In cases in which any interested party or signatory refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings ^{1/}, affirmative or negative, may be made on the basis of the facts available.

2.1.2(9).1 Interpretation, paragraph 9

Paragraph 9 provides that if any interested party or foreign government does not provide or refuses to provide information with which the investigating authority can make its determinations, the investigating authority will make its determinations on the basis of the best information available, which could permit the use of information submitted by the person(s) requesting the investigation. Provisions similar to those in paragraph 9 are found in Article 6(h) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-9.

Similar provisions have been the subject of agency rule-making and are a part of U.S. administrative practice. For example, the Treasury Department has a rule concerning its administration of the Antidumping Act, 1921, which is similar in substance to paragraph 9. (See, 19 C.F.R. 153.31(a).)

^{1/} Because of the different terms used under different systems in various countries, the term "finding" is hereinafter used to mean a formal decision or determination.

Part IArticle 2 Imposition of provisional measures, preliminary determinations2.2.1(10) Text, paragraph 10

10. The procedures set out above are not intended to prevent the authorities of a signatory from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final findings, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

2.1.2(10).1 Interpretation, paragraph 10

Paragraph 10 refers to the provisional measures provided for in the Code. Such provisional measures could consist of suspension of liquidation, 1/ bonding, and estimated duties. The references to expeditious process in connection with initiation appear to support our remarks concerning the interpretation and implementation of Article 2, paragraph 4. Provisions similar to those in paragraph 10 are found in Article 6(i) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-9.

The U.S. countervailing duty statute does not currently authorize the imposition of estimated duties prior to a final determination. In the case of duty-free merchandise, the liquidation of subject entries is suspended as soon as the Secretary of the Treasury has made a final affirmative determination with regard to a bounty or grant. If the U.S. International Trade Commission subsequently makes an affirmative injury determination, the Secretary will direct the assessment and collection of countervailing duties retroactive to the date of publication for the final bounty or grant determination.

1/ Clubb and Feller describe liquidation as ". . . the process whereby the amount of customs duty owing on each entry is determined, based on tariff classification rate of duty on, value, and quantity of the entry." Lawyer's Guide to International Business Transactions (2d ed.), at 133, n. 50.

Part IArticle 2 Country of origin rule2.1.2(11) Text, paragraph 11

11. In cases where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the provisions of this Agreement shall be fully applicable and the transaction or transactions shall, for the purposes of this Agreement, be regarded as having taken place between the country of origin and the country of importation.

2.1.2(11).1 Interpretation, paragraph 11

Paragraph 11 incorporates the current provision of the countervailing duty statute for applying the countervailing duty against subsidies of the country of origin in cases where the merchandise was exported to the United States from a third country. Section 1303(a) of Title 19, United States Code provides --

Whenever any country. . .shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article. . .produced in such country. . .then upon the importation of any such article. . .into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article. . .is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases. . .an additional duty equal to the net amount of such bounty or grant. . .

Part IArticle 12 Termination of an investigation2.1.2(12) Text, paragraph 12

12. An investigation shall be terminated when the investigating authorities are satisfied either that no subsidy exists or that the effect of the alleged subsidy on the industry is not such as to cause injury.

2.1.2(12).1 Interpretation, paragraph 12

Paragraph 12 provides that when the effect of an alleged subsidy on the complaining industry is "not such as to cause injury" the investigation will be terminated. A similar but more strongly worded provision is found in Article 5(c) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-7. These provisions could be modeled after section 201 (c) of the Antidumping Act, 1921. That section provides that once a dumping complaint is properly filed with the Customs Service, Customs has 30 days in which to initiate a formal investigation or terminate the case. If the Department of the Treasury has substantial doubt that a domestic industry is being or likely to be injured, the complaint may be referred to the U.S. International Trade Commission for a determination as to whether or not there is a reasonable indication that an industry in the United States is being injured, is likely to be injured, or is prevented from being established by reason of the complained-of imports. If the Commission makes a determination that there is "no reasonable indication," the complaint is dismissed. As in the case of the antidumping act, amendment of the countervailing duty statute to authorize summary determinations could "eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade." ^{1/}

The existence of a provision for an injury review of requests for investigations prior to their initiation (Article 2, paragraph 4), however, indicates that such termination would be the result of the simultaneous

^{1/} Senate Report No. 93-1298, at 171.

consideration of the subsidy and injury issues. We have commented on the difficulties of providing meaningful public participation should both investigations be conducted simultaneously.

Part I

Article 2 Customs clearance

2.1.2(13) Text, paragraph 13

13. An investigation shall not hinder the procedures of customs clearance.

2.1.2(13).1 Interpretation, paragraph 13

Paragraph 13 provides that articles subject to countervailing duty investigations will not be prevented from clearing customs. The posting of an appropriate bond or, if authorized, payment of estimated duties are contemplated in this paragraph. A similar provision is found in Article 5(d) of the International Antidumping Code. See, Appendix B, at page B-7.

Part I

Article 2 Duration of investigations

2.1.2(14) Text, paragraph 14

14. Investigations shall, except in special circumstances, be concluded within one year after their initiation.

2.1.2(14).1 Interpretation, paragraph 14

Paragraph 14 reflects the provision in the U.S. statute which requires the Secretary of Treasury to make a final determination with regard to whether a bounty or grant is being paid or bestowed within twelve months of the filing of a petition for an investigation. The countervailing duty statute would need to be amended to incorporate an injury investigation within

one year of the initiation of the investigation. Also, a provision could be added to indicate to whether the implementing legislation is mandatory or directory; i.e., whether any consequences result in domestic law from the failure to complete the investigation within one year. The provisions of paragraph 14 are identical with those of Article 5(e) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-7.

Part I

Article 2 Notification of preliminary or final determinations

2.1.2.(15) Text, paragraph 15

15. Public notice shall be given of any preliminary or final finding whether positive or negative and of the revocation of a finding. In the case of positive finding each such notice shall set forth the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor. In the case of a negative finding each notice shall set forth at least the basic conclusions and a summary of the reasons therefor. All notices of finding shall be forwarded to the signatory or signatories the products of which are subject to such finding and to the exporters known to have an interest therein.

2.1.2(15).1 Interpretation, paragraph 15

One of the chief U.S. negotiating goals in the area of nontariff measures has been to provide "transparency" to the investigation procedures of U.S. trading partners. Paragraph 15 requires the publication of any preliminary or final determinations with a statement explaining the basis upon which the determination was reached.

Part IArticle 2 Reports to the Committee of Signatories2.1.2(16) Text, paragraph 16

16. Signatories shall report without delay to the Committee all preliminary or final actions taken with respect to countervailing duties. Such reports will be available in the GATT secretariat for inspection by government representatives. The signatories shall also submit, on a semi-annual basis, reports on any countervailing duty actions taken within the preceding six months.

2.1.2(16).1 Interpretation, paragraph 16

Paragraph 16 requires signatories to notify the Committee of Signatories of each preliminary or final countervailing duty action taken and to submit a report to the Committee on a semiannual basis concerning any actions taken in the preceding six months. The provisions of paragraph 16 are also found in Article 14(4) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-16.

Part IArticle 3 Consultations2.1.3.0 Introduction

Consultations among signatories are an important part of the overall Code mechanism. The provisions for the establishment of the Committee on Signatories (Chapter V), the provisions for consultations, and the provisions for the permissive imposition of countervailing duties (Article 4) taken together are a framework for the negotiation of countervailing duty related matters, including the lowering of injury-causing subsidies to the level at which they cease to cause injury to producers in the importing country.

2.1.3(1-4) Text, paragraphs 1-4

1. As soon as possible after a request for initiation of an investigation is accepted, and in any event before the initiation of any investigation, signatories the products of which may be subject to such investigations shall be afforded a reasonable opportunity for consultations with the aim of clarifying the situation as to the matters referred to in Article 2, paragraph 1 above and arriving at a mutually agreed solution.

2. Furthermore, throughout the period of investigation, signatories the products of which are the subject of the investigation shall be afforded a reasonable opportunity to continue consultations, with a view to clarifying the factual situation and to arriving at a mutually agreed solution. 1/

3. Without prejudice to the obligation to afford reasonable opportunity for consultation, these provisions regarding consultations are not intended to prevent the investigating authorities, in accordance with the provisions of this Agreement, from proceeding expeditiously with regard to initiating the investigation, reaching a preliminary or final finding, affirmative or negative, or applying a provisional or final measure.

4. For purposes of such consultations, the signatory which intends to initiate investigations shall permit, on request, the signatory or signatories the products of which are subject to such investigation access to non-confidential evidence including the non-confidential summary of confidential data being used for initiating the investigation.

2.1.3(1-4).1 Interpretation, paragraphs 1-4

Paragraphs 1 and 2 obligate signatories to allow other signatories, whose products are the subject of a request for a countervailing duty investigation, an opportunity to consult for the purpose of negotiating a solution to the complained-of subsidy prior to the institution of an

1/ It is particularly important, in accordance with the provisions of this paragraph, that no affirmative finding whether preliminary or final be made without reasonable opportunity for consultations having been given. Such consultations may establish the basis for proceeding under the provisions of Part VI of this Agreement.

investigation. If desired, opportunity for consultations must continue throughout the investigation. For the purpose of these consultations, paragraph 4 obligates signatories which intend to initiate a countervailing duty investigation to submit all available nonconfidential information concerning the information required in the written request to the signatories whose products are the subject of the request.

Paragraph 2 extends the obligation to afford other signatories the opportunity to continue negotiations during the countervailing duty investigation. The provision does not prevent institution, preliminary determination, or the imposition of provisional or final measures.

Part I

Article 4 Imposition of countervailing duties

2.1.4.0 Introduction

The theme of Article 4 is that in those cases where the imposition of countervailing duties is necessary, the duties must not be higher than the level which countervails the perunit amount of the subsidy calculated for the exported product. The goal of the Code is to prevent the injurious effect of subsidies, not necessarily to neutralize the subsidy. The practice of accepting pricing assurances is borrowed from the International Antidumping Code and administration of the Antidumping Act, 1921. Every reasonable opportunity will be afforded to signatories, whose products are under investigation, to adjust their complained-of subsidy practice in order to avoid causing injury.

Part IArticle 4 Permissive imposition of countervailing duties2.1.4(1) Text, paragraph 1

1. The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less are decisions to be made by the authorities of the importing signatory. It is desirable that the imposition be permissive in the territory of all signatories and that the duty be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry.

2.1.4(1).1 Interpretation, paragraph 1

Paragraph 1 would permit a signatory to limit the imposition of any countervailing duty to an amount ". . . adequate to preclude any further injury being caused to the domestic industry," or, to permit a signatory to dispense with the imposition of a countervailing duty altogether.

The provision essentially reflects the position of the EEC. The EEC has long taken the position that taking countervailing duty measures against subsidized imports does not make sense ". . . unless they are materially injuring a domestic industry of the importing country." 1/ In the absence of material injury to producers, the EEC maintains that subsidized imports benefit the consumers in the importing country by reducing prices. 2/ This same concept was incorporated into the International Antidumping Code in another hortatory provision to the effect that "It is desirable . . . that the duty be less than the (dumping) margin, if such lesser duty would be adequate

1/ Marks and Malmgren, at 347.

2/ Marks and Malmgren, at 347.

to remove the injury to the domestic industry." 1/ The U.S. countervailing duty statute is mandatory, not permissive. If a bounty or grant is determined to exist on dutiable merchandise, the Secretary of Treasury must assess countervailing duties. 2/

Part I

Article 4 Amount of countervailing duties

2.1.4(2) Text, paragraph 2

2. No countervailing duty shall be levied 3/ on any imported product in excess of the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product. 4/

2.1.4(2).1 Interpretation, paragraph 2

Paragraph 2 prohibits the imposition of a countervailing duty in excess of the estimated subsidy calculated on a per unit product basis. This provision is a truism. The concept of a countervailing duty measure is to impose a duty which will countervail or offset the amount of the offensive subsidy.

The U.S. countervailing duty statute currently provides that:

. . .there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a countervailing duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. 5/

1/ Article 8(a). See, Appendix B, at page B-11.

2/ See, 38 Op. Att'y Gen. 489, 490 (1936).

3/ As used in this Agreement "levy" shall mean the definitive or final legal assessment or collection of duty or tax.

4/ An understanding among signatories should be developed setting out the criteria for the calculation of the amount of the subsidy.

5/ 19 U.S.C. 1303(a)(1).

Article 8(c) of the proposed revision of the International Antidumping Code prohibits an antidumping duty at an amount in excess of the margin of dumping. See, Appendix B, at page B-11.

Part I

Article 4 Imposition of countervailing duties on non-discriminatory basis.

2.1.4(3) Text, paragraph 3

3. When a countervailing duty is imposed in respect of any product, such countervailing duty shall be levied, in the appropriate amounts, on a non-discriminatory basis on imports of such product from all sources found to be subsidized and to be causing injury, except as to imports from those sources which have renounced any subsidies in question or from which undertakings under the terms of this Agreement have been accepted.

2.1.4(3).1 Interpretation, paragraph 3

Paragraph 3 contains a commitment not to discriminate in the imposition of countervailing duties against injurious imports from several sources with comparable subsidies. The provision does not, however, require that a signatory initiate investigations on the basis of finding that additional countries have subsidy programs comparable to those which were found to have caused injury in a particular investigation.

Part I

Article 4 Imposition of countervailing duties after consultations

2.1.4(4) Text, paragraph 4

4. If, after reasonable efforts have been made to complete consultations, a signatory makes a final determination of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, it may impose a countervailing duty in accordance with the provisions of this section unless the subsidy is withdrawn.

2.1.4(4).1 Interpretation, paragraph 4

Paragraph 4 permits a signatory to continue to negotiate with respect to a change in the subsidy subject to its countervailing duty investigation, but after such consultations have taken place and the injurious subsidy has not been withdrawn, the signatory may impose a countervailing duty.

Part IArticle 4 Voluntary price and quantity assurances2.1.4(5) Text, paragraph 5

5(a) Proceedings may 1/ be suspended or terminated without the imposition of provisional measures or countervailing duties, if undertakings are accepted under which:

(1) the government of the exporting country agrees to eliminate or limit the subsidy or take other measures concerning its effects; or

(2) the exporter agrees to revise its prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Price increases under undertakings shall not be higher than necessary to eliminate the amount of the subsidy. Price undertakings shall not be sought or accepted from exporters unless the importing signatory has first (a) initiated an investigation in accordance with the provisions of Article 2 of this Agreement and (b) obtained the consent of the exporting signatory. Undertakings offered need not be accepted if the authorities of the importing signatory consider their acceptance impractical, for example if the number of actual or potential exporters is too great, or for other reasons.

1/ The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings, except as provided in paragraph 5(b) of this Article.

- (b) If the undertakings are accepted, the investigation of injury shall nevertheless be completed if the exporting signatory so desires or the importing signatory so decides. In such a case, if a determination of no injury or threat thereof is made, the undertaking shall automatically lapse, except in cases where a determination of no threat of injury is due in large part to the existence of an undertaking; in such cases the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement.
- (c) Price undertakings may be suggested by the authorities in the importing country, but no exporter shall be forced to enter into such an undertaking. The fact that governments or exporters do not offer such undertakings or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the subsidized imports continue.

2.1.4(5).1 Interpretation, paragraph 5

Paragraph 5 adopts the practice of accepting price assurances from the administration of the antidumping regulations under the International Antidumping Code 1/ and the practices of previous U.S. administrations. 2/ The acceptance of price assurances in the administration of the Antidumping Act, 1921, has not always been a successful program and, for instance, was sharply curtailed in 1971. 3/ The practice of accepting price assurances or quantitative export restraints, in effect, replaces injury investigations.

1/ Article 7, Appendix B, pages 9-11.

2/ See Treasury regulations at 19 CFR 153.33(a).

3/ See the paper prepared by the Treasury Department on the administration of the Antidumping Act in U.S. Int'l Economic Policy in an Interdependent World, Report to the President by the Comm. on Int'l Trade and Investment Policy (1971), Vol. 1, at 404-407.

The provision for accepting quantitative restrictions reflects EEC practice more than U.S. practice; although, quantity restrictions have been negotiated by the Treasury Department under the authority of its price assurance regulations. 1/ The proposed revisions to the International Antidumping Code to not provide for quantitative restrictions. The 1967 International Antidumping Code did not provide for quantitative restrictions either. 2/

Quantitative restrictions negotiated, monitored, and enforced by the Treasury Department are presumably exempt from the antitrust laws in that the conduct, which would normally be considered to be in violation of the law, was directed by an authorized governmental body. 3/

Treasury department price and quantity assurances have not been challenged under the rulemaking authority of the agency under the Antidumping Act, 1921. Standards for the exercise of the discretion to accept assurances and terminate investigations without injury determinations would be an appropriate subject for rulemaking proceedings.

1/ Compare, Treasury notice in the Matter of Ceramic Glazed Wall Tile from Japan (32 F.R. 16108, published November 23, 1967) and Trade Policy Staff Committee Paper for U.S. Proposals on a Multilateral Safeguard System, document 76-5 (February 13, 1976), at I-11.

2/ Article 7, Appendix B, pages B-9 through B-11.

3/ Compare Continental Ore Co. v. United Carbide & Carbon Corp., 370 U.S. 690 (1962) and Parker v. Brown, 317 U.S. 341 (1943).

Part IArticle 4 Periodic reporting requirements under voluntary price and quantity assurances program.2.1.4(6) Text, paragraph 6

6. Authorities in an importing country may require any government or exporter from whom undertakings have been accepted to provide periodically information relevant to the fulfilment of such undertakings, and to permit verification of such data. In case of violation of undertakings, the authorities of the importing country may take expeditious actions under this Agreement in conformity with its provisions which may constitute immediate application of provisional measures using the best information available. In such cases, definitive duties may be levied in accordance with this Agreement on goods entered for consumption not more than ninety days before the application of provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

2.1.4(6).1 Interpretation, paragraph 6

Paragraph 6 provides that governments and exporters from whom assurances or undertakings are accepted may be required to provide periodic information to the investigative authorities. The paragraph also provides that price and quantity undertakings should not be enforced any longer than countervailing duties would remain in force. Article 4, paragraph 8, provides that a countervailing duty shall remain in force only as long as necessary to counteract injury caused by subsidization. In the area of duty-free imports the U.S. International Trade Commission has promulgated regulations for petitions for the revocation of injury findings under 19 U.S.C. 1303(b) on the basis of changed circumstances. (19 CFR 207.9 (1977)). Similar regulations could be promulgated for the revocation of price and quantity assurances.

Paragraph 6 also provides that in the case where undertakings or assurances are violated the importing country would be justified in applying

immediate provisional measures and duties retroactive to before the date of the beginning period for provisional measures.

Part I

Article 4 Review of assurances

2.1.4(7), Text, paragraph 7

7. Undertakings shall not remain in force any longer than countervailing duties could remain in force under the Agreement. The authorities of an importing country shall review the need for the continuation of any undertaking, where warranted, on their own initiative, or if interested exporters or importers of the product in question so request and submit positive information substantiating the need for such review.

2.1.3(7) Interpretation, paragraph 7

Paragraph 7 requires signatories to reconsider the need for assurances "of interested exporters or importers of the product in question so request and submit positive information substantiating the need for review." This provision for review parallels the provision for the review of outstanding countervailing duty orders set out below. The signatories are not obligated to conduct such reviews automatically. The provisions of paragraph 7 are found in Article 7(f) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-9.

Part I

Article 4 Notice of termination or suspension of investigation on the basis of assurances

2.1.4(8) Text, paragraph 8

8. Whenever a countervailing duty investigation is terminated or suspended pursuant to the provisions of paragraph 5 above and whenever an undertaking is terminated, this fact shall be officially notified and must be published. Such notices shall set forth at least the basic conclusions and a summary of the reasons therefor.

2.1.4(8).1 Interpretation, paragraph 8

Paragraph 8 provides that whenever a countervailing duty investigation is terminated or suspended on the basis of price assurances or quantitative restrictions and whenever such undertakings are terminated these events will be noticed and published with the basic conclusions and reasoning set forth in the notice.

Part IArticle 4 Review of outstanding countervailing duty orders2.1.4(9) Text, paragraph 9

9. A countervailing duty shall remain in force only as long as, and to the extent necessary to counteract the subsidization which is causing injury. The investigating authorities shall review the need for continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review.

2.1.4(9).1 Interpretation, paragraph 9

Paragraph 9 requires signatories to reconsider determinations of injury "if any interested party so requests and submits positive information substantiating the need for review." This provision for review appears to be similar to the type of reconsideration contemplated in the present rules of the U.S. International Trade Commission, which allow interested persons to petition for such review after two years. The agency is not obligated to conduct a review automatically. 19 C.F.R. 207.9 (1977). The provisions of paragraph 9 are also found in Article 9(a)-(b) of the proposed revisions of the International Antidumping Code. See, Appendix B, at page B-12.

Part IArticle 5 - Provisional measures and retroactivity2.1.5(1) Text, Paragraph 1

1. Provisional measures may be taken only after a preliminary positive finding has been made that a subsidy exists and that there is sufficient evidence of injury as provided for in Article 2 paragraph 1(a) to (c). Provisional measures shall not be applied unless the authorities concerned judge that they are necessary to prevent injury being caused during the period of investigation.

2.1.5(1).1 Interpretation, paragraph 1

Paragraph 1 sets forth the criteria necessary for a signatory to apply provisional measures prior to reaching a final determination in the investigation. The paragraph provides that provisional measures shall not be applied unless the investigating authorities determine they are necessary to prevent injury during the period of investigation. In addition, paragraph 1 requires that a preliminary determination that a subsidy exists must be made before provisional measures may be taken. These same provisions are found in Article 10(a) of the proposed revisions of the International Antidumping Code. See, Appendix B, at page B-13.

Part IArticle 5 Form of provisional measures2.1.5(2) Text, paragraph 2

2. Provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization.

2.1.5(2).1 Interpretation, paragraph 2

Provisional countervailing measures are not authorized by the U.S. countervailing duty statute in the case of dutiable imports. In the case of duty-free imports the liquidation of entries is suspended as soon as the Secretary of the Treasury has made a final affirmative determination regarding the bounty or grant.

Part IArticle 5 Duration of provisional measures2.1.5(3) Text, paragraph 3

3. The imposition of provisional measures shall be limited to as short a period as possible, not exceeding four months.

2.1.5(3).1 Interpretation, paragraph 3

Paragraph 3 provides a mandatory limit of four months for the imposition of provisional measures. In the proposed revisions of the International Antidumping Code Article 10(c) provides that the imposition of provisional measures shall not exceed four months unless the exporters representing a significant percentage of the trade under investigation requests a period not exceeding six months and the authorities grant the request. See, Appendix B, at page B-13.

Part IArticle 5 Article 4 procedures2.1.5(4) Text, paragraph 4

4. Relevant provisions of Article 4 shall be followed in the imposition of provisional measures.

2.1.5(4).1 Interpretation, paragraph 4

Article 4 contains the provisions of the Agreement relating to the imposition of countervailing duties.

Part IArticle 5, Retroactive application of countervailing duties2.1.5(5) Text, paragraph 5

5. Where a final finding of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or in the case of a final finding of threat of injury where the subsidized imports would, in the absence of the provisional measures, have led to a finding of injury, countervailing duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

2.1.5(5).1 Interpretation, paragraph 5

Paragraph 5 permits the retroactive levying of countervailing duties for the period for which provisional measures could have been applied in cases where (1) a final determination of injury is reached or (2) a final determination of the threat of injury is reached in a case in which the subsidized imports would have led to a finding of injury in the absence of provisional measures. This provision is taken from Article 11(a)(i) of the International Antidumping Code. See, Appendix B, at page B-13.

The exception of products subject to a determination of threat of injury unless they had been subject to provisional measures is based upon the rationale that no present injury exists for a duty to remedy. This is inconsistent with the U.S. countervailing duty statute which aims to neutralize the subsidy. A comparable practice under the the Antidumping Act, 1921, was successfully challenged in recent litigation. In The Timken Company v. Simba, 1/ the Secretary of Treasury had found sales at

1/ 539 F.2d 221 (D.C. Cir. 1976).

less-than-fair-value and the U.S. International Trade Commission had found a likelihood of injury to a domestic industry by reason of the less-than-fair-value sales. In an affirmative case the Secretary is under a ministerial duty to issue a dumping finding. In Timken, however, before issuing this order, the Secretary attempted to revoke the withholding of appraisement in effect from the time of his determination that there was reason to believe or suspect sales at less-than-fair-value. If successful, the attempted revocation would have freed past shipments from the special dumping duty. However, the court held that the action was unauthorized.

Part I

Article 5, Differences between definitive countervailing duty and deposit collected or bond posted

2.1.5(6) Text, paragraph 6

6. If the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. If the definitive duty is less than the amount guaranteed by the cash deposit or bond, the excess amount shall be reimbursed or the bond released in an expeditious manner.

2.1.5(6).1 Interpretation, paragraph 6

Paragraph 6 provides that if the definitive countervailing duty is higher than the amount guaranteed, the importing signatory shall not collect the difference. In cases where the amount is lower, however, the excess amount collected shall be reimbursed or the bond released. Section 1623, Title 19, United States Code, provides that the Secretary of the Treasury may authorize customs officers to require such bonds as are necessary to insure compliance with any provision of law administered by that department.

Part IArticle 5 Prospective application of duties2.1.5(7) Text, paragraph 7

7. Except as provided in paragraph 5 above where a finding of threat of injury or material retardation is made (but no injury has yet occurred) a definitive countervailing duty may be imposed only from the date of the finding of threat of injury or material retardation and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

2.1.5(7).1 Interpretation, paragraph 7

Paragraph 7 provides that where a finding of threat of injury is made but no injury has yet occurred, a definitive countervailing duty may be imposed only from the date of the finding and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released. If, however, the absence of the provisional measures would have led to a finding of injury, countervailing duties may be levied retroactively for the period for which the provisional measures had applied (Article 5, paragraph 5).

Similarly, where a finding of material retardation is made but no injury has yet occurred, a definitive countervailing duty may be imposed only from the date of the finding. Any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released.

Implementation of paragraph 7 would overrule the statutory construction employed by the Court of Appeals for the District of Columbia in The Timken Company v. Simon, a case involving the Antidumping Act, 1921. See, Interpretation of Article 5, paragraph 5 (2.1.5(5).1).

Part IArticle 5 Bond refund2.1.5(8) Text, paragraph 8

8. Where a final finding is negative any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

2.1.5(8).1 Interpretation, paragraph 8

Paragraph 8 provides that in the case of a negative determination any deposits made during the period of the application of provisional measures shall be refunded and any bonds released.

Part IArticle 5, Retroactive imposition of countervailing duties2.1.5(9) Text, paragraph 9

9. In critical circumstances where for the subsidized product in question the authorities find that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from export subsidies paid or bestowed inconsistently with the provisions of the General Agreement and of this Agreement, and where it is deemed necessary, the definitive countervailing duty may be assessed on imports which were entered for consumption not more than ninety days prior to the date of application of provisional measures if, to effectively remedy the injury and preclude its recurrence it is deemed necessary to assess countervailing duties retroactively on those imports.

2.1.5(9).1 Interpretation, paragraph 9

Paragraph 9 permits the retroactive imposition of countervailing duties for ninety days beyond the period for preliminary measures--

- . in critical circumstances;
- . to prevent injury which would be difficult to repair,

- . where injury is caused by a massive amount of imports over a relatively short period of time;
- . when imports benefit from export subsidies within, presumably, the illustrations of export subsidies in Part I;
- . only if such measures would effectively remedy the injury and preclude its recurrence.

The application of countervailing duties is retroactive only in a very limited sense and any remedy afforded by countervailing duties is basically prospective. To the degree that a domestic industry is not merely injured, but is in "critical circumstances," the application of countervailing duties may remove the source of injury but it is unlikely that it could repair injury already suffered. The imposition of duties by the government does not "repair" injury in any literal sense. Article 11(a)(ii) of the proposed revision of the International Antidumping Code sets forth a "sporadic dumping" test similar to the critical circumstances element relating to massive imports in a short period of time. However, the importer must have been aware or should have been aware that the exporter(s) had historically engaged in the practice for the provision to take effect. See, Appendix B, at page B-14.

Part I

Article 6 Determinations of injury

2.1.6.0 Introduction

Article 6 sets forth definitions for a domestic industry within the material injury test of GATT Article VI, criteria to be considered in determining whether or not a petitioning industry is injured or is likely to be injured, and the degree of causation which must be attributed to the impact of subsidized imports to justify an affirmative determination.

The adoption of an injury provision for dutiable merchandise will, of course, reduce the chances of a domestic industry's ultimate success in petitioning for the issuance of special duties to countervail the subsidized import competition. For instance, in the well-known Michelin Tire case the Treasury Department determined that Canadian regional assistance to counter the depressed economy of Nova Scotia constituted a bounty or grant within the meaning of the countervailing duty statute. One of the bases for the determination ". . . was that approximately 75 percent of the output of the plant benefiting from the assistance scheme was exported to the United States." 1/ Had an injury provision been a part of the statutory determination, however, injury might ". . . have been difficult to sustain, since the import of Canadian Michelin tires was not expected to reach as much as one percent of U.S. tire consumption in 1973." 2/ The adoption of injury standards which could be more difficult to satisfy than those already in U.S. trade law could reduce the possibilities of import relief for U.S. industries even further. The price assurances program outlined in the Code will have an impact in that it provides an alternative to an injury investigation, the exercise of which will be discretionary with the Treasury Department.

Part I

Article 6 Determination of injury

2.1.6(1) Text, paragraph 1

1/ Marks and Malmgren, at 356.

2/ Pestieau, at 17 (footnote omitted).

1. A determination of injury 1/ for purposes of Article VI of the General Agreement shall involve an objective examination of both (a) the volume of subsidized imports and their effect on prices in the domestic market for like products 2/ and (b) the consequent impact of these imports on producers of such products.

2.1.6(1).1 Interpretation, paragraph 1

The provision is a general statement concerning the consideration of injury within the context of implementing an obligation to abide by the provisions of GATT Article VI. A nearly identical provision is found in Article 3(a) of the International Antidumping Code. See, Appendix B, at page B-4. The terminology "like products" to characterize the producers constituting the domestic industry is a concept taken from both the text of GATT Article VI and from the International Antidumping Code. 3/ "Like product" is defined as meaning ". . . a product which is identical, i.e., alike in all respects to the product under consideration, or in the absence of such a product, another product, which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." The definition is taken from Article 2(b) of the International Antidumping Code. See, Appendix B, at page B-3. The broader phrase which occurs in GATT Article XIX is "like or directly competitive" was intended to be broader than "like products" to insure that competing products which were injuring domestic producers could be brought within the scope of

1/ Determinations of injury under the criteria set forth in this Article shall be based on positive evidence. In determining threat of injury the investigating authorities, in examining the factors listed in this Article, may take into account the evidence on the nature of the subsidy in question and the trade effects likely to arise therefrom.

2/ Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e., alike in all respects to the product under consideration or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

3/ Article 4.4(a)

Article XIX even though they were "unlike." 1/ Directly competitive products are competitive in the broader sense that a consumer can, with substantial ease, switch from one product to another, e.g., the prices are roughly comparable, the products are available in similar channels of distribution, and the products are interchangeable in purpose or use. The meaning of the phrase "like or directly competitive" as used in sections 301 and 405(4) of the Trade Expansion Act of 1962 was interpreted as not requiring that imported finished articles be considered as "like or directly competitive with domestically produced component parts of the competitive articles. See, United Shoe Workers of America v. Catherine Bedell, 506 F.2d 174 (D.C. Cir. 1974).

In its administration of the injury provisions in both the Antidumping Act, 1921, and the duty-free provision of the countervailing duty statute, the U.S. International Trade Commission has not considered a domestic industry to be limited to the producers of a "like product" as defined in the International Antidumping Code. 2/ The Commission has described the Antidumping Act, 1921, providing ". . . no qualification as to the kind of industries that might be affected by the imports under consideration." 3/ In its administration of the duty-free provision of the countervailing duty statute the Commission has "interpreted the relevant operative words of section 303(b) . . . in the same way it has interpreted identical language under section 201 (a) of the Antidumping Act, 1921, as amended." 4/

1/ See Jackson, World Trade and the Law of GATT, at 260-262.

2/ Report of the U.S. Tariff Commission on S. Con. Res. 38, at 338.

3/ Report of the U.S. Tariff Commission on S. Con. Res. 38, at 338.

4/ Certain Zoris from the Republic of China (Taiwan), Inv. No. 303-TA-1 (USITC Pub. 787 (1976)).

Although the U.S. International Trade Commission's interpretation of the term "industry" in the Antidumping Act, 1921, and the countervailing duty statute is not consistent with the provisions of paragraph 1, implementing legislation could limit the definition of domestic industry to one similar to that in Article 2 (b) of the International Antidumping Code or permit the Commission to continue to employ a broader concept of domestic industries in its investigations. With respect to the latter, we do not believe that the Commission's nonconforming concept of domestic industries has been considered controversial by the GATT Antidumping Committee.

Note 1 indicates that the authorities in the importing country "may take into account the evidence on the nature of the subsidy." Presumably, this provision distinguishes between export subsidies and other subsidies in the same manner as Part II of the Code.

The U.S. countervailing duty statute does not authorize the Treasury Department to distinguish between export and other kinds of subsidies in making a determination on the existence of a bounty or grant.

Part I

Article 6 Assessing the relative amount of subsidized imports and their impact on domestic price levels

2.1.6(2) Text, paragraph 2

2. With regard to volume of subsidized imports the investigating authorities shall consider whether there has been a significant increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing country. With regard to the effect on prices of the subsidized imports, the investigating authorities shall consider whether there has been a significant price undercutting by the subsidized imports as compared with the price of a like product of the importing country, or whether the effect of

such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

2.1.6(2).1 Interpretation, paragraph 2

The factors in paragraph 2 call for the measurement of the increase of subsidized imports, in either relative or absolute terms, in relation to the total imports, production, and consumption of the importing country. The paragraph also calls for price comparisons between the subsidized product and the competitive domestic products at different levels of distribution. Among the factors to be considered in investigating such price comparisons are whether the subsidized imports are responsible for price depression 1/ or price suppression 2/ of the competing domestic products. Significantly, the evaluation is not in two distinct stages. The amount of statistical penetration and the effect on prices in the affected product market are both factors to be taken into account. One factor is not a condition precedent for the evaluation of the other. A nearly identical provision is found in Article 3(b) of the proposed revision to the International Antidumping Code. See, Appendix B, at page B-4.

Part I

Article 6 Assessing the impact of subsidized imports on the domestic industry

1/ Measured in investigations of the International Trade Commission in terms of an absolute decrease in unit prices for substantially identical articles, i.e., no quality differences.

2/ Measured in investigations of the International Trade Commission in terms of comparison with an index of articles in a product mix which includes the domestic products under investigations.

2.1.6(3) Text, paragraph 3

3. The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors such as actual and potential decline in output, sales, market share, profits, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investment, and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

2.1.6(3).1 Interpretation, paragraph 3

The illustrative list of factors to be considered in assessing the impact of subsidized imports on the domestic producers of competing products includes factors normally considered under different statutes for gauging the impact of imports on domestic producers. Three of the factors mentioned in paragraph three, however, are not typically considered. The first, return on investment, is generally measured on an enterprise rather than a product basis and, at least as often as not, significant producers of the products under investigation are significant producers of other products too. The second, actual and potential negative effects on growth, has not been considered as a factor as such. This concept would, presumably, include such considerations as a description of planned capital investment to expand production of a product, a factor considered as an indicator of injury by the EEC.

The third factor would introduce the concept of interference with government agricultural programs as an element of injury to domestic agricultural producers. The language ". . . injury may include . . ." such interference probably does not mean that injury cannot be established in the absence of a demonstration of such interference. When this factor is read

together with the last sentence of the paragraph to the effect that the factors listed are ". . . not exhaustive, nor can one or several of these factors necessarily give decisive guidance," the preferable reading is that the reference to agricultural support programs is merely an additional factor which may be considered where an agricultural product market is being investigated. The concept of "interference" in paragraph 3 is similar to the concept of protecting price support programs in section 22 of the Agricultural Adjustment Act. With the exception of the factor concerning an increased burden on government support programs for agricultural commodities, an identical provision is found in Article 3(c) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-5.

Part I

Article 6 Causation requirement

2.1.6(4) Text, paragraph 4

4. It must be demonstrated that the subsidized imports are, through the effects 1/ of the subsidy, causing injury within the meaning of this Agreement. There may be other factors 2/ which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the subsidized imports.

2.1.6(4).1 Interpretation, paragraph 4

Paragraph 4 would require that subsidized imports be a cause of injury, that is a contributing factor in causing or threatening injury. A requirement that subsidized imports must be the only cause of injury or the

1/ As set forth in paragraphs 2 and 3 of this Article.

2/ Such factors can include *inter alia*, the volume and prices of nonsubsidized imports of the product in question, contraction in demand or changes in the pattern of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

principal cause of injury (language in the 1967 International Antidumping Code) would render an injury test inoperable. The factors set forth to be considered in assessing injury to domestic producers in paragraph 3 would be affected by other competition from other domestic products, inefficiencies in domestic production, style changes, competition from unsubsidized imports, a business recession, etc., as well as subsidized imports. Requiring that subsidized imports be "the" cause of injury would be tantamount to repealing the statute.

The 1967 International Antidumping Code described the use of the "principal cause" standard in the following manner. "In reaching their decision the authorities shall weigh, on the one hand, the effect of the dumping and, on the other hand, all other factors taken together which may be adversely affecting the industry." 1/ No methodology exists, however for weighing all of the possible influencing factors. 2/ In its report on the 1967 International Antidumping Code prepared for the Senate Finance Committee, the Commission stated that the Antidumping Act, 1921--

does not require a determination that dumped imports are adversely affecting an industry to a degree greater than any one or a combination of other factors adversely affecting an industry before there can be an affirmative determination of injury, as is required by the Code. The Commission in making its determinations with respect to injury under the Act has not weighted the injury caused by such imports against other injuries that an industry might be suffering. 3/

1/ Article 3(a).

2/ In the context of the escape clause provision of the Trade Expansion Act of 1962, see the discussion in U.S. Int'l Economic Policy in an Interdependent World, Report to the President by the Comm. on Int'l Trade and Investment Policy (1971), Vol. 1, at 50.

3/ U.S. Tariff Comm. Report on S. Con. Res. 38, at 33.

The proposed revision of the International Antidumping Code would conform Article 3(d) of that code to paragraph 4. See, Appendix B, at page B-5. This same policy of not weighing factors is followed in the Commission's administration of the duty-free provision of the countervailing duty statute.

The language to the effect that subsidized imports must be "a contributing factor in causing or threatening" to cause injury comprises a test of injury causation which is currently performed in Commission investigations. This standard is a qualitative one which does not assign weights to all the possible influencing factors, and has been articulated in opinions of individual Commissioners in specific investigations. For example, in an antidumping case former Commissioners Leonard and Young stated that--

Besides less than fair value sales, other causes of injury are also present . . . All that is required for an affirmative determination is that the less than fair value sales be a cause of injury to an industry. The causation between sales at less than fair value and injury must be identifiable . . . 1/

Part I

Article 6 Definition of "domestic industry"

2.1.6(5) Text, paragraph 5

5. In determining injury, the term "domestic industry" shall, except as provided in paragraph 7 below, be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that when producers are related 1/ to the exporters or importers or are themselves importers of the allegedly subsidized product the industry may be interpreted as referring to the rest of the producers. (Emphasis added.)

1/ The Committee should develop a definition of the word "related" as used in this paragraph.

1/ Concurring opinions of former Commissioners Leonard and Young, Inv. No. AA1921-92, Elemental Sulfur from Mexico (U.S.T.C. Pub. 484, May 1972), at 9.

2.1.6(5).1 Interpretation, paragraph 5

With the exception of the underscored phrase referring to paragraph 7, this entire provision is taken from Article 4(a) and 4(a)(i) of the International Antidumping Code. 1/ The restricted meaning of "like products" has been discussed in connection with Article 6, paragraph 1, of the Code. As we stated in the earlier discussion, domestic legislation has not defined the term "domestic industry" as narrowly. We do not believe, however, that such nonconformity with GATT Article VI and with this paragraph would be considered a breach of U.S. obligations. We base this observation on the failure of the GATT Antidumping Committee to react to current U.S. practice under the Antidumping Act, 1921. The International Trade Commission's interpretation of the term domestic "industry" in the duty-free provision of the countervailing duty statute is identical to its interpretation of the term in the Antidumping Act, 1921.

Part IArticle 6 Analysis of domestic production affected by subsidized imports2.1.6(6) Text, Paragraph 6

6. The effect of the subsidized imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realization, profits. When the domestic production of the like product has no separate identity in these terms the effects of subsidized imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

1/ See, Appendix B, at page B-6.

2.1.6(6).1 Interpretation, paragraph 6

Paragraph 6 directs that investigations of the effect of subsidized imports on domestic producers should examine the "like" domestic products or, if that information is not available, the narrowest range of products, including the like product, for which information is available. Foremost among the considerations to be addressed in implementing the provision is the difficulty of allocating production costs to a single product or a narrow mix of products in an enterprise which is multiproduct or conglomerate. A nearly identical provision is found in Article 3(e) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-5.

Part IArticle 6 Regional market injury2.1.6(7) Text, paragraph 7

7. In exceptional circumstances the territory of a signatory may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of subsidized imports into such an isolated market and provided further that the subsidized imports are causing injury to all or almost all of the producers within such market.

2.1.6(7).1 Interpretation, paragraph 7

Paragraph 7 authorizes the imposition of countervailing duties when the subsidized imports are concentrated in a particular region. To qualify for such relief regional producers must demonstrate that they are (1) located in a geographic market area, (2) primarily serve the market of the geographic

area, and (3) that the demand in that market is not supplied in any substantial measure by producers located elsewhere. An identical provision is found in Article 4(a)(ii) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-6.

The International Trade Commission has determined that an industry was injured within the meaning of the Antidumping Act, 1921, by reason of injury occurring in regional markets. ^{1/} Although the Commission has not yet reached this issue in a case brought under the duty-free provisions of the countervailing duty statute, the Commission's criteria for injury in regional markets under this act would be the same as those under the antidumping act. The Commission's criteria for regional injury under these statutes, however, would not necessarily preclude demand in the regional market being supplied by domestic producers located elsewhere for the producers within the region to qualify for relief under the injury test.

These provisions are less onerous than those in subsection 201(b)(3) of the Trade Act of 1974 which also requires that the regional producers must "constitute a substantial portion of the domestic industry in the United States."

Part I

Article 6 Regional assurances, levying of duties

2.1.6(8) Text, paragraph 8

8. When the industry has been interpreted as referring to the producers in a certain area, as defined in paragraph 7 above, countervailing duties shall be levied only on the products in question consigned for final consumption to that area. When the constitutional law of the importing country does not permit the levying of countervailing duties on such a basis, the importing

^{1/} E.g., Elemental Sulfur from Mexico (U.S.T.C. Pub. 484, May 1972), at 9.

signatory may levy the countervailing duties without limitation, only if (1) the exporters shall have been given an opportunity to cease exporting at subsidized prices to the area concerned or otherwise give assurances pursuant to Article 4, paragraph 5, of this Agreement, and adequate assurances in this regard have not been promptly given, and (2) such duties cannot be levied only on products of specific producers which supply the area in question.

2.1.6(8).1 Interpretation, paragraph 8

Paragraph 8 provides that in cases where the domestic industry concerned with the countervailing duty investigation consists of regional producers defined in Article 6, paragraph 7, of the Code, countervailing duties shall only be definitively collected on the products in question consigned for final consumption to that area. A nearly identical provision is found in Article 4(b) of the proposed revision of the International Antidumping Code. See, Appendix B, at page B-6.

The interpretation of the Customs Court and the Court of Customs and Patent Appeals that the Constitution requires special antidumping duties to be uniformly assessed at all ports, 1/ may preclude implementation of paragraph 8. The only way to restrict duty collection to regional ports in a manner consistent with this constitutional requirement appears to be to levy the duties against the products of only those exporters that ship only to the regional ports in question. Even assuming that this type of administration were to survive legal challenges for attempting to accomplish non-uniform assessment of duties at all ports indirectly, the provision might not be administerable. The consignment of products to consumption in particular

1/ *Imbert Imports, Inc. v. United States*, 331 F.Supp. 1400, 1405 (Customs Court 1971), *aff'd*, 475 F. 2d 1189, 1192 (C.C.P.A. 1973). See, also, *Ellis K. Orlowitz Co. v. United States*, 50 C.C.P.A. 36, 40-41 (1963).

geographic areas depends upon transportation costs. For these products which could be transported from the market area economically there is no way for a customs officer to determine where the product will be finally consumed.

Paragraph 8 also provides that in cases where the exporter agrees to adequate price assurances (or, presumably, a voluntary export restraint in accordance with the provisions of Article 4, paragraph 5), prior to the imposition of countervailing duties such duties will not be imposed.

Part IArticle 6 Customs unions2.1.6(9) Text, paragraph 9

9. Where two or more countries have reached under the provisions of Article XXIV:8(a) of the General Agreement such a level of integration that they have the characteristics of a single, unified market the industry in the entire area of integration shall be taken to be the industry referred to in paragraphs 5 to 7 above.

2.1.6(9).1 Interpretation, paragraph 9

Paragraph 9 is taken from Article 4(b) of the International Antidumping Code with the exception of the reference to paragraphs 5 to 7 of this Article of this Code and the reference to Article XXIV:8(a) of the General Agreement. That provision was intended to apply to customs unions. The Executive Branch analysis of Article 4(b) of the International Antidumping Code, dated June 19, 1968, indicated that the provision would apply to the European Community but not the United States. ^{1/} The provision in the International Antidumping Code, interpreted literally, however, could have been interpreted to apply to the U.S.-Canadian Automotive Agreement. To prevent this interpretation, a reference to GATT Article XXIV (Customs Unions) has been added to this paragraph and Article 4(c) of the proposed revision of the International Antidumping Code has been drafted to conform. See, Appendix B, at page B-7.

^{1/} Senate Comm. on Finance, Hearings on the International Antidumping Code . . . (June 27, 1968), at 293.

Part II

Article 7 Notification of subsidies2.2.7.0 Introduction

Article XVI:1 of the GATT was premised upon a notification mechanism which would eventually provide information concerning the subsidy practices of contracting parties from which GATT policies could be designed for eliminating distortions to international trade which resulted from such practices.

Article XVI:1 of the GATT provides:

Subsidies

Section A--Subsidies in General

1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the Contracting Parties in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other Contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.

As commentators have described, this notification provision has been ignored from the beginning. ^{1/} The structure of the reporting procedure in Article XVI:1 requires the member to estimate the effect of its "subsidization on the quantity of the affected product or products imported into or exported from its territory. . . ." This requirement is tantamount to an admission that the notifier's subsidy practice is trade distorting. Moreover, its effect is to supply other GATT members with a justification for either

^{1/} John W. Evans, Subsidies and Countervailing Duties in the GATT: Present Law and Future Prospects, 3 Int'l Trade L.J. 211, 229-231 (1977).

resorting to countervailing duties under Article VI of the GATT 1/ or to supply other members with a calculation of their damages in import substituting complaints brought before the GATT under Article XXIII nullification and impairment proceedings. 2/ Europeans were especially reluctant to comply with the notification provisions while the United States would not subject subsidized exports to an injury test under its countervailing duty statute. 3/

In 1950 the GATT instituted a procedure for requesting members to submit their notifications within stated deadlines. 4/ This procedure was abandoned in 1962 and replaced with a questionnaire survey conducted by the GATT on a three-year basis. 5/ GATT members have failed to respond to the notification requirement of Article XVI:1. In preparation for subsidy-related negotiations at the MTN, the negotiators prepared lists of subsidies maintained by other negotiators. These lists revealed subsidy practices which had never been reported by the subsidizing country. 6/

Article 7 of the Code is concerned with modifying the reporting obligations of members of the General Agreement on Tariffs and Trade under

1/ Article VI:6(a) of the GATT permits an importing member to impose a special duty to offset a subsidy granted in an exporting country. Article I of the arrangement deals with GATT Article VI.

2/ Article XXIII gives GATT members consultation rights in connection with the trade-related concessions they had negotiated under the aegis of the GATT. If a GATT member believes that any benefit which it had negotiated for is being "nullified or impaired" by the action of another member, it may complain to the GATT. Article III of this code deals with GATT Article XXIII.

3/ See, Seamus O'Cleiracain, "Subsidies and Countervailing Duties," 437, 445 (1978).

4/ GATT, II BISD 19 (1952), cited in Evans, at 230, note 50.

5/ Evans, at 230.

6/ Evans, at 231, note 52.

Article XVI, paragraph 1, of that agreement. In addition to modifying the obligation of a signatory to the code to report its subsidy practices to the GATT, the Code creates a procedure for a signatory to notify the GATT of a subsidy maintained by another signatory which has failed to report its subsidy practices.

Article 7 Notification of Subsidies 1/

2.2.7(1-3) Text, paragraphs 1-3

1. Having regard to the provisions of Article XVI:1 of the General Agreement, any signatory may make a written request for information on the nature and extent of any subsidy granted or maintained by another signatory, (including any form of income or price support) which operates directly or indirectly to increase exports of any product from or reduce imports of any product into its territory.
2. Signatories so requested shall provide such information as quickly as possible and in a comprehensive manner, and shall be ready upon request to provide additional information to the requesting signatory. Any signatory which considers that such information has not been provided may bring the matter to the attention of the Committee.
3. Any signatory which considers that any practice of another signatory having the effects of a subsidy has not been notified in accordance with the provisions of Article XVI:1 of the General Agreement may bring the matter to the attention of such other signatory. If the subsidy practice is not thereafter notified promptly, such signatory may itself bring the subsidy practice in question to the notice of the Committee.

2.2.7(1-3).1 Interpretation, paragraphs 1-3

Article XVI:1 of the GATT requires contracting parties (i.e., member signatories) to notify the organization in writing with regard to any subsidy

1/ In this Agreement, the term "subsidies" shall be deemed to include subsidies granted by any government or any public body within the territory of a signatory. However, it is recognized that for signatories with different federal systems of government, there are different divisions of powers. Such signatories accept nonetheless the international consequences that may arise under this Agreement as a result of the granting of subsidies within their territories.

it operates which has the direct or indirect effect of either increasing its exports from or reducing imports into its territory. 1/

The three paragraphs in Chapter 1 of the code constitute a mechanism for enforcing the obligations of Article XVI:1 of the GATT and for increasing their obligations to other signatories of the code. The first paragraph of the chapter gives a signatory the right to request written information concerning the subsidy practices of another signatory directly whether or not that signatory has reported such practices to the GATT under the terms of Article XVI:1.

The reference to State and local government subsidies in Note 1 following the Article 7 "notification" heading indicates that the national government of a signatory would have a duty to report the subsidy practices of subsidiary governmental units. This raises the issue of the obligation of the United States under GATT Article XXIV:12, which provides that

Each contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territory.

At the very least, the United States would appear to need an "inquiry point" to provide information on subsidy programs of subsidiary governmental units. In this connection, some information on state government assistance for plant locations, bond financing, tax incentives, land use arrangements, and labor recruiting is collected by the Department of Commerce.

1/ The Interpretive Note to Article XVI:1 provides that the remission (by either rebate or exemption) of taxes on products when exported which would have been collected had the products been sold domestically is not a subsidy. See GATT, Annex I, Ad. Article XVI. This same provision is found in GATT Article VI:4.

The second paragraph of the chapter provides that a signatory to the code is obligated to respond to requests for information concerning its subsidy practices when so requested by another signatory. Should the requesting signatory consider the response to be inadequate, it may bring the matter to the attention of the Committee established in Chapter V of the code.

The GATT has been notified of four U.S. subsidy programs -- (1) the Domestic International Sales Corporation (DISC), (2) Western Hemisphere Sales Corporations (WHSC), (3) ship construction subsidies, and (4) tax exemptions for U.S. goods sold in U.S. overseas military exchanges. A 1976 GATT panel found that the DISC did constitute a prima facie nullification and impairment under GATT Article XXIII. The United States offered to accept the panel's findings with respect to DISC, but only if France, Belgium, and the Netherlands accepted panel findings concerning tax exemptions for foreign-source income. Those countries have dissented from the panel's findings. Should the GATT Council accept the findings of the panel report, presumably alternatives to these tax practices would be proposed before any withdrawals of concessions were sanctioned.

The WHSC was repealed by the Tax Reform Act of 1976 for taxable years beginning after December 31, 1979. Ship construction subsidies, and aids to shipyards are maintained by many maritime nations and analysis of shipyard aids has been conducted by the OECD. Against this background, a challenge to U.S. construction subsidies might not take place. Similarly, the likelihood of a challenge to tax exemptions for U.S. goods sold in U.S. overseas military exchanges is not clear.

Finally, the third paragraph provides that any signatory of the code which considers that another signatory has not reported a subsidy practice in accordance with the provisions of Article XVI:1 may bring this matter to the attention of that signatory. In the event the subsidy practice remains unreported after this notification, the requesting signatory may then itself notify the Committee of Signatories of the subsidy practice in question.

The GATT enjoys the status of an executive agreement in domestic U.S. law. The modified obligations of the United States should it become a signatory to Article 7 of the code would not require domestic legislation. Such obligations could be undertaken in the form of another executive agreement with the other signatories. Although the establishment of an "inquiry point" to provide information on state and local government subsidies may be desirable, this could be established within the executive branch without specific legislation. Similar information is now collected by offices of the Department of Commerce concerned with foreign investment in the United States.

Part II

Article 8 Subsidies -- General Provisions

2.2.8(1-3) Text, Paragraphs 1-3

1. Signatories recognize that subsidies are used by governments to promote important objectives of social and economic policy. Signatories also recognize that subsidies can cause adverse effects to the interests of other signatories.
2. Signatories agree not to use export subsidies in a manner inconsistent with the provisions of this Agreement.
3. Signatories further agree that they shall seek to avoid causing, through the use of any subsidy:

- (a) injury to the domestic industry of another signatory 1/;
- (b) nullification or impairment of the benefits accruing directly or indirectly to another signatory under the General Agreement 2/; or
- (c) serious prejudice to the interests of another signatory. 3/

2.2.8(1-3).1 Interpretation, paragraphs 1-3

Article 8 is a hortatory provision which states that signatories shall avoid causing injury within the meaning of GATT Article VI (counter-vailing measures) or serious prejudice to other signatories within the meaning of GATT Article XVI while using subsidies to achieve national policy objectives. Moreover, the signatories will endeavor to avoid nullifying or impairing the benefits of GATT membership within the meaning of GATT Article XXIII.

The obligations of a signatory under Article 8, paragraphs 1-3 are not precise. A judgment as to whether a subsidy practice causes injury to the industry of another signatory, serious prejudice to the interests of another GATT signatory, or nullification and impairment of another GATT signatory's expectations from GATT negotiations are all ex post facto determinations. For example, the commitment of a signatory in paragraph 2 "not to use export subsidies in a manner inconsistent with the provisions" of the Code is not a prohibition against export subsidies but one against export subsidies demonstrated to have proscribed effects on other signatories, or on their domestic industries.

1/ The term injury to domestic industry is used here in the same sense as it is used in Part I of this Agreement.

2/ Benefits accruing directly or indirectly under the General Agreement include the benefits of tariff concessions bound under Article II of the General Agreement.

3/ Serious prejudice to the interests of another signatory is used here in the same sense as it is used in Article XVI:1 of the General Agreement and includes threat of serious prejudice.

The language "seek to avoid causing" in paragraph 3 is badly drafted in that it creates a significant interpretive issue. Has a signatory to paragraph 3 agreed to an obligation not to cause injury, serious prejudice, or nullification and impairment? On the other hand, has a signatory to the paragraph merely agreed "to try" to avoid causing such results? If the obligation is merely to try to avoid causing an unpleasant effect, other signatories will never be capable of demonstrating that the obligation was not undertaken. This result would remove any discipline from the paragraph.

Part II

Article 8 Adverse effects

2.2.8(4) Text, paragraph 4

4. The adverse effects to the interests of another signatory required to demonstrate nullification and impairment 1/ or serious prejudice may arise through:

- (a) the effects of subsidized imports in the domestic market of the importing signatory;
- (b) the effects of the subsidy in displacing 2/ or impeding the imports of like products into the market of the subsidizing country; or
- (c) the effects of subsidized exports in displacing the exports of like products of another signatory to a third country market. 3/

1/ Signatories recognize that nullification or impairment of benefits may also arise through the failure of a signatory to carry out its obligations under the GATT or this Agreement. Where such failure concerning export subsidies is determined by the Committee to exist, adverse effects may, without prejudice to paragraph 9 of Article 18 below, be presumed to exist. The other signatory will be accorded a reasonable opportunity to rebut this presumption.

2/ The term "displacing" shall be interpreted in a manner which takes into account the trade and development needs of developing countries and in this connection is not intended to fix traditional market shares.

3/ The problem of third country markets so far as certain primary products are concerned are (sic) dealt with exclusively under Article 10 below.

2.2.8(4).1 Interpretation, paragraph 4

The second sentence in footnote 1 to paragraph 4 states that the Committee of Signatories may presume a prima facie nullification and impairment where a signatory fails to carry out its obligations under the GATT or this code with respect to export subsidies. This presumption does not apply to "subsidies other than export subsidies" (Article II).

The presumption operates to shift a burden of persuasion to the accused signatory to show the lack of any "adverse effect" from its failure to carry out its obligation (or "violation"). In the case of the GATT panel report on the DISC, the panel equated a tax deferral to a subsidy, presumed that the subsidy caused a dual pricing result proscribed in GATT Article XVI:4 and that, therefore, Article XVI:4 was violated. The violation, in turn, comprised a prima facie nullification of GATT benefits and, because of the nullification, the GATT council could authorize countermeasures under Article XXIII. 1/ The experience with the panel report on the DISC indicates the danger of such burden shifting to an accused signatory.

Paragraph 4 provides that adverse effects on the trade and production of a signatory may arise in any one of three situations -- 1) the effects of subsidized imports in the signatory's domestic market; 2) the effects of a subsidy impeding exports of a signatory from competing in the markets of the subsidizing country; and 3) the effects of subsidized imports in displacing or impeding exports of another signatory to a third market country. In the case

1/ See, John H. Jackson, "The Jurisprudence of International Trade: The DISC Case in GATT," 72 Amer. J. Int'l L. 747..

of the first example, "adverse effects" would not be as difficult to demonstrate as material injury in Article VI.

The issue of subsidized imports displacing or impeding U.S. exports to third market countries is important to the United States. GATT Article VI:6(b) authorizes a contracting party importing subsidized goods to impose a special duty to countervail the subsidy which may not be injuring its domestic industry but is injuring the exports of another contracting party in its market. The provision has never been used because it makes no economic sense for the importing country to increase the costs of its imports to its consumers for the benefit of certain foreign suppliers and the detriment of other foreign suppliers. Paragraph four authorizes the Committee of Signatories to find "adverse effects" and serious prejudice from such export displacement. The paragraph works in conjunction with Article 18 of the Code which authorizes the Committee to authorize the disadvantaged exporting signatory to take countermeasures. At the domestic level, section 301 of the Trade Act of 1974 should enable U.S. exporters to petition for action on the basis of "adverse effects" if, in a petition to the Special Representative for Trade Negotiations, they could demonstrate reduced sales in third country markets resulting from such subsidies.

In the case of serious prejudice occurring from the imposition of or increase of a subsidy by an importing country which had an adverse effect on the exports of another signatory, paragraph 4, would move the initial location of dispute settlement procedures under the nullification and impairment provisions of GATT Article XXIII from the GATT membership to the Committee of Signatories.

Part IIArticle 9 Export subsidies on products other than certain primary products ^{1/}2.2.9(1-2) Text, paragraphs 1-2

1. Signatories shall not grant export subsidies on products other than certain primary products.
2. The practices in points (a) to (1) in the Annex are illustrative export subsidies.

2.2.9(1-2).1 Interpretation, paragraphs 1-2

Paragraph one contains a prohibition against granting export subsidies on industrial and mineral products but does not contain a definition of export subsidies.

Paragraph two references an illustrative list of export subsidies in the Annex to the Code. The Annex provides:

AnnexIllustrative List of Export Subsidies

- (a) The provision by governments of direct subsidies to a firm or an industry contingent on export performance.
- (b) Currency retention schemes or any similar practices which involve a bonus on exports.
- (c) Internal transport and freight charges on export shipments, provided or mandated by governments, on terms more favourable than for domestic shipments.
- (d) The delivery by governments or their agents of imported or domestic products or services for use in the production of exported goods, on terms or conditions more favorable than for delivery of like or directly competitive products or services for use on the production of goods for domestic consumption, if (in the case of products) such terms or conditions are more favorable than those commercially available on world markets to its exporters.

^{1/} For definition of "certain primary products" see footnote number one to Article 10 below.

- (e) The full or partial exemption, remission or deferral, specifically related to exports, of direct taxes 1/ or social welfare charges paid or payable by industrial or commercial enterprises. 2/
- (f) The allowance of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.
- (g) The exemption or remission in respect of the production and distribution of exported products of indirect taxes 1/ in excess of those actually levied in respect of the production and distribution of like products when sold for domestic consumption.
- (h) The exemption, remission, or deferral of prior stage cumulative, indirect taxes 1/ on goods or services used in the production of exported goods in excess of the exemption, remission, or deferral of like prior stage cumulative indirect taxes on goods or services used in the production of the same goods if sold for internal consumption; provided, however, that prior stage indirect taxes may be exempted, remitted, or deferred on exported goods even when not remitted on the same goods sold for internal consumption, if the prior stage indirect taxes are levied on components that are physically incorporated (making normal allowance for waste) in the exported product. 3/
- (i) The remission or draw-back of import charges 1/ in excess of those actually levied on imported goods that are physically incorporated (making normal allowance for waste) in the exported product; provided, however, that in particular cases a firm may use a quantity of home market goods equal to, and having the same quality and characteristics as, the imported goods as a substitute for them in order to benefit from this provision if the import and the corresponding export operations both occur within a reasonable time period, not to exceed two years.
- (j) The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes of insurance or guarantee programmes against increases in the costs of exported products 4/ or of exchange risk programmes, at premium rates which are manifestly inadequate to cover the long-term operating costs and losses of the programmes. 5/

- (k) The grant by governments (or special institutions controlled by and/or acting under the authority of governments of export credits at rates below those which they have to pay for the funds so employed (or would have to pay if they borrowed on international capital markets in order to obtain funds of the same maturity and denominated in the same currency as the export credit), or the payment by them of all or part of the costs incurred by exporters or financial institutions in obtaining credits, insofar as they are used to secure a material advantage in the field of export credit terms.

Provided, however, that if a signatory is a party to an international undertaking on official export credits to which at least twelve original signatories 6/ to this Agreement are parties as of 1 January 1979 (or a successor undertaking which has been adopted by those original signatories), or if in practice a signatory applies the interest rate provisions of the relevant undertaking, an export credit practice which is in conformity with those provisions shall not be considered an export subsidy prohibited by this Agreement.)

- (l) Any other charge on the public account constituting an export subsidy in the sense of Article XVI of the General Agreement.

Note:

1/ For the purpose of this Arrangement, the term "direct taxes" shall mean taxes on wages, profits, interests, rents, royalties, and all other forms of income, and taxes on the ownership of real property.

The term "import charges" shall mean tariffs, duties, and other fiscal charges not elsewhere enumerated in this Note that are levied on imports.

The term "indirect taxes" shall mean sales, excise, turnover, value added, franchise, stamp, transfer, inventory and equipment taxes, border taxes all taxes other than direct taxes and import charges.

"Prior stage" indirect taxes are those levied on goods or services used indirectly or indirectly in making the product.

"Cumulative" indirect taxes are multi-staged taxes levied where there is no mechanism for subsequent crediting of the tax if the goods or services subject to tax at one stage of production are used in a succeeding stage of production.

"Remission" of taxes includes the refund or rebate of taxes.

2/ The signatories recognize that deferral need not amount to an export subsidy where, for example, appropriate interest charges are collected. The signatories further recognize that nothing in this text prejudices the disposition by the Contracting Parties of the specific issues raised in GATT document L/4422.

The signatories reaffirm the principle that prices for goods in transactions between exporting enterprises and foreign buyers under their or under the same control should for tax purposes be the prices which would be charged between independent enterprises acting at arm's length. Any signatory may draw the attention of another signatory to administrative or other practices which may contravene this principle and which result in a significant saving of direct taxes in export transactions. In such circumstances the signatories shall normally attempt to resolve their differences using the facilities of existing bilateral tax treaties or other specific international mechanisms, without prejudice to the rights and obligations of signatories under the General Agreement, including the right of consultation credited in the preceding sentence.

Paragraph (e) is not intended to limit a signatory from taking measures to avoid the double taxation of foreign source income earned by its enterprises or the enterprises of another signatory.

Where measures incompatible with the provisions of paragraph (e) exist, and where major practical difficulties stand in the way of the signatory concerned bring such measures promptly into conformity with the Agreement, the signatory concerned shall, without prejudice to the rights of other signatories under the General Agreement or this Agreement, examine methods of bringing these measures into conformity within a reasonable period of time.

In this connection the European Economic Community has declared that Ireland intends to withdraw by 1 January 1981 its system of preferential tax measures related to exports, provided for under the Corporation Tax Act of 1976, whilst continuing nevertheless to honour legally binding commitments entered into during the lifetime of this system.

3/ Paragraph (h) does not apply to value-added tax systems, and border-tax adjustment in lieu thereof and the problem of the excessive remission of value-added taxes is exclusively covered by paragraph (g).

4/ the signatories agree that nothing in this paragraph shall prejudice or influence the deliberations of the panel established by the GATT Council on 6 June 1978 (C/M/126).

5/ In evaluating the long-term adequacy of premium sales, costs and losses of insurance programs, in principle only such contracts shall be taken into account that were concluded after the date of entry into force of this Agreement.

6/ An original signatory to this Agreement shall mean any signatory which adheres ad referendum to the Agreement on or before 30 June 1979.

Paragraph (a) describes a direct subsidy contingent on export performance as a subsidy which is unavailable to firms or industries for products or services sold for domestic consumption. Another consideration is that paragraph (a) of the illustrative list of export subsidies could reach exports efforts of the United States which are not tax-related, such as government assisted export financing programs 1/ and Commerce Department export promotion activities. 2/ The paragraph is an elaboration of a similar provision in the 1960 GATT working party's list of eight specific practices that would be considered subsidies within the meaning of GATT Article XVI:4. 3/

Paragraph (b) describes currency programs in which exports are granted a preferential rate. Paragraph (b) is also taken from the 1960 list of the GATT working party. That earlier provision also specified bonuses on re-exports.

1/ See John E. Mullen, "Export Promotion: Legal and Structural Limitations on a Broad United States Commitment," 7 Law & Pol'y Int'l Bus. 57, 62-72 (1975).

2/ Id., at 81-84.

3/ GATT, 9th Suppl. BISD 188, 191 (1961). Although the GATT working party did not address the issue, the specific practices were, presumably, not to be prohibited unless they resulted in dual pricing within the meaning of GATT Article XVI:4.

Paragraph (c) describes preferential transportation and freight changes on export shipments made possible by a governmental unit.

Paragraph (d) describes government programs for providing component goods or services for use in the production of products for exports on terms more favorable than those on component goods or services in products consumed domestically in cases where the terms are more favorable than those available on world markets.

Paragraph (e) provides that the full or partial exemption, remission or deferral of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises is an export subsidy when specifically calculated in relation to exports. Direct taxes are defined as all forms of income taxes and taxes on the ownership of real property. This provision was among those listed by the 1960 GATT working party's list of eight specific practices that would be considered "subsidies" within the meaning of GATT Article XVI:4. 1/ The reference to "social welfare charges" is a reference, presumably, to contributions to social security type programs.

The economic justification for treating the exemption, remission or deferral of direct taxes as an export subsidy and the exemption, remission or deferral of an indirect tax to avoid double taxation on exported products through border tax adjustments has been the belief that sales taxes, excise taxes, value-added taxes, turnover taxes, cascade taxes, etc., are shifted forward to the consumer and, therefore, influence the price of the product. Direct taxes were presumed not to be shifted forward to the consumer and, therefore, not presumed to influence price. 2/ The latter assumption may be

1/ GATT, 9th Suppl. BISD 188, 191 (1961).

2/ Michael Von Steinaecker, Domestic Taxation and Foreign Trade: The United States-European Border Tax Dispute (1973), at 23.

incorrect. Both direct and indirect taxes influence prices. 1/ The exemption of exports from a "product" tax is the basis for the controversy over border tax adjustments. Countries which rely primarily upon excise taxation in their fiscal policies often exempt from taxation or provide tax rebates for their exports to avoid the double taxation of the product which would otherwise take place when the importing country also levied an excise tax. Countries which rely upon direct taxation of business income (i.e., enterprise income rather than product sales taxes) may not exempt or rebate taxes on exports under GATT rules without the practice being considered a subsidy. To allow adjustments for indirect taxes only penalizes countries which rely on direct taxes for revenues (the U.S.) rather than indirect taxes (EEC). 2/

Footnote two provides that deferral of income would not amount to an export subsidy where interest was taxed on the amount deferred. This is a reference to the finding of the GATT panel which investigated the complaint against the U.S. DISC provision for deferral of direct taxes. In response to an EEC and Canadian complaint about the DISCs, a GATT panel found a prima facie nullification or impairment of benefits and the finding will, presumably, go to a session of the GATT Contracting Parties. GATT, United States Tax Legislation (DISC), Report of the Panel, L/4422 of 2 Nov. 1976. If the matter is not resolved by negotiation, the GATT Contracting Parties must determine if the matter is serious enough to justify suspension of some or all of the benefits that the United States receives under the GATT.

1/ Marian Krzyzaniak and Richard A. Musgrave, The shifting of the Corporation Income Tax (1963).

2/ Thomas Horst, Income Taxation and Competitiveness In the United States, West Germany, France, The United Kingdom, and Japan (1977).

Footnote two also adopts the concept of arm's-length pricing principle in the GATT.

Paragraph (f) provides that special deductions in the calculation of direct taxes which are available for export-related activities but not for activities related to domestic consumption amount to an export subsidy. ^{1/}

Paragraph (g) provides that the exemption or revision of indirect taxes on exported products in excess of those levied on like products sold for domestic consumption amounts to an export subsidy. The exemption or remission of an equivalent amount, however, does not constitute an export subsidy within the provisions of GATT Articles VI and XVI.

Paragraph (h) provides that the exemption, remission or deferral of a prior stage of a turnover tax on the goods and services used in the production of exported products, but not physically incorporated in the exported products, amounts to an export subsidy when it exceeds the amount exempted, refunded or deferred on goods and services used in the production of products consumed domestically. In cases where the prior stage of taxes are levied on goods that are physically incorporated in the final exported product, however, the prior stage indirect tax may be exempted, refunded or deferred even though it had not been exempted, refunded or deferred on like products when sold for domestic consumption and will not be considered to constitute an export subsidy.

Footnote 3 provides that paragraph (h) does not apply to value-added tax systems and border tax adjustments which are provided for exclusively in

^{1/} See Mullen, at 80-81.

paragraph (g). The value-added tax is noncumulative; it is added separately to a sales price and is creditable. Where a turnover tax is levied as a multistage cumulative tax, the tax on a given product at a given stage of manufacture or distribution cannot be readily calculated because the different components have different tax burdens. The tax is added at each stage of sale and accumulates. Under the value-added tax system it is possible to refund at export the exact amount of tax previously levied. In contrast, a refund at export under a multi-stage cumulative tax cannot be calculated but must be estimated. Where the products change hands many times, taxes will cumulate to high levels. On the other hand, where turnover has been low, as in integrated industries, the taxes will not have cumulated to high levels.

Paragraph (i) provides that the drawback of customs charges may amount to an export subsidy in cases where it exceeds import charges on the imported goods.

Paragraph (j) provides that export insurance or guarantee programs against increases in the costs of exported programs and exchange risk programs will be considered export subsidies where the premiums are not adequate to cover the long-term operating costs of the programs. Footnote 4 refers to the panel established to take into account the Report of the Working Party on Export Inflation Insurance Schemes (L/4552) and examine whether and under what conditions export inflation insurance schemes are export subsidies.

Paragraph (k) classifies government export credits at rates below those necessary to obtain private funds as an export subsidy unless the signatory is a party to a separate undertaking on official export credits with at least eleven other signatories, or applies the lowest interest rate

provisions provided in that separate agreement. Similar undertakings have been made by the United States, the United Kingdom, West Germany, Japan, Canada, France, and Italy to establish guidelines for interest rates and repayment terms related to the private markets. Such guidelines have not been applied to agricultural commodities, aircraft, or nuclear power plants. 1/ Differences in the availability of capital in different national markets, however, will prevent the rigid pegging of interest rates. 2/

Paragraph (1) provides that "any other charge on the public account" constituting an export subsidy in the sense of GATT Article XVI is an export subsidy for the purpose of the list.

The current provisions in GATT Article XVI dealing with export subsidies on industrial products are couched in the vague framework of a concept of "dual pricing," which is not defined. GATT Article XVI:4 provides that a ". . . subsidy on the export of any product other than a primary product 3/. . . which results in the sale of . . . the subsidized product

1/ Statement of Stephen DuBrul, President of the Export-Import Bank, reprinted, *BNA*, 111 Export Weekly M-1 (June 15, 1976), cited in John J. Barcello, "Subsidies and Countervailing Duties: Analysis and a Proposal," 9 *Law & Pol'y Int'l Bus.* 779, 829-30 (1977).

2/ John J. Barcello, "Subsidies and Countervailing Duties," at 830-31.

3/ The term "primary products" is defined in Annex I, Ad Article XVI, Sec. B, Note 2, an Interpretive Note to Section B of Article XVI, which provides: For the purposes of Section B, a 'primary product' is understood to be any product of farm, forest or fishery, or any mineral, in its natural form or which has undergone such processing as is customarily required to prepare it for marketing in substantial volume in international trade.

The U.S. accepted Article XVI with a reservation to the effect that it interpreted Article XVI as permitting payment on an exported processed product which has been produced from subsidized primary products if payment were limited to the subsidy which would have been paid on the primary product if it had been exported in primary form. See GATT Documents, Summary Record 13/20, at 215 (1958).

for export at a price lower than the comparable price charged for the like product to buyers in the domestic market" is a proscribed export subsidy. It is unclear whether dual pricing is to be presumed from the activities enumerated on the list of illustrative export subsidies or whether it must be established in accordance with obligations under GATT Article XVI:4 in addition to the enumerated practices. The language in paragraph (1) of the Annex does not resolve the question.

The dual pricing criterion is derived from the first U.S. draft of the International Trade Organization Charter. 1/ The stronger language in the draft ITO provision prohibited export subsidies which resulted in the sale of a product at a lower price than the comparable price in the domestic market. 2/ The provision, in its present language, was one of the proposals in Section B, the addition of which amended Article XVI in 1955, covering into force for those nations which accepted them in 1957. 3/

As Professor Jackson has noted, the dual pricing criterion "has many interpretive difficulties," not the least of which is what is meant by "price." 4/ Jackson suggests that some guidance may be gleaned by applying provisions of the International Antidumping Code to GATT Article XVI:4 by analogy. 5/ Yet, as Malmgren notes,

The charging of different prices for the same product in different markets can result from the fact that there are always some impediments to arbitrage and from the fact that elasticities of

1/ U.S. Suggested Charter, Dep't of State Pub. No. 2598, art. 25, at 18-20 (1946).

2/ Dept. of State Pub. No. 2598, at 18.

3/ The history of the amendment of Article XVI is found in Jackson, World Trade and the Law of GATT, 371-376.

4/ Jackson, at 397.

5/ Jackson, at 398.

demand vary from market to market. . . . This has nothing to do with the question of subsidies. While dual pricing may be relevant to ascertaining whether dumping is taking place, it should not be carried over (from questions of dumping) to the analysis of subsidization by governments. 1/

In addition to these interpretive difficulties, the limitation of otherwise undefined export subsidies to practices resulting in "dual pricing" establishes a "loop hole" for export subsidies which do not result in dual pricing. Pestieau cites the example of concessionary credit forms which ". . . may influence a producer's sales strategy without leading to a price differential." 2/ Advertising, service improvements, and product guarantees are other such examples. 3/ Moreover, improved cash-flow, product development, and the achievement of economies of scale for exporting firms may be subsidized without resulting in dual pricing. 4/

In addition to these problems with the GATT proscription concerning export subsidies on industrial products, only seventeen countries have accepted the obligation not to engage in such export subsidization. 5/

One of the negotiating objectives of the United States has been to change the "dual pricing" criterion of GATT Article XVI:4. In the integrated text distributed as MTN document MTN/WTM/W168, dated July 10, 1978, Chapter III, Part G, paragraph 1, provided --

Signatories agree not to grant export subsidies on (non-primary) (non-Agricultural) products, (whether or not such subsidies result in dual pricing).

1/ Halmgren, International Order for Public Subsidies (1977), at 40-41.

2/ Pestieau (1976), at 7.

3/ Barcello, "Subsidies and Countervailing Duties-Analysis and a Proposal," 9 Law & Pol. Int'l Bus. 779, 784 (1977).

4/ Seamus O'Clairescain, "Towards a Code on Subsidies and Countervailing Duties" (1978), at 447.

5/ Austria, Belgium, Canada, Denmark, France, Federal Republic of Germany, Italy, Japan, Luxemburg, the Netherlands, New Zealand, Norway, Rhodesia, Sweden, Switzerland, the United Kingdom, and the United States.

The same result as the bracketed language in the July 10, 1978, provision appears to have been accomplished by the language "including price" in Article 9, paragraph 2, of the Working Paper circulated by the U.S. delegation on January 22, 1979. However, other language in that draft, "except as otherwise provided in Article XVI of the General Agreement or its notes and supplementary provisions" appeared to reintroduce the dual pricing criterion. The effect of the Code's silence and the confusion in the negotiating history is to create ambiguity with regard to the dual pricing criterion in GATT Article XVI:4.

Article 10 Export subsidies on certain primary products 1/

2.2.10(1-3) Text, paragraphs 1-3

1. In accordance with the provisions of Article XVI:3 of the General Agreement, signatories agree not to grant directly or indirectly any export subsidy on certain primary products in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product, account being taken of the shares of the signatories in trade in the product concerned during a previous representative period, and any special factors which may have affected or may be affecting trade in such product.

2. For purposes of Article XVI:3 of the General Agreement and paragraph 1 above:

- (a) "more than an equitable share of world export trade" shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets;
- (b) with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country, in which the new market is situated shall be taken into account in determining "equitable share of world export trade";

1/ For purposes of this Agreement "certain primary products" means the products enumerated in Note Ad Article XVI of the General Agreement, Section B, paragraph 2, with the deletion of the words "or any mineral".

- (c) "a previous representative period" shall normally be the three most recent calendar years in which normal market conditions existed.

3. Signatories further agree not to grant export subsidies on exports of certain primary products to a particular market in a manner which results in prices materially below those of other suppliers to the same market.

2.2.10(13).1 Interpretation, paragraphs 1-3

GATT Article XVI:3 obliges members to "seek to avoid the use of subsidies on the export of primary products." Article XVI:3 also provides that where a member directly or indirectly subsidizes the export of a primary product and, as a result, increases its exports of that product, the export subsidy may not be applied in a manner that gives the subsidizing country a "more than equitable share of world export trade in that product. . . ." The GATT, however, provides no guidelines for determining what a country's equitable share of world trade in the product would be without the subsidy. As a result, there is no way reasonably to judge whether a subsidy is in violation of Article XVI:3. Moreover, subsidized exports could "seriously prejudice" the interests of other trading partners in particular markets without gaining more than an "equitable" share of world trade. ^{1/} As Pestieau points out, this tolerance in the treatment of export subsidies on primary products "militates against the interests of efficient primary producers." Primary producers which suffer from their competitors' export subsidies feel that they are not being offered any significant protection in the agricultural field and, are therefore, not encouraged to respect the

^{1/} Organization of American States, Inter-American Economic and Social Council, "GATT Rules and U.S. Law Regarding Export Subsidies and Countervailing Duties" (Sept. 12, 1977, mimeo.), at 54.

stricter provisions concerning subsidization of nonprimary products (Article XVI:4), when these are not in their interest. 1/

Paragraphs 1-2 introduce geographic and time period considerations to the measurement of "an equitable share of world trade." Paragraph 3 obligates signatories to avoid significant underselling in export markets developed or supplied by other signatories. These proposals would both enable rough estimates of the influence of an export subsidy on a particular market and provide for the elimination of "adverse effects" of underselling by corrective price increases.

Part II

Article 11, Subsidies other than export subsidies

2.2.11(1-2) Text, paragraphs 1-2

1. Signatories recognize that subsidies other than export subsidies are widely used as important instruments for the promotion of social and economic policy objectives and do not intend to restrict the right of signatories to use such subsidies to achieve these and other important policy objectives which they consider desirable. Signatories note that among such objectives are:

- the elimination of industrial, economic and social disadvantages of specific regions;
- to facilitate the restructuring, under socially acceptable conditions, of certain sectors, especially where this has become necessary by reason of changes in trade and economic policies, including international agreements resulting in lower barriers to trade;
- generally to sustain employment and to encourage re-training and change in employment;
- to encourage research and development programmes, especially in the field of high-technology industries;

1/ Pestieau, at 7.

- the implementation of economic programmes and policies to promote the economic and social development of developing countries;
- redeployment of industry in order to avoid congestion and environmental problems.

2. Signatories recognize, however, that subsidies other than export subsidies, certain objectives and possible forms of which are described, respectively, in paragraphs 1 and 3 of this Article, may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory or may nullify or impair benefits accruing to another signatory under the General Agreement, in particular where such subsidies would adversely affect the conditions of normal competition. Signatories shall therefore seek to avoid causing such effects through the use of subsidies. In particular, signatories, when drawing up their policies and practices in this field, in addition to evaluating the essential internal objectives to be achieved, shall also weigh, as far as practicable, taking account of the nature of the particular case, possible adverse effects on trade. They shall also consider the conditions of world trade, production (e.g. price, capacity utilization etc.) and supply in the product concerned.

2.2.11(1-2).1 Interpretation, paragraphs 1-2

Paragraphs 1 and 2 are hortatory provisions which state that the Code is not intended to restrict the right of signatories to use subsidies other than export subsidies to achieve social and economic national policy objectives. Signatories when establishing subsidy programs, however, are to take into account the potential trade effects of such programs.

Part II

Article 11

2.2.11(3-4) Text, paragraphs 3-4

3. Signatories recognize that the objectives mentioned in paragraph 1 above may be achieved, inter alia, by means of subsidies granted with the aim of giving an advantage to certain enterprises. Examples of possible forms of such subsidies are: government financing of commercial enterprises, including grants, loans or guarantees; government provision or government financed provision of utility, supply distribution and other operational or support services or facilities; government financing of research and development programmes; fiscal incentives; and government subscription to, or provision of, equity capital.

The signatories note that the above forms of subsidy are granted either regionally or by sector. The enumeration of forms of subsidy set out above is illustrative and non-exhaustive, and reflects those currently granted by a number of signatories to this Agreement.

Signatories recognize, nevertheless, that the enumeration of forms of subsidy set out above should be reviewed periodically and this should be done, through consultations, in conformity with the spirit of Article XVI(5) of the General Agreement.

4. The signatories recognize further that, without prejudice to their rights under this Agreement, nothing in paragraphs 1-3 above and in particular the enumeration of forms of subsidy creates, in itself, any basis for action under the General Agreement, as interpreted by this Agreement.

2.2.11(3-4).1 Interpretation, paragraphs 3-4

Paragraph 3 references a list of domestic subsidy practices which ". . . may have an adverse effect on the trade and production of other signatories." The list consists of five guidelines which include: government financing of commercial enterprises and subscription to their capital; government grants, loans or guarantees; government performed services; government financing of research and development.

Two factors are significant with regard to the guidelines. First, many of the costs will be very difficult for another signatory to establish, especially in converting the costs to different currencies during a regime of floating exchange rates. Second, the difficulty in establishing this type of information emphasizes the importance of the consulting mechanism in Article 12 of the Code.

Paragraph 4 provides that nothing in paragraphs 1-3 may be used as an admission by a signatory of any subsidy practice inconsistent with the obligations of the GATT, as interpreted by the Code.

Part IIArticle 12 Consultations2.2.12(1-5) Text, paragraphs 1-5

1. Whenever a signatory has reason to believe that an export subsidy is being granted or maintained by another signatory in a manner inconsistent with the provisions of this Agreement, such signatory may request consultations with such other signatory.
2. A request for consultations under paragraph 1 above shall include a statement of available evidence with regard to the existence and nature of the subsidy in question.
3. Whenever a signatory has reason to believe that any subsidy is being granted or maintained by another signatory and that such subsidy either causes injury to its domestic industry, nullification or impairment of benefits accruing to it under the General Agreement, or serious prejudice to its interests, such signatory may request consultations with such other signatory.
4. A request for consultations under paragraph 3 above shall include a statement of available evidence with regard to (a) the existence and nature of the subsidy in question and (b) the injury to the domestic industry caused or, in the case of nullification or impairment, or serious prejudice, the adverse effects caused to the interests of the signatory requesting consultations.
5. Upon request for consultations under paragraph 1 or paragraph 3 above, the signatory believed to be granting or maintaining the subsidy practice in question shall enter into such consultations as quickly as possible. The purpose of the consultations shall be to clarify the facts of the situation and to arrive at a mutually acceptable solution.

2.2.12(1-5).1 Interpretation, paragraphs 1-5

Paragraphs 1-5 provide for consultations between a signatory complaining of (1) an export subsidy being granted or maintained by another signatory in a manner inconsistent with the Code or (2) any subsidy granted or maintained by another signatory where the effect causes injury to its industries, nullification or impairment of benefits under the GATT, or serious prejudice to its interests as a GATT signatory. The purpose of the

consultations is to clarify the factual situation and provide the signatories an opportunity to negotiate a solution.

Part II

Article 13 Conciliation, dispute settlement, and authorized countermeasures

2.2.13(1-4) Text, paragraphs 1-4

1. If, in the case of consultations under paragraph 1 of Article 12, a mutually acceptable solution has not been reached within thirty days ^{1/} of the request for consultations, any signatory party to such consultations may refer the matter to the Committee for conciliation in accordance with the provisions of Part VI.
2. If, in the case of consultations under paragraph 3 of Article 12, a mutually acceptable solution has not been reached within sixty days of the request for consultations, any signatory party to such consultations may refer the matter to the Committee for conciliation in accordance with the provisions of Part VI.
3. If any dispute arising under this Agreement is not resolved as a result of consultations or conciliations, the Committee shall, upon request, review the matter in accordance with the dispute settlement procedures of Part VI.
4. If, as a result of its review, the Committee determines that an export subsidy is being granted in a manner inconsistent with the provisions of this Agreement or that a subsidy is being granted or maintained in such a manner as to cause injury, nullification or impairment, or serious prejudice, it shall make such recommendations ^{2/} to the parties as may be appropriate to resolve the issue and, in the event the recommendations are not followed, it may authorize such countermeasures as may be appropriate, taking into account the degree and nature of the adverse effects found to exist.

2.2.13(1-5).1 Interpretation, paragraphs 1-4

Paragraph 1 provides that in cases in which consultations provided for under Article 12 do not result in a mutually acceptable solution -- within thirty days -- of a complaint that a signatory grants or maintains an export

^{1/} Any time periods mentioned in this Article and in Article 18 may be extended by mutual agreement.

^{2/} In making such recommendations, the Committee shall take into account the trade, development and financial needs of developing country signatories.

subsidy in a manner inconsistent with the Code, any signatory which is a party to the consultations may refer the matter to the Committee of Signatories for conciliation in accordance with the provisions of Article 14. The thirty-day time limit may be extended by mutual agreement of the parties to the consultations.

Paragraph 2 provides that in cases in which consultations provided for under Article 12 do not result in a mutually acceptable solution -- within sixty days -- of a complaint that a signatory grants or maintains a subsidy which has the effect of causing injury to a domestic industry of another signatory or of nullifying or impairing its benefits under the GATT or of seriously prejudicing its interests as a GATT signatory, any signatory which is a party to the consultations may refer the matter to the Committee of Signatories for conciliation in accordance with the provisions of Article 14. The time limit may be extended by mutual agreement of the parties to the consultations.

Paragraph 3 provides that if a dispute arises between or among signatories to this Code which is not resolved by consultation under Article 12 or conciliation under Article 14, the Committee of Signatories will review the matter in accordance with the dispute resolution procedures of Article 15.

Paragraph 4 provides that if as a result of its review in accordance with the provisions of Article 15, the Committee of Signatories determines (1) an export subsidy is being granted in a manner inconsistent with the provisions of the Code or (2) a subsidy is being granted or maintained in such a manner as to cause injury, serious injury, nullification or impairment, or serious prejudice, the Committee shall make appropriate recommendations to the parties to resolve the matter. In the event that the recommendations of the

Committee are not adhered to, the Committee may authorize appropriate countermeasures. The significance of this paragraph is that the authorization of countermeasures is entirely discretionary with the Committee.

The negotiating history of this Code indicates that in earlier drafts 1/ the signatories reserved the right to apply provisional countermeasures on a unilateral basis while the consultation, conciliation, and dispute settlement efforts were in process. "By reserving the right to take provisional action" some assurance was built into the system that ". . . the parties are subject to real teeth." 2/

The abandonment of unilateral authority for provisional measures under Part II of the Code coupled with granting absolute discretion to the Committee of Signatories for authorizing countermeasures prevents the retaliation by the United States against any signatory under section 301 of the Trade Act of 1974 unless such retaliation is authorized by the Committee.

Should the United States resort to section 301 action against a signatory without the authorization of the Committee, the United States will have breached the Code, and might give rise to claim of prima facie nullification and impairment within the meaning of Article 8, paragraph 4, footnote 4.

1/ See, GATT document MTN/NTM/W168, dated July 10, 1978, Chapter III, Part D, paragraphs 1-2.

2/ See, Seamus O'Cleireacain, "Towards a Code on Subsidies and Countervailing Duties," at 449.

Part III

Developing CountriesPart IIIArticle 14 Developing countries2.3.14.0 Introduction

The provisions of Part III concern the "Special and Differential" treatment to be accorded less-developed signatories 1/ to the code. This treatment essentially consists of the right to negotiate the phaseout of export subsidies over a period of time in cases where other signatories would be obligated to discontinue the export subsidy practices or be subject to countermeasures authorized by the Committee.

2.3.14(1-10) Text, paragraphs 1-10

1. Signatories recognize that subsidies are an integral part of economic development programmes of developing countries.
2. Accordingly, this Arrangement shall not prevent developing country signatories from adopting measures and policies to assist their industries, including those in the export sector. In particular the commitment of Article 9 shall not apply to developing country signatories, subject to the provisions of paragraphs 5 through 8 below.
3. Developing country signatories agree that export subsidies on their industrial products shall not be used in a manner which causes serious prejudice to the trade or production of another signatory.
4. There shall be no presumption that export subsidies granted by developing country signatories result in adverse effects, as defined in this Agreement, to the trade or production of another signatory. Such adverse effects shall be demonstrated by positive evidence, through an economic examination of the impact on trade or production of another signatory.

1/ Within the context of GATT usage a "developing country" is one in which the economy "can support only low standards of living" and is "in the early stages of development," including "undergoing a process of industrialization to correct an excessive dependence on primary production." GATT, Annex I, Ad Art. XVIII, par. 1 and par. 4, notes 1,2.

5. A developing country signatory should agree or enter into a commitment 1/ to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive needs.

6. When a developing country has agreed or committed to reduce or eliminate export subsidies, as provided in paragraph 5 above, countermeasures pursuant to the provisions of Parts II and VI of this Agreement against any export subsidies of such developing country shall not be authorized for other signatories of this Agreement, provided that the export subsidies in question are in accordance with the terms of the commitment referred to in paragraph 5 above.

7. With respect to any subsidy, other than an export subsidy, granted by a developing country signatory, action may not be authorized or taken under Parts II and VI of this Agreement, unless nullification or impairment of tariff concessions or other GATT obligations is found to exist as a result of such subsidy, in such a way as to displace or impede imports of like products into the market of the subsidizing country, or unless injury to domestic industry in the importing market occurs in terms of Article VI of the GATT, as interpreted and applied by this Agreement. Signatories recognize that in developing countries, governments may play a large role in promoting economic growth and development. Intervention by government in the economy, for example through the practices enumerated in paragraph 3 of Article II, shall not, per se, be considered subsidies.

8. "The Committee shall, upon request by an interested signatory, undertake a review of a specific export subsidy practice of a developing country signatory to examine the extent to which the practice is in conformity with the obligations of this Agreement. If a developing country has entered into a commitment pursuant to paragraph 5 of this Article, it shall not be subject to such review for the period of that commitment."

9. The Committee shall, upon request by an interested signatory, also undertake similar periodic reviews of measures maintained or taken by developed country signatories under the provisions of this Agreement which affect interests of a developing country signatory.

10. Signatories recognize that the obligations of this Agreement with respect to export subsidies for primary products apply to all signatories.

1/ It is understood that, after this Agreement has been entered into force, any such proposed commitment shall be notified to the Committee in good time.

2.3.14(1-10).1 Interpretation, paragraphs 1-10

Paragraph one provides that signatories recognize that subsidies are an integral part of the development programs of developing countries. Domestic subsidies are necessary to establish "infant industries" and adequate "infrastructures" for industrialization. Export subsidies are necessary for developing foreign exchange earning industries.

Paragraph 2 provides that the Code shall not prevent developing country signatories from adopting subsidy programs, including export subsidies, to assist their industries. Subject only to the provisions of paragraphs 5-8, which follow, this paragraph exempts developing country signatories from the obligations of Part II, Article 9 of the Code, concerning "Export subsidies on products other than certain primary products." Developing country signatories are unaffected, too, by the illustrative list of export subsidies in Annex A, referenced in Article 9, paragraph 2. This exemption reflects the current position of the LDCs in the provision of GATT Article XVI:4.

The provision makes no reference to Part I of the Code (countervailing duties). Injurious subsidized imports from developing country signatories will be subject to the national countervailing duty legislation of other signatories.

Paragraph 3 is a hortatory provision. It states that developing country signatories "agree that export subsidies shall not be used in a manner that causes adverse effects" to the trade or production of another signatory.

Paragraph 4 provides that there will be no presumption that the subsidized exports from developing country signatories result in adverse effects, but, rather, that any adverse effects must be demonstrated.

Paragraph five provides that a developing country signatory "should agree or enter into a commitment to reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive needs." The language is not mandatory. A developing country signatory is not required to reduce or eliminate export subsidies. Moreover, the guide triggering the commitment -- when such subsidies are inconsistent with the needs of the developing country signatory -- is vague.

Paragraph 6 provides that if a developing country signatory makes a commitment to reduce or eliminate its export subsidies, and the subsidies that it maintains are within the terms of that agreement that countermeasures contemplated under Parts II and VI of the Code shall not be authorized for other signatories.

Paragraph 7 provides that the only actions under Parts II and VI of the Code which could be authorized against developing country signatories would be in response to (1) the nullification and impairment of a GATT obligation resulting from the subsidy which displaces or impedes the imports of like products into the market of the subsidizing country or (2) injury in the importing markets of the other country within the meaning of countervailing duty legislation which conforms with GATT Article VI as interpreted by the Code. No action would be authorized for displacement in third-country markets resulting from exports of developing country signatories.

Paragraph 8 provides that the Committee of Signatories shall, upon request only, review an export subsidy program of developing country signatories to determine whether it is in conformity with the Code. If, however, the developing country signatory has agreed to reduce or eliminate its export subsidies when their use became inconsistent with its needs in accordance with the provisions of Article 14, paragraph 5, above, so long as the provisions of its agreements are respected, that developing country signatory will not be subject to the review activities of the Committee of Signatories.

Paragraph 9 provides that the Committee of Signatories shall undertake periodic reviews of the measure taken by signatories under the Code which affect the interests of the developing countries. In this connection, GATT Article XXVII:3 requires all Contracting Parties to pay "special regard to the trade interests of less-developed Contracting Parties."

Paragraph 10 provides that the obligation of Article 10 of the Code, concerning "Export subsidies on primary products applies to all signatories," including developing countries, whether or not they had agreed to reduce or eliminate their export subsidies.

Part IV

State-Controlled Economy Countries

Part IV

Article 15 - Special situations

2.4.15 Text

In cases of alleged injury caused by imports from a country described in the notes and supplementary provisions to the General Agreement (Annex I, Article VI, paragraph 1, point 2) the importing signatory may base its procedures and measures either

- (a) on this Agreement, or, alternatively
- (b) on the Anti-dumping Code,

it being understood that in both cases the calculation of the margin of dumping or of the amount of the estimated subsidy can be made by comparison of the export price with:

- (a) the price at which a like product of a country other than the importing signatory or those mentioned above is sold, or
- (b) the constructed value ^{1/} of a like product in a country other than the importing signatory of those mentioned above.

If neither prices nor constructed value as established under (a) or (b) above provide an adequate basis for determination of dumping or subsidization then the price in the importing signatory, if necessary duly adjusted to reflect reasonable profits, may be used.

All calculations shall be based on prices or costs ruling at the same level of trade, normally at the ex factory/level, and in respect of operations made as nearly as possible at the same time. Due allowance shall be made in each case, on its merits, for the difference in conditions and terms of sale or in taxation and for the other differences affecting price comparability, so that the method of comparison applied is appropriate and not unreasonable.

2.4.15.1 Interpretation

There is no agreed-upon methodology for a state-controlled economy country to quantify a transfer of resources to any particular industry. Reliance on the import relief mechanism of GATT Article XIX (the escape clause), although it has a higher standard of injury than that provided in the arrangement for the countervailing duty statute, affords some protection to domestic producers from imports from state-controlled economy countries. In addition, section 406 of the Trade Act of 1974 applies specifically to disruption in domestic product markets caused by imports from communist

^{1/} Constructed value means cost of production plus a reasonable amount for administration, selling and any other costs and for profits.

countries. Article XIX requires most-favored nation treatment in remedy measures. Provisions for "selectivity" in fashioning remedy measures; i.e., focusing on the source of the injury, and avoiding most-favored-nation treatment may become subject to the complaint procedure under GATT Article XXIII on the ground that Article XIX expectations have been nullified or impaired.

The safeguard approach is not comparable to the theory of countervailing duties. Safeguards are designed to protect a noncompetitive product sector from foreign competition long enough to enable it to become efficient enough to compete or to divert what resources it has into some other market opportunity. (The 1977 Orderly Marketing Agreement with Japan on television parts was designed to allow the market shares of other off-shore producers to grow while subjecting the products of Japanese origin to quantitative restrictions.) Countervailing duties, on the other hand, do not protect a domestic industry from product competition. Countervailing duties neutralize whatever price effect a proscribed subsidy had. In addition to section 406 the United States has employed hypothetical cost calculations using third-market countries for costs under the authority of the Antidumping Act, 1921, to deal with pricing pressure from the exports of communist countries. 1/

None of these measures protects the interests of U.S. exporters to third-country markets. Techniques such as those in the Antidumping Act for dealing with the pricing of products of state-controlled economy countries are not available as a practical matter to counter disruption in third-country markets.

1/ 19 U.S.C. (164 (c) ("constructed value").

Part V

Committee of SignatoriesPart VArticle 16 Committee of Signatories2.5.16(1-3), Text paragraphs 1-3

1. There shall be established under this Agreement a Committee of Signatories composed of representatives from each of the signatories to this Agreement. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at request of any signatory. The Committee shall carry out special responsibilities as assigned to it under this Agreement or by the signatories and it shall afford signatories the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The GATT secretariat shall act as the secretariat to the Committee.
2. The Committee may set up subsidiary bodies as appropriate.
3. In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a signatory, it shall inform the signatory involved.

2.5.16 (1-3).1 Interpretation, paragraphs 1-3

Chapter V establishes a Committee of Signatories for consulting with the signatories toward furthering the purposes of the Code and conducting an annual review of the provisions of the Code. The Committee will police the imposition of countervailing measures and determine whether complainant signatories to the Code were seriously prejudiced or whether their expectations as contracting parties were nullified or impaired within the meaning of GATT Article XVI and GATT Article XXIII, respectively. Should the Committee succeed in applying the guidelines of the Code to develop a series of precedents, the development of a GATT "case law" approach to subsidy issues might be possible.

Membership in the Committee will consist of the representatives of the national authorities of the signatories responsible for the administration of countervailing measures. The similarity of the Committee to the GATT Antidumping Committee 1/ at which the Treasury Department represents the United States in addition to the nature of the responsibilities of the Treasury Department for the administration of the countervailing duty statute indicate that the same officials of that department who represent the United States on the International Antidumping Committee would represent the United States on this Committee as well. Section 121(d) of the Trade Act of 1974 authorizes any necessary expenditures for U.S. participation in the GATT.

There are no provisions for the procedure to be utilized by the Committee in making its determinations. Presumably each signatory would get one vote and issues would be determined by a majority vote of those signatories voting. 2/ In this connection, Part VII, paragraph 2, provides for the EEC to be a signatory to the Code. The GATT secretariat has recorded that the nine members of the EEC have initialed the Code. Consequently, the EEC has 10 votes on the Committee. Should states associated with the EEC become signatories as well, the EEC may control the Committee voting.

1/ See Article 14(1)-(3) of the proposed revision of the International Antidumping Code, Appendix B, at page B-16.

2/ GATT Article XXV, paragraph 3, provides: "Each contracting party shall be entitled to have one vote at all meetings of the CONTRACTING PARTIES." Paragraph 4 provides: "Except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast."

Part VI

2.6.0 Introduction

The provisions of Articles 17 and 18 create a formal mechanism in the Committee of Signatories for the resolution of disputes concerning subsidies in lieu of the informal practice under GATT Article XXIII:2 which has characterized GATT dispute settlement cases to date. 1/ The provisions of Articles 17 and 18 provide for assistance for conciliatory negotiations, guidelines for the selection of dispute panel members, including both governmental and non-governmental persons, and time limits for consultation, conciliation, and panel action. They also encourage written panel reports in cases in which the disputing parties do not reach agreement. The provisions also emphasize the availability of the "good offices" of the Committee of Signatories for the resolution of disputes. Finally, these provisions authorize the Committee to authorize countermeasures, including the withdrawal of concessions and GATT obligations.

Part VIArticle 17 Conciliation paragraphs 1-32.6.17(1-3) Text, paragraphs 1-3

1. In cases where matters are referred to the Committee for conciliation failing a mutually agreed solution in consultations under any provision of this Agreement, the Committee shall immediately review the facts involved and, through its good offices, shall encourage the signatories involved to develop a mutually acceptable solution. 2/

1/ Hudec, The GATT Legal System and World Trade Diplomacy (1975), at 269.

2/ In this connexion, the Committee may draw signatories' attention to those cases in which, in its view, there is no reasonable basis supporting the allegations made.

2. Signatories shall make their best efforts to reach a mutually satisfactory solution throughout the period of conciliation.

3. Should the matter remain unresolved, notwithstanding efforts at conciliation made under paragraph 2 above, any signatory involved may, thirty days after the request for conciliation, request that a panel be established by the Committee in accordance with the provisions of Article 18 below.

2.6.17(1-3).1 Interpretation, paragraphs 1-3

Paragraph 1 provides that where matters are referred to the Committee of Signatories for conciliation, the Committee will review the facts and encourage the signatories to develop a negotiated solution which is mutually acceptable. A note to the paragraph indicates that in cases in which the Committee was of the view that there was no reasonable basis for allegations made, the Committee would make its views known to the signatories. The paragraph also indicates that the Committee would make its "good offices" available to encourage signatories to develop a mutually acceptable solution. However, it is not clear what the resources of the Committee will be. Nothing in Part V of the Code indicates that professional arbitrators will be available to the Committee for conciliation attempts.

Paragraph 2 indicates that signatories are to make "best efforts" to reach a negotiated settlement during the conciliation period. The paragraph indicates a preference for negotiated compromises rather than formal panel findings.

Paragraph 3 provides that thirty days after the request for conciliation any signatory involved in the dispute may request that the Committee establish a panel in accordance with the provisions of Article 18.

Article 18 Dispute settlement2.6.18(1-9) Text, paragraphs 1-9

1. The Committee shall establish a panel upon request pursuant to paragraph 3 of Article 17. 1/ A panel so established shall review the facts of the matter and, in light of such facts, shall present to the Committee its findings concerning the rights and obligations of the signatories party to the dispute under the relevant provisions of the General Agreement as interpreted and applied by this Agreement.

2. A panel should be established within thirty days of a request therefor 2/ and a panel so established should deliver its findings to the Committee within sixty days after its establishment.

3. When a panel is established, the Chairman of the Committee, after securing the agreement of the signatories concerned, should propose the composition of the panel. Panels shall be composed of three or five members, preferably governmental, and the composition of panels should not give rise to delays in their establishment. It is understood that citizens of countries whose governments 3/ are parties to the dispute would not be members of the panel concerned with that dispute.

4. In order to facilitate the constitution of panels, the Chairman of the Committee should maintain an informal indicative list of governmental and non-governmental persons qualified in the fields of trade relations, economic development, and other matters covered by the General Agreement and this Agreement, who could be available for serving on panels. For this purpose, each signatory would be invited to indicate at the beginning of every year to the Director-General the name of one or two persons who would be available for such work.

5. Panel members would serve in their individual capacities and not as governmental representatives, nor as representatives of any organization. Governments would therefore not give them instructions with regard to matters before a panel. Panel members should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience.

1/ This does not preclude, however, the more rapid establishment of a panel when the Committee so decides, taking into account the urgency of the situation.

2/ The parties to the dispute would respond within a short period of time, i.e., seven working days to nominations of panel members by the Chairman of the Committee and would not oppose nominations except for compelling reasons.

3/ The term "governments" is understood to mean governments of all member countries in cases of common markets or customs unions.

6. To encourage development of mutually satisfactory solutions between the parties to a dispute and with a view to obtaining their comments, each panel should first submit the descriptive part of its report to the parties concerned, and should subsequently submit to the parties to the dispute its conclusions, or an outline thereof, a reasonable period of time before they are presented to the Committee.

7. If a mutually satisfactory solution is developed by the parties to a dispute before a panel, any signatory with an interest in the matter has a right to enquire about and be given appropriate information about that solution and a notice outlining the solution that has been reached shall be presented by the panel to the Committee.

8. In cases where the parties have failed to come to a satisfactory solution, the panels shall submit a written report to the Committee which should set forth the findings of the panel as to the questions of fact and the application of the relevant provisions of the General Agreement as interpreted and applied by this Agreement and the reasons and bases therefor.

9. The Committee shall consider the panel report as soon as possible and, taking into account the findings contained therein, may make recommendations to the parties with a view to resolving the dispute. If the Committee's recommendations are not followed within a reasonable period, the Committee may authorize appropriate countermeasures (including withdrawal of GATT concessions or obligations) taking into account the nature and degree of the adverse effect found to exist. Committee recommendations should be presented to the parties within thirty days of the receipt of the panel report.

2.6.18(1-9).1 Interpretation, paragraph 1-9

Paragraph 1 provides that upon the request of any signatory party to a dispute which has not been settled to the mutual satisfaction of the parties within 30 days of the beginning of the conciliation period under Article 17, the Committee shall establish a panel to make findings concerning the rights and obligations of the parties to the dispute under the relevant portions of the GATT as interpreted and applied by the Code.

Paragraph 2 provides that panels should deliver their findings to the Committee within sixty days of the request that the Committee establish a panel. The language of the provision is directory rather than mandatory. No particular consequence is provided for should a panel fail to deliver its findings within the sixty-day period.

Paragraph 3 provides that, when a panel is to be established, the Chairman of the Committee with the consent of the signatories concerned should propose its composition for approval of either 3 or 5 members, "preferably governmental." It is worth noting that non-governmental tax experts were on the panel which ruled on the Article XXIII complaints involving the U.S.-DISC legislation and the income tax treatment of foreign-source income in France, Belgium, and the Netherlands. 1/

Although paragraph 3 declares that "the composition of panels should not give rise to delays in their establishment," there is no time limit within which the panel must be completed. Footnote 2 to paragraph 2 provides that the parties to the dispute would respond to nominations of panel members "within a short period of time, i.e., 7 working days" and that they "would not oppose nominations except for compelling reasons." No example of a compelling reason is offered.

Paragraph 3 provides that citizens whose governments are parties to the dispute would not be members of the panel concerned with the particular dispute. 2/ Footnote 3 to the paragraph further provides that the term

1/ See, Jackson, "The Jurisprudence of International Trade: the DISC Case in GATT;" Hudec, The GATT Legal System and World Trading Diplomacy (1975), at 238.

2/ Charles Maechling, Jr., has observed that the record of both the International Court of Justice and its predecessor, the Permanent Court of International Justice, "shows that a judge almost invariably votes for his country of origin when that country is a litigant." "The Hollow Chamber of the International Court," 33 Foreign Policy 101,115 (winter 1978-79).

"governments" in the context of this paragraph includes "governments of all member countries in cases of common markets or customs unions." Although this indicates that a citizen of a member country of the EEC would not sit on a panel concerned with a dispute to which the EEC was a party, it would not prevent a citizen of a country with which the EEC was associated in preferential trading agreements from sitting on panels concerned with disputes to which the EEC was a party.

Paragraph 4 provides that the Chairman of the Committee of the GATT should maintain an informal list of both governmental and nongovernmental persons qualified in the fields of "trade relations, economic development, and other matters" covered by the GATT and the Code, who would be available for serving on panels to facilitate the constitution of panels. Although the paragraph authorizes the inclusion of nongovernmental persons on the list, paragraph 3, above, registered a preference for using governmental people on the panels.

Each signatory would be invited at the beginning of every year to indicate to the Director-General the names of one or two persons who could serve on panels. Presumably the use of the term "signatories" rather than the term "Contracting Parties" limits the invitation to Code signatories and does not permit such invitations to Contracting Parties which have not become signatories to the Code.

Paragraph 5 provides that panel members would serve in their individual capacities and not as representatives of any government or other organization. The paragraph also provides that the panel members would not be given instructions from governments with regard to matters before a panel and

that the panel members for any particular case "should be selected with a view to ensuring the independence of the members, a sufficiently diverse background and a wide spectrum of experience."

Paragraph 6 provides that each panel should inform the parties to the dispute first of the descriptive part of its report and, subsequently, the conclusions or an outline of them before the findings or conclusions are presented to the Committee of Signatories. The provisions enable the panel to take the views of the parties into account and give the parties additional opportunities to negotiate solutions to the dispute.

Paragraph 7 provides that where a mutually satisfactory solution to a dispute is developed by the parties, any signatory with an interest in the matter has a right to inquire about and be given information about the solution. Moreover, a notice outlining the solution reached will be presented to the Committee by the panel.

Paragraph 8 provides that where the parties to the dispute have failed to come to a satisfactory solution, the panel must submit a written report to the Committee setting forth the findings of fact of the panel and the application of the relevant provisions of the GATT as interpreted and applied by the Code. The "reasons and bases" of the findings and conclusions of the panel must be included in the written report. Should the parties to the dispute negotiate a settlement, however, the written report of the panel may be "confined to a brief description of the case and to reporting that a solution has been found." Presumably, an outline of the solution, as provided in paragraph 7, above, would also be included in cases where a negotiated settlement took place.

Paragraph 9 provides that Committee recommendations should be presented to the parties within thirty days of the Committee's receipt of the panel report. If the Committee's recommendations for resolving the dispute are not followed within a reasonable period, or if the circumstances otherwise warrant, the Committee may authorize appropriate countermeasures (including the withdrawal of GATT concessions or obligations). The authorized countermeasures are to take into account both the "nature and degree of the adverse effect" found by the panel. The "nature" of the subsidy refers, presumably, to whether or not the subsidy was an export subsidy.

Paragraph 9 is significant because the authorization of countermeasures is expressed in discretionary language. Should the Committee not authorize countermeasures, the Code does not authorize unilateral retaliation by signatories. In the case of the United States, section 301 of the Trade Act of 1974 authorizes the President to take countermeasures. Unless the countermeasures were authorized by the Committee of Signatories, however, the exercise of section 301 against a Code signatory on a matter concerning subsidies would put the United States in violation of its obligations under the Code.

The proposed revision of the International Antidumping Code cross-references the provisions of the Frameworks Agreements for the resolution of disputes among signatories except that references to the Direct General and to the Contracting Parties are replaced with references to the Chairman and to the Committee of Signatories. 1/

1/ See, Article 15(6), Appendix B, at page B-19.

PART VII

Final Provisions

Part VIArticle 19, Final Provisions2.7.19(1) Text, paragraph 1

No specific action against the subsidy of another signatory can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement. 1/

2.7.19(1)1 Interpretation, paragraph 1

Paragraph 1 appears to have two specific effects on domestic U.S. law. First, this provision limits unilateral action by the United States against export subsidies of other signatories under section 301 of the Trade Act of 1974. Second, the provision could justify Presidential disapproval of orders issued by the U.S. International Trade Commission under section 337 of the Tariff Act of 1930, as amended, against nationals of other signatories in cases where the unfair trade practices were based on exclusionary pricing in which the export prices of the subject products were in some manner established with reference to government subsidies. Section 337 (g) authorizes the President to disapprove section 337 orders for "policy" reasons. The report of the Senate Finance Committee on the bill which became the Trade Act of 1974, creating this provision for Presidential intervention, stated that the granting of relief against imports could have a very direct and substantial economic and political impact on foreign relations. 2/

1/ This paragraph is not intended to preclude action under other relevant provisions of the General Agreement, where appropriate.

2/ Senate Report No. 93-1298 (to accompany H.R. 10710), 93rd Cong., 2nd Sess., 199 (1974).

Action inconsistent with an interpretation of Article 19, paragraph 1, could be considered to have a "direct" and "substantial" impact on foreign relations. Although section 337 proceedings are sanctioned by the provisions by GATT Article XX (d), section 337 actions might not be taken in accordance with the provisions of the GATT, as interpreted by this code in cases involving product pricing influenced by subsidy practices. 1/

The provisions of paragraph 1 also appear in Article 16(1) of the proposed revision of the International Antidumping Code. 2/

Article 19 - Acceptance and accession.

2.7.19(2) Text, paragraph 2

2. (a) This Agreement shall be open for acceptance by signature or otherwise, by governments, contracting parties to the GATT and by the European Economic Community.

(b) This Agreement shall be open to accession by any other government on terms, related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the signatories, by the deposit with the Director-General to the CONTRACTING PARTIES to the GATT of an instrument of accession which states the terms so agreed.

(c) Contracting parties may accept this Agreement in respect of those territories for which they have international responsibility, provided that the GATT is being applied in respect of such territories in accordance with the provisions of Article XXVI:5(a) or (b) of the General Agreement; and in terms of such acceptance, each such territory shall be treated as though it were a signatory.

1/ The Commission retained jurisdiction of a section 337 proceeding concerning Japanese television exports in which it had been argued that any Commission determination on whether the pricing of the exports constituted an unlawful conspiracy to restrain or monopolize trade and commerce in the United States would necessarily involve a determination as to whether the receipt by Japanese exporters of economic benefits and incentives from the Government of Japan were unlawful, a matter that the Executive Branch maintained was properly within the exclusive jurisdiction of the countervailing duty statute. See, Commission Memorandum Opinion In the Matter of Certain Color Television Receiving Sets, Inv. No. 337-TA-23, December 20, 1976, at 7.

2/ See, Appendix B, at page B-20.

2.7.19(2).1 Interpretation, paragraphs 2

Paragraph 2(a) provides that governments which are contracting parties to the GATT as well as non-GATT members are eligible to sign the Code. The paragraph clearly contemplates signature by the EEC as well as by its member states. This provision raises the questions concerning voting in the Committee of Signatories discussed in connection with Part V, Article 16.

Paragraph 2(b) provides that governments which are not contracting parties to the GATT or have not acceded provisionally to the GATT, may negotiate terms for accession to this Code with the other Code signatories.

Paragraph 2(c) provides that GATT contracting parties may accept the Code's rights and obligations for territories for which they have international responsibilities.

Article 19 - Reservations2.7.19(3) Text, paragraph 3

3. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other signatories.

2.7.19(3).1 Interpretation, paragraph 3

Paragraph 3 provides that signatories must accept all of the Code's rights and obligations unless they can negotiate the acquiescence of other signatories with their reservations upon accession.

Article 19 - Entry into force2.7.19(4) Text, paragraph 4

2. This Agreement shall be open for acceptance by signature or otherwise, by governments, contracting parties to the GATT or having provisionally acceded to the GATT and by the European Economic Community.

3. Any government which is not a contracting party to the GATT, or has not acceded provisionally to the GATT, may accede to this Agreement on terms to be agreed between that government and the signatories. (The instrument of Accession shall be deposited with the Director-General to the CONTRACTING PARTIES to the GATT.)

4. Reservations, except those agreed upon Accession, may not be entered in respect of any of the provisions of this Agreement.

5. This Agreement shall enter into force on 1 January 1980 for the governments which have accepted or acceded to it by that date. For each other government, it shall enter into force on the thirtieth day following the date of its acceptance or accession to this Agreement.

2.7.19(4).1 Interpretation, paragraph 4

Paragraph 4 provides that for the parties accepting the Code by January 1, 1980, the Code will become effective on that date. For governments accepting the Code after January 1, 1980, the Code will enter into force 30 days after their acceptance or accession to it.

Article 19 - National legislation and review

2.7.19(5-6) Text, paragraphs 5-6

(a) Each government accepting or acceding to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply to the signatory in question.

(b) Each signatory shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

6. The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the CONTRACTING PARTIES to the GATT of developments during the period covered by such reviews. 1/

1/ At the first such review, the Committee shall, in addition to its general review of the operation of the Agreement, offer all interested signatories an opportunity to raise questions and discuss issues concerning specific subsidy practices and the impact on trade, if any, of certain direct tax practices.

2.7.19(5-6).1 Interpretation, paragraphs 5-6

Paragraph 5(a) provides that not later than the date of the entry into force of the Code for each signatory, that signatory shall take "all necessary steps. . . to ensure" that its laws, regulations and administrative procedures comply with the provisions of the Code. In the case of the United States, the amendment of the countervailing duty statute to provide for an injury provision in investigations of duty-free merchandise is necessary. Provision by statute or agency regulation should be made for the application of the injury test to all the products of other signatories subject to outstanding countervailing duty orders.

Paragraph 5(b) provides that each signatory shall inform the Committee of Signatories of changes in its laws and regulations which are relevant to the Code as well as changes in its administration of such laws and regulations.

Paragraph 6 provides that the Committee annually review the operation of the Code. Note one provides that the Committee give signatories the opportunity to raise the trade effects of subsidy practice concerning direct taxes. This gives the United States a forum in which it may criticize the panel decision on the DISC.

Article 19 - Amendments2.7.19(7) Text, paragraph 7

9. The signatories may amend this Agreement having regard, inter alia, to the experience gained in its implementation. Such an amendment, once the signatories have concurred in accordance with procedures established by the Committee, shall not come into force for any signatory until it has been accepted by such signatory.

2.7.19(7).1 Interpretation, paragraph 7

The paragraph allows the code to be amended at any time. The voting procedure for adopting decisions is left to the Committee to formulate.

Apparently, an amendment is effective only among those parties that have signed it. From the language of paragraph 7 it would seem that the amendment of the Code could result in different signatories adopting different amendments under the Code. It would then be possible for many different tiers of GATT/Code obligations to exist in the area of subsidies and countervailing measures.

Article 19 - Withdrawal2.7.19(8) Text, paragraph 8

8. Any signatory may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of sixty days from the date on which the written notice of withdrawal is received by the Director-General to the CONTRACTING PARTIES to the GATT. Any signatory may upon such notification, request an immediate meeting of the Committee.

2.7.19(8).1 Interpretation, paragraph 8

Paragraph 8 allows withdrawal at any time, to become effective sixty days after the GATT Director-General receives written notice. Any signatory may then request a Committee meeting, presumably to determine the coverage of the agreement.

Article 19 - Non-application of this Agreement between particular signatories2.7.19(9) Text, paragraph 9

9. This Arrangement shall not apply as between any two signatories if either of the signatories, at the time either accepts or accedes to this Agreement, does not consent to such application.

2.7.19(9).1 Interpretation, paragraph 9

Paragraph 9, like GATT Article XXV, allows a signatory to refuse to accept the application of the Code between it and another signatory if the nonconsenting party makes known its nonacceptance at the time of its or the other party's acceptance or accession. Execution of the provisions of this paragraph could result in an exception to most-favored-nation application of the Code's provisions among signatories.

Article 19 - Annex2.7.19(10) Text, paragraph 10

10. The Annex to this Agreement constitutes an integral part thereof.

2.7.19(10).1 Interpretation, paragraph 10

Paragraph 19 provides that Annex A, containing an "Illustrative List of Export Subsidies," referenced in Article 9 of the Code is an integral part of the Code.

Article 19 - Secretariat, Deposit, Registration2.7.19(11-13) Text, paragraphs 11-13Secretariat

11. This Arrangement shall be serviced by the GATT secretariat.

Deposit

12. This Arrangement shall be deposited with the Director-General to the CONTRACTING PARTIES to the GATT, who shall promptly furnish to each signatory and each contracting party to the GATT a certified copy thereof and of each amendment thereto pursuant to paragraph 7, and a notification of each acceptance thereof or accession thereto pursuant to paragraph 2 or each withdrawal therefrom pursuant to paragraph 8 above.

Registration

13. This Arrangement shall be registered in accordance with the provisions of Article 102 of the Charter of the United States.

Done at Geneva this _____ day of _____ nineteen hundred and seventy-nine, in a single copy, in English, French, and Spanish languages, each text being authentic.

2.7.19(11-13).1 Interpretation, paragraphs 11-13

Paragraphs 11-13 provide that the code will be serviced by the GATT Secretariat, deposited with the GATT Director-General, registered in accordance with the United Nations Charter and that an English, French, and Spanish text shall each be authentic.

MFN MFN Treatment in the Application of the Subsidies/Countervailing Measures Code

The Code addresses three provisions of the GATT: Article VI (countervailing duties), Article XVI (subsidies), and Article XXIII (dispute settlement). The obligations undertaken by signatories to the Code which are not required in the underlying GATT provisions raise the issue of conditional MFN treatment. Indeed, section 102(f) of the Trade Act of 1974 anticipated that unconditional MFN treatment may discourage the lowering of trade barriers. Similarly, the Senate Finance Committee recognized the structural problems of the Article XVI provisions concerning export subsidies being adhered to by only 17 countries and stated that there would be little incentive for other countries to incur such obligations if they could receive all the benefits of the Code without incurring obligations. 1/

The Protocol of Provisional Application relieved the United States of any requirement to adopt a material injury test under Article VI. As a signatory to the Code, the obligation of the United States to employ a material injury test in countervailing duty determinations arguably could

1/ Senate Finance Committee Report No. 93-1298, at 77-78.

extend only to other signatories of the Code. This is not a hypothetical consideration. The Code does not exempt the outstanding countervailing duty orders of the United States from the injury test obligation. If the injury test is administered on a most-favored-nation basis rather than being confined to signatories, over 75 import/injury investigations must be conducted. Of course, there are policy reasons for applying the material injury test on an unconditional basis; viz, the international harmonization of import administration and regulation. There are also the practical problems of conducting procedurally different investigations if the material injury test is not applied on an unconditional basis.

Arguments for extending Code obligations only to other Code signatories include (1) the nature of the application of countervailing duties and (2) the continued application of the Protocol of Provisional Application to the U.S. countervailing duty statute. The first argument is based upon the observation that although GATT Article I employs expansive language, the Article is not addressed to the investigation of imports under the provisions of Article VI. 1/ Governments enjoy a prosecutorial discretion in the self-initiation of countervailing duty investigations. An investigation being conducted with respect to a subsidy provided by one trading partner does not obligate a GATT Contracting Party to investigate all imports from other trading partners which maintain comparable subsidy programs. Thus, it can be argued that there is no violation of the most-favored-nation provision of GATT

1/ Article I provides that . . . any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

Article I in confining the imposition of countervailing duties to imports of the products of the contracting party which were the subject of the investigation. However, a contracting party not signatory to the Code could argue a nullification and impairment of Article I under the Article 23 procedures. There is a possibility that the votes in the full GATT would be sympathetic to such a challenge.

The GATT obligations are incurred through the Protocol of Provisional Application which contains an exception for existing inconsistent legislation. The U.S. countervailing duty statute existed without an injury test prior to the U.S. undertaking to apply Article VI of the GATT "to the fullest extent not inconsistent with existing legislation." At the time the countervailing duty statute was amended to cover duty-free articles (section 331 of the Trade Act of 1974), an injury provision was added, in part because the application of the law to duty-free merchandise was not contemplated in existing legislation when the Protocol was signed. It can be argued that any amendment of the U.S. countervailing duty statute to implement an injury test for dutiable merchandise will waive the application of the preexisting inconsistent legislation provision of the Protocol of Provisional Application and the United States will no longer be entitled to "grandfather" its countervailing duty law under Article VI of the GATT. Arguably, then, a failure to extend an injury test to the dutiable merchandise of a contracting party which was not a signatory under the Code could constitute a breach of GATT obligations under Article VI and XXIII. Again, the votes in the full GATT might be sympathetic to such a challenge. Even in this situation, however, the right to an injury test would not necessarily extend to nations

which were not members of the GATT. Nations not parties to GATT which have bilateral agreements with the United States containing MFN clauses might argue that countervailing duty investigations amount to import restrictions within the meaning of MFN clauses. On the other hand, should the implementing legislation explicitly limit the extension of an injury test to the dutiable products of the signatories to an international understanding concerning subsidies/countervailing duties, it is possible for the United States to argue that the status of the countervailing duty statute -- by virtue of comparison to its amendment under section 331 of the Trade Act of 1974 -- would not be changed from preexisting legislation for the purpose of interpreting the scope of the GATT Protocol and that equal treatment is available to any nation which negotiates terms for accession to the Code with the Committee of Signatories within the terms of Article 19, paragraph 3 of the Code.

In the case of Article XVI, the provisions of the Code would deprive the Executive Branch of the discretion to take retaliatory action against other Code signatories under the authority of section 301 of the Trade Act of 1974 unless it had the express authorization of the Committee of Signatories to do so. Similarly, the Code would appear to provide the Executive Branch with an obligation in the form of a required "policy" rationale for exercising a statutory disapproval of affirmative orders of the U.S. International Trade Commission under section 337 of the Tariff Act directed against the export pricing of nationals of other signatories in cases where those nationals were subject to or participants in government subsidy programs. These limitations would not apply to non-signatories.

With respect to the Article XXIII dispute settlement procedures of the GATT, it appears that the dispute mechanism of the Committee will be limited to those disputes in which all of the parties are Code signatories.

IAC Proposed revision of the International Antidumping Code

During the negotiation of the Code on subsidies/countervailing duty measures, several delegations agreed that it would be necessary to ensure consistency between the measures drafted for implementing GATT Article VI concerning countervailing duties and parallel provisions with regard to the elaboration and implementation of Article VI in the International Antidumping Code. 1/ The results of this endeavor 2/ harmonize the factors to be considered in determining whether material injury exists, 3/ the injury causation requirement, and the definition of domestic industry. The injury factor in countervailing duty investigations relating to an increased burden on government agricultural support programs was not added to the International Antidumping Code. With regard to causation, the International Antidumping Code will abandon the "principal cause" of injury criterion, i.e., that the dumped imports must be greater than any other single cause of injury. The causation test for the countervailing duty investigation is adopted for its replacement. Article 6, paragraph 4, of the Code on subsidies/countervailing duty measure and Article 3(d) of the revised International Antidumping Code provides that --

1/ See, for example, MTN/NTM/W/210, dated 19 December 1978, page 1, note 1.

2/ See documents COM.AD/W/90 (March 27, 1979) and MTN/NTM/W 232.

3/ Including threat of material injury and material retardation of the establishment of an injury.

It must be demonstrated that the subsidized (or dumped) imports are, through the effect of the subsidy, causing injury. . . . There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the subsidized (or dumped) imports.

The difficulties encountered with the concept of the "principal cause" of injury are discussed in connection with the interpretation of Article 6, paragraph 4 of the Code on subsidies/countervailing duty measures. The definitions of domestic industry were also harmonized with the result that the revised International Antidumping Code recognizes that the U.S. Constitution has been interpreted to prohibit the application of antidumping duties on a regional port basis.

In addition to provisions concerning the determination of injury in antidumping investigations, the proposed revision of the International Antidumping Code requires that the national authorities conducting such investigations provide notice to parties subject to the investigation, provide participants in investigations access to nonconfidential information, publish preliminary and final determinations with their bases and reasons, and limit the duration of provisional measures to four months unless exporters representing a significant portion of the trade subject to investigation request six months. The proposed revision of the International Antidumping Code also establishes a dispute settlement mechanism within the Committee of Signatories. ^{1/} Unlike the code concerning subsidies, the dispute settlement mechanism for antidumping is not designed to enforce international agreements about commercial practices, but, rather, it is to ensure that national

^{1/} Article 15, MTN/WTM/W/232 and Add. 1 and Corr. 1.

antidumping proceedings are conducted consistently with its provisions. Should the Committee determine that an antidumping proceeding is conducted in a manner inconsistent with that Code's provisions, the Committee may authorize the exporting signatory, whose benefits under the code were nullified or impaired, to take whatever countermeasures the Committee authorizes. 1/

Although the MIN emphasized the harmonization of antidumping and countervailing duty investigations, we would note that there are two significant distinctions between antidumping policies and policies concerning government subsidies and countervailing duty actions. As a practical matter, subsidy disputes and countervailing duty measures require government-to-government consultation and negotiations. This is not the case in antidumping measures unless nonmarket economy countries are the subject of antidumping proceedings. Second, there are significant distinctions in the underlying rationals for antidumping measures and countervailing duty measures. Kenneth W. Dam articulated these differences --

Unlike antidumping duties, which are designed to offset lower prices attributable to price discrimination by foreign private exporters, countervailing duties are designed to offset low prices attributable to subsidies by foreign governments. This difference leads to several observations. The first is that the arguments for permitting countervailing duties are somewhat more forceful, from a free-trade perspective, than the arguments for antidumping duties. From such a perspective countervailing duties merely seek to offset the distortion arising from foreign governmental interference in a free international market, whereas antidumping duties compound the distortion created by foreign private monopoly in that they assure that local purchasers will also pay the monopoly price. 2/
(Emphasis in original; citation omitted)

1/ MIN/27 (April 11, 1979).

2/ Kenneth W. Dam, The GATT: Law and International Economic Organisation (1970), at 177-178.

From this perspective it is apparent that the harmonization of national antidumping and countervailing duty measures may further inject international political considerations into the processing of individual antidumping investigations. 1/

1/ Compare, Jacob Viner, "International Relations Between State-Controlled National Economies," 34 American Economic Review 320 (1944).

**LEVELS AND PATTERNS OF SUBSIDIZATION IN SEVERAL
MAJOR TRADING COUNTRIES**

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Background

This paper presents an overall picture of levels and patterns of subsidization in several major trading countries. Countries' own definitions and documentation of subsidies serve as the data source. The data presented do not cover all types of possible subsidization nor do they give fine detail as to the products subsidized. However the data do give a broad picture of acknowledged subsidization that would be difficult to obtain from any other source.

A subsidy can be thought of as a benefit bestowed by a government upon a product or industry which allows more production than there would be without the benefit. The economics of a subsidy's possible relationship to trade is quite straightforward. The additional subsidized production could replace imports and/or increase exports, and countries without subsidies might experience more import competition or lose export markets in the subsidizing country or in third countries.

The United States can resort to countervailing duties if subsidized products enter the U.S. market. As a practical matter the authority for Presidential retaliation under section 301 of the Trade Act of 1974 and the rights of the U.S. to the consultation and dispute settlement mechanisms of the General Agreement on Tariffs and Trade have not provided a recourse for U.S. exporters whose exports to subsidizing countries' home markets or third-country markets have been displaced. The possibility of U.S. export displacement has been a major reason behind a U.S. effort to negotiate a code on subsidy practices that might affect trade. In the proposed code the United States would have to provide an injury test in countervailing duty cases, but in return would get the right to withdraw its GATT concessions in response to subsidies shown to displace U.S. exports.

Subsidies can take many forms and can appear at different stages of the production process. Therefore unless a subsidy is clearly labelled as applying only to exports, it is not easy to define a trade distorting

subsidy. A definition including only direct government grants to private industry would exclude benefits bestowed by governments in the form of tax credits or subsidized inputs to production. A definition which covers only subsidies to exports may overlook export and import substitution incentives resulting from domestic subsidy programs. On the other hand, broader definitions might complicate injury tests designed to isolate subsidy-related trade problems from other factors affecting trade and production. 1/

The analytical problems involved in measuring levels of subsidization and quantifying subsidies' trade effects are important considerations in designing procedures to limit the use of subsidies. The cost of information-gathering in this area is probably high. Efforts made to measure the trade effects of subsidies have not been very successful. The measurement and quantification problems are compounded because there is a considerable amount of variation in the mode and degree of government participation in the economies of the developed countries and even more variation among the developing countries. The analytical problems suggest that considerable effort will be required to make effective use of any procedures designed to investigate the trade distortion effects of subsidies. This is especially true if a subsidy must be linked to trade induced injury.

This paper presents data on subsidies whose existence has been acknowledged and documented by the subsidizing governments. For the most part, this means using published government data on a disbursement basis. 2/ The basic purpose of the data is to highlight the levels and broad areas of acknowledged subsidization in major trading countries.

1/ The subsidy code would require an injury test as a prerequisite for the imposition of countervailing duties. The section of the code dealing with "serious prejudice" due to the use of subsidies also requires "an economic examination of the impact of a subsidy on trade and production."

2/ Some of the data include sustained losses of public corporations and other forms of subsidization. However, the level of aggregation of the data as well as the lack of detailed explanation of its preparation, preclude a detailed explanation of its composition. Most of the sector data presented comes from input-output tables which usually give figures for sector subsidization but which do not document the calculation of the figures.

Aggregate Levels of Subsidization in
Selected Countries

The Organization for Economic Cooperation and Development (OECD) gathers national income accounts data in a common format. These data include subsidies of general governments 1/ as published in their national accounts schemes.

Tables 1, 2, 3, and 4 present this data and related information in a comparable form for several countries, including the major trading partners of the United States.

The ratio-subsidies paid as a percent of government disbursement-gives an indication of government subsidization activity in a country. Of the 18 countries shown in table 1, the United States had the lowest rate of acknowledged subsidization in each year, with subsidies averaging only 1.6 percent of current government disbursements during 1964-75. Norway had the highest rates after 1968, with subsidies averaging 14.0 percent of current disbursements, followed by Finland with subsidies averaging 11.6 percent of disbursements. These can be compared with the average subsidies for all countries and all years shown of 5.3 percent of current disbursements. After 1964, a calculated average subsidy rate for all countries in the table tended to rise annually, while the subsidy rates trended downward for the United States.

Although table 1 suggests that the U.S. government subsidizes less than the governments of our trading partners, it is possible that some countries with high government subsidy/disbursement ratios have low disbursements (i.e. a low level of government participation in the economy); therefore it is necessary to account for this possibility. Table 2 shows current general

1/ General government means national and regional government.

government disbursements as a percent of gross domestic product (GDP) for selected countries. This table highlights the variation in government participation in the economies of the countries listed. Current disbursements as a percentage of GDP for Japan averaged 15.4 percent for the 12 years shown, the lowest rate in the table. The Netherlands had the highest ratio of current disbursements to GDP, averaging 42.6 percent for the 8 years for which data are available. The United States, with current disbursements averaging 29.3 percent of GDP over the period 1964-75, is very close to the overall average of 29.7 percent for all countries and all years shown. The lack of relationship between the ratios in tables 1 and 2 is highlighted by a correlation coefficient of 0.07 between the columns of the tables for the year 1972. This means there is no statistical relationship between the ratio of subsidies to disbursements and the ratio of government disbursements to GDP. This result discounts the possibility that subsidies may be high just because government participation in the economy is high. However, to provide more certainty, a measure was created that compares the rate of subsidization in the economy across countries.

Tables 3 and 4 provide a comparison of the degree of subsidization of the economies of selected countries. Here subsidies are shown as a percentage of gross domestic product and, interestingly, correlate quite highly with the measures in table 1. 1/ This means that in spite of the variation in the degree of government participation in the economy, countries having governments with a high ratio of subsidies to disbursements also tend to have a high ratio of subsidies to GDP or a high rate of subsidization in the economy. 2/

1/ The data in columns for 1972 of tables 1 and 3 have a correlation coefficient of 0.91.

2/ Note that it can be argued that increased government participation in the economy increases the likelihood of subsidization in forms other than a direct disbursement basis.

Of the developed countries listed in table 3, the United States had the lowest rate of subsidy in the economy in all years, with subsidies averaging 0.5 percent of GDP over the 1964-75 period. Subsidization of the economy in Norway was highest with an overall average of 5.4 percent of GDP, followed by Finland averaging 3.3 percent. A calculated overall average subsidy as a percent of GDP for all years and all countries shown was 1.6 percent. A calculated average subsidy for all countries as a percentage of GDP rose each year except in 1971. The subsidy rate declined for the United States and Australia in the 1970's.

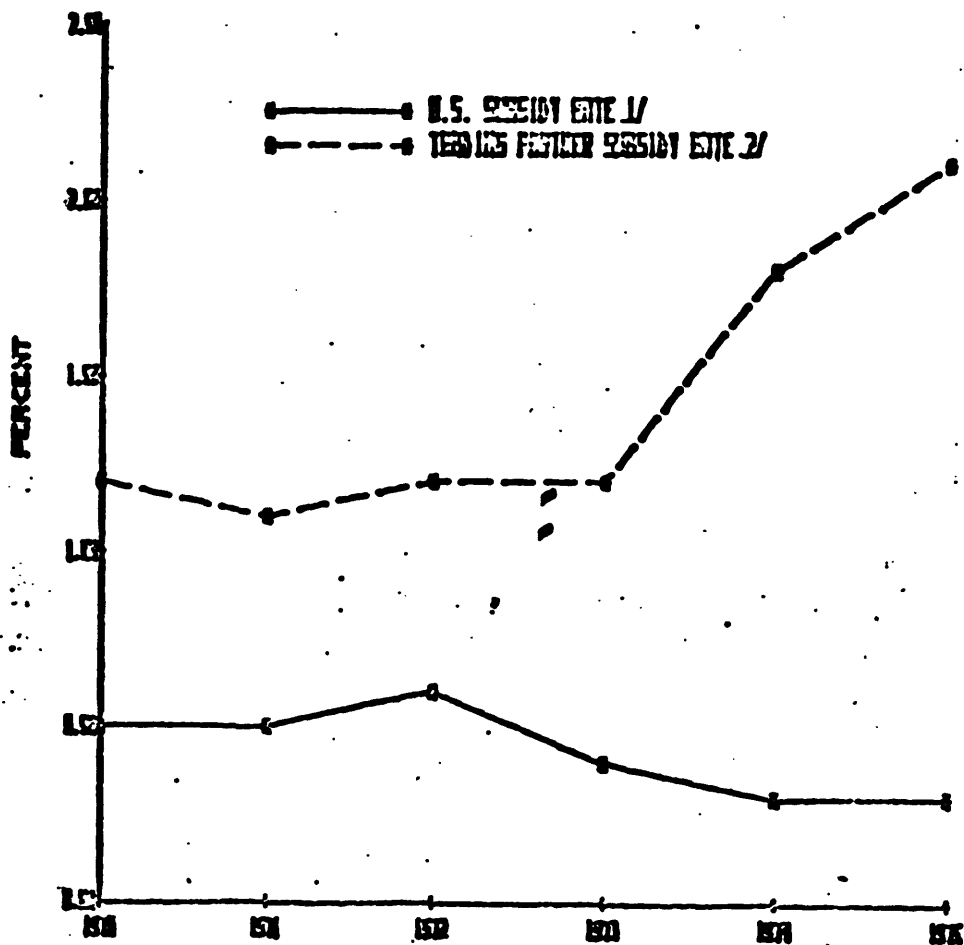
Table 4 shows subsidies as a percentage of GDP for five developing nations. Calculated average rates for these countries for the years shown is 1.7 percent, with Venezuela and Korea lowest at 0.2 and 0.3 percent, respectively. These latter rates are even lower than the U.S. rate shown in table 3.

While the data within the tables are not strictly comparable (some use the present and some the former system of national accounts, i.e., slightly different definitions of subsidies ^{1/}), the figures are an indication of absolute and relative levels of acknowledged subsidization and trends therein. The data generally suggest that the United States subsidizes less than its trading partners and that subsidization has decreased in recent years in the United States, while it has increased in other major trading countries.

In order to compare U.S. subsidy levels to an average of its major trading partners, the U.S. level of economic subsidization is compared with the trade-weighted average of economic subsidization rates of other countries in table 3. In 1977, U.S. subsidies were about 0.3 percent of GDP. Using 1977 U.S. exports to other countries in table 3 as weights, the 1975 trade-weighted average foreign subsidy is 2.1 percent of GDP. Chart 1 presents this

^{1/} For an explanation of differences in national accounts definitions of subsidies, see the footnotes of table 1.

Chart 1.— Ratios of subsidies to GDP for the United States and its trading partners, 1970-75.



1/ U.S. subsidies as a percent of GDP.
 2/ A trade-weighted average of foreign subsidies as a percent of GDP.

Source: Calculated from data in table 3 (using 1977 U.S. exports as weights).

calculation for the years 1970-75. In 1975, the average level of subsidization in the trading partners of the United States was about seven times as great as the level in the U.S. economy. This is an increase over the relative levels in the early seventies, when foreign subsidy rates averaged about twice the U.S. level. If the increased relative levels of subsidization distort trade in a manner unfavorable to the United States, then the United States would appear to have very much to gain from a code designed to reduce trade distortions caused by subsidies.

Subsidization Patterns Within Selected Countries

Some information is available for selected countries concerning sector patterns of acknowledged subsidization. Tables 5 through 9 show the allocation of subsidies by broad sectors for selected countries and the corresponding ratios of exports to production and imports to apparent consumption. These statistics were calculated from the national input-output tables which were published in the countries' national statistics. 1/ Table 10 shows the five sectors in each of these countries receiving the largest shares of total subsidies paid. Table 11 compares the sector allocation of subsidies for these countries and table 12 gives published information on subsidies for the United States.

These tables do not give details of subsidy programs nor do they necessarily include all forms of subsidizations that occur (e.g., the subsidy elements of a low-interest government loan or tax relief programs may not be entirely included). However, the subsidies are important because they are prominent enough to require their documentation in the construction of a country's input-output table.

1/ Input-output tables are an economic "snapshot" of value flows in an economy. National accounting principles require that major sector subsidization be accounted for in the construction of such tables.

It is important to keep in mind that the sector data on subsidies is aggregate. This could mean that while subsidies are a fairly small percentage of aggregate sector production, they could apply only to particular commodities or production activities within a sector and thus be very important on a product basis. Also note that the data may not include small product oriented subsidies of various forms which were not deemed important enough to affect the broad sector value flows documented in an input-output table. The data presented below are best interpreted as an identification of sectors wherein major subsidies are documented by the governments and as a rough estimate of the level of subsidization by broad sector grouping. A brief country-by-country description follows.

Japan

In terms of the ratio of subsidies to production, coal and lignite production receive the largest subsidy in Japan. Since Japan already imports 86 percent of coal and lignite consumed, this subsidy most likely is supporting a small domestic mining operation. The second largest sector receiving subsidies is the grain-milling sector, in which subsidies account for 24 percent of total output value. This sector has little export or import trade. Furthermore, wheat flour, rice flour, and groats and meal of wheat and rice were subject to import quotas in 1978. 1/ Thus it would appear that import restrictions accompanied by subsidies encourage domestic production in this sector. Although there are few exports, it is possible that protection and subsidies in this sector would discourage U.S. imports. This subsidy is important because it accounts for 37 percent of Japanese subsidies in the 1975 input-output table. The other sector in which subsidies might affect trade is agricultural products. Seventeen percent of Japanese subsidies in 1975 were in this sector, although the overall sector subsidy rate was only about 6 percent. Most of the other Japanese subsidies appear to be in the service sectors, where effects on production and trade would be indirect. The data suggest that, since there are few exports from Japan in the sectors receiving a significant share of the subsidies, if Japanese subsidies affect trade, it is likely to be on the import side where subsidies cause the substitution of domestic production for imports. For the United States this would mean that Japanese direct subsidies would likely discourage U.S. exports to Japan. The subsidies documented in the Japanese input-output table are less likely to displace U.S. goods in the U.S. market or in third markets since Japanese exports from the major subsidized sectors are small. 2/

1/ JETRO Overseas PR Department, Focus Japan, March 1978, vol. 5, No. 3, p. #3.

2/ Unless, of course, a small subsidy is concentrated on particular products within sectors.

Canada

The 1971 Canadian input-output table indicates that the ratio of subsidies to output was fairly small in all sectors producing goods. In fact, less than 15 percent of total subsidies were in such sectors in 1971. Of this 15 percent, half were in agriculture and thus could affect trade, since 27 percent of the agriculture output was exported and 13 percent of agricultural products consumed were imported. The subsidies that went to service sectors (85 percent of total subsidies going to sectors numbered higher than 74) could affect goods trade indirectly.

West Germany

Subsidy rates (ratio of subsidies to sector output) were fairly low for all sectors in West Germany in 1970. However, 26 percent of the subsidies were in agriculture, a major importing sector. Since agricultural (and food) exports are generally fairly small, the data suggest that subsidies in these sectors are likely to keep imports out rather than promote exports. Small subsidies are distributed throughout several other sectors that produce and trade goods. However, strong conclusions can not be drawn about the relationship of these subsidies to trade. ^{1/} As is generally true for any aggregate figure, it is possible that a small subsidy in an aggregate sector is very important for particular products within the sector.

^{1/} Correlation analysis proved to be inadequate to generally link subsidy patterns to trade patterns across sectors for the data derived from country input-output tables.

Italy

Twenty-six percent of Italy's 1970 subsidies were for agriculture, forestry, and fishing. Exports in this sector were fairly low, suggesting that these subsidies might have kept out imports. Other subsidies in goods-producing sectors were small, and no conclusions are suggested concerning their possible trade effects.

Netherlands

The largest share of Netherlands subsidies (40 percent of the total) in 1971 went to the milk and dairy products sector. The next largest share (20 percent) went to an "other foods" sector. Both of these sectors had significant exports and some imports. The coal mining sector also received some subsidies and had some trade. Because of the high ratio of subsidy paid to output value in milk and dairy products, this subsidy most likely affected both export and import trade.

United States

The Survey of Current Business publishes data on subsidies each year for the United States. These data are reproduced in table 12. The figures labeled "Federal subsidies" plus "State and local subsidies" are the source of data given by the OECD data in tables 1-3. An argument can be made for adding deficits of government enterprises for those enterprises which always run a deficit and therefore must make up the deficit out of tax revenue. Table 13 gives a breakdown of the distribution of subsidies by sectors excluding and including deficits of government (federal and local) enterprises for 1975.

Table 13.—Percentage distribution of U.S. subsidies, by sectors, 1975

Sector	Subsidies (1)	Subsidies plus deficits of government enterprises (2) <u>1/</u>
Agriculture-----	16	11
Housing-----	50	25
Transportation-----	12	19
Other-----	2/ 23	45
	100	100

1/ This includes subsidies in col. (1) plus the deficit of Commodity Credit Corporation added to agriculture, state and local government public transit deficits added to transportation, and the postal service deficit added to "other."

2/ Subsidies to exporters of farm products and to railroads (83 percent of the "Other" category). Seventeen percent of this figure is for State and local subsidies.

Source: Calculated from data in table 12.

Note.—Because of rounding, figures may not add to the totals shown.

The data in table 13 indicate that U.S. agriculture received some subsidies in 1975, but that most other subsidies went to sectors producing services (i.e., all other sectors in the table). The exception is a subsidy suggested in footnote 2 to table 13 for exporters of farm products (which is lumped together with subsidies to railroads). The Export-Import Bank is mentioned in a footnote on government enterprises; however, it does not normally run a deficit. 1/

1/ Any documentation of the Export-Import Bank's subsidization of trade would involve complex calculation of the subsidy element in its loan programs.

Table 14 gives the distribution of subsidies for major trading countries by very broad economic sectors.

Table 14.--Percentage distribution of subsidies for major trading countries, by sectors, 1970, 1971, and 1975

Sector	: Japan, : 1975	: Canada, : 1971	: Germany, : 1970	: Italy, : 1970	: Nether- lands, : 1970	: United States, : 1975	1/
Agriculture and food products, forestry, and fishing-----	59	10	32	28	72	16	
Minerals & fuels-----	3	4	4	4	4	0	
Manufactures-----	0	0	2	4	0	0	
Transportation-----	13	30	23	39	7	12	
Other services <u>2/</u> -----	24	55	40	26	16	73	
	100	100	100	100	100	100	

1/ Col. (1) of table 13 (housing and "other" in table 13 are put under "other services" in this table).

2/ Construction, utilities, wholesale and retail trade, finance, and other services.

Source: Calculated from data in tables 11 and 13.

Note.--Because of rounding, figures may not add to the totals shown.

The data in table 14 suggest that major direct subsidies are found mostly in transportation, other services, and agriculture (agriculture and food products, forestry, and fishing). Since traded goods are directly associated with agriculture, minerals and fuels, and manufactures, one can conclude that a subsidy code omitting agriculture and food products would exclude an important sector which does receive significant subsidization in many countries. 1/ If the code allows for indirect effects of subsidies on trade

1/ Although the input-output tables for the United Kingdom do not break out subsidies, they do have a category "net taxes linked to production" which has a large negative figure for agriculture and food products. A negative sign means a subsidy in the notation; hence the United Kingdom pattern may be similar to those of other countries in table 14.

(e.g., subsidies to transportation and other services), it would also be more effective. However, measurement of the trade effects of such indirect subsidies would present difficult empirical, if not legal, problems.

While there are subsidies in agriculture and manufacturing sectors in many countries, the data presented here do not tell us which sectors are experiencing the greatest growth in subsidization.

Official Complaints About Subsidies in the General Agreement
on Tariffs and Trade

The General Agreement on Tariffs and Trade (GATT) maintains an inventory of complaints about subsidies which were submitted to the GATT by contracting parties during the years 1974 through 1977. The GATT inventory lists more than 100 types of complaints about subsidies or subsidized products. The documentation of the subsidies in the GATT inventory varies considerably in quantity and quality. In some cases detailed product and subsidy information is given; in others, only a general complaint is made with little supporting documentation.

About 40 percent of products listed in the GATT inventory cover the subsidy practices of the European Community (EC). ^{1/} The bulk of these products were agricultural products, processed food products, and food-related chemicals. The complaints did not give country detail about subsidies since the program is Community-wide and is intended to offset export price disadvantages resulting from the Community policy of supporting product prices above world market levels. Thus the complaints are directed against a subsidy associated with the Community's common agricultural policy.

In addition, the GATT inventory has complaints about other products and services in specific European countries. These products included motion-

^{1/} A fairly detailed description of EC subsidies (product, amounts, and so forth) is given in the GATT inventory complaint filed by the United States.

picture films in West Germany, Italy, and the Netherlands, and iron and steel products, export insurance, shipbuilding, and paper in Italy.

The GATT inventory also contains complaints against subsidies for tires and motion-picture film in Canada as well as complaints about film subsidies and a general tax deferral scheme in Japan.

It is relevant to compare the broad pattern of complaints found in the GATT inventory with the broad sector patterns of acknowledged subsidies documented using countries' input-output tables. Clearly there is a strong degree of coincidence, since the bulk of the acknowledged subsidies and complaints fall in agricultural and food-product sectors. This coincidence is especially strong for the European Community countries. The GATT inventory does not contain complaints about agricultural and food subsidies in Japan or Canada as one would expect, given the subsidies in these sectors documented by the Japanese and Canadian Governments. Also, the GATT inventory contains few complaints about service-sector subsidies. This is significant considering the importance of these subsidies in governments' own accounting of their subsidy practices. It suggests that either (a) indirect subsidies are more acceptable practices or (b) any possible link of these subsidies to trade is too remote for easy detection.

One can conclude that the subsidy complaint pattern in the GATT inventory enforces the view that a subsidy code not covering agricultural products would weaken the code. However, if there was evidence that subsidies to manufactured products were increasing beyond the levels indicated in the countries' input-output tables, then the code would have a "deterrent" value. Also, it would appear that GATT contracting parties are not as worried about subsidies to service sectors which could operate as indirect subsidies to sectors producing traded goods.

Additional Considerations 1/

Subsidy elements may be present in many government programs. It is difficult to measure the subsidy element in some programs and even more difficult to relate that element to trade. An example would be the problem posed by determining the subsidy element and the trade effects of export credit insurance programs of governments. Such programs guarantee export credit advanced by commercial banks, and can have subsidy elements to the extent that they encourage exports by providing financing costs below market rates. If it were possible to measure the subsidy elements, then the next step would be to determine what exports would have been if official export credit insurance programs did not exist. Such a determination could be difficult and time consuming. 2/.

One of the most complete documentations of the possibilities for subsidization is given in the Annual Report; 1973-74 of the Australian Industries Assistance Commission (IAC). The IAC was given the mandate to document all assistance to the private sector, whether direct or indirect. Thus its annual report documents assistance as direct subsidies, grants, low-interest loans, tax-revenue losses, as well as traditional protection devices such as tariffs and quotas. Less obvious items considered to be assistance devices include tax rebates for exports, export market development allowances, research and development grants for export products, structural adjustment assistance, bounties to production sectors, investment allowances, postal concessions, export insurance, workers' training grants, and natural

1/ A more complete discussion of these considerations can be found in a report delivered by the Commission to STR. ("Impact of Foreign Export Subsidies," Office of Economic Research, U.S. International Trade Commission, August 1977).

2/ An argument for some sort of injury test (e.g., documentation of sales lost in domestic or foreign markets because of subsidies) is that a determination process has to begin somewhere and that a party being injured would be an appropriate initiator for such a process. This institutional process would also cut down on the need for complex investigatory work since, aside from some general equilibrium arguments, some subsidies may injure no one except the taxpayers of the subsidizing governments.

disaster relief. The IAC report shows that subsidies constituted about 40 percent of Australian assistance to agriculture, 5 percent of the assistance to mining, and about 65 percent of the assistance to manufacturing.

The difficulty of quantifying the trade effects of subsidies as well as the subsidy element in many government programs is illustrated in a recent book on subsidization of manufactures in the United Kingdom. ^{1/} This book quantified and summarized British assistance to industry in 1971. Included were the write-offs against losses of the government-owned British Steel Corporation, direct grants and subsidies, and subsidy elements in loans. This study indicated that only about 1 percent of total United Kingdom subsidization to industry consisted of subsidy elements in loans. The remainder was direct grants (for various purposes including research and development), subsidies, and losses of public corporations. Making a statistical comparison across the manufacturing sectors of the economy, the study was not able to reach any strong conclusion about the effect of the subsidy pattern on sector trade patterns. There was some weak evidence that trade balances were more positive (or less negative) in subsidized sectors. However, there was no statistical evidence as to whether the improvement was on the export or import side.

Recent studies of developing countries' trade policies have suggested that countries which intervene with export incentives have a better record of growth than those which provide heavy protection to their domestic industries. One "overview" study has concluded that developing countries can speed the

^{1/} G. Denton, S., O'Cleireacain and L. Ashe, Trade Effects of Public Subsidies to Private Enterprise, London, Macmillan, 1975.

development process by subsidizing exports. 1/ On the other hand, this study suggests that the reason this strategy may be more successful than import substitution policies is that developing country governments cannot afford to subsidize very much and therefore an export incentive (subsidy) program has to be much more market oriented and efficient than one which protects highly inefficient import industries (note the relatively low overall subsidy rates for most of the developing countries in table 4). Traditionally, developing countries have used a complex mix of protection devices and some subsidization in order to develop their production capabilities. Because of the growing importance of U.S. trade with developing countries, it would seem important that a subsidy code provide some way of dealing with serious problems caused by subsidization in developing as well as developed countries.

A major problem in assessing trade effects of subsidies is that many factors combine to determine trade patterns, and these factors change relative to each other and among countries over time. In demand terms, for example, imports usually respond to domestic economic growth, and exports respond to foreign economic growth. In terms of resource allocation among sectors of an economy, a subsidy or profits or any other incentive that keeps resources in one sector by default keeps them out of another sector. If incentives such as subsidies are eliminated, nonsubsidized sectors would benefit over a longer period because more resources would be available to them. This consideration presents a particularly difficult analytical problem when an attempt is made to quantify what trade would have been had the subsidy not existed. Thus the argument can be made, for example, that a decrease in European subsidization to agriculture would benefit U.S. agricultural trade but might harm U.S.

1/ Bhagwati and Kruger, "Exchange Control, Liberalization and Economic Development," American Economic Review, May 1973.

manufacturing trade because resources would be released from European agriculture into European manufacturing. While these general "equilibrium" effects seem abstract, their possible impacts should be investigated if the MTN results in a subsidy code that could make major changes in the sector subsidization patterns in the economies of major trading nations.

Finally, there is the question of dealing with subsidies given by regional or local governments (tax holidays, and so forth). In the United States, this would be state and local governments; in many countries it would be regional authorities of various sizes and types. While the legal questions concerning a code's applicability to regional subsidization are complex, the problems of analyzing the trade effects of regional subsidization would present additional analytical problems for any body dealing with subsidy complaints.

Table 1.--Ratios of subsidies to current disbursements, 1/ 1964-75

Country	(In percent)												System of National Accounts (SNA) 2/ P = Present SNA F = Former SNA
	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	
Canada-----	3.4	3.3	4.0	3.4	3.0	2.9	2.7	2.5	2.5	2.7	5.2	6.4	P
United States----	1.7	1.8	2.0	1.7	1.7	1.7	1.6	1.5	1.9	1.4	.8	.9	P
Japan-----	3.9	4.0	4.7	5.8	7.5	7.1	7.6	7.4	6.8	6.3	8.3	7.0	F
Australia 3/-----	3.2	3.4	3.7	3.8	4.0	4.2	3.9	4.6	3.3	2.7	2.0	1.6	P
Austria-----	6.7	6.6	6.5	5.5	5.1	4.8	4.6	4.5	4.3	5.0	6.6	5.8	F
Belgium-----	3.6	3.9	4.4	4.2	4.7	5.0	4.0	3.7	3.7	4.0	3.3	2.8	F
Denmark-----	4.2	3.2	3.6	4.1	4.6	4.4	4.3	4.0	3.9	1.5	4.2	2.5	P
Finland-----	13.5	12.7	11.8	10.5	10.0	11.0	11.9	10.7	10.4	9.3	13.4	14.0	F
France-----	NA	NA	NA	NA	NA	NA	5.7	4.5	4.4	4.7	5.1	5.0	P
West Germany-----	3.3	4.1	3.8	3.4	4.3	3.9	4.3	3.7	3.9	4.3	3.7	3.2	F
Greece-----	4.4	5.4	7.6	7.7	6.1	4.0	3.7	5.3	5.7	9.0	10.4	9.4	F
Italy-----	NA	NA	NA	NA	NA	NA	5.1	4.9	5.4	4.8	5.0	6.5	P
Netherlands 4/-----	NA	NA	NA	NA	2.4	2.6	3.3	2.3	2.8	3.8	3.8	3.3	P
Norway-----	NA	NA	NA	NA	13.3	13.6	14.5	14.0	13.7	13.6	14.5	15.0	P
Sweden-----	3.3	3.3	3.7	3.4	3.2	2.6	2.8	2.8	2.5	2.7	3.2	4.5	P
Switzerland-----	NA	NA	NA	NA	5.6	4.6	3.9	4.2	4.5	3.9	4.8	4.8	F
Turkey-----	6.5	5.1	4.7	5.3	3.2	10.4	7.5	5.4	5.9	NA	NA	NA	P
United Kingdom--	5.2	5.2	4.8	6.1	6.2	5.5	5.2	4.9	5.2	5.8	9.3	9.2	P

1/ In the present System of National Accounts (SNA), subsidies are defined as grants on current account by the public authorities to (i) private industries and public corporations and (ii) government enterprises to compensate for losses which are clearly the consequence of the price policies of the public authorities. Excluded are current grants to producers of private nonprofit services to households. The former SNA includes in subsidies the transfers on current account to private nonprofit bodies mainly serving business enterprises which are entirely or primarily financed and controlled by the public authorities. See footnote two for a history of the SNA.

Current disbursements is the sum of final consumption expenditure, property income payable, net casualty insurance premiums payable, subsidies, social security benefits, social assistance grants, current transfers to private nonprofit institutions serving households, unfunded employee welfare benefits, and current transfers, n.e.c.

2/ The former System was formulated in 1952 and continued with revisions until superseded by the present SNA adopted by the U.N. Statistical Commission at its 15th session. Not all statistics have been revised according to the new SNA, hence the most recent statistical series available might be either the present or former system as noted.

3/ Subsidies on wheat and wool recorded on an accrual basis in OECD accounts.

4/ Subsidies which are granted in order to maintain the price of products (especially food products) at a certain level are reduced duties levied for same purpose.

Source: Percentages calculated from data in the National Accounts of the OECD countries, OECD, Vol. II, 1975. Definitions from United Nations, Yearbook of National Accounts Statistics, 1975, 1976.

Table 2.--Ratios of current disbursements to gross domestic product, 1/ 1964-75

Country	(In percent)												System of National Accounts (SNA) 2/ P = Present SNA F = Former SNA
	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	
Canada-----	25.2	25.0	25.8	27.8	29.1	29.8	32.2	32.9	33.6	32.7	34.3	37.1	P
United States----	25.8	25.4	26.6	28.6	29.0	28.8	30.3	30.5	30.5	30.0	31.6	33.9	P
Japan-----	13.8	14.6	14.7	14.3	14.2	14.1	14.3	14.9	15.7	15.7	18.1	20.8	F
Australia-----	20.0	21.6	21.9	22.5	21.8	21.9	22.4	23.0	23.2	23.2	26.2	28.6	P
Austria-----	28.3	28.4	29.0	30.3	31.0	31.0	30.3	30.6	30.3	30.9	31.8	33.9	F
Belgium-----	27.8	30.0	30.6	31.4	32.9	32.9	30.0	33.8	35.0	35.8	36.4	41.6	F
Denmark-----	24.5	25.7	27.3	29.4	31.3	31.1	34.6	36.8	36.8	36.0	39.7	43.0	F
Finland-----	24.9	25.8	26.7	28.1	28.7	27.8	27.6	28.9	29.4	28.3	30.0	32.7	F
France-----	NA	NA	NA	NA	NA	NA	34.6	34.3	34.2	34.8	35.5	38.9	P
West Germany----	29.6	30.6	31.2	33.4	32.6	32.1	31.6	32.8	34.1	35.1	37.6	41.7	F
Greece-----	19.8	20.6	21.5	23.6	23.5	22.5	22.4	22.8	22.0	21.1	24.8	26.8	F
Italy-----	NA	NA	NA	NA	NA	NA	32.1	35.4	37.2	36.5	36.0	39.8	P
Netherlands-----	NA	NA	NA	NA	33.3	38.2	39.7	41.6	42.8	43.7	46.8	50.5	F
Norway-----	NA	NA	NA	NA	33.5	34.8	36.7	38.4	39.7	40.1	40.3	41.9	P
Sweden-----	28.8	29.9	31.7	33.2	35.0	35.8	36.7	39.3	40.4	40.7	44.4	46.8	F
Switzerland-----	NA	NA	NA	NA	20.7	21.8	21.3	21.9	21.9	24.2	25.5	29.2	F
Turkey-----	15.3	15.5	15.1	15.4	15.5	16.9	16.4	17.4	18.0	NA	NA	NA	F
United Kingdom---	30.0	31.0	31.5	33.4	33.9	33.2	33.3	33.1	34.7	34.9	39.3	41.3	F

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1/ Current disbursements in the present SNA is the sum of final consumption expenditure, property income payable, net casualty insurance premiums payable, subsidies, social security benefits, social assistance grants, current transfers to private nonprofit institutions serving households, unfunded employee welfare benefits, and current transfers, n.e.c.

By type of expenditure, the gross domestic product is equal to the sum of the items in respect of final expenditure on goods and services, in purchasers' values, less the c.i.f. value of imports of goods and services. By cost-structure, the items constituting the cost-structure of gross domestic product are compensation of employees, operating surplus, consumption of capital assets, and excess of indirect taxes over subsidies. The gross domestic product in purchasers' values in the former SNA differs from that in the present SNA because included are (i) operating surplus (net rent) in respect of buildings owned and occupied by government, (ii) motor-vehicle duties and similar government levies paid by households, and (iii) bank service charges to households. Excluded are charges in respect of the consumption of machinery and equipment of government and private nonprofit services. Private nonprofit bodies primarily serving business which are entirely, or mainly, financed and controlled by the public authorities are classified as enterprises (industries) rather than as government services. Additions to and withdrawals from stocks of internally processed commodities are, in principle, valued at explicit costs rather than at producers' values.

2/ The former System was formulated in 1952 and continued with revisions until superseded by the present SNA adopted by the U.N. Statistical Commission at its 15th session. Not all statistics have been revised according to the new SNA, hence the most recent statistical series available might be either the present or former system as noted.

Source: Percentages calculated from data in the National Accounts of the OECD countries, OECD, Vol. II, 1975. Definitions from United Nations, Yearbook of National Accounts Statistics, 1975, 1976.

Table 3.—Ratio of subsidies to gross domestic product, 1/ 1964-75

Country	(In percent)												System of National Accounts (SNA) 2/ P = Present SNA F = Former SNA
	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	
Canada-----	0.9	0.8	1.0	1.0	0.9	0.9	0.9	0.8	0.8	0.9	1.8	2.4	P
United States----	.4	.5	.5	.5	.5	.5	.5	.5	.6	.4	.3	.3	P
Japan-----	.5	.6	.7	.8	1.1	1.0	1.1	1.1	1.1	1.0	1.5	1.5	F
Australia 3/-----	.6	.7	.8	.9	.9	.9	.9	1.1	.8	.6	.5	.4	F
Austria-----	1.9	1.8	1.9	1.7	1.6	1.5	1.4	1.4	1.3	1.6	2.1	2.0	F
Belgium-----	1.0	1.2	1.4	1.3	1.5	1.6	1.3	1.3	1.3	1.4	1.2	1.2	F
Denmark-----	1.0	.8	1.0	1.2	1.4	1.4	1.5	1.5	1.5	.6	1.7	1.1	F
Finland-----	3.4	3.3	3.2	2.9	2.9	3.1	3.3	3.1	3.1	2.6	4.0	4.6	F
France-----	NA	NA	NA	NA	NA	NA	2.0	1.6	1.5	1.6	1.8	2.0	P
West Germany-----	1.0	1.3	1.2	1.1	1.4	1.3	1.4	1.2	1.3	1.5	1.4	1.3	F
Greece-----	.9	1.1	1.6	1.8	1.4	.9	.8	1.2	1.3	1.8	2.6	2.3	F
Italy-----	NA	NA	NA	NA	NA	NA	1.6	1.7	2.0	1.8	1.8	2.6	P
Netherlands 4/-----	NA	NA	NA	NA	.9	1.0	1.3	1.0	1.2	1.7	1.8	1.7	P
Norway-----	NA	NA	NA	NA	4.5	4.7	5.3	5.4	5.4	5.4	6.0	6.3	P
Sweden-----	1.0	1.0	1.2	1.1	1.1	.9	1.0	.9	1.0	1.1	1.4	2.1	P
Switzerland-----	NA	NA	NA	NA	1.2	1.0	.8	.9	1.0	.9	1.2	1.4	F
Turkey-----	1.0	.8	.7	.8	.5	1.8	1.2	.9	1.1	NA	NA	NA	P
United Kingdom----	1.6	1.6	1.5	2.0	2.1	1.8	1.7	1.6	1.8	2.0	3.7	3.8	P

1/ In the present System of National Accounts (SNA), subsidies are defined as grants on current account by the public authorities to (i) private industries and public corporations and (ii) government enterprises to compensate for losses which are clearly the consequence of the price policies of the public authorities. Excluded are current grants to producers of private nonprofit services to households. The former SNA includes in subsidies transfers on current account to private nonprofit bodies mainly serving business enterprises which are entirely, or primarily, financed and controlled by the public authorities. See footnote 2 for a history of the SNA.

In present SNA.

By type of expenditure, the gross domestic product in the present SNA is equal to the sum of the items in respect of final expenditure on goods and services, in purchasers' values, less the c.i.f. value of imports of goods and services. By cost-structure, the items constituting the cost-structure of gross domestic product are compensation of employees, operating surplus, consumption of capital assets, and excess of indirect taxes over subsidies. The gross domestic product, in purchasers' values, in the former SNA differs from that in the present SNA because included are (i) operating surplus (net rent) in respect of buildings owned and occupied by government, (ii) motor vehicle duties and similar government levies paid by households, and (iii) bank service charges to households. Excluded are charges in respect of the consumption of machinery and equipment of government and private nonprofit services. Private nonprofit bodies primarily serving business which are entirely, or mainly, financed and controlled by the public authorities are classified as enterprises (industries) rather than as government services. Additions to, and withdrawals from stocks of internally processed commodities are, in principle, valued at explicit costs rather than at producers' values.

2/ The former System was formulated in 1952 and continued with revisions until superseded by the present SNA adopted by the U.N. Statistical Commission at its 15th session. Not all statistics have been revised according to the new SNA, hence the most recent statistical series available might be either the present or former system as noted.

3/ Subsidies on wheat and wool recorded on an accrual basis in OECD accounts.

4/ Subsidies which are granted in order to maintain the price of products (especially food products) at a certain level are reduced with similarly levied duties.

Source: Percentages calculated from data in the National Accounts of the OECD countries, OECD, Vol. II, 1975. Definitions from United Nations, Yearbook of National Accounts Statistics, 1975, 1976.

Table 4.--Ratios of subsidies to gross domestic product for selected developing nations, 1/ 1965-74

Country	(In percent)										System of
	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	National Accounts (SNA) 2/
											P = Present SMA
											F = Former SMA
Brazil-----	1.9	1.3	1.3	1.1	0.9	0.6	0.4	0.5	0.4	NA	F
Iran-----	5.8	6.5	6.5	6.6	6.6	6.5	6.1	5.7	4.3	NA	F
Republic of Korea----	0	0	0	0	0	0	0	0	0.3	2.7	F
Saudi Arabia-----	NA	NA	.7	.8	.9	.7	.3	3	.1	NA	F
Venezuela-----	NA	NA	NA	.3	.3	.2	.2	.2	.2	.1	F

1/ In the present System of National Accounts (SNA), subsidies are defined as grants on current account by the public authorities to (i) private industries and public corporations and (ii) government enterprises to compensate for losses which are clearly the consequence of the price policies of the public authorities. Excluded are current grants to producers of private nonprofit services to households. The former SMA includes in subsidies transfers on current account to private nonprofit bodies mainly serving business enterprises which are entirely, or primarily, financed and controlled by the public authorities. See footnote 2 for a history of the SMA.

By type of expenditure, the gross domestic product in the present SMA is equal to the sum of the items in respect of final expenditure on goods and services, in purchasers' values, less the c.i.f. value of imports of goods and services. By cost-structure, the items constituting the cost-structure of gross domestic product are compensation of employees, operating surplus, consumption of capital assets, and excess of indirect taxes over subsidies. The gross domestic product, in purchasers' values, in the former SMA differs from that in the present SMA because included are (i) operating surplus (net rent) in respect of buildings owned and occupied by government, (ii) motor-vehicle duties and similar government levies paid by households, and (iii) bank service charges to households. Excluded are charges in respect of the consumption of machinery and equipment of government and private nonprofit services. Private nonprofit bodies primarily serving business which are entirely, or mainly, financed and controlled by the public authorities are classified as enterprises (industries) rather than as government services. Additions to, and withdrawals from stocks of internally processed commodities are, in principle, valued at explicit costs rather than at producers' values.

2/ SMA refers to the System of National Accounts. The former System was formulated in 1952 and continued with revisions until superseded by the present SMA adopted by the U.N. Statistical Commission at its 15th session. Not all statistics have been revised according to the new SMA, hence the most recent statistical series available might be either the present or former system as noted.

Source: Definitions from United Nations, Yearbook of National Accounts Statistics, 1975, Volumes I and II, 1976. Percentages calculated from data in the same volume.

Table 3.--Selected ratios calculated from Japan's input-output table 1975

		(In percent)					
Input output code	Sector	Ratio of --					
		Subsidy to total subsidies	Subsidy to total sector output	Exports to total sector production	Imports (duty- and tax-paid) to apparent consumption	Customs duty to duty- and tax-paid imports	Commodity tax to duty- and tax paid imports
1	Agricult. prod- ucts, excl. industrial-----	16.5	5.6	0.1	18.2	2.7	0
2	Agricult. prod- ucts, in- dustrial-----	0	.1	.9	59.7	.1	0
4	Other livestock---	.9	.7	.1	0.8	3.1	0
5	Forestry & hunt- ing-----	0	.1	.8	35.0	0	0
6	Fishery products---	.3	.3	1.2	7.5	5.7	0
7	Coal & lignite---	3.2	40.1	.2	85.9	0	0
8	Iron ore-----	0	.3	0	99.5	0	0
9	Non-ferrous metal ore-----	0	.4	1.5	85.6	.4	0
10	Crude petroleum & natural gas---	.1	2.2	.1	99.1	2.3	0
14	Grain mill prod- ucts-----	37.3	24.2	.1	0.4	1.5	0
15	Miscellaneous food prepared-----	4.1	1.2	1.0	9.4	6.0	.4
16	Beverages & alco- holic drinks---	.1	.1	.5	4.5	16.0	31.0
44	Other construc- tion-----	.1	0	0	0	0	0
47	Water supply & sanitary ser- vices-----	1.1	2.0	0	0	0	0
48	Wholesale and re- tail-----	8.4	.6	2.8	.9	0	0
49	Financial & insur- ance business---	4.4	.8	.3	.4	0	0
51	Rents-----	1.5	1.4	.9	.1	0	0
52	Transportation---	13.2	2.6	20.9	12.2	0	0
55	Community ser- vices-----	3.1	.5	0	0	0	0
60	Activities not adequately de- scribed-----	5.6	1.7	8.4	10.4	0	0
	All sectors-----	100.0	1.4	6.3	6.5	2.4	.4

Source: Calculated by the staff of the U.S. International Trade Commission, Office of Economic Research, from data in Economic Statistics Annual, 1977, Statistics Department, the Bank of Japan, Tokyo, Japan, Mar. 31, 1978, pp. 5-360.

Table 6.—Selected ratios calculated from Canada's input-output table, 1971

		(In percent)			
Input-out- put code	Sector	Ratio of --			
		Subsidy to total subsidies	Subsidy to total sector output	Exports to total sector pro- duction	Imports to apparent consumption
1-3	Agricultural-----	7.5	1.0	27.2	13.1
5-6	Fishing, hunting, trapping-----	.1	.3	23.4	19.7
7-8	Metal mines-----	1.0	.4	46.4	36.8
9-11	Mineral fuels-----	3.4	1.1	51.2	51.3
12	Non-metal mining--	0	0	52.8	57.7
14-24	Food & beverages--	2.5	.2	9.1	8.6
45-49	Primary metal in- dustry-----	.1	0	37.8	29.1
64-67	Chemical indus- tries-----	0	0	18.2	25.4
74	Transportation & storage-----	29.9	2.5	7.0	1.8
75-77	Communications-----	24.1	5.8	1.1	1.0
78-79	Utilities-----	.5	.1	1.7	.3
80	Wholesale trade---	27.3	3.1	11.0	1.7
82	Owner-occupied dwelling-----	2.3	.4	0	0
83	Finance, insur., real estate-----	1.2	.1	.7	2.9
88	Accommodations & food service----	.1	0	0	0
All	Total sector output-----	100.0	.5	9.5	8.7

Source: Calculated by the staff of the U.S. International Trade Commission from data in The Input-Output Structure of the Canadian Economy in Constant 1961 Prices, 1961-71, Statistics Canada, Publications Distribution, Ottawa, December 1977.

Table 7.—Selected ratios from West Germany's input-output table, 1970

Input-output code	Sector	Ratio of —			
		Subsidy to total subsidies	Subsidy to sector output	Imports to apparent consumption	Exports to total sector output
01	Agr., forest, fish	26.0	3.6	25.5	2.7
03	Coal, lig., briq	2.8	2.2	7.6	10.5
07	Petrol., gas, prod	.5	.1	38.0	4.2
09	Electric power & gas	.9	.3	3.0	.6
13	Orcs and metals	.2	0	19.9	12.8
15	Non-metallics	.3	.1	11.5	8.2
17	Chemicals	.1	0	18.0	27.0
19	Metal prod., exc. machinery	.2	0	6.1	10.5
21	Agr. & ind. mach	.1	0	16.0	36.6
27	Motor vehicles	.3	0	15.0	34.6
29	Other transp. equip	.3	0	36.6	27.7
31	Meats	.9	.3	12.7	2.7
33	Milk & dairy prod	4.1	3.1	10.0	4.9
35	Other foods	1.1	.2	12.7	3.7
41	Textiles & clothing	.2	0	19.0	10.7
43	Leather & footwear	.1	0	19.8	9.6
45	Wood & furniture	.2	0	7.5	3.7
47	Paper & print	.1	0	10.7	5.6
53	Building & construc	.4	0	.3	1.0
55	Recovery & repair	.1	.1	2.8	6.5
57	Wholesale & retail	25.4	1.9	.8	3.4
59	Lodging & catering	.1	0	2.6	0
61	Inland transport	22.7	6.9	4.4	8.7
63	Sea & air transp	.4	.4	37.8	70.6
65	Aux. trans. service	.1	.2	22.6	20.0
67	Communication	1.4	1.0	.8	.5
71	Business services	.6	.2	11.3	4.5
73	Rental services	10.0	2.3	0	.1
75	Educa. & rec. svc	.1	.7	0	1.4
77	Health market	.1	.1	0	0
79	Recreat. & cultural	.3	.2	4.5	.6
All	Total sector output	100.0	.6	10.2	9.9

Sources: Calculated by the staff of the U.S. International Trade Commission from data in Input-Output-Tabelle, BR Deutschland-1970, Baromet, Statistical Office of the European Communities, Luxembourg, 1978, p. 164-194.

Table 8.—Selected ratios from Italy's input-output table, 1970

		(In percent)			
Input- output code	Sector	Ratio of --			
		Subsidy to total subsidies	Subsidy to total sector output	Imports to apparent consumption	Exports to total sector output
01	: Agr., forest, fish----	26.3	2.7	19.2	4.9
07	: Petrol., gas, prod----	1.5	.3	30.0	11.5
09	: Electricity & gas----	1.4	.6	1.3	.4
15	: Non-metallic mineral--	2.8	1.1	10.8	12.3
29	: Other transp. equip----	3.6	3.7	23.6	22.8
33	: Milk & dairy prod----	.4	.4	15.4	2.8
35	: Other foods-----	1.6	.3	6.7	5.2
39	: Tobacco-----	.2	.2	5.6	0
53	: Building & construc----	3.1	.3	0	0
57	: Wholesale & retail----	4.3	.4	3.6	5.1
59	: Lodging & catering----	.5	.2	0	0
61	: Inland transpor-----	28.6	11.6	.8	6.8
63	: Sea & air transpor----	9.7	7.7	19.0	9.1
65	: Aux. transp. serv-----	.6	.7	22.5	18.4
69	: Credit & insurance----	7.5	2.5	2.6	3.2
77	: Health market-----	4.0	1.9	0	0
79	: Recrea. & cultural----	3.7	2.2	1.3	1.4
All	: Total sector output----	100.0	.8	11.1	9.7

Source: Calculated by the staff of the U.S. International Trade Commission from data in Italy's Input-Output, 1970, Eurostat, Statistical Office of the European Communities, Luxembourg, 1977, pp 166-192.

Table 9.--Selected ratios from the Netherlands' input-output table, 1970

(In percent)

Input- output code	Sector	Ratio of --			
		Subsidies to total subsidies	Subsidies to total output	Imports to apparent consumption	Exports to total sector output
01	: Agr., forest, fish----	2.4	0.3	29.9	20.6
03	: Coal, lig., briq-----	4.4	10.3	35.9	44.6
29	: Other transp. equip----	.3	.1	43.2	50.0
31	: Meats-----	9.2	3.3	21.0	50.4
33	: Milk & dairy prod-----	40.4	23.8	13.7	32.1
35	: Other foods-----	19.6	2.6	21.3	22.5
37	: Beverages-----	.4	.4	21.7	10.8
57	: Wholesale & retail-----	3.6	.3	7.9	20.9
61	: Inland transpor-----	7.2	2.4	6.2	21.1
73	: Rental service-----	12.5	5.8	0	0
99	: Total-----	100.0	.7	26.8	23.9

Source: Calculated by the staff of the U.S. International Trade Commission from data in Input-Output Tabel, Nederland-1970, Eurostat, Statistical Office of the European Communities, Luxembourg, 1976, pp 16-19.

Table 10.—Selected ratios for the 5 most heavily subsidized sectors in specified countries

Country, year, and sector	(In percent)		
	Subsidy to total subsidies	Ratio of — Exports to total sector output	Imports to apparent consumption
Japan (1975):			
Agricultural products, excl. industrial-----	16.5	0.1	18.2
Grain mill products-----	37.3	.1	.4
Wholesale and retail-----	8.4	2.8	.9
Transportation-----	13.2	20.9	12.2
Activities not adequately described-----	5.6	8.4	10.4
Canada (1971):			
Agriculture-----	7.5	27.2	13.1
Mineral fuels-----	3.4	51.2	51.3
Transportation and storage-----	29.9	7.0	1.8
Communications-----	24.1	1.1	1.0
Wholesale trade-----	27.3	11.0	1.7
West Germany (1970):			
Agriculture, forestry, & fishing-----	26.0	2.7	25.5
Milk and dairy products-----	4.1	4.9	10.0
Wholesale and retail-----	25.4	3.4	.8
Inland transportation-----	22.7	8.7	4.4
Rental services-----	10.0	.1	0
Italy (1970):			
Agriculture, forestry, & fishing-----	26.3	4.9	19.2
Wholesale and retail-----	4.3	5.1	3.6
Inland transportation-----	28.6	6.8	.8
Sea and air transportation-----	9.7	80.6	19.0
Health marketing services-----	4.0	0	0
Netherlands (1970):			
Coal, lignite, and briquettes-----	4.4	44.6	55.9
Milk and dairy products-----	40.4	32.1	13.7
Other foods-----	19.6	22.5	21.3
Inland transportation-----	7.2	21.1	6.2
Rental services-----	12.5	0	0

Sources: Tables 1-9.

Table 11.—Allocation of subsidies in selected countries (subsidies by sector as a percent of total subsidies), 1970, 1971, and 1975

Aggregated input-output sectors	West				
	Japan, 1975	Canada, 1971	Germany, 1970	Italy, 1970	Netherlands, 1970
Agriculture, forestry, & fishing-----	17.8	7.6	26.0	26.3	2.4
Mineral & fuels:	3.2	3.4	3.2	1.5	4.4
Coal and lignite-----	3.2	3.4	2.8	0	4.4
Crude petroleum & natural gas-----	.1		.5	1.5	0
Metal mining-----	.1	1.0	.2	0	0
Nonmetallic mining-----	0	0	.3	2.8	0
Food and beverages:	41.5	2.5	6.1	2.0	69.6
Carcass, meat prods. & prep-----	0		.9	0	9.2
Dairy products-----		2.5	4.1	.4	40.4
Grain mill products-----	37.3		1.1	1.6	19.6
Other foods-----	4.1				
Beverages-----	.1		0	0	.4
Tobacco products-----	0	0	0	.2	0
Textiles & clothing-----	0	0	.2	0	0
Chemical products-----	0	0	.1	0	0
Rubber & plastics-----	0	0	0	0	0
Leather & fur-----	0	0	.1	0	0
Wood & products, incl. paper & publish-----	0	0	.3	0	0
Primary metals & fabricating-----	0	.1	.2	0	0
Machinery & other manufacturing:	0	0	.6	3.6	.3
Agric. & indust. mach-----	0	0	.1	0	0
Office mach. & equipment-----	0	0	0	0	0
Elect. machinery-----	0	0	0	0	0
Motor vehicles-----	0	0	.3	0	0
Other transport. equipment-----	0	0	.3	3.6	.3
Other manufactures-----	0	0	0	0	0
Construction	.1	0	.6	3.1	0
Building construction-----		0	.4	3.1	0
Recovery & repairs-----	.1	0	.1	0	0
Electric, gas, & water utilities:	1.1	.5	.9	1.4	0
Electric & gas-----	0	.5	.9	1.4	0
Water & sewer-----	1.1				0
Wholesale & retail	8.4	27.3	25.4	4.3	3.6
Transportation & storage:	13.2	29.9	23.2	38.9	7.2
Inland transportation service-----			22.7	28.6	7.2
Sea & air transportation service-----	13.2	29.9	.4	9.7	0
Auxiliary transportation service-----			.1	.6	0
Communications-----	0	24.1	1.4	0	0
Finance, insurance, real estate:	5.9	3.5	10.6	7.5	12.5
Finance & insurance-----	4.4		.6	7.5	0
Real estate-----	1.5	3.5	10.0	0	12.5
Accommodations & food services-----	NA	.1	.1	.5	0
Other & not adeq. described-----	8.8	0	.6	8.8	0

Source: Country input-output tables mentioned in tables 5-9.

Note.— Because of rounding, figures may not add to the totals shown.

Table 12.--Subsidies less current surplus of Government enterprises in the United States, 1960-76

(In millions of dollars)																		
Line:	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976	
1	Subsidies less current surplus of Government enterprises----	422	1,683	1,758	1,120	1,658	1,610	2,496	1,619	1,332	1,817	2,716	2,387	3,588	3,872	952	2,264	767
2	Federal-----	2,615	4,011	4,211	3,874	4,506	4,576	5,498	4,674	4,495	5,165	6,316	6,192	7,805	8,223	5,277	6,727	5,946
3	Subsidies-----	1,239	2,137	2,399	2,310	2,800	3,070	4,008	3,870	4,259	4,583	4,840	4,786	6,783	5,392	3,434	4,722	5,671
4	Agricultural-----	719	1,515	1,728	1,683	2,175	2,462	3,282	3,116	3,489	3,787	3,674	3,151	3,948	2,622	508	780	706
5	Housing-----	146	159	176	195	210	234	254	278	327	420	606	944	1,639	1,646	2,137	2,422	3,132
6	Maritime-----	242	299	338	279	283	276	255	284	316	275	328	405	440	440	478	514	541
7	Air carriers-----	70	81	83	83	82	79	67	60	51	39	31	75	67	67	75	63	74
8	Other 1/--	62	83	74	70	50	19	150	132	76	64	201	211	889	617	236	943	1,218
9	Less: Current surplus of Government enterprises-----	-1,376	-1,874	-1,812	-1,564	-1,706	-1,506	-1,490	-804	-236	-580	-1,476	-1,406	-1,022	-2,831	-1,843	-2,003	-275
10	Postal Service-----	-610	-779	-800	-590	-679	-728	-954	-1,057	-754	-1,044	-1,943	-1,982	-1,466	-2,141	-1,986	-3,172	-1,730
11	Commodity Credit Corporation-----	-1,284	-1,629	-1,590	-1,584	-1,712	-1,501	-1,239	-572	-343	-557	-532	-514	-672	-1,740	-1,027	-253	-197
12	Federal Housing Administration-----	122	134	145	153	175	196	181	196	214	230	250	282	285	260	115	190	193
13	Tennessee Valley Authority-----	98	99	98	105	121	118	114	119	133	145	178	238	230	257	327	357	469
14	Other 2/--	298	301	335	352	389	409	408	510	514	646	571	570	601	533	728	873	990

See footnotes at end of table.

Table 12.--Subsidies less current surplus of Government enterprises, 1960-76--Continued

(In millions of dollars)

Line:	1960	1961	1962	1963	1964	1965	1966	1967	1968	1969	1970	1971	1972	1973	1974	1975	1976
15 : State and local:	-2,193	-2,328	-2,453	-2,754	-2,848	-2,966	-3,002	-3,055	-3,163	-3,348	-3,600	-3,805	-4,217	-4,351	-4,375	-4,462	-5,179
16 : Subsidies-----	0	0	0	12	10	18	24	26	27	25	24	34	53	81	116	148	231
17 : Less: Current:																	
surplus of																	
government																	
enter-																	
prises-----	2,193	2,328	2,453	2,766	2,858	2,984	3,026	3,081	3,190	3,373	3,624	3,839	4,270	4,432	4,441	4,621	5,410
18 : Water and																	
sewer-																	
age-----	654	651	766	879	918	952	945	904	933	1,065	1,225	1,353	1,501	1,595	1,620	1,644	1,615
19 : Gas and																	
elec-																	
tric-																	
ity-----	649	675	706	856	875	909	914	963	1,023	1,074	1,129	1,142	1,252	1,415	1,499	1,681	2,030
20 : Toll fa-																	
cili-																	
ties----	359	373	405	426	463	513	549	570	599	639	648	670	728	767	733	757	736
21 : Liquor																	
stores--	251	252	256	264	278	301	325	350	377	392	403	412	417	433	438	441	458
22 : Air and																	
water																	
termi-																	
nals-----	86	106	117	137	151	170	194	229	259	283	309	351	419	474	513	535	558
23 : Housing																	
and ur-																	
ban re-																	
newal---	180	203	175	223	204	207	191	190	214	227	264	363	461	318	564	610	1,161
24 : Public																	
trans-																	
it-----	-18	10	17	-31	-28	-61	-55	-74	-144	-165	-215	-367	-541	-722	-1,133	-1,275	-1,423
25 : Other 3/---	32	58	11	12	-3	-7	-37	-51	-71	-142	-139	-90	33	152	207	228	275

1/ Consists largely of subsidies to exporters of farm products and to railroads.

2/ Consists largely of Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, Government National Mortgage Association, and Export-Import Bank.

3/ Consists of State lotteries, off-track betting, local parking, and miscellaneous activities.

Source: The National Income and Products Accounts of the United States, 1929-74 Statistical Tables, a supplement to the Survey of Current Business, U.S. Department of Commerce, Bureau of Economic Analysis. Statistics for 1973-76 are from The Survey of Current Business, July 1977.

Appendix B

GENERAL AGREEMENT ON
TARIFFS AND TRADE

Committee on Anti-Dumping Practices

PROPOSED REVISION OF THE AGREEMENT ON IMPLEMENTATION
OF ARTICLE VI CONSEQUENT TO THE PRESENT STATE OF
NEGOTIATIONS ON SUBSIDIES/COUNTERVAILING MEASURES

**AGREEMENT ON IMPLEMENTATION OF ARTICLE VI
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE**

The parties to this Agreement,

Recognizing that anti-dumping practices should not constitute an unjustifiable impediment to international trade and that anti-dumping duties may be applied against dumping only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry;

Considering that it is desirable to provide for equitable and open procedures as the basis for a full examination of dumping cases;

Taking into account the particular trade, development and financial needs of developing countries; and

Desiring to interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;

Desiring to provide for the speedy, effective and equitable resolution of disputes arising under this Agreement;

Hereby agree as follows:

PART I - ANTI-DUMPING CODE

Article 1

Principles

The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated¹ and conducted in accordance with the provisions of this Code. The following provisions govern the application of Article VI of the General Agreement in so far as action is taken under anti-dumping legislation or regulations.

Article 2

Determination of Dumping

(a) For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

¹The procedural action by which a signatory formally commences an investigation as provided in paragraph (f) of Article 6.

(b) Throughout this Code the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

(c) In the case where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely trans-shipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

(d) When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

(e) In cases where there is no export price or where it appears to the authorities¹ concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

¹When in this Code the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate, senior level.

(f) In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable, the price established pursuant to the provisions of Article VI:1(b) of the General Agreement, the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in Article 2(e) allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.

(g) This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I of the General Agreement.

Article 3

Determination of Injury¹

(a) A determination of injury for purposes of Article VI of the General Agreement shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and their effect on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

(b) With regard to volume of the dumped imports the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

¹Under this Code the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

(c) The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.⁶

(d) It must be demonstrated that the dumped imports are, through the effects¹ of dumping, causing injury within the meaning of this Code. There may be other factors² which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.

(e) The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

(f) A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.³

(g) With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care.

⁶For consideration: reference to affiliates of a complainant.

¹As set forth in paragraphs (b) and (c) of this Article.

²Such factors include, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

³One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices.

Article 4

Definition of Industry

(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that

- (i) when producers are related¹ to the exporters or importers or are themselves importers of the allegedly dumped product the industry may be interpreted as referring to the rest of the producers;
- (ii) in exceptional circumstances the territory of a party may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (a) the producers within such market sell all or almost all of their production of the product in question in that market, and (b) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

(b) When the industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in Article 4(a)(ii), anti-dumping duties shall be levied² only on the products in question consigned for final consumption to that area. When the constitutional law of the importing country does not permit the levying of anti-dumping duties on such a basis, the importing party may levy the anti-dumping duties without limitation only if (1) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 7 of this Code, and adequate assurances in this regard have not been promptly given, and (2) such duties cannot be levied on specific producers which supply the area in question.

¹An understanding among parties should be developed defining the word "related" as used in this Code.

²As used in this Code "levy" shall mean the definitive legal assessment of a duty or tax.

(c) Where two or more countries have reached under the provisions of Article XXIV:8(a) of the General Agreement such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the industry referred to in paragraph (a) above.

(d) The provisions of Article 3(e) shall be applicable to this Article.

Article 5

Initiation and Subsequent Investigation

(a) An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry¹ affected. The request shall include sufficient evidence of the existence of (a) dumping; (b) injury within the meaning of Article VI as interpreted by this Code and (c) a causal link between the dumped imports and the alleged injury. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have sufficient evidence on all points under (a) to (c) above.

(b) Upon initiation of an investigation and thereafter, the evidence of both dumping and injury caused thereby should be considered simultaneously. In any event the evidence of both dumping and injury shall be considered simultaneously (a) in the decision whether or not to initiate an investigation, and (b) thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Code provisional measures may be applied, except in the cases provided for in Article 10(c) in which the authorities accept the request of the exporters.

(c) An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There should be immediate termination in cases where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible.

(d) An anti-dumping proceeding shall not hinder the procedures of customs clearance.

(e) Investigations shall, except in special circumstances, be concluded within one year after their initiation.

¹An defined in Article 4.

Article 6**Evidence**

(a) The foreign suppliers and all other interested parties shall be given ample opportunity to present in writing all evidence that they consider useful in respect to the anti-dumping investigation in question. They shall also have the right, on justification, to present evidence orally.

(b) The authorities concerned shall provide opportunities for the complainant and the importers and exporters known to be concerned and the governments of the exporting countries, to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph (c) below, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information.

(c) Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom he acquired the information) or which is provided on a confidential basis by parties to an anti-dumping investigation shall, upon cause shown, be treated as such by the investigating authorities. Such information shall not be disclosed without specific permission of the party submitting it.¹ Parties providing confidential information may be requested to furnish non-confidential summaries thereof. In the event that such parties indicate that such information is not susceptible of summary, a statement of the reasons why summarization is not possible must be provided.

(d) However, if the authorities concerned find that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities would be free to disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.

(e) In order to verify information provided or to obtain further details the authorities may carry out investigations in other countries as required, provided they obtain the agreement of the firms concerned and provided they notify the representatives of the government of the country in question and unless the latter object to the investigation.

¹ Parties are aware that in the territory of certain parties disclosure pursuant to a narrowly drawn protective order may be required. Parties agree that requests for confidentiality should not be arbitrarily rejected.

(f) When the competent authorities are satisfied that there is sufficient evidence to justify initiating an anti-dumping investigation pursuant to Article 5, the party or parties the products of which are subject to such investigation and the exporters and importers known to the investigating authorities to have an interest therein and the complainants shall be notified and a public notice shall be given.

(g) Throughout the anti-dumping investigation all parties shall have a full opportunity for the defence of their interests. To this end, the authorities concerned shall, on request, provide opportunities for all directly interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

(h) In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available.

(i) The provisions of this Article are not intended to prevent the authorities of a party from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final findings, whether affirmative or negative, or from applying provisional or final measures in accordance with the relevant provisions of this Code.

Article 7

Price Undertakings

(a) Proceedings may¹ be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping.

¹The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph (c).

(b) Price undertakings shall not be sought or accepted from exporters unless the authorities have initiated an investigation in accordance with the provisions of Article 5 of this Code. Undertakings offered need not be accepted if the authorities of the importing country consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons.

(c) If the undertakings are accepted, the investigation of injury shall nevertheless be completed if the exporter so desires or the authorities so decide. If a determination of no injury or threat thereof is made, the undertaking shall automatically lapse except in cases where a determination of no threat of injury is due in large part to the existence of a price undertaking. In such cases the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Code.

(d) Price undertakings may be suggested by the authorities in the importing country, but no exporter shall be forced to enter into such an undertaking. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

(e) Authorities in an importing country may require any exporter from whom undertakings have been accepted to provide periodically information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data. In case of violation of undertakings, the authorities of the importing country may take, in conformity with the provisions of this Code, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases definitive duties may be levied in accordance with this Code on goods entered for consumption not more than ninety days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

(f) Undertakings shall not remain in force any longer than anti-dumping duties could remain in force under the Code. The authorities of an importing country shall review the need for the continuation of any price undertaking, where warranted, on their own initiative or if interested exporters or importers of the product in question so

request and submit positive information substantiating the need for such review.

(g) Whenever an anti-dumping investigation is suspended or terminated pursuant to the provisions of paragraph (a) above and whenever an undertaking is terminated, this fact shall be officially notified and must be published. Such notices shall set forth at least the basic conclusions and a summary of the reasons therefor.

Article 8

Imposition and Collection of Anti-Dumping Duties

(a) The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

(b) When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources, from which price undertakings under the terms of this Code have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

(c) The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin the amount in excess of the margin shall be reimbursed as quickly as possible.

(d) Within a basic price system the following rules shall apply provided that their application is consistent with the other provisions of this Code:

If several suppliers from one or more countries are involved, anti-dumping duties may be imposed on imports of the product in question found to have been dumped and to be causing injury from the country or countries concerned, the duty being equivalent to the amount by which the export price is less than the basic price established for this purpose, not exceeding the lowest normal price in the supplying country or countries where normal conditions of competition are prevailing. It is understood that for products which are sold below this already established basic price a new anti-dumping investigation shall be carried out in each particular case, when so demanded by the interested parties and the demand is supported by relevant evidence. In cases where no dumping is found, anti-dumping duties collected shall be reimbursed as quickly as possible. Furthermore, if it can be found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

(c) Public notice shall be given of any preliminary or final finding whether positive or negative and of the revocation of a finding. In the case of positive finding each such notice shall set forth the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities, and the reasons and basis therefor. In the case of a negative finding, each notice shall set forth at least the basic conclusions and a summary of the reasons therefor. All notices of finding shall be forwarded to the signatory or signatories the products of which are subject to such finding and to the exporters known to have an interest therein.

Article 9

Duration of Anti-Dumping Duties

(a) An anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury.

(b) The investigating authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review.

Article 10**Provisional Measures**

(a) Provisional measures may be taken only after a preliminary positive finding has been made that there is dumping and that there is sufficient evidence of injury as provided for in (a) to (c) of Article 5(a). Provisional measures shall not be applied unless the authorities concerned judge that they are necessary to prevent injury being caused during the period of investigation.

(b) Provisional measures may take the form of a provisional duty or, preferably, a security - by deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

(c) The imposition of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved to a period not exceeding six months.

(d) The relevant provisions of Article 8 shall be followed in the application of provisional measures.

Article 11**Retroactivity**

(a) Anti-dumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under Articles 8(a) and 10(a), respectively, enters into force, except that in cases:

(i) Where a final finding of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or in the case of a final finding of threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a finding of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

If the anti-dumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

(ii) Where for the dumped product in question the authorities determine

- (a) either that there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause injury, and
- (b) that the injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to levy an anti-dumping duty retroactively on those imports,

the duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

(b) Except as provided in paragraph (a) above where a finding of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the finding of threat of injury or material retardation and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

(c) Where a final finding is negative any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

Article 12

Anti-Dumping Action on behalf of a Third Country

(a) An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

(b) Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

(c) The authorities of the importing country in considering such an application shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

(d) The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the CONTRACTING PARTIES seeking their approval for such action shall rest with the importing country.

Article 13

Developing Countries

It is recognized that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code. Possibilities of constructive remedies provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries.

Rev. 1

PART II

Article 14

Committee on Anti-Dumping Practices

1. There shall be established under this Agreement a Committee on Anti-Dumping Practices composed of representatives from each of the parties to this Agreement. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any party. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the parties and it shall afford parties the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The GATT Secretariat shall act as the secretariat to the Committee.
2. The Committee may set up subsidiary bodies as appropriate.
3. In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a signatory, it shall inform the signatory involved. It shall obtain the consent of the signatory and any firm to be consulted.
4. Signatories shall report without delay to the Committee all preliminary or final actions taken with respect to antidumping duties. Such reports will be available to government representatives for inspection in the GATT Secretariat. The signatories shall also submit, on a semi-annual basis, reports of any antidumping duty actions taken within the preceding six months.

Article 15¹**Consultations, conciliation and resolution of disputes**

1. Each party shall afford sympathetic consideration to, and shall afford adequate opportunity for consultations regarding, representations made by another party with respect to any matter affecting the operation of this Agreement.

2. If any party considers that any benefit accruing to it, directly or indirectly, under this Agreement, is being nullified or impaired, or that the achievement of any objective of the Agreement is being impeded by another party or parties, it may, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the party or parties in question. Each party shall afford sympathetic consideration to any request from another party for consultations. The parties concerned shall initiate consultations promptly.

3. If any party considers that the consultations pursuant to Paragraph 2 have failed to achieve a mutually agreed solution and final action has been taken by the administering authorities of the importing country to levy definitive antidumping duties or to accept price undertakings, it may

¹If disputes arise between parties relating to rights and obligations of this Agreement, parties should complete the dispute settlement procedures under this Agreement before availing themselves of any rights which they have under the GATT.

refer the matter to the Committee for conciliation. When a provisional measure has a significant impact and the party considers the measure was taken contrary to the provisions of Article 10.1 of this Agreement, a party may also refer such matter to the Committee for conciliation. In cases where matters are referred to the Committee for conciliation the Committee shall ~~immediately~~ ^{meet w/in 30 days to} review the matter, and, through its good offices, shall encourage the signatories involved to develop a mutually acceptable solution.²

4. Signatories shall make their best efforts to reach a mutually satisfactory solution throughout the period of conciliation. If no mutually agreed solution has been reached after detailed examination by the Committee under paragraph 3 within three months, the Committee shall, at the request of any party to the dispute, establish a panel to examine the matter, based upon

(a) a statement of the party making the request indicating how a benefit accruing to it, directly or indirectly, under these Agreements has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

(b) the facts made available in conformity with domestic procedures to the authorities of the importing country.

²In this connection the Committee may draw signatories' attention to those cases in which, in its view, there are no reasonable bases supporting the allegations made.

5. Confidential information provided to the panel shall not be revealed without formal authorization from the person or authority providing the information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the authority or person providing the information, will be provided.

6. Further to paragraphs 1 - 5 the resolution of disputes shall be governed by the provisions of the Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance (), except that whenever in that Understanding there is a reference to the Director General, there shall be substituted therefor the Chairman of the Committee and whenever there is a reference to the Contracting Parties, there shall be substituted therefor the Committee. Panel members shall have relevant experience and be selected from the signatory countries not parties to the dispute.

PART III

Article 16

Final Provisions

1. No specific action against dumping of exports from another Party can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement.¹

Acceptance and accession

2. (a) This Agreement shall be open for acceptance by signature or otherwise, by governments contracting parties to the GATT and by the European Economic Community.
- (b) This Agreement shall be open to accession by any other government on terms, related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the Parties, by the deposit with the Director-General to the CONTRACTING PARTIES to the GATT of an instrument of accession which states the terms so agreed.
- (c) Contracting parties may accept this Agreement in respect of those territories for which they have international responsibility, provided that the GATT is being applied in respect of such territories in accordance with the provisions of Article XXVI:5(a) or (b) of the General Agreement; and in terms of such acceptance, each such territory shall be treated as though it were a Party.

Reservations

3. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Parties.

Entry into force

4. This Agreement shall enter into force on 1 January 1980 for the governments² which have accepted or acceded to it by that date. For each other government it shall enter into force on the thirtieth day following the date of its acceptance or accession to this Agreement.

¹This is not intended to preclude action under other relevant provisions of the General Agreement, as appropriate.

²The term "government" is deemed to include the competent authorities of the European Economic Community.

Denunciation of acceptance of the 1967 Agreement

5. Acceptance of this Agreement shall carry denunciation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, done at Geneva on 30 June 1967, which entered into force on 1 July 1968, for Parties to the 1967 Agreement. Such denunciation shall take effect for each Party to this Agreement on the date of entry into force of this Agreement for each such Party.

National legislation

6. (a) Each government accepting or acceding to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of this Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Party in question.
- (b) Each Party shall inform the Committee of any changes in its laws and regulations relevant to this Agreement and in the administration of such laws and regulations.

Review

7. The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall annually inform the CONTRACTING PARTIES to the GATT of developments during the period covered by such reviews.

Amendments

8. The Parties may amend this Agreement having regard, inter alia, to the experience gained in its implementation. Such an amendment, once the Parties have concurred in accordance with procedures established by the Committee, shall not come into force for any Party until it has been accepted by such Party.

Withdrawal

9. Any Party may withdraw from this Agreement. The withdrawal shall take effect upon the expiration of sixty days from the day on which written notice of withdrawal is received by the Director-General to the CONTRACTING PARTIES to the GATT. Any Party may upon such notification request an immediate meeting of the Committee.

Non-application of this Agreement between particular Parties

10. This Agreement shall not apply as between any two Parties if either of the Parties, at the time either accepts or accedes to this Agreement, does not consent to such application.

Secretariat

11. This Agreement shall be serviced by the GATT secretariat.

Deposit

12. This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES to the GATT, who shall promptly furnish to each Party and each contracting party to the GATT a certified copy thereof and of each amendment thereto pursuant to paragraph 8, and a notification of each acceptance thereof or accession thereto pursuant to paragraph 2, or each withdrawal therefrom pursuant to paragraph 9 above.

Registration

13. This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

Done at Geneva this day of
nineteen hundred and seventy-nine in a single copy, in the English, French
and Spanish languages, each text being authentic.

