

# THE ROLE OF LAW AND LAWYERS UNDER THE NEW MULTILATERAL TRADE AGREEMENTS

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## I. INTRODUCTION

Integration of the economies of non-Communist nations is proceeding at an increasingly rapid rate. Dramatic changes are occurring in the patterns of productive enterprise around the globe. These developments are partly a result of United States leadership in a series of international trade-liberalizing initiatives that began with the Reciprocal Trade Agreements Act of 1934. Partly they result from developments in technology, living standards, and population that have made most of the nations of the western world deeply dependent on one another for economic essentials. Trade-liberalizing programs have created business opportunities and international divisions of labor which serve to bind nations together. The growth of these new business activities has in turn confirmed the effectiveness of the trade-liberalizing measures, stimulated more of them, and made us all dependent on their success.

A major new move toward further economic integration was achieved in the agreements reached during the latest Multilateral Trade Negotiations. The current agreements are of extraordinary importance, not because they bring further progress in the forty-five-year effort to eliminate tariff barriers, but because, for the first time since the General Agreement on Tariffs and Trade was established thirty-one years ago, the major trading nations have reconfirmed the role of law in creating the structure—the system of mutual expectations—essential for liberal and open trade.

The importance of legal rules in establishing the regularity and predictability businesses need for successful long-term operations was recognized in 1947, when the GATT was written as a series of rules governing the conduct of nations affecting the flow of trade. But since that time the trade-liberalizing efforts of the GATT nations have been focused principally on reducing tariff rates. Respect for the rules set forth in the General Agreement has

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seriously eroded.<sup>1</sup> The result has been that, though tariffs are much lower and the volume of trade has greatly increased, achievement of an open and competitive trading environment among participating nations has been frustrated by a variety of government practices which inhibit competition from foreign enterprises and aid home enterprises, both in holding their home markets and gaining sales abroad.

The new rules, expressed in ten codes negotiated in Geneva during the past five years, are designed to establish a broader and more effective international regime which will prevent nations from taking certain kinds of action that distort the flow of trade from what it would be were it free to perform in accordance with comparative economic advantage. The new codes are, in my view, likely to have a dramatic effect on the work of lawyers for business enterprises.<sup>2</sup> The codes, and the legislation implementing them, will have an impact on a vast range of business transactions not presently affected by international trading rules. As imports and exports play an increasing role in our national economy, the new rules will take their place alongside other regulatory programs as major factors for businessmen to consider in designing investment, production, and marketing programs.

The new rules may present a level of complexity not present in most domestic regulatory legislation. Enforcement of the rules governing United States business activity, though imposed as a result of implementing legislation adopted by Congress, will in some degree be influenced by international rules set forth in the codes and by interpretations of these rules by international dispute settlement bodies. The international rules may also develop further as a result of continuing negotiations likely to be authorized soon by Congress. Such changes would in turn be implemented by further domestic legislation. Thus the lawyer will have to deal with two sets of continually evolving rules.<sup>3</sup>

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<sup>1</sup> See Jackson, *The Crumbling Institutions of International Trade*, 12 J. WORLD TRADE L. 93, 96-98.

<sup>2</sup> There will also be a significant new role for government lawyers in enforcing the codes, negotiating changes and new codes, and perhaps eventually in building a sound body of international institutions for helping to administer the codes and resolve disputes. However, that role must be the subject of a separate article.

<sup>3</sup> Still more levels of lawmaking and interpretation may be involved. In working with the important new Code on Technical Barriers to Trade (Standards), lawyers will have to concern themselves not only with the international rules and domestic implementing legislation, but also with the impact of these new international and federal rules on state and local laws and industry agreements, which establish the industrial standards governed by the new Code.

Further challenge for the business lawyer will result from the fact that his client's ability to sell products in foreign countries will also be affected by the new codes and the international interpretations of them, as well as by the implementing legislation of foreign countries.

In the following pages I will discuss the new sources of law that lawyers will have to become familiar with and the new proceedings they may become involved in—in short, the challenges lawyers will face in the effort to counsel and defend clients in a period of great change and uncertainty for international business. But the significance of the discussion will go beyond the subject of new demands for the lawyer's already overtaxed energies. It is also important to indicate how and why these new challenges are worthwhile, and how the special skills of lawyers can serve to build a framework of rules within which international trade can flow according to economic principles rather than in response to assertions of national power.

## II. TRADITIONAL ROLE OF THE TRADE LAWYER

As a basis for appraising the impact of the new codes and implementing legislation on law and lawyers, it is useful to take a brief look at the functions lawyers have filled previously in working with international trade agreements and related United States legislation.

During the four decades that the reciprocal trade agreements program has been in effect, the lawyer's role in private businesses has been rather limited. The main objective of the program has been to reduce the level of import duties imposed by the principal trading nations. Government negotiators performed this task. The lawyer for a business enterprise affected favorably or unfavorably by proposed tariff reductions might present his client's views to the Executive Branch or to Congress. In this work, the lawyer contributed little other than his skills of orderly factual presentation and political persuasion, skills which nonlawyers also possess.

Private lawyers have also had occasion to represent business interests in "escape clause" or "safeguard" cases, in which the government was called upon to decide whether imports of a given article had increased in such a way as to meet certain statutory criteria. If the criteria were met, the law allowed the United States to impose temporary import restrictions to permit United

States industry adjustment to changing competitive conditions.<sup>4</sup> The private lawyer ordinarily based his fact presentations and his arguments on a standard set forth in the statute. In hearings held by the United States Tariff Commission and its successor, the International Trade Commission, the lawyer enjoyed a limited opportunity to face his opposition and to focus attention on the critical issues. But the importance of a lawyer's skills has always been tempered by several features of these proceedings. First, the parties to a controversy could not have access to the full record developed by the Commission in its investigation.<sup>5</sup> Second, the Commission's decisions, over the years, failed to develop coherent doctrines or lines of reasoning which could provide precedent or guidance in planning future conduct or deciding future cases. And third, after all was said and done in the Commission, if the decision was that the statutory criteria for import-relief had been met, the President made the ultimate decision whether to impose an import restriction under a broad "national interest" standard. This fact has tended to cause the decision-makers, the parties, and counsel to regard the tasks of making disciplined findings of fact and defining clear standards of decision as less important than influencing the overriding politics of a case.

Private lawyers have also had a limited number of opportuni-

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<sup>4</sup> 19 U.S.C. §§ 2251-53. Such proceedings are contemplated by Article XIX of the GATT. According to the docket numbers of the proceedings conducted by the International Trade Commission, and its predecessor the Tariff Commission, thirty-eight of these proceedings arose under the current version of United States law, contained in the Trade Act of 1974. There were twenty-nine proceedings under the preceding version, enacted in the Trade Expansion Act of 1962 and there were 112 proceedings prior to 1962 under section 7 of the Trade Agreements Extension Act, which first introduced escape clause proceedings in 1951.

<sup>5</sup> The Commission has traditionally viewed the participation of interested businesses and their counsel merely as a part of an investigation conducted independently by the Commission through its large staff. Extensive economic data collected by the staff have not normally been made available to interested parties, though in recent years a summary of some of the data has been made available. Questioning of adverse witnesses has been permitted, but the commissioners grow impatient with detailed or extensive cross-examination. Until recently, the Commission allowed interested members of Congress (usually, of course, from the home state or district of the domestic industry involved in the proceeding) to testify at the beginning of the hearing, and to be immune from cross-examination.

In keeping with its view of the nature of the hearing as one part of an overall investigation, and not the occasion where the exclusive record for decision is made, the Commission does not formally recognize lawyers in their distinct role as advocates. It allows nonlawyers to represent parties in the hearings. (I have observed at least one who did quite a creditable job.) It also requires lawyers to be sworn in along with the witnesses they are presenting. Contrary to the expectations of some, this practice has neither crimped the lawyers' style nor improved the usefulness of their rhetoric.

ties to represent clients in cases under the countervailing duty law<sup>6</sup> (which imposes offsetting duties on United States imports that benefit from a foreign government subsidy) and the anti-dumping statute<sup>7</sup> (which imposes special duties to offset foreign sales in the United States at "less than fair value").

Activity under the countervailing duty law was extremely limited until enactment of the Trade Act of 1974, since the decision whether to proceed with an investigation and make a determination under this Act was left to the discretion of the Secretary of the Treasury. Policy or political reasons often made it expedient for the Secretary to leave a case open, with essentially no action being taken for years. The statute required the Secretary to impose countervailing duties whenever he determined the existence of a foreign bounty or grant benefiting exports to the United States. However, the duty to make these tough decisions, and to establish adequate administrative procedures for doing so, was effectively avoided for almost eighty years by the simple technique of discretionary inaction. From 1934 to 1969, for example, only about two hundred investigations were processed.<sup>8</sup> Since the Trade Act of 1974 placed mandatory time limits on the Secretary, approximately seventy-five new proceedings have been commenced and thirty previously pending cases disposed of.<sup>9</sup>

Decisions in antidumping cases were not so easily avoided, and over eight hundred cases have been filed and decided since the statute was enacted in 1921.<sup>10</sup>

Both countervailing duty and antidumping cases would appear to have called for extensive and refined use of legal skills. Both kinds of proceedings require the collection, analysis, and presentation of highly complex facts relating to business transactions. Both also call for interpretation and application of broad statutory criteria to individual cases in a systematic fashion.<sup>11</sup> In both kinds

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<sup>6</sup> 19 U.S.C. § 1303.

<sup>7</sup> 19 U.S.C. §§ 160-66.

<sup>8</sup> HOUSE COMM. ON WAYS AND MEANS, 91ST CONG., 2D SESS., SELECTED PROVISIONS OF THE TARIFF AND TRADE LAWS OF THE UNITED STATES AND RELATED MATERIALS 148 (Comm. Print 1970).

<sup>9</sup> This calculation is based on a record maintained in the author's office.

<sup>10</sup> This estimate is calculated from the 684 complaints filed between January 1, 1921 and October 31, 1966 (1 SENATE FINANCE COMM., 90TH CONG. 2D SESS., COMPENDIUM OF PAPERS ON LEGISLATIVE OVERSIGHT REVIEW OF U.S. TRADE POLICIES 176 (Comm. Print 1968)), and the approximately one hundred complaints filed from 1972 to date (according to a record of cases maintained in the author's office).

<sup>11</sup> In addition, in antidumping cases, it has been necessary for The International Trade Commission to conduct an investigation into whether an industry in the United States is be-

of proceedings, the lawyer's talent for insuring fair and rational decisionmaking procedures would have been every bit as appropriate as it has been in other administrative proceedings when government officials make determinations under statutory criteria which affect private interests. But the fact is that disciplined administrative proceedings that make full use of the fact-gathering and analytical skills of lawyers for the affected parties have not been developed under these statutes. Factual conclusions have not been documented by reference to a proper record of evidence. Legal interpretations have not been supported by careful reasoning based on the legislation and previous decisions.

Perhaps part of the reason for the primitive state of administrative procedure under these statutes has been the feeling of Treasury Department officials that they must retain an unusually high amount of discretion because of the international impact of their decisions. In large part, however, I believe informal and undisciplined procedures have resulted from a severe shortage of judicial review.<sup>12</sup>

In addition to the above proceedings, there have been a few occasions for lawyers to represent business interests in adminis-

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ing or is likely to be "injured" and whether the injury is "by reason of" imports at less than fair value. These cases, therefore, call for consideration of broad economic data and expert opinion testimony rather like that commonly presented by antitrust trial lawyers.

<sup>12</sup> Judicial review of antidumping decisions adverse to the importer has been discouraged in most cases by the long wait required after the dumping determination while the amount of special dumping duties was assessed. This wait serves no purpose in the judicial review, and is required only by jurisdictional technicalities. 19 U.S.C. §§ 168, 169; 28 U.S.C. § 1582. See *J.C. Penney Co. v. U.S. Treasury Dept.*, 439 F.2d 63 (2d Cir. 1971); *cert. denied* 404 U.S. 869 (1973); *Matsushita Electric Ind. v. U.S. Treasury Dep't*, 60 C.C.P.A. 85 (1973); *cert. denied* 404 U.S. 21 (1973). But it leads most importers and foreign industry interests adversely affected by dumping determinations to accommodate them rather than seek review, which would provide relief only after competitive battles had been lost. Judicial review of antidumping decisions adverse to the domestic industry—i.e., negative determinations—has been discouraged by the courts' refusal to review in any way the legal or factual correctness of a decision, so long as the Treasury follows the appropriate procedures. See *Orlowitz v. United States*, 43 Cust. Ct. 548 (1959), *aff'd* 200 F. Supp. 302 (Cust. Ct. 1961), *aff'd* 50 C.C.P.A. 36 (1963). Judicial review in countervailing duty cases has been discouraged by the Treasury Department's habit, referred to above, of postponing for years administrative action—especially in cases likely to lead to a positive determination. When Treasury entered a negative determination, the domestic industry which had petitioned for relief found that it had no right to judicial review. *United States v. Hammond Lead Products*, 440 F.2d 1024 (C.C.P.A. 1971). See *Berger, Judicial Review of Countervailing Duty Determinations*, 19 HARV. INT'L L.J. 593 (1978); *Gerhart, Judicial Review of Customs Service Actions*, 9 LAW & POL. INT'L BUS. 1101 (1977). Even though the countervailing duty law has been in force for eighty years, judicial review has been so inadequate that the question of the scope of review remains unsettled. See *ASG Industries v. United States*, 467 F. Supp. 1200 (Cust. Ct. 1979).

trative proceedings under Section 301 of the Trade Act of 1974<sup>13</sup> and its predecessor statute (concerning "unjustifiable," "unreasonable," and "discriminatory" trade practices of foreign governments): approximately twenty-five cases;<sup>14</sup> Section 22 of the Agricultural Adjustment Act of 1933 (permitting restrictions on imports of agricultural products which threaten a domestic price support program): forty-one cases; import quota negotiations under Section 204 of the Agricultural Act of 1956;<sup>15</sup> and Section 232 of the Trade Expansion Act of 1962 and its predecessor statutes (concerning import restrictions needed for national security reasons): approximately thirty-five cases.<sup>16</sup> But to a great degree the governmental determinations reached at the end of all these proceedings are discretionary. Though lawyers have been helpful in supplementing the government's information, they have normally not been able to play a significant role in insuring that determinations were reached in a factually supported manner and in accordance with reasoned legal conclusions, following disciplined administrative proceedings.<sup>17</sup>

In addition to the above domestic statutes governing international trade with the United States, there are also international rules established in the General Agreement on Tariffs and Trade. The GATT rules might have provided a fruitful basis for the exercise of one distinctive and valuable lawyer's skill—the develop-

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<sup>13</sup> 19 U.S.C. § 2411.

<sup>14</sup> Personal communication with staff members of the Office of the Special Representative for Trade Negotiations.

<sup>15</sup> In the absence of administrative regulations for petitioning under this provision, it is difficult to cite an exact number of cases. The negotiating powers under section 204 have only been involved with respect to a very few products: agreements on meat imports and bilateral textile agreements were negotiated under the authority of this section. *See* HOUSE COMM. ON WAYS AND MEANS, 93D CONG. 1ST SESS., BRIEFING MATERIALS PREPARED FOR THE USE OF THE COMMITTEE ON WAYS AND MEANS IN CONNECTION WITH HEARINGS ON THE SUBJECT OF FOREIGN TRADE AND TARIFFS 253 (Comm. Print 1973).

<sup>16</sup> HOUSE COMM. ON WAYS AND MEANS, 91ST CONG. 2D SESS., SELECTED PROVISIONS OF THE TARIFF AND TRADE LAWS OF THE UNITED STATES AND RELATED MATERIALS 104-05 (Comm. Print 1970) and personal communication with the individual responsible for the administration of this statute from 1965 to 1973 in the Office for Emergency Planning and from 1973 to 1977 in the Treasury Department.

<sup>17</sup> The lawyer's role has been somewhat more important in one class of cases, those which arise under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337, concerning "unfair methods of competition and unfair acts" involving imports (128 cases). The portion of the proceeding which takes place in the International Trade Commission is conducted under normal rules for adjudicatory hearings, including pleadings, prehearing discovery, and a hearing on the record before a presiding officer. In addition, many of these cases involve arcane questions of patent law, as to which the deciding agency is more dependent on presentations by private lawyers.

ment, on a case-by-case basis, of legal doctrines and lines of reasoning which can enlighten and clarify questions arising in the future. But they did not. Disputes concerning GATT obligations arise between governments, and a tendency has developed in recent years among participating governments to regard GATT rules not as rules of law, but more as general principles which can serve as the starting point for negotiation and compromise when disputes arise. Controversies have been bargained away, with the result turning little on the meaning or purpose of the rule and largely on the congeries of existing political and economic relationships between the two countries.

The GATT rules have thus not in practice served as rules of general applicability which provide a basis for predicting the conduct of others and planning one's own conduct. They have worked more like provisions in a contract between two parties, where each has something of an interest in keeping the good will of the other, but where there is no effective outside enforcement and each is more or less free to re-bargain the meaning of the contract whenever it wishes on the basis of how much each needs the other at that time. The private lawyer has had to know about or "use" the rules of the GATT only in a few specialized kinds of situations.<sup>18</sup>

### III. FUTURE ROLE OF LAWYERS

This very sketchy background provides a starting point for evaluating the potential impact on private lawyers of the new sets of rules and the decisionmaking proceedings that will be established in the MTN codes and implementing legislation.

Many of the codes are efforts at regulating diverse and sometimes complex areas of government behavior which, in turn, affect complex patterns of trade. They contain some novel concepts. Their Delphic phrases and sometimes turgid style indicate that the negotiators have used general and ambiguous language to

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<sup>18</sup> He might participate in a proceeding before the Special Representative for Trade Negotiations under section 301 of the Trade Act of 1974, 19 U.S.C. § 2411, in which the question would be whether a foreign nation had violated GATT commitments to the United States and whether the President should exercise his discretion to negotiate with, or retaliate against, the nation involved. Or the lawyer might refer to GATT rules when addressing arguments to the discretion of the Executive Branch or Congress, where he might urge that a contemplated course of government action would be inconsistent with the GATT, and therefore cause the United States embarrassment or difficulty with its trading partners.



achieve agreements in principle where there was disagreement on the operational details.

One cannot hope for too much clarity or precision in the implementing legislation either, since the entire implementing bill covering all the codes, and any other subjects which are considered necessary or desirable to equip the United States Government to carry out its MTN commitments, is being written in a very few months. Once introduced, the legislation will have to be approved or disapproved by Congress without amendment. Thus we will soon be presented with the results of two extraordinary and unprecedented lawmaking efforts, one at the international level and one from our own Congress. At this early stage, it is not possible to predict concretely or confidently the consequences of these new rules, for lawyers or for anyone else, including industries and nations. One can only make some informed guesses, such as those which follow.

The MTN codes and implementing legislation will mark the beginning of a distinct new phase in the regulation of trade among nations. We will see a new ordering of production and marketing activities in the industries that serve international markets. If the codes are effective in establishing rules of general applicability, they will in the course of a few years bring into harmony some of the divergent practices of national governments, local governments, and industries which at present serve to inhibit open and competitive trade.

Lawyers could play a crucial role in building this new system of rules. They would counsel clients on how to conduct their businesses within the rules and help them uncover and secure preventive action against violations by their competitors. More importantly, the lawyers—and only the lawyers—would insure that the actions of government officials in implementing the international rules are carried out fairly and objectively. Administrative proceedings disciplined by lawyers are the only technique yet devised for assuring business enterprises, workers, consumers, and others that government decisions affecting them are based on a careful consideration of all material facts and a reasoned and consistent interpretation of the rules, expressed in a public explanation which provides guidance for future cases.

But the new codes may not work this way in practice. Instead of establishing rules of general applicability within which business enterprises can operate, the codes might evolve in a way which

simply expands the role of central government administrations in individual commercial decisions. This would happen if governments do not seek to conform their practices rigorously to the codes but instead act according to economic expediency and, when the action is inconsistent with the codes, seek to bargain away any complaints of noncompliance, reaching compromise arrangements that mollify the complainant without correcting the offending practice. Government action in these instances is, of necessity, broadly discretionary. Thus there is less room for lawyers to play a role in insuring fair and objective government decisions. The only safeguard, the only check on government discretion, is of a political nature. The government decisions in question involve such complex and specialized subjects that political checks are not likely to operate effectively or evenly.

As will be indicated, there is room under the codes, and possibly even under United States implementing legislation, for either of these scenarios to develop.

#### A. *The new international regime.*

The MTN codes establish a much more pervasive set of international rules than those which previously existed.<sup>19</sup> The codes which have the greatest potential for developing a regime of law governing national conduct are those on Technical Barriers to Trade (Standards), Subsidies and Countervailing Measures, Anti-dumping, and Government Procurement. They appear to be based on the assumption that governmental intervention in international markets should be minimized, and that the system of rules might help achieve this objective.<sup>20</sup>

A rather different orientation appears in the codes on certain agricultural products. They are concerned principally with establishing international mechanisms for governments to intervene in markets, when necessary, to achieve stability. Each of the three protocols to the International Dairy Arrangement, for example, specifically calls on the participating nations "to ensure that the

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<sup>19</sup> For a more complete description of the codes discussed here, and the codes not discussed, see Graham, *Results of the Tokyo Round*, at 153 *supra*.

<sup>20</sup> Other codes which have been agreed upon include the Code on Customs Valuation, regularizing the system of evaluating imports for the purpose of imposing customs duties; the Code on Import Licensing Procedures; the Code on Trade in Civil Aircraft; the International Arrangements on Dairy Products and Bovine Meats; and a catchall code on "Framework" matters, the most significant part of which for our purposes is a "Draft Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance."

export prices of the products defined . . . shall not be less than the minimum price"<sup>21</sup> specified in the protocol. A special committee reviews and modifies minimum price levels.<sup>22</sup> The Arrangement also sets up an "International Dairy Products Council" to monitor and evaluate market conditions and to devise solutions for any "serious market disequilibrium" or threat thereof.<sup>23</sup> At the same time the Arrangement establishes this international price level and administrative structure for other possible market-stabilizing interventions, it calls for limitations on similar market interventions by national governments, such as subsidies, safeguard measures, and discriminatory technical standards.<sup>24</sup> Thus the Arrangement might be characterized for our present purposes as tolerating—indeed sponsoring—government intervention in critical market decisions, though it attempts to coordinate the intervention of individual nations through the international organization.<sup>25</sup>

The non-agricultural codes mentioned above attempt to establish limitations on market interventions pursued by individual nations. But unlike the agricultural codes, they do not substitute an international body with authority to sponsor such interventions and to make judgments concerning equitable prices to consumers, adequate returns to producers, or methods for stabilizing markets.

The Subsidies and Countervailing Measures Code prohibits certain subsidies granted by nations specifically on their exports. It calls for participating nations to avoid certain other subsidy practices which distort trade and injure producers in other countries, and also attempts to regularize the use of countermeasures so that they do not become trade barriers themselves. It calls for full disclosure of subsidy practices and of countermeasures, so that each participant can observe the compliance of the others. It also provides an international process for resolving disputes and enforcing compliance with the Code. Similar measures are established to regulate countermeasures taken by nations to combat dumping practices of foreign industries.

The Code on Technical Barriers to Trade (Standards) is perhaps the most novel and potentially far-reaching of all. It places each

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<sup>21</sup> *E.g.*, Protocol Regarding Certain Cheeses, Part Two, Art. 3, ¶ 1.

<sup>22</sup> *Id.*, ¶ 3.

<sup>23</sup> Part One, Art. IV, ¶ 2.

<sup>24</sup> Part One, Art. V.

<sup>25</sup> The Arrangement Regarding Bovine Meats is similar in approach, though less far-reaching in its regulatory impact.

nation under an obligation to avoid product standards, testing requirements, and certification systems that (1) are intended to create obstacles to international trade, (2) in fact discriminate against imported products, or (3) create "unnecessary obstacles to international trade."<sup>26</sup> Vast numbers of technical product standards and testing systems exist in any modern industrial society. The Code requires national governments to ensure that their own measures comply with the Code,<sup>27</sup> and to use "such reasonable methods as may be available to them" to achieve compliance of technical standards established by state and local governments and by private organizations.<sup>28</sup> In order to achieve compliance with the Code, technical standards are required to be published, and open procedures are to be used in formulating new standards. A dispute resolution procedure is also provided.

The Government Procurement Code is also distinctive and of great potential significance. The other codes call on national governments to desist from various kinds of intervention in market decisions in a way that distorts trade from what it would be according to comparative economic advantage. In the case of government procurement, the government is conducting trade, not intervening in or influencing the trade of others. The Government Procurement Code places international rules on the conduct of national governments in their own proprietary purchasing decisions—decisions which have normally been highly discretionary. The Code requires that participating governments use contracting procedures that allow suppliers from other participating countries to compete effectively for the contracts. Specifications for goods to be procured must be drawn in a nondiscriminatory way; bid opportunities and rules for tendering bids must be published; adequate time must be allowed for response from foreigners; and losing bidders are entitled to information about the winning bidder and the reasons for the award made. The Code establishes a procedure for resolving disputes between governments, but under this code, unlike the others, individual business enterprises from abroad will also be entitled to deal directly with the procuring government's authorities and resolve disputes through negotia-

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<sup>26</sup> Art. 2.1, 7.1.

<sup>27</sup> Art. 2, 5, 7. For a discussion of the applicability of the Code to a broad new system of federal government control over chemicals entering United States commerce, see papers delivered at the 1979 Annual Meeting of The American Society of International Law, Panel on "International Control of Toxic Substances," April 26, 1979, to be published by the Society in its proceedings of the meeting.

<sup>28</sup> Art. 3, 4, 6, 8.

tion.<sup>29</sup>

At the outset, these codes are likely to introduce substantial new uncertainties in the planning and conduct of United States business at home and abroad. Lawyers will be called on to interpret the new codes and give guidance on how they are likely to be enforced.

Whether lawyers will be able to carry out this function effectively will depend on the extent to which the new codes succeed in establishing a system of rules which will constitute a basis for making reasonably reliable predictions concerning national conduct and enforcement action. Legal guidance will not be feasible if the codes serve instead as a set of ideals generally viewed as unachievable in practice and functioning only as a starting point for negotiation and compromise—with each controversy being handled differently, the result depending not on systematic and objective interpretation of the rule, but on the economic significance of the particular dispute in question and the relative economic and political power and circumstances of the nations involved.

These uncertainties reflect perhaps the greatest ambiguity in the new codes: just what is to be the status and function of the codes themselves? Officials and businessmen from different countries have different attitudes on this question. Some feel that the rules in the codes should be observed by the participating nations in small cases and in large ones, and that long-term investments and sophisticated trading patterns will develop only if business in the various nations can predictably rely on observance of the rules.<sup>30</sup> Others view the rules more as though they were terms in a

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<sup>29</sup> If the Government Procurement Code works effectively in practice, the use of similar codes might present an approach to establishing reciprocity in trade with nations of the Soviet Bloc and other state trading countries. At present, if a western nation grants tariff concessions to a state trading country, the only way to achieve some rough reciprocity is to receive an assurance from that country that it will purchase a specified amount of goods in a specified time. This approach, if continued, is likely to draw the government of the western nation increasingly into a commercial role, to see that the trade ledger remains balanced over the years. However, if the state trading country were to agree to treat western nation suppliers as equal competitors under transparent and enforceable purchasing rules, as in the Procurement Code, then reciprocity could be achieved through competitive forces. The role of the western government would be to see that its industry is treated fairly under the rules, rather than to worry about commercial decisions.

<sup>30</sup> "A major purpose of all the codes is to establish greater certainty regarding international rights and obligations. Clearly, whichever body administers the codes should make its decisions on the basis of legal criteria and economic analysis, rather than domestic political and foreign policy considerations." (Testimony of

commercial agreement, which can be modified by the parties to the agreement at any time and in response to whatever inducements one may offer the other.

The former group is normally reluctant to have the government involved in making commercial transactions. It feels that the government's role should be limited to making and enforcing rules within which diverse business entities decide on the business transactions they wish to conduct. The latter group is more accustomed to centralized decisionmaking and government participation in business transactions.<sup>31</sup>

The former or "rule oriented" group views disputes between two or more countries concerning a code provision as an occasion to clarify the rule, if possible, so that it will function better in the future for the guidance of all. The latter or "power oriented" viewpoint regards these disputes as occasion for commercial negotiation between the governments, to be settled without too much concern for how similar disputes might have been handled in the past or might be handled in the future.<sup>32</sup>

It is too early to attempt to predict how effectively each of the new codes might function in establishing rules rather than merely serving as a forum for continued bargaining. Some of the codes have the potential for developing either way depending on the attitude of the participating nations.

The International Dairy Arrangement is, among the codes, the

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Elizabeth V. Perkins of the United States Chamber of Commerce before the Subcommittee on Trade of the Senate Finance Committee (U.S. Chamber of Commerce, March 7, 1979) at 4-5.).

<sup>31</sup> The following two recent examples illustrate a degree of government involvement in commercial decisions not considered normal in the United States.

On April 9, 1979, *The Wall Street Journal*, at 12, col. 3, reported that

Societe Lorraine & Meridionale de Laminage, a French steelmaker, canceled an order for a Sperry Rand Corp. Sperry Univac 1100-82 dual-processor computer system valued at more than \$6 million. The company, instead, turned to CII-Honeywell Bull, which will sell one of its 66 systems. . . .

Industry sources said the Univac order was canceled under strong pressure from the French authorities. . . .

On April 20, 1979, the *Journal of Commerce*, at 1, col. 5, reported that the French president, after offering Ford Motor Co. subsidies to establish an assembly plant in France, indicated that a French company might be selected instead. "He stressed that the government would have to consider not only what was good for Lorraine but what was in 'the interests of French industry' in making the decision."

<sup>32</sup> The "power oriented" and "rule oriented" approaches are discussed in Jackson, *supra*, note 1 at 98-101, where the author explains why "a particularly strong argument exists for pursuing even-handedly and with a fixed direction the progress of international economic affairs towards a rule oriented approach."

most likely to develop as a mechanism for centralized governmental decisionmaking since it envisions several international committees with authority to regulate the minimum prices on specific products.

The Subsidies and Countervailing Measures and Antidumping codes are designed to develop mechanisms for making and enforcing rules, rather than for intergovernmental commercial bargaining. Under these codes, the domestic industry of an importing nation may petition that nation to investigate whether exporters from another nation are receiving anticompetitive subsidies or dumping products so as to injure the domestic industry. If an affirmative determination results, the importing nation can take certain prescribed countermeasures to protect its domestic industry. This investigation procedure, with prescribed criteria for imposing remedial tariffs, could regularize the government practices of trading nations in these matters. Commercial activity could take place in reliance on the boundaries of government intervention established by the rules.

Under both codes, however, the importing nation is required to consult with the exporting nation prior to initiating an investigation. Moreover, the codes provide that the importing nation may terminate the investigation if certain undertakings as to prices, quantities or subsidy amounts are made by the exporter. These provisions create an opportunity for the importing nation to bargain away its differences with the exporting nation, rather than enforce rules against subsidies and dumping.

The Government Procurement and Technical Barriers to Trade (Standards) codes both have the potential to function well as systems of rules, rather than as contexts for commercial bargaining. Both codes require governments to conduct certain internal functions openly and within a rather narrow range of discretion. Thus they may be more readily enforceable as systems of rules than the requirements of other codes.

The "transparency" provisions found in some of the codes might assist in establishing a rule oriented approach. These provisions require each participating government to make available to the others full information concerning its activities in areas governed by the codes. This information will help disclose noncompliance and thus assist in holding countries accountable under the rules.<sup>33</sup>

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<sup>33</sup> One proposed bill to implement the Code on Subsidies and Countervailing Measures would require the responsible United States Government agency to publish a report at

It will also help disclose compromises negotiated in lieu of compliance. Such compromises may be more difficult when their terms are known to others who might seek equivalent treatment.

The Code on Technical Barriers to Trade (Standards) provides that when a nation proposes a technical standard which will be applied to imported products, it must notify the other signatories to the agreement and give them an opportunity to comment on the proposed standard. Under the Subsidies and Countervailing Measures Code, any signatory may inquire of another concerning "the nature and extent of any subsidy granted or maintained" by the other which affects trade. All parties are entitled to notify the GATT community of suspected subsidy practices of other parties. The imposition of countervailing duties will only occur through public proceedings in which the nation alleged to be involved in an improper subsidy practice will have the opportunity to examine the evidence and participate.

These transparency provisions will give lawyers an important quasi-investigative role in assisting clients to analyze whether foreign government behavior might have an adverse effect on the client's competitive opportunities abroad or at home, assisting the client in presenting demands that the United States Government seek information from the foreign government, and assisting the client and the Government to understand the significance of the information received.

Another part of the codes that will have a very significant impact on the development of a legal regime is the mechanism for resolving disputes between participating countries concerning their obligations under the codes. I defer this subject, however, until we have considered the United States implementing legislation.

### *B. Domestic implementation of the codes.*

Certainly the greatest need for the private lawyer's skills and energies will be found in the programs by which the United States Government implements internally the obligations it has undertaken in the codes. We are told that the codes will not be self-executing, that they will not authorize Executive Branch action or impose obligations on private parties, and that such authorization

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least twice a year "describing any practice engaged in by a foreign country which may constitute a bounty or grant." S. 538, 95th Cong., 2d Sess., 125 CONG. REC. S2061, S2065 (March 5, 1979).



and obligations will flow only from legislation adopted by Congress. This legislation will establish domestic programs which will, in the judgment of Congress, carry out the nation's code obligations. Implementation will thus be expressed in this legislation, in administrative action, and—to a degree not yet evident—in judicial review of administrative action.

Of course, the object of the implementing programs is not merely to insure compliance with United States obligations. There is also a need to insure that United States rights under the codes are adequately enforced. These include the right to information about foreign government activities, such as subsidy practices and government contracting procedures; the right to invoke the international dispute resolution process for certain offending actions; and the right to impose countermeasures under specified circumstances.

In legislating on countervailing duties and antidumping matters, where there is substantial prior experience, Congress should be able to set forth the responsibilities of the Executive Branch in considerable detail, defining standards for administrative decisions and specifying decisionmaking procedures more clearly than was previously possible. If Congress demands more careful and disciplined procedures in antidumping and countervailing duty cases, the ability of lawyers to play a constructive role in these proceedings will undoubtedly be enhanced. The administrative decisionmakers should be required to keep a complete record of all information received in their investigation and make it available to interested parties.<sup>34</sup> Unless a careful and complete record is kept, it is simply not possible to distinguish clearly between cases in which the agency makes an objective determination and those in which it yields to political pressures or other parochial interests. The agency should also be required to publish a written explanation of its decisions, with explicit findings of fact and citations to the evidence relied on to support them. In a case challenging nontariff import restrictions on the ground that they were adopted for political reasons and not in response to the criteria set forth in the governing statute, the United States Court of Appeals said that "a procedure not requiring an opportunity for oral pre-

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<sup>34</sup> Confidential business information can be made available under protective orders such as are commonly used in federal court litigation, including proceedings in the Customs Court. Cust. Ct. R. 6.1(c)(7) and (8). Authority to fashion these orders in each case could rest with the administrative agency involved, but sanctions for violating the orders could be imposed both by the agency and the court in which judicial review is available.

sentation . . . on crucial matters, and not requiring evidence in the record, is a seed bed for the weed of industry domination."<sup>35</sup> The court held that when the administrative decisionmaker comes to make factual determinations and legal conclusions, "he must think in terms of support in evidence and general standards, and cannot be guided solely by deference to industry desires."<sup>36</sup>

Implementation of one of the codes—on Technical Barriers to Trade (Standards)—will involve, potentially, a brand new regulatory effort with potentially large consequences for major segments of United States industry. Most of the product standards and test and certification systems in use in the United States are established by state and local governments and by industry groups. The scope and complexity of such standards and systems are immense, including such items as local building codes and health regulations, state laws on pressurized gas cylinders, and product specifications of the telecommunications industry. It has been suggested that Congress enact a blanket prohibition on all such standards which create "unnecessary obstacles to international trade," creating a civil right of action for injunctive relief in federal courts for private parties as well as the federal government. Attempting to comply with these new legal requirements, United States business managers and their lawyers will be facing difficulties not unlike those imposed by other major regulatory programs in the past. What is "an unnecessary obstacle to international trade?" Should businesses operating under established industrial standards undertake to review them and revise them unilaterally? What will be the expense and inconvenience if they are found to be in noncompliance? How does business ascertain reliably what the requirement means? If the technical standard is imposed by state or local law, how can a businessman find out whether it complies with the new federal requirement or is instead invalid? When a standard is ruled invalid, will a transition period be allowed for the adaptation of industrial practices to new technical standards? Are judges competent to examine the extreme technicalities of a United States industrial standard and ascertain whether, in the context of international competition, it creates "an unnecessary obstacle?"<sup>37</sup>

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<sup>35</sup> *Walter Holm & Co. v. Hardin*, 449 F.2d 1009, 1016 (D.C. Cir. 1971).

<sup>36</sup> *Id.* at 1016.

<sup>37</sup> Such litigation would probably raise questions quite similar to those which the federal courts have faced in cases under the Commerce Clause of the United States Constitution. See, e.g., *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), involving the question

To ask these questions is not to imply that all the horrors suggested are likely to occur. It is simply to suggest a large challenge American lawyers will encounter in assisting their clients to cope with this program.

*C. Judicial review in United States courts.*

The lawyer's role under the new codes and implementing legislation will, of course, be affected significantly by the extent to which the decisions of Executive Branch officials under these laws will be subject to judicial review. As noted above, judicial review of countervailing duty and antidumping determinations has in the past been impaired by jurisdictional limitations to such a degree that it was unavailable, as a practical matter, in most cases. The proposed implementing legislation would remove some of these jurisdictional limitations. First, review would be available in the Customs Court as soon as administrative procedures have been exhausted, rather than after the determination and assessment of the duties and the filing and denial of a protest.<sup>38</sup> Second, administrative decisions would be made on the basis of an administrative record which includes all information submitted in the course of the proceeding, all governmental memoranda relating to the case, and records of all ex parte contacts. The Customs Court would review administrative decisions under the substantial evidence standard. Third, determinations not to initiate an investigation would be subject to judicial review as well as determinations made after an investigation.<sup>39</sup>

These legislative initiatives would be natural products of a concern that has persisted for some years among members of Congress, that the discretion of the Executive Branch must be confined somewhat by enforceable statutory standards lest the Executive go too far in trading off important priorities, established by Congress pursuant to its explicit constitutional mandate, in response to political or foreign policy pressures which the President feels with particular intensity.<sup>40</sup> But confining the President's discre-

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whether an existing local regulation, which serves a legitimate purpose, is invalid because an alternative might exist which imposes a less severe restriction on trade.

<sup>38</sup> See, e.g., *Matsushita Elec. Ind. Co., Ltd. v. U.S. Treas. Dep't*, 67 Cust. Ct. 328 (1971), *aff'd*, 485 F.2d 1402 (C.C.P.A. 1973), *cert. denied*, 414 U.S. 21 (1973).

<sup>39</sup> See American Bar Association Resolution No. CV-8-76-S13, Report No. 124 (Aug. 1976) (ABA internal reference).

<sup>40</sup> The great discretionary power over the welfare of business enterprises presently enjoyed by the Treasury Department under antidumping and countervailing duty laws in the

tion in decisions regulating international trade has been somewhat more difficult than in decisions that merely affect domestic commerce, since the courts traditionally were quite reluctant to give close scrutiny to Executive Branch decisions affecting foreign relations.<sup>41</sup> Thus, the proposed expansion of judicial power is necessary if Congress wants reassurance that the policies it establishes will be carried out.

D. *The international dispute resolution mechanism.*

Certainly the greatest influence over the next few years on the development of a legal regime governing international trade will be the international dispute resolution process that is established, in an embryonic fashion, in some of the new codes. If it evolves in one direction, this process could strengthen the development of legal principles and rules for the guidance of nations and individuals in planning future conduct. However, the mechanisms established in the codes are so rudimentary that it is entirely possible that the dispute settlement process will function not to develop and strengthen rules, but to provide an escape from them into *ad hoc* compromises applicable only to individual situations and based on the political and economic trade-offs of the moment.

Since the United States economy will be increasingly tied to those of other nations, the direction in which the international legal regime evolves will have a great influence on the degree to which effective and reliable rules can be established and enforced in the domestic legal system. Clearly stated and enforceable international rules will reinforce the development of domestic rules that guide the United States economy in a fashion consistent with

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absence of effectively available judicial review is analogous to that which the same Department held until recently under the penalty provision, 19 U.S.C. § 1592. Treasury could impose enormous penalties for alleged import infractions, and then agree to mitigate them under procedures which then precluded the importer from securing judicial review of the government's action. See Gerhart, note 12 *supra* at 1101, 1130-35; Herzstein, *The Need to Reform Section 592 of the Tariff Act of 1930*, 10 INT'L LAWYER 285 (1976). Congress remedied this situation in response to the urging of the American Bar Association and various business groups. Pub. L. No. 95-410, Oct. 3, 1978.

<sup>41</sup> One prominent example of judicial deference to the Executive Branch in international trade matters is the recent statement by the Court of Customs and Patent Appeals that the Secretary of Treasury has a "wide latitude" within which he "may determine the existence or non-existence of a bounty or grant" under the countervailing duty statute, 19 U.S.C. § 1303. *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1216 (C.C.P.A. 1977), *aff'd* 437 U.S. 443 (1978). See also *Republic of Mexico v. Hoffman*, 324 U.S. 30, 36, 38 (1945); *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943) (courts will defer to State Department suggestion whether a foreign nation has the right to claim sovereign immunity in a particular case).

international expectations. But if international rules leave room for broad discretion in the actions of other countries, there will be strong practical pressures to leave broad discretionary power in the hands of our own government, to permit it to cope with the shifting behavior of other nations.

In 1978, the American Bar Association adopted a resolution urging

the United States Government to seek, during the current trade negotiations in Geneva, reform of the procedures for resolving disputes between nations concerning the application or interpretation of internationally agreed rules for the conduct of trade between nations, such reforms to be achieved through an international agreement creating a new set of procedures which include the following features:

The procedure should place great reliance on an adjudication by an impartial panel;

All adjudications should result in a reasoned opinion which will be published, to insure that the opinions can be subjected to informed criticism and can serve as precedents for future world trade practices;

The procedure should be understandable to the public, and should contain provisions which guarantee its integrity and impartiality, so that public and political acceptance of it will steadily increase; . . . .<sup>42</sup>

In 1976 a study panel of the American Society of International Law had recommended a uniform dispute resolution procedure for disputes under all codes, emphasizing use of impartial tribunals, published reports which "can become a part of a growing body of jurisprudence . . . as a means of guidance for future conduct of nations and as a means of bringing particular international trade problems to the attention of the international community. . . ." The study panel suggested that complaints be initiated not only by individual participating nations but also by an international secretariat or by the executive council of a world trade organization.<sup>43</sup>

The dispute resolution system set forth in the new codes falls far short of these goals, though it can be viewed as a modest start

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<sup>42</sup> ABA Resolution No. IC-2-78-S16B, Report No. 102 (Aug. 1978) (ABA internal reference).

<sup>43</sup> PANEL ON INTERNATIONAL TRADE POLICY AND INSTITUTIONS, AMERICAN SOCIETY OF INTERNATIONAL LAW, RE-MAKING THE SYSTEM OF WORLD TRADE: A PROPOSAL FOR INSTITUTIONAL REFORM 33-35 (ASIL Studies in Transnational Legal Policy No. 12, 1976).

which, if carefully and conscientiously developed by the participating nations, could grow into a system which enhances and reinforces the international legal regime.

Although almost all of the codes have separate dispute resolution systems, the procedures employed in each are largely the same. The first stage in resolving a dispute is consultation between the interested nations. If the dispute is not resolved through consultation, the complaining party may raise the issue with the committee established to administer the code under which the dispute has arisen. Should the committee fail to resolve the dispute through conciliation between the parties, it would then convene a panel to investigate the matter, consult with the interested parties and prepare a statement of facts and a recommended ruling.

The panel would be composed of three to five individuals of diverse backgrounds who would not sit as representatives of their governments. No member of the panel may be a citizen of a nation interested in the dispute. The panel would submit first its factual findings and subsequently its conclusions to the concerned parties prior to submitting either document to the committee.<sup>44</sup> By allowing the concerned parties to examine these documents first, it is hoped that they would agree to a resolution of the dispute prior to presentation of the panel's report to the full committee.<sup>45</sup>

After the panel has reported to the committee, the committee would issue its own statement concerning the facts of the dispute and its recommendation for corrective action. If the party to which the recommended action is directed is unable to comply, it must submit written reasons to the committee, which would then consider what other action to take.<sup>46</sup>

How will the lawyer for business enterprises function under

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<sup>44</sup> The timetable for panel decisions under the Subsidies and Countervailing Measures Code is much tighter than under other agreements. The panel must be established within thirty days after the dispute has been raised before the committee and must report back to the committee within sixty days after its establishment. Under most other codes, the panel must be established within three months after the dispute is presented to the committee and may take as much time as is reasonable under the circumstances to reach a decision, although six months is generally suggested.

<sup>45</sup> The committee which administers the Code on Technical Barriers to Trade (Standards) may choose, instead of forming a panel, to refer technical questions involved in the dispute to a technical expert group. As with a panel, no member of the technical expert group may represent his respective government and none is a citizen of one of the interested nations. The technical expert group will examine the matter, consult with the concerned parties and submit factual findings and conclusions as to the technical issues to the committee.

<sup>46</sup> In addition to the resolution procedures for disputes among concerned parties, the Subsidies and Countervailing Measures and Antidumping codes each provide a mechanism for

this system? At this stage, perhaps the best approach to this question is to ask a series of further questions:

1. Counseling clients: Will the decisions resulting from the international dispute resolution process function effectively as constraints on the actions of the United States and other countries?

2. Taking action against foreign government violations: Will there be a procedure by which private business entities or labor organizations can complain, in the international forum, about national government practices which distort trade and appear to be inconsistent with one of the codes? The dispute resolution mechanisms established in the new codes provide no such procedure. Perhaps it will be feasible some day, when confidence in the objectivity and competence of the international forum is greater.

When it appears that foreign government action is contrary to an international code and affects American interests: how will the United States Government decide whether to initiate international dispute resolution procedures?

The Senate Subcommittee on International Trade has stated that:

[a]bsent effective use of the dispute settlement apparatus by the United States, adherence to some of the codes by the United States could lead to minimal, uncertain, or perhaps harmful results.<sup>47</sup>

Under the implementing legislation, the President's Special Trade Representative (STR) will be authorized to recommend that the President take action under a revised version of section 301 of the Trade Act of 1974 to enforce United States rights under the new codes and the GATT articles generally. Any interested party

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an importing nation to investigate whether its domestic industry is being injured or is threatened with injury from an exporting nation's improper subsidy or from an exporter's dumping practices. Under its own law, the importing nation may undertake an investigation into a suspected subsidy or dumping practice which may injure domestic industry. The codes require that the investigation must consider simultaneously two principal issues: whether an improper subsidy or dumping practice exists and whether it injures or threatens to injure domestic industry. The investigation must be public and the interested nations and private enterprises must have an opportunity to examine all nonconfidential evidence and make their own submissions. In addition, the codes lay down strict standards for determining the amount and the starting date of any countervailing or dumping duties which may be imposed. Thus, internal self-help measures within specified limits are authorized under these codes, as well as international complaint mechanisms. Both can proceed simultaneously.

<sup>47</sup> Senate Finance Subcomm. on International Trade, Press Release No. H-5, at 4 (Feb. 8, 1979).

will be able to file a complaint with the STR setting forth foreign government conduct which it believes is inconsistent with code obligations. The STR will be required to respond within a brief time period, such as 45 days, by either commencing a section 301 proceeding or stating the reasons why it has decided not to do so.<sup>48</sup>

Is the STR decision wholly discretionary? Will it be subject to judicial review in any respect? What are the considerations which the responsible Government official should, and should not, take into account? Is the official free to decide that the United States will not complain internationally, even in the face of a clear-cut violation by a foreign government, because of extraneous political or economic considerations affecting United States relations with that government? Or, alternatively, must he decide to file a complaint when it appears to be meritorious, even though it appears likely that the act of complaining will bring forth serious economic or political consequences adversely affecting United States interests?

If the international dispute resolution process is unavailable or ineffective, section 301 of the Trade Act of 1974 will still authorize the President to impose unilateral sanctions when he determines that a foreign country is unjustifiably or unreasonably burdening United States commerce. Sanctions include withdrawal of trade concessions previously made and imposition of new duties or import restrictions on products of the foreign country. It appears that the decision whether to impose these sanctions will remain highly discretionary within the Executive Branch and will continue, as in the past, to be significantly affected by the general state of economic and political relations with the foreign government.

3. Taking action against the United States Government violations: When a foreign country or industry is aggrieved by conduct of the Government that might be inconsistent with code obligations, a lawyer for United States import interests or foreign producer interests might play some role in asking or assisting the officials of the foreign government to present a complaint in the international forum against United States action. One is prompted to speculate on whether the foreign government officials would welcome representation by private lawyers urging that a com-

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<sup>48</sup> H.R. 4537, 96th Cong., 1st Sess. § 901 (1979) (revising section 301 and adding section 302 to the Trade Act of 1974).



plaint *not* be filed. Such representations might come, for example, from United States producers or from consumer or importer interests in the foreign country which benefit from the imports. Presentations to the government by such interests are common in the United States.

4. Presenting facts and arguments to the international panel: Once an international dispute resolution proceeding has been commenced, to what extent will private lawyers for the affected business interests on both sides be allowed to participate in the proceedings? Will they be permitted to work along with the officials of the United States Government, and the foreign government, who are acting for their countries in the proceeding? Will all the pertinent information possessed by the government be made available to them? Will they be consulted on the factual evidence and length of argument to be presented? Will they be allowed to submit to the international forum, perhaps through their government channels, evidence and arguments of their own in addition to those presented by the government?<sup>49</sup>

5. Effect on United States law: How will our domestic law be influenced by interpretations of the codes in the international forum? Presumably Congress, in the implementing legislation, is mandating Executive Branch action along lines which the Government presently views as being consistent with United States obligations under the codes.<sup>50</sup> What will happen if the United States administration, acting under the implementing legislation, imposes, for example, countervailing duties on certain imports, and this action is upheld by domestic courts as consistent with the statute, but the international dispute resolution procedure results in a determination that the United States action is inconsistent

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<sup>49</sup> When the United States Government is a party in the domestic courts, private interests affected by the outcome of the case are allowed to intervene, become parties to the case, and submit evidence and arguments in addition to those presented by the government. FED. R. CIV. P. 24(a)(2).

<sup>50</sup> For example, the definition of subsidy in the proposed implementing legislation includes all of the export subsidies described in the Annex (Illustrative List of Export Subsidies) to the Code on Subsidies and Countervailing Measures plus the same types of domestic subsidies as are described in article 11 of the Code. H.R. 4537, 96th Cong., 1st Sess. § 101 (1979) (adding section 771(5) to the Tariff Act of 1930). The proposed implementing legislation also sets forth a procedure for investigating subsidy complaints which follows the Code in requiring that information submitted in the investigation, with few exceptions, be available to all parties and that investigation simultaneously consider the two issues of whether a subsidy exists and whether it injures domestic industry. H.R. 4537, 96th Cong., 1st Sess. § 101 (1979) (adding sections 702, 703, 705 and 777 to the Tariff Act of 1930).

with the code? It does not appear that Congress will authorize the Executive then to change its interpretation of United States law. It will be necessary to seek new legislation, to negotiate with the aggrieved foreign nations some reprieve for the offending United States conduct, or to suffer sanctions that may be imposed on the United States under the code. Present indications are that Congress will make permanent the President's authority to negotiate agreements concerning nontariff barriers and other trade distortions contained in Section 102 of the Trade Act of 1974, and will also continue the "fast track" legislative method for approving and implementing such agreements contained in Section 151. Thus, when the need arises to alter United States law to make a practice consistent with international decisions, these procedures can be utilized.

#### E. *Continuing negotiating authority.*

If Congress does authorize the President to engage in further negotiations on nontariff matters, such negotiations could be used by the participating nations to clarify and improve the codes recently agreed upon, to establish new codes for other areas of divergent national conduct which impairs the flow of trade, and to improve the dispute resolution process. The continuing negotiations can also, of course, be used to work out *ad hoc* solutions for individual industry problems, such as market sharing agreements or minimum import price mechanisms. Though such agreements may be useful or necessary in occasional situations, their widespread use would diminish the significance of general legal rules as a framework in which individual commercial decisions are made, and would instead substitute regimes of continuing administrative control over the course of commerce.

### IV. CONCLUSION

The private lawyer's role in international trade decisionmaking in the past has involved, in large part, efforts to influence Executive Branch action which was highly discretionary under United States law and subject to very few international constraints. There has been little opportunity for lawyers to participate, as they often do elsewhere in the American legal system, in the development of a reasonably reliable framework of legal principles and rules within which private businesses were free to plan

and carry out long-range commercial programs.

The broadly discretionary role of the federal government in making decisions with vast impact on private international trade has been unsatisfactory in several respects. It has deprived businesses of the reliability and predictability they need for long-range business programs that commit large amounts of investment capital and affect the destiny of large number of workers. And it has brought government into a more active role in commercial decisionmaking—who can buy and who can sell, in what quantity and at what prices—than is regarded as customary or desirable in the United States.

It has also raised a serious question concerning the legitimacy of government action. To the extent that private economic activity is to be regulated, the United States Constitution places responsibility for such regulation in the Congress, and the President's role is to execute such laws as Congress may adopt.<sup>51</sup> American businesses, workers, and consumers do not view their President as having a claim to any special understanding or competence in commercial decisions, either domestic or international. His political accountability is not sufficiently great to provide satisfactory public control over decisions he might make that directly alter patterns of business activity. Thus Executive Branch decisions regulating international trade have in significant instances been perceived as unfairly depriving workers of their jobs, unfairly increasing prices to consumers, or depriving businesses of the legitimate rewards of their investment and enterprise. They have been seen by both domestic industry and import groups as trade-offs of commercial interests for political interests, a process which is not per se improper, but which is unacceptable when the decisionmaker is not viewed as adequately understanding the commercial interests involved. The result is a loss of confidence in government, and a spread of the attitude that politics and power are more important than good economic performance in determining commercial success.

The only way to avoid further drift in this direction is to work steadily at building a system of rules governing Executive Branch

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<sup>51</sup> The President's power to regulate foreign commerce is largely limited to the authority granted him by Congress. Where Congress has enacted legislation affecting foreign commerce, the President may act under his power to "take Care that the Laws be faithfully executed." U.S. CONST., art. II, § 3. Otherwise, the President may act in the area of foreign commerce where Congress has specifically delegated powers to him by statute. See L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION*, 54-56, 94-107 (1972).

decisions in international trade—rules which have a strong claim to legitimacy. The rules will be so perceived when (1) they are produced by the political process, through Congress, (2) they are sufficiently clear to provide predictability in private commercial programs, and (3) they are applied through disciplined administrative procedures and are subject to meaningful judicial review to insure objective application and consistent interpretation.

Some might argue that this is precisely the wrong direction to move in; that we are already subject to too many laws and considerably overlawyered. More rules, they will observe, mean more complexity, burdening business with the continuing overhead and delays of regulation. They would urge that government decisions regulating international trade should not be less discretionary but more so, as is the case in many foreign nations, including not just the state trading countries but also Japan and some of the countries of Western Europe.

This argument presents a basic policy choice of immense magnitude for United States business and the American people. It involves a shift of power over commercial activity and decisionmaking from diverse private hands to centralized governmental authority. Though such a move would at first affect only international trading decisions, it would ultimately affect domestic commercial decisions also, in view of the increasing integration of the United States and international economies. Since American business is a highly sophisticated and complex organism, a system of discretionary regulation is likely to lead to bureaucratic complexities which exceed those involved in regulation under legal rules. Even complex bureaucratic regulation could not be subtle and flexible enough for the needs of the present business system, and would end up slowing and burdening economic activity. For these reasons, a move to greater government discretion over international trading arrangements is too fundamental a choice to be made by drift and without full public appreciation for the consequences.

In the absence of such a basic alteration in the relative roles of government and private decisionmaking in commercial activity, the American public and Congress will no doubt continue to expect that the relationship in international commerce will be much like that which prevails in domestic commerce. Decisions of government officials would then be distinctly limited by legal standards, and the standards would be enforceable not just by political processes but by judicial review available to parties

adversely affected. Less government, in this context, means more laws and—yes—a greater role for lawyers. The lawyers' role, ultimately, will be to insure that legislative standards are adequate, that administrative procedures fully reveal the facts and reasoning upon which official government decisions are based, and that judicial review is rigorous and meaningful. Lawyers for the private sector are guardians of the lines of official accountability. They have been fulfilling this function for years in regard to domestic commerce. The new trade agreements, reflecting and amplifying the dramatic scope of United States involvement in the world economy, will provide the opportunity for them to perform the same salutary work in connection with international commerce.

