

RESULTS OF THE TOKYO ROUND

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I. INTRODUCTION

On April 12, representatives of the United States and 22 other countries announced in Geneva their agreement on a set of far-reaching new rules for the international trading system.¹ Although some loose ends remained, this announcement virtually concluded the four and one-half year negotiating phase of the Tokyo Round of Multilateral Trade Negotiations (MTN). Negotiators had overcome an unfavorable world economic climate and awesome political and technical complexities to reach agreements covering—

- Trade-distortive government subsidies and countervailing duties imposed to offset the effects of such subsidies;

- New international rules on dumping, or sales of goods in an export market at less than fair value, through amendment of the existing international antidumping code;

- Government procurement, requiring fairness and non-discrimination between imports and domestically produced goods when specified government agencies buy products for their own use;

- Rules of fairness and non-discrimination in the development and use of product standards and related tests and certifications;

- Elimination of red tape and delay in the issuance of import licenses;

- Rational, uniform, and fair methods for appraising the value of imported goods for the purpose of assessing import duties;

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¹ This announcement was contained in GATT Doc. MTN/28 (April 11, 1979), a *Procès Verbal* signed by the representatives of Argentina, Australia, Austria, Bulgaria, Canada, Czechoslovakia, the nine nations of the European Economic Community, Finland, Hungary, Japan, New Zealand, Norway, Romania, Spain, Sweden, Switzerland, and the United States. The representative of Argentina signed "with reservations" with respect to the texts on government procurement and subsidies/countervailing duties. The representative of Spain signed "with reservations" with respect to the texts on subsidies/countervailing duties, on licensing, and on an alternative version of the dairy agreement proposed by developing countries. Neither representative specified the nature of its government's reservations. See GATT Doc. GATT/1234 (April 12, 1979), a press release setting forth a statement by the GATT Director General and a description of the Tokyo Round agreements.

—Consultations and exchanges of information with respect to international trade in bovine meat;

—Consultations, minimum export sales prices, and other arrangements regarding international trade in cheese, milk powder, and some other dairy products;

—The future treatment of agricultural trade within the international trading system;

—Basic reforms of the trading system in order to facilitate the granting of trade preferences to developing countries, improve international procedures for settling trade disputes, modernize the rules governing restrictions on imports for balance of payments reasons, and pave the way for a future agreement on export restrictions; and

—Free trade and fair trading conditions for civil aircraft and aircraft parts.²

In addition, the representatives reported near-final agreement on the reduction of tariff rates for thousands of articles traded internationally.³ They also expressed hope that negotiations on the counterfeiting of established trademarks, such as "Levi's," and on "safeguard" actions—by which governments limit imports temporarily in order to aid ailing domestic industries—would be finished in time to become part of the Tokyo Round results.

President Carter hailed the agreements announced on April 12 as bringing "[a] new order to the world trading system . . . that will . . . steer us away from destructive protectionism and into a path of greater export opportunities. . . ." The President's enthusiasm was understandable, but in fact the Tokyo Round results face several more stiff tests. The agreements still must be approved and implemented by the United States Congress and other national parliaments. No developing countries joined in the April 12 announcement,⁴ and it remains to be seen whether they will do so

² The aircraft agreement, which was begun late in the Tokyo Round, was endorsed only by Canada, the E.E.C., Japan (with reservations), Sweden, and the United States. *Id.*

³ GATT Doc. MTN/26/Rev. 2 (April 11, 1979), reported that delegations representing twenty-two nations had drawn up "comprehensive records" of their reciprocal tariff commitments, and that these delegations had undertaken to conclude their tariff negotiations by June 30. These twenty-two countries were Australia, Austria, Bulgaria, Canada, Czechoslovakia, the E.E.C. Nine, Finland, Hungary, Japan, New Zealand, Norway, Sweden, Switzerland, and the United States.

⁴ Statement by the President on the Multilateral Trade Negotiations (The White House, April 12, 1979).

⁵ On April 11, developing country participants in the Tokyo Round issued a statement to the Trade Negotiations Committee, the steering body for the negotiations, stating:

We regret that the multilateral trade negotiations have failed to achieve greater

within the next few months and what effect their participation or abstention will have on the GATT system. Finally, assuming the Congress approves the agreements and developing countries participate, a "shakedown" period of some years probably will be necessary before the impact of the Tokyo Round can be assessed with much confidence.

There can be little doubt, however, that the agreements announced April 12 were a solid first step toward the new trading order that President Carter foresaw. This summer the Congress will be debating whether to approve these agreements and enact legislation proposed by the Administration for implementing them. It is timely and appropriate, then, to present diverse views of the Tokyo Round's results in this symposium. I intend, however, to leave evaluations to the other participants to the extent possible. As a former participant, or survivor, of these negotiations, my purpose is to lay a foundation by presenting the factual results as accurately and concisely as possible.

II. THE SETTING⁶

Perhaps because trade negotiators spend so much time sealed in airplanes together, they tend to forget that their jargon is not as widely understood as, say, that of weathermen. A bit of preliminary background information may help some readers follow the discussion of the agreements.

results in substance as well as in scope for the trade of the developing countries within the objectives and principles set out in the Tokyo Declaration. At this stage we are not able to assess results because negotiations are not completed in tariff and some non-tariff measures and it shall take time to have a complete picture of the results in relation to objectives for developing countries' trade in the Tokyo Declaration. . . .

Statement on Behalf of Developing Countries by Dr. Tomic of Yugoslavia (April 11, 1979) (unpublished remarks on file at the offices of the *Georgia Journal of International and Comparative Law*). It should be noted, however, that the United States has concluded some twenty bilateral agreements with developing countries during the course of the Tokyo Round. These agreements, which cover both tariff and non-tariff matters, have been concluded with Argentina, Bolivia, Brazil, Colombia, the Dominican Republic, Egypt, Haiti, India, Israel, the Ivory Coast, Jamaica, the Republic of Korea, Malaysia, Pakistan, Peru, the Philippines, Singapore, Sri Lanka, Taiwan, and Thailand.

⁶ Portions of this section and those that follow are based upon a manuscript entitled "A Practitioner's Guide to the Tokyo Round Trade Negotiations," which the author has prepared for publication in a forthcoming issue of the *North Carolina Journal of International Law and Commercial Regulation*. The author also has drawn upon GATT Doc. GATT/1234, *supra* note 1, as well as the texts of the agreements, which are cited throughout this article. For more extensive information about the Tokyo Round, including the state of negotiations as of late 1978, see Graham, *Reforming the International Trading System: The Tokyo Round Trade Negotiations in the Final Stage*, 12 CORNELL INT'L L.J. 1 (1979).

The General Agreement on Tariffs and Trade (GATT)⁷ was formulated in 1947 as a body of rules accepted by nations for the promotion and maintenance of an open and fair international trading system. The GATT rules are more than merely a statement of international principles. They specify procedures for complaints, reviews of alleged violations and ultimately sanctions against violators, although such sanctions rarely have been imposed.⁸ The GATT also maintains in Geneva a relatively small international secretariat to facilitate meetings of the Contracting Parties and to oversee the operation of the GATT rules.

The GATT Contracting Parties have sponsored periodic "rounds" of negotiations aimed at reducing barriers to the international movement of goods.⁹ Until recently, these "multilateral" or multination negotiations have concentrated almost exclusively upon the reciprocal lowering of tariff barriers. Beginning with the "Kennedy Round" in the mid-1960's, however, there was growing recognition that tariffs had become less important as obstacles to trade than more subtle "non-tariff" barriers, such as the exclusion of (or other discrimination against) foreign suppliers in bidding for government contracts; failure to certify foreign products as meeting domestic product standards; or the appraising of imports in a way that artificially inflates their value and thus increases the duties payable on them. Most of these practices are not adequately covered by the current GATT rules. From the late 1960's onward there also has been a growing recognition that the GATT rules were obsolete, ignored, or in need of strengthening in several key areas. These included the rules pertaining to government sub-

⁷ *Opened for signature* Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194. The Agreement has been modified in several respects since 1947. The current version is contained in 4 General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents (1969) [hereinafter cited as "BISD"]. The GATT rules were to have been one component of a more comprehensive International Trade Organization, which in turn was to have joined with the World Bank and the International Monetary Fund to form the pillars of the post-war international economic system. When the ITO collapsed in 1949, principally as a result of the failure of the U.S. Congress to ratify the treaty establishing it, the GATT rules became the nucleus of a small international organization. For more information about the background of the GATT, see J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 35-57 (1969).

⁸ In fact, trade retaliation has been authorized only once, in 1953, in a case involving a complaint by the Netherlands against U.S. trade restrictions on dairy imports. See *id.* at 172, citing the decision appearing in BISD (1st Supp.) 23 (1953).

⁹ The first round after the formation of the GATT took place in 1949 at Annecy, France. The second was held in 1951 at Torquay, England. The third, fourth, and fifth rounds took place in 1955, 1960-61, and 1962-67 at Geneva, Switzerland. See J. JACKSON, note 7 *supra*, at 217-19.

sities, to temporary import restrictions under the "escape clause," to government restrictions on exporting, and to settlement of international trade disputes.

Other changes were stirring the international trading environment. The European Economic Community (E.E.C.) was emerging as a trading entity with bargaining strength capable of challenging the virtual United States hegemony in post-war trading relationships. Less developed countries (LDCs) gained a unified international voice with the establishment of the United Nations Conference on Trade and Development (UNCTAD) in 1964, and were using this forum to promote vigorously trading interests which in some instances conflicted with such basic tenets of the GATT system as the most-favored nation (MFN) principle of non-discrimination.

These factors prompted nearly one hundred foreign ministers, meeting in Tokyo in September of 1973, to initiate negotiations to "[c]over tariffs, non-tariff barriers and other measures which impede or distort international trade in both industrial and agricultural products. . . ."¹⁰

This "Tokyo Declaration," which gave a name to the Tokyo Round and established its terms of reference, also specified that "[c]onsideration shall be given to improvements in the international framework for the conduct of world trade. . . ." and (for the first time in a GATT-sponsored negotiating round) recognized "[t]he importance of the application of differential measures to developing countries in ways which will provide special and more favorable treatment for them in areas of the negotiation where this is feasible and appropriate."¹¹

There was no pretense of serious negotiations until, more than a year following the Tokyo Declaration, the Trade Act of 1974¹² provided a mandate for United States participation in the negotiations and procedures for approving and implementing the results. The Trade Act followed the pattern of past trade legislation by delegating to the President authority to carry out tariff agreements by proclaiming, within specified limits, changes in United States duty rates.¹³ The Trade Act broke sharply with tradition,

¹⁰ Declaration of Ministers Approved at Tokyo on 14 September 1973, para. 5, *reprinted* in BISD (20th Supp.) 19, 21 (1974).

¹¹ *Id.* para. 5, BISD (20th Supp.) at 21.

¹² Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified in various sections of 5 & 19 U.S.C.).

¹³ Section 101 of the Act authorizes the President to proclaim tariff reductions of up to 60% for U.S. duty rates that exceed 5% and of up to 100% for duty rates of 5% or less. 19 U.S.C. § 2111 (1976).

however, in establishing a unique set of procedures for concluding and implementing agreements on non-tariff matters.¹⁴ Under these procedures, non-tariff agreements and implementing legislation submitted by the President cannot be amended by the Congress, and must be voted up or down within 90 Congressional working days.¹⁵ These "fast-track" implementing procedures represent an attempt to balance the desire of the Congress to review agreements (which call in some cases for changes in politically sensitive United States legislation) and to retain the right to enact or reject such legislative changes, against the need of United States negotiators to establish credibility with other nations that we will indeed act quickly to implement the results of our negotiations. Foreign memories extending from the League of Nations treaty to the Havana Charter¹⁶ give rise to some understandable skepticism on this point.

In an attempt to provide some advance assurance that the non-tariff agreements and legislative changes flowing from them will be acceptable to the Congress and the American public, the Trade Act also calls for the President to give the Congress at least 90 days advance notice of the Administration's intention to enter into non-tariff agreements. This notice was transmitted to the Congress last January 4.¹⁷ The Trade Act further requires the Administration, before entering into non-tariff agreements, to consult about the agreements and their implementation with the House Ways and Means and Senate Finance Committees, and with all other Congressional Committees having jurisdiction over subjects affected by the agreements or the legislation. These consultations have been taking place intensively since early March. They have resulted in detailed recommendations by Congressional Committees with respect to the content of the implementing legislation.¹⁸ These suggestions and other aspects of the evolving implementing

¹⁴ Trade Act of 1974, §§ 102 and 151, 19 U.S.C. §§ 2112 & 2191 (1976).

¹⁵ The period for a vote in the Congress is sixty congressional working days unless legislation submitted under these procedures is considered to be a "revenue bill," in which case the period for voting is ninety Congressional working days. A bill to implement the Tokyo Round agreements almost certainly will be considered a revenue bill, because it will contain provisions amending the method of appraising imports for the purpose of imposing tariffs, as well as other matters affecting the collection of revenue.

¹⁶ The Havana Charter embodied the treaty which would have founded the International Trade Organization, had that treaty been ratified by the U.S. Senate. See note 7 *supra*.

¹⁷ This notice was published in 44 Fed. Reg. 1933 (January 8, 1979).

¹⁸ These recommendations are set forth in press releases of the Senate Finance Committee dated March 6, 7, 8, 15, and 26, and April 4 and 5, 1979; and in press releases of the House Ways and Means Committee dated March 13 and 19, and April 6 and 10, 1979.

legislation will be referred to frequently below.

Finally, the Congress also provided for participation by designated members of Congress and their staffs throughout the Tokyo Round negotiations,¹⁹ and for exchanges of information between negotiators and an extensive network of private-sector advisory committees.²⁰

III. THE AGREEMENTS

The *procès verbal* of April 12 listed one tariff and eleven non-tariff texts on which negotiations had been concluded, and stated that these texts would now be submitted for the consideration of appropriate national authorities. Thus the April 12 agreement was, in common international terminology, an "initialing" or an *ad referendum* agreement.

With the April 12 agreement there began in participating countries a delicate period of preparing national legislation, Executive orders and directives that would meet domestic political needs yet faithfully carry out the obligations expressed in the agreements. No nation wants gains won in hard negotiations to be nullified by the way that other nations implement those negotiated results. The eyes of most participants are on actions of the United States during this period, both because our separation of powers makes implementation of international trade commitments somewhat more cumbersome and uncertain than in parliamentary systems, and because we have adopted more transparent procedures for preparing and approving legislative changes than have other countries. Only when the United States Congress and other legislatures have accepted the agreements and faithfully implemented them—one hopes by this fall—can the Tokyo Round be considered as successfully concluded.

Early on, the Administration decided to submit all Tokyo Round non-tariff agreements and their implementing legislation to the Congress as a single, omnibus bill. The reasons for this approach were straightforward: the Tokyo Round agreements together are an interrelated, carefully balanced whole. To submit them separately would permit the Congress to accept and implement some but reject others—an approach with a high probability of causing the entire fabric of the negotiations to unravel.

The sections below describe briefly the tariff agreement, and

¹⁹ 19 U.S.C. § 2211 (1976).

²⁰ 19 U.S.C. § 2155 (1976).

then present each of the non-tariff agreements with comments about the current state of U.S. preparations for implementing legislation where appropriate. Additional sections cover amendments to the framework for the conduct of international trade, as well as commercial counterfeiting and safeguards (two non-tariff subjects on which agreements still may be concluded) and the steel sectoral agreement that was concluded a few months ago under the auspices of the Organization for Economic Cooperation and Development (OECD), but which is closely related to the Tokyo Round.

A. *Tariffs*

As part of the April 12 agreement, twenty-two nations²¹ issued a statement that they were depositing with the GATT Secretariat records of their reciprocal tariff commitments. This statement added, however, that these records would not become final obligations until about June 30, indicating that minor renegotiations as well as technical corrections might be made until that time.

According to the United States Administration, the records of tariff concessions submitted on April 12 call for tariff reductions averaging about 33 percent.²² Such a reduction would be comparable to the average reduction of 35 percent on dutiable manufactured goods that was negotiated in the Kennedy Round. In this negotiation, moreover, the United States obtained a number of tariff concessions of substantial benefit to our agricultural exports.²³

Several qualifications are necessary to make the tariff result intelligible. First, not all tariff rates in the United States and other countries are being reduced by 33 percent. Some products are excluded altogether from tariff cuts. In the United States, these products include nonrubber footwear, television receivers, specialty steel, and other items subject to "escape clause" import relief

²¹ *Supra* note 3.

²² Office of the Special Representative for Trade Negotiations, Background Paper on the 'Tokyo Round' Multilateral Trade Agreements (April 12, 1979) at 5.

²³ According to the Office of the Special Representative for Trade Negotiations, foreign concessions would offer increased export opportunities for the following U.S. agricultural exports: "(1) agricultural products exports to Europe, Japan, Canada, and some LDCs; (2) meat exports, including beef and poultry, to Europe, Japan, Canada, and some LDCs; (3) tobacco exports to Europe, Canada and Australia; (4) fruit exports to Europe, Japan, and some LDCs; (5) vegetable exports to Europe, Japan and LDCs; (6) wine exports to Japan and Canada; (7) oilseed exports to Europe, Japan, Canada, and some LDs; and (8) nut exports to Europe, Japan and some LDCs." *Id.*

actions,²⁴ as well as other items that negotiators have withheld for political or tactical reasons. Other articles are subject to greater or lesser reductions than those called for by the "formula," or working hypothesis. The tariff formula itself calls for higher duty rates to be reduced by a greater amount than lower ones, in order to "harmonize" tariff rates internationally. The figure of 33 percent, then, is the average tariff reduction taking into account rates that were not reduced, those reduced by more or less than the formula called for, etc.

The negotiating parties also have agreed that the tariff reductions, which are to begin on January 1, 1980, will be phased in over a period of eight years but will be reviewed at the conclusion of five years to determine whether external economic conditions warrant their continuation. Considering this eight-year staging of a relatively modest average tariff reduction, it can be appreciated why the tariff negotiation was not regarded as the most significant part of the Tokyo Round.

B. *Non-Tariff Matters*

1. *Subsidies and Countervailing Duties*

The GATT system has always had difficulty coping with government aids to industry. This difficulty does not arise so much from those relatively few subsidies imposed directly for the purpose of promoting exports. The GATT rules and settled practice generally regard such practices as unfair methods of competition. Problems arise instead with respect to the myriad forms of subsidies that are viewed by the governments granting them as legitimate instruments of domestic socio-economic policy, but which almost incidentally confer advantages upon the recipient industries in the international marketplace. Some illustrative examples are nationalizations, tax holidays for those who invest in economically depressed regions, concessionary loans or direct grants to maintain full employment during recessions, and grants for research and development of new technology. Such practices raise a central dilemma for the international trading system: how to balance the freedom to make these sovereign national policy choices against the rights of those whose international competitive position is thereby adversely affected.

²⁴ 19 U.S.C. § 2137(b) (1976), requires the President to "reserve from negotiations" any products subject to outstanding escape clause actions.

The present GATT rules on subsidies and countervailing duties seem reasonably straightforward. "Export subsidies" for industrial products are prohibited if they result in a lower price for export than is charged for the same product domestically. Any "bounty or subsidy" which causes or threatens material injury to an industry in another country, or retards the establishment of such an industry, may be subject to a countervailing duty imposed by the importing country sufficient to offset the effect of the subsidy.

These deceptively simple rules contain a number of legal and political problems. Legal problems arise from the fact that there is no definition of an "export subsidy," and the line between "export subsidies" and other, "domestic" subsidies is often wholly unclear. Politically, an overriding source of international friction has been the fact that the United States countervailing duty law does not require a showing of material injury to a domestic industry, as is required by the GATT rules,²⁵ so that the Secretary of the Treasury is required to impose duties upon any dutiable imports²⁶ found to be benefitting from a "bounty or grant." Understandably, other nations have sought in the Tokyo Round to secure adoption by the United States of an injury standard. Equally understandably, the United States has sought to ensure that the GATT rules impose greater discipline over the increasing tendency of governments to aid their industries in ways that, indirectly at least, confer advantages in the international marketplace.

The agreement on subsidies and countervailing duties²⁷ is an attempt to reconcile these positions by providing greater discipline over the use of subsidies, and by ensuring that the United States and other signatories to the agreement apply an injury test before

²⁵ GATT Art. VI(6)(a), 4 BISD at 11, provides that "No contracting party shall levy any . . . countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the . . . subsidization . . . is such as to cause or threaten material injury to an established industry, or is such as to retard materially the establishment of a domestic industry." The clear inconsistency of United States law with this international obligation is excused by the technicality of "grandfathering"; the United States undertook in 1948 to apply the GATT only to the extent that it was not inconsistent with pre-existing legislation. The United States countervailing duty law, which is set forth at 19 U.S.C. § 1303 (1976), was first enacted in the 1890's.

²⁶ Duty-free imports may only be subject to United States countervailing duties following a showing of injury. 19 U.S.C. § 1303(b) (1976). This provision was first enacted in the Trade Act of 1974 (previously duty-free goods were not subject to countervailing duties), so that it has no "grandfather" protection.

²⁷ Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, GATT Doc. MTN/NTM/W/236.

imposing countervailing duties against subsidized imports. The agreement provides greater discipline over "export" subsidies by including non-agricultural primary products (such as minerals) within the flat prohibition on such subsidies, by eliminating the present requirement that a prohibited export subsidy be shown to result in a lower price than that charged domestically, and by updating an "illustrative list" of prohibited export subsidies maintained by the GATT for some years. Greater discipline over export subsidies on agricultural, fishery and forestry products is provided by defining more precisely the ways in which subsidies on these products can give exporting countries a more than equitable share of world trade (a key element in the GATT prohibition of subsidies on such products).

In addition, the agreement promises greater regulation of "domestic" subsidies by prohibiting signatories from using them in a way that would seriously harm the trade interests of other signatory countries, and by listing as "indicative guidelines" types of domestic subsidies that may have adverse effects upon international competition. At the same time, the agreement acknowledges that these politically sensitive domestic subsidies "[a]re intended to promote important objectives of national policy. . . ."

The agreement provides two methods for importing countries to offset the effects of subsidized imports. The first is the traditional one of applying countervailing duties to subsidized imports that cause or threaten material injury to a domestic industry. The second is the authorization, by a Committee of Signatories created to settle disputes under the agreements, of "countermeasures" to be taken by one signatory against the subsidy practices of another which "nullify or impair" benefits accruing under the GATT to the complaining party, or that result in "serious prejudice" to its domestic industry. Countermeasures could take the form of ordinary countervailing duties or other trade retaliation. The concept of serious prejudice, moreover, includes not only adverse effects upon industries in the importing country as a result of subsidized imports, but also covers the loss of export markets if the subsidized products of one country displace non-subsidized goods of another within the subsidizing country ("import-substitution subsidies") or in third countries where the subsidized and non-subsidized exports compete ("third-country market displacement").

The new agreement on subsidies and countervailing duties would permit "provisional measures," consisting of temporary penalty duties or other import restrictions, to be taken almost im-

mediately in cases where there is a preliminary finding of injury caused by subsidized imports, and where serious harm is threatened unless rapid action is taken. In extreme cases, countervailing duties could be imposed retroactively for up to ninety days prior to the commencement of an investigation. The agreement would additionally permit countervailing duties to be replaced by voluntary price undertakings.

The agreement recognizes that subsidies are an integral part of developing countries' economic programs, and accordingly does not subject LDC signatories to the flat prohibition on export subsidies for non-primary products. Developing country signatories instead would agree not to subsidize their industrial products in ways that cause harm to the trade or production of other signatories, but such harm ("serious prejudice") would not be presumed by the Committee of Signatories in international cases involving LDC export subsidies. It would, instead, have to be demonstrated by positive evidence.

The Senate Finance Committee and the House Ways and Means Committee have made several detailed suggestions for United States legislation to implement the agreement on subsidies and countervailing duties.²⁸ The most politically delicate problem, both domestically and internationally, clearly involves the precise way in which the injury standard is expressed in the United States countervailing duty law. This injury standard is expected to be applied only in countervailing duty investigations involving imports from countries that are signatories of the subsidies/countervailing agreement. The Treasury Department will continue to countervail without a showing of injury against subsidized imports from non-signatory countries. It is anticipated that the implementing legislation also will revise the time limits and procedures for the conduct of countervailing duty investigations by the Treasury Department.

2. *Amendments to the International Antidumping Code*

Several of the participants in the Tokyo Round put forward a revision of the GATT Anti-Dumping Code,²⁹ which was negotiated by a group of industrialized countries during the Kennedy Round

²⁸ See note 18 *supra*.

²⁹ Proposed Revision of the Agreement on Implementation of Article VI Consequent to the Present State of Negotiations on Subsidies/Countervailing Measures, GATT Doc. COM.AD/W/90.

to improve the GATT rules pertaining to sales of goods in an export market at "less than fair value." This revised version of the Anti-Dumping Code brings certain of its provisions (notably those concerning determination of injury, price undertakings between exporting and importing countries, and imposition and collection of anti-dumping duties) into line with the corresponding provisions of the agreement on subsidies and countervailing duties.

In discussing implementation of the revised Anti-Dumping Code, the Ways and Means and Finance Committees have suggested a number of procedural amendments to United States anti-dumping law.³⁰ These amendments would, among other things, shorten considerably the time limits for completion of the various stages of a dumping investigation.

3. *Government Procurement*

Government agencies buy for their own use everything from spacecraft to paper clips. Nations ensure that most of this multi-billion dollar market is reserved for domestic producers through techniques ranging from formal "margins of preference," such as those set forth in the "Buy American Act,"³¹ to exclusions of foreign bidders, failure to advertise contracts or solicit bids, or awarding of contracts without disclosure of criteria. All these practices constitute significant non-tariff barriers to trade not covered by current GATT rules.³²

The agreement on government procurement covers purchases that exceed approximately \$195,000 (SDRs 150,000), by government agencies specified in annexes to the agreement. These lists of agencies subject to the code differ from signatory to signatory, reflecting painstaking negotiations to ensure reciprocity. Such reciprocity has not yet been achieved between the United States and Japan. The U.S. Special Trade Representative announced on March 29 that, as a result of the alleged inadequacy of the Japanese offer with respect to agency coverage, the United States would not at this time regard the agreement on government procurement as applying between the governments of the United

³⁰ *Supra* note 18.

³¹ 41 U.S.C. §§ 10a-10c (1976). The regulations which implement the federal Buy American Act establish a six percent margin of preference. 41 C.F.R. § 1-18.603-1 (1977).

³² Article III(8)(b) of the GATT exempts government purchasing from the "national treatment" principle embodied in Article III, which requires non-discrimination between imports and products of national origin in the application of taxes and other laws.

States and Japan.³³ Work continued on this problem during the visit of Japanese Prime Minister Ohira to the United States in early May.³⁴

For those purchases and agencies covered, the government procurement agreement prohibits discrimination between imported products and those made domestically. The agreement also sets forth detailed procedural rules designed to make the invitation and award of government purchasing contracts more transparent. Future rounds of negotiations are expected to bring additional agencies within the coverage of the agreement. Special provisions for developing countries specify that their lists of covered agencies may reflect individual development, financial, and trade needs, with least-developed countries making the smallest contribution.

The government procurement agreement creates an international committee of signatories, under GATT auspices, to administer the agreement and to provide for the settlement of multilateral disputes.

The United States implementing legislation will maintain existing "buy American" preferences, and other reservations, for purchases below the \$195,000 threshold and for purchases by agencies not subject to the agreement. The benefits of the agreement for purchases above the threshold by covered agencies will be extended to products of all signatories. It is not yet certain whether products of non-signatories will be subject to existing margins of discrimination or will in some cases be excluded from bidding for government purchasing contracts altogether.

4. *Technical Barriers to Trade (Standards)*

Standards imposed to regulate the quality of imported goods often can serve as a covert type of trade barrier, even where the standard appears on its face to promote unimpeachable public policy goals. For example, an ostensible "anti-pollution" standard could be written in technical terms which disguised the fact that its real purpose was to prevent the sale of Japanese cars. The E.E.C. could require that American-made radios be certified by an E.E.C. authority as conforming to Community electrical safety standards, and then could decline to certify the products. Japan

³³ See Office of the Special Representative for Trade Negotiations, Press Release No. 303 (March 29, 1979).

³⁴ N.Y. Times, May 1, 1979, at 1, col. 6.

could refuse to accept the results of foreign tests of the safety of gas stoves, and then subject foreign-made stoves to more stringent or expensive tests than those applicable to the same products made in Japan.

The standards code³⁵ attempts to promote nondiscrimination between domestic and imported products, as well as open and fair procedures in the development and use of product standards, test methods, and certification systems. The requirements of the code are entirely procedural; they do not require adoption of any particular standards or related practices. The code would not, moreover, prevent any government from adopting measures deemed necessary for the protection of human, animal or plant life or health; the environment; national security; or the prevention of deceptive practices, so long as these measures were not merely disguised means of discriminating against imports.

The key requirement of the standards code is that product standards and related testing and certification are not to be used to create unnecessary obstacles to international trade. In addition, the code requires public notice and opportunities for comment with respect to standards under development; that international standards be used as the basis for new domestic standards where appropriate; and that foreign testing and certification of conformity with product standards be permitted where feasible.

The standards code applies to product standards and related testing and certification of federal, state, regional, local, and private entities. Central governments undertake to use "such reasonable measures as may be available to them" to secure compliance by non-federal bodies, and accept international responsibility for such compliance. Special provisions call for technical assistance in the standards area to be made available to developing countries.

Finally, the standards code creates an international Committee on Technical Barriers to Trade, which will function under the GATT to review operation of the code and deal with related disputes.

5. *Customs Valuation*

The appraised value of goods for customs purposes is important not only for the assessment of customs duties; it is also used as a basis for other taxes and charges levied at the border and for the

³⁵ Draft Agreement on Technical Barriers to Trade, GATT Doc. MTN/NTM/W/192/Rev. 5.

administration of licenses and import quotas based on the value of goods. The customs valuation agreement has developed a new set of international rules to harmonize divergent national valuation systems and to reduce the likelihood of artificially inflated customs appraisals.

The current United States system for customs valuation is an example of both the unpredictability and the artificially "inflating" characteristics that many systems contain. Under the American scheme, there are nine different methods for determining customs value, depending on the product being valued and the circumstances under which it is imported. One of these nine valuation methods is the controversial American Selling Price system, by which certain products are valued for tariff purposes at the level of the domestically produced articles with which they compete.³⁶ This American Selling Price system was first enacted in 1922 and thus is protected by "grandfathering" against the GATT admonition that customs appraisals should not reflect "the value of merchandise of national origin . . . or fictitious values."³⁷ The valuation systems of most other nations also have controversial and protective features that create problems for American exporters.

The customs valuation code is intended to establish a fair, uniform, and neutral system for the valuation of goods for customs purposes. The code establishes a "transaction value," defined as the price actually paid or payable with additions for certain costs possibly not reflected in that price, as the most preferred valuation method. But transaction value cannot be used in many cases, such as those involving non-arms-length transactions between a subsidiary and its parent company. Accordingly, the draft code establishes alternative bases of valuation, to be used in the following order of precedence when transaction value is inappropriate: the transaction value for an "identical good," preferably made by the same manufacturer but sold in a different transaction; the value of "similar goods" produced in the same country which are commercially interchangeable; a "deductive value" based on the price of the good on resale after importation, minus expenses in-

³⁶ 19 U.S.C. § 1401a(e) (1976). The products subject to the American Selling Price system include benzenoid chemicals, rubber footwear, and certain types of shellfish. For a detailed description of the system, see *Tariff and Trade Proposals: Hearings Before the House Comm. on Ways and Means*, 91st Cong., 2d Sess. 645 (1970) (Statement of Ambassador Carl J. Gilbert, Special Representative for Trade Negotiations).

³⁷ Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, GATT Doc. MTN/NTM/W/229/Corr. 1.

volved in the resale; and a "computed value" based on the estimated cost of production.

Developing countries would be allowed to delay applying the code for five years following the date of entry into force (January 1, 1981). They also would receive technical assistance to set up new valuation systems based on the code.

The code also contains provisions on currency conversion, judicial review, publication of customs laws and regulations, and the prompt clearance of imported goods. An international Committee on Customs Valuation, under GATT auspices, will supervise the code's operation and facilitate consultations among signatories.

6. *Import Licensing*

Governments use import licenses both to collect data and to administer import restrictions. Import licensing systems may be "automatic" (with licenses given freely) or "non-automatic" (with licenses in effect constituting permits to import goods under quota).

The Agreement on Import Licensing Procedures³⁸ attempts to ensure that licensing systems do not in themselves operate to restrict imports. The licensing agreement requires that rules and information regarding national licensing systems be published and furnished to the GATT Secretariat. It further requires that application forms be kept simple, that importers be given a reasonable amount of time to complete them, and that, in most instances, a single administrative body be made available to review applications. The agreement also prohibits refusal of applications for licenses due to minor errors in documentation. Similarly, imports covered by licenses cannot be refused because of minor variations in value or quantity. Happily, the licensing agreement should not require any changes in United States law.

C. *Reforms of the International Trading Framework*

In addition to calling for negotiations on tariffs and non-tariff matters, the Tokyo Declaration stipulated that negotiators were to consider "improvements in the international framework for the conduct of world trade." This mandate gave rise to creation of a negotiating group on "Framework" reform, which concluded the five arrangements described below.³⁹

³⁸ Agreement on Import Licensing Procedures, GATT Doc. MTN/NTM/W/231.

³⁹ GATT Doc. MTN/FR/W/20/Rev. 2.

1. *Developing Countries*

One of the cornerstones of the GATT system has been the most-favored nation principle, which in essence requires that imports from all GATT Contracting Parties be treated equally. For years developing countries have sought to modify this principle so that industrialized countries could, consistently with the GATT, give special advantages to LDC exports. One qualified success in this effort was international acceptance, in the early 1970's, of the Generalized System of Preferences (GSP), by which selected exports from developing countries are allowed to enter the markets of developed countries at duty rates lower than those applicable to the same products from developed countries.⁴⁰ In the Tokyo Round the LDCs set out to secure a more permanent international legal basis for the GSP and for other forms of preferences that might be arranged in the future. In doing so they built upon the recognition in the Tokyo Declaration that the negotiations might result in "special and more favorable" treatment for the products of developing countries "where appropriate and feasible."

The results of this effort are embodied in the text on Differential and More Favorable Treatment, Reciprocity, and Fuller Participation of Developing Countries.⁴¹ This agreement is known more commonly as the "enabling clause" because its key provision establishes as a permanent principle of trade law that GATT Contracting Parties may give unique preferential treatment to the products of developing countries, notwithstanding the GATT's most-favored nation provision. Permitted types of special treatment include the GSP, provisions for LDCs in the non-tariff agreements, regional or global trade arrangements among developing countries, and extra-special treatment for the least-developed countries. Qualifying provisions are designed to ensure that special arrangements under the enabling clause do not merely raise barriers to the trade of non-members of such arrangements (such as by creating a bogus regional free trade area for the real purpose of raising an impenetrable external tariff against non-members), and that special treatment does not impede future global tariff reductions.

In this text, the developed countries also reiterate and clarify

⁴⁰ For an extended discussion of the Generalized System of Preferences, see Graham, *The U.S. Generalized System of Preferences for Developing Countries: International Innovation and the Art of the Possible*, 72 AM. J. INT'L L. 513 (1978).

⁴¹ *Supra* note 39.

the principle, already expressed in Part IV of the GATT, that they do not expect full reciprocity from developing countries in trade negotiations. This is done by stating specifically that developed countries do not expect LDCs to negotiate concessions "inconsistent with their individual development, financial, and trade needs."⁴² As a price for these gains, the agreement expresses an expectation of developing countries that their economies and trade will so improve as to enable them to participate more fully in the GATT system of rights and obligations.

2. *Dispute Settlement*

The provisions of the GATT for settling international trade disputes have become increasingly ineffectual in recent years.⁴³ Since they specify no detailed procedures or time limits, cases may drag on for years. In any event, GATT settlement mechanisms have lost most of their bite because their ultimate sanction—authorized trade retaliation against offending countries—has been used only once, some 26 years ago.⁴⁴

The Tokyo Round's Draft Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance⁴⁵ attempts to clarify procedures for dispute settlement by codifying an "agreed description" of customary GATT practice in this area. The text also tightens procedures by suggesting time limits both for the establishment of panels of experts to hear complaints and for the ultimate disposal of cases,⁴⁶ by providing for a standing roster of potential panelists to be maintained by the GATT Secretariat, and by clarifying the functions and procedures of panels.

In addition to these refinements of the general provisions on dispute settlement in the GATT, most of the individual non-tariff codes contain their own sets of provisions for handling disputes arising under those codes. The relationship between these sepa-

⁴² GATT, Art. XXXVI, ¶ 8.

⁴³ See Jackson, *The Crumbling Institutions of International Trade*, 12 J. WORLD TRADE L. 93 (1978); Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. (1978); R. HUDEC, *ADJUDICATION OF INTERNATIONAL TRADE DISPUTES* (1978).

⁴⁴ *Supra* note 8.

⁴⁵ *Supra* note 39.

⁴⁶ The text states that "... The parties to [a] dispute would respond within a short period of time, i.e., seven working days, to nominations of panel members by the Director-General. . . .", *id.*, at 3/4; and it further states that "... panels should aim to deliver their findings without undue delay . . . in cases of urgency the panel would be called upon to deliver its findings within a period normally of three months. . . ." *ibid.*, at 3/6.

rate new agreements and the general rules of the GATT with respect to dispute settlement can only be clarified with precision through case experience.

3. *Other Framework Matters*

The "Framework" sections of the texts initialed on April 12 also include undertakings with respect to trade restrictions imposed to restore balance of payments equilibrium, trade restrictive "safeguard" actions used for developmental purposes by LDCs, and charges and other restrictions on exports. The principal result of the declaration on trade restrictions for balance of payments (BOP) purposes is to recognize that such restrictions may consist of tariff surcharges as well as import quotas, which previously were the only form of BOP-related restriction recognized by the GATT. The text on safeguard actions for developmental purposes accords LDCs somewhat greater flexibility in restricting imports to protect their "infant industries" and for other development objectives. Finally, an understanding on export restrictions and charges merely expresses the need to examine, after the Tokyo Round, the adequacy of GATT provisions on this subject.

D. *Sectoral Agreements*

1. *Agriculture*

The Tokyo Round agreements apply to agricultural as well as industrial products. In addition, governments signing the *procès verbal* on April 12 undertook generally to make the GATT operate better with respect to agricultural trade, and concluded specific agreements on trade in dairy products and bovine meat.

a. *Dairy*

The new International Dairy Arrangement⁴⁷ consists of a general agreement covering all dairy products, and three protocols covering international trade in certain milk powders, milk fats (including butter), and certain cheeses. The general agreement is merely an undertaking to exchange information through an International Dairy Products Council to be created within the GATT. The three protocols set forth more detailed provisions, including minimum prices, with respect to the milk powder, milk fat, and cheese items covered.

⁴⁷ GATT Doc. MTN/DP/8.

b. *Meat*

An Arrangement Regarding Bovine Meat⁴⁸ covers trade in beef, veal, and live cattle. The arrangement calls for establishment within the GATT of an International Meat Council to monitor international trade in meat and to provide for consultations and exchanges of information among member countries.

2. *Aircraft*

Some of the Tokyo Round participants⁴⁹ have concluded an Agreement on Trade in Civil Aircraft⁵⁰ which commits them to eliminate by January 1, 1980, all customs duties and similar charges on imported civil aircraft, aircraft parts, and repairs on civil aircraft. This agreement contains an annex listing all products covered, which range from passenger airliners, helicopters, gliders, and ground flight simulators to food warmers and oxygen masks. The agreement does not cover military aircraft or military aircraft parts.

3. *Steel*

An understanding on international trade in steel was developed recently in the Organisation for Economic Cooperation and Development (OECD). Although this understanding was not formally part of the Tokyo Round, it was related closely to the negotiations. This agreement establishes a Steel Committee under OECD auspices, to encourage the continuation and extension of free trade in steel, and to provide a means of disseminating information and coordinating policies among governments with respect to trade in steel. To supplement this OECD Steel Committee, MTN tariff negotiators are exploring the possibility of tariff equalization for steel on a product-by-product basis among the major developed countries.

E. *Negotiations Not Yet Concluded*

Negotiations on trade in products bearing counterfeit trademarks or trade names, and on "safeguards"—temporary import restrictive measures imposed to give an ailing domestic industry opportunity to recover—reached an advanced stage but were not

⁴⁸ MTN/ME/8.

⁴⁹ *Supra* note 2.

⁵⁰ GATT Doc. MTN/W/38.

concluded in time for inclusion in the April 12 procès verbal. The safeguards negotiation, which had attracted early attention as one of the central issues in the Tokyo Round, stalled over the question of whether, and in what circumstances, governments might take safeguard import relief actions "selectively," i.e., against a particular product from one or two exporting countries rather than from all exporters on a most-favored nation basis. The April 12 signatories agreed that safeguards negotiations should continue urgently "with the objective of reaching agreement before 15 July 1979."⁵¹

IV. WHAT LIES AHEAD?

The Carter Administration currently plans the agreements initialed on April 12 to Congress to submit in June accompanied by a major proposal for new trade legislation and administrative action to implement the agreements. The Congress then will have some ninety working days to vote on this package, which cannot be amended. If Congress approves the proposals, as appears likely at this time, the Tokyo Round agreements will enter into force on January 1, 1980.

United States implementing legislation is likely to contain some important adjustments to the conduct of trade policy reaching beyond those strictly necessary to implement the Tokyo Round.⁵² One of these proposals is a strengthened provision for private sector complaints that other nations have violated the new agreement or the GATT, or have engaged in other unfair trade practices.⁵³ The implementing legislation will almost certainly shorten deadlines and alter other procedures for investigating alleged illegal dumping or subsidy practices, and will provide for greater participation by private sector advisors in preparing the defense and prosecution of international trade complaints. It appears probable, moreover, that the "fast-track" procedures for implementing international non-tariff commitments will become a permanent feature of U.S. law, perhaps making a reality of the conventional prediction that the Tokyo Round would mark the end of periodic negotiating "rounds" because hereafter adjustments to the

⁵¹ *Supra* note 1.

⁵² The expedited implementation procedures set forth in 19 U.S.C. 2112 and 2191 are available to be used for legislative proposals that are "necessary or appropriate" to implement non-tariff trade agreements.

⁵³ It appears that this will take the form of amendments to section 301 of the Trade Act of 1974, 19 U.S.C. § 2411 (1976).

trading system will be negotiated more or less continuously.

Congressional enactment of the Tokyo Round agreements will mark only the beginning of a new stage, rather than the end, of a process of revising international trading rules which began with the Tokyo Declaration in 1973. The new dispute settlement procedure provided for both the GATT and the various non-tariff agreements must be tested—particularly the relationship between these two sets of new rules. Another worrisome problem is the effect on the GATT system of applying some of the new codes on a “conditional MFN” basis, denying the benefits of the agreements to non-signatories—even GATT-member non-signatories.

Notwithstanding the difficulties which may lie ahead, the miracle of the Tokyo Round is simply that it was concluded, with some apparent success, in the face of truly formidable technical complexities and despite unfavorable economic and political circumstances. This example offers some hope for international cooperation in a dangerous world.

