ANNUAL SURVEY OF DEVELOPMENTS IN INTERNATIONAL TRADE LAW: 1985

As the volume of world trade burgeons, the demands on private international law associated with the trend toward a world economy escalate. In recognition of this private legal trend, The Georgia Journal of International and Comparative Law features a yearly survey of developments in international trade law. The following survey catalogues the changes and developments which occurred in international trade law during 1985, and will serve both academicians and practitioners. The survey highlights developments from a United States perspective, and focuses on areas such as the regulation, litigation, and multilateral or bilateral negotiation of trade issues.

The annual survey covering developments during 1986 will be published in the Spring of 1987.

—the 1986-87 Managing Board—
TRADE LAW SUPPLEMENT

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TAXATION

A. Legislation

1. Tax Reform Act of 1985

Grasping an "historic opportunity to restore confidence in the tax system and to assure the productive use of [United States economic] resources,"' the Ways and Means Committee of the House of Representatives (the Committee), at the urging of the Reagan Administration, drafted and introduced the Tax Reform Act of 1985. The bill proposes the most significant reforms in the Internal Revenue Code since 1954. On December 18, 1985 the House of Representatives passed the measure, which awaits action in the Senate.

a. Section 2

In light of the fundamental reforms that the Act would make to present tax laws, the Committee stipulated that Congress enact the bill as the Internal Revenue Code of 1985. The Internal Revenue Code of 1985 would combine provisions of the Internal Revenue Code of 1954 with the amendments made by the proposed Act. Section 2 of the Act addresses the preemptory effect that a newly adopted code would have upon existing tax treaties.

In general, when a statute and a treaty provision conflict, the one

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* Editors note: The writer's survey of H.R. 3838 addresses Congress' action on this bill through the end of 1985. Since then, the House and Senate passed a compromise version of H.R. 3838 entitled the Tax Reform Act of 1986. President Reagan signed this bill into law on October 22, 1986. The Annual Survey of Developments in International Trade Law: 1986, which should be published in the Spring of 1987, will highlight the provisions of the bill as it was enacted relevant to international trade.


3 H.R. REP. No. 426, supra note 1, at 78. "The last time the internal revenue laws were enacted into law as a whole was in 1954. Since that year, numerous bills have amended the Internal Revenue Code of 1954, but none has enacted the provisions of existing law, together with all amendments, as a new Code." Id.


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adopted later controls. The Internal Revenue Code of 1954 includes an exception to this rule providing that no section of the Code may apply where such application would be contrary to a United States treaty obligation. Section 2 of the Act would amend this exception regarding conflicting treaties and tax statutes. Section 2 provides that the enactment of a new code would conduce to application of the rule that the later in time of a statute or treaty controls. The Committee disavowed any intentions to change existing treaty relationships by the codification of the Act. The Committee emphasized, however, that it "is making substantive modifications to present law with clear policies in mind, and does not intend those policies to be defeated by literal interpretations of existing treaties."

b. Title VI—Foreign Tax Provisions

Title VI of the Act contains the bulk of the provisions regarding international trade law. The provisions of the title address six areas of foreign tax laws: foreign tax credit, source rules, United States taxation of income earned through foreign corporations, special tax provisions for United States persons, foreign taxpayers, and foreign currency exchange gain or loss.

Title VI proposes few changes affecting foreign tax credit rules. The measure retains the overall foreign tax credit limitation of present...
law, as well as the present law on the effect of losses on foreign tax credit. The bill also provides for the modification of the creditability of gross withholding taxes on interest and the deemed paid credit for a United States corporation's share of foreign taxes paid by a foreign corporation.

The bill includes several reforms regarding source rules. The types of income and expenses affected by the new source rules include among others: income derived from the purchase and sale of inventory-type property, income from the manufacture and sale of inventory-type property, income from intangible property, transportation income, dividend and interest income, and interest expenses.

Title VI includes several revisions regarding the United States taxation of income earned through foreign corporations. Such revisions focus primarily on tax haven income and the determination of United estates and trusts of the United States, as presently provided in I.R.C. § 7701(a)(30) (West Supp. 1985).


The bill clarifies "that foreign source losses reduce all types of foreign source income before reducing United States source income." Summary of H.R. 3838, supra note 12, at H12,439.

Under the bill the source is generally determined by the country of residence of the seller. The bill repeals the place-of-title-passage source rule of the present law. Id. at H12,438.

The bill provides that "[a]t least 50 percent of such income must be allocated to manufacturing activity, which is sourced where the manufacturing occurs." Id.

"With respect to royalty income, the bill retains the place-of-use source rule of present law." Id.

"The bill sources transportation income from United States-foreign routes as 50 percent United States source income and 50 percent foreign source income." Id. The bill repeals certain rules relating to sourcing income from the leasing of vessels and aircraft. Id.

The bill provides that interest, dividends, gains receivable by banks and insurance companies, base company rents and royalties, and gains from foreign currency shall be taxed currently if earned by controlled foreign corporations. In addition, the bill replaces the subjective tax-avoidance safe-harbor rule with an objective test. Id.
States taxpayer control of foreign corporations.\textsuperscript{22} The measure also addresses the taxation of foreign investment companies, possessions-chartered corporations, and the de minimus tax haven income rule.\textsuperscript{23}

The measure includes special tax provisions for United States persons, particularly with respect to United States possessions and foreign sales corporations (FSCs).\textsuperscript{24} Under Title VI, the Virgin Islands will continue to use the mirror code,\textsuperscript{25} while the Virgin Islands inhabitant rule is repealed.\textsuperscript{26} The bill proposes full authority to Guam and the Commonwealth of the Northern Mariana Islands to determine their own income tax laws.\textsuperscript{27} The bill retains the existing possession tax credit for United States operations within the possessions, with certain modifications.\textsuperscript{28} The bill also changes the reduction in taxable income for FSC individual shareholders from sixteen percent to fourteen percent of export income, and from fifteen percent to thirteen percent for corporate shareholders.\textsuperscript{29} Corresponding changes are made to rules for domestic international sales corporations (DISCs).\textsuperscript{30}

\textsuperscript{22} \textit{Id.} For instance, the bill extends the anti-tax haven rules to foreign corporations when 50\% or more of the vote or value of that corporation belongs to 10\% United States shareholders. \textit{Id.}

\textsuperscript{23} \textit{Id.}

\textsuperscript{24} \textit{See} I.R.C. §§ 921-27 (West Supp. 1985). In order to enhance global export competitiveness among United States firms while complying with GATT, in 1984 Congress generally substituted Domestic International Sales Corporations (DISCs) with Foreign Sales Corporations (FSCs) as a new export tax incentive. Tax Reform Act of 1984, Pub. L. No. 98-369, tit. VIII, 98 Stat. 985. \textit{See Note, DISC to FSC: A Small Business Alternative?,} 15 GA. J. INT’L & COMP. L. 351 (1985) [hereinafter cited as \textit{DISC to FSC}]. While the purpose and forms of exempted income of the two exporting companies are similar, their structures are different. The FSC statutes, unlike the DISC provisions, require foreign incorporation, foreign presence, and certain technical compliance by the export company. \textit{Id.} at 358-60. \textit{Compare} FSC statutes with DISC statutes, \textit{infra} note 30 (explaining the form and existing DISC provisions).

\textsuperscript{25} \textit{Summary of H.R. 3838, supra} note 12, at H12,439.

\textsuperscript{26} \textit{Id.}

\textsuperscript{27} \textit{Id.}

\textsuperscript{28} Under the bill the modifications involve the optional cost sharing method of allocating intangible income and the active income test for possession corporation status. \textit{Id.}

\textsuperscript{29} \textit{Id.} at H12,440.

\textsuperscript{30} \textit{Id.} Sections 991-97 of the Internal Revenue Code (West Supp. 1985) set out the statutory provisions relating to DISCs. Congress enacted DISC legislation in 1971 to provide tax incentives for United States firms to increase their exports. Under those provisions United States corporations which produced and sold abroad through foreign subsidiaries generally could postpone payment of United States tax on the foreign earnings to the extent the earnings were kept abroad. \textit{See H.R. REP. No. 533, 92d Cong., 1st Sess. 58, reprinted in 1971 U.S. CODE CONG. & AD. NEWS
The measure amends certain rules regarding foreign taxpayers. The branch-level tax which the President proposed as a substitute for the present dividend and interest withholding taxes has been generally adopted. Under a separate provision, the bill treats income or gain as effectively connected with a United States trade or business if the income or gain is attributable to a different taxable year and would have been so treated had it been taken into account in the other year. The bill also amends the provisions governing accumulated earnings tax and personal holding company tax for foreign corporations.

In addition, Title VI clarifies the tax treatment of foreign currency exchange gains or losses, as well as clarifying the character, source, and timing of such treatment. Generally, the bill provides that exchange gain or loss is ordinary in nature. All business entities that account for foreign operations in a foreign currency are generally required to use a profit and loss translation method. For purposes of the foreign tax credit, a foreign tax is translated at the exchange rate in effect on the payment date. The bill also addresses appropriate exchange rates for the indirect foreign tax credit.

c. Other Provisions


Summary of H.R. 3838, supra note 12, at H12,440.

Id.

This provision would allow foreign corporations a net capital deduction for purposes of calculating the accumulated earnings tax or personal holding tax only if the gains are taxed by the United States at the corporate level. Id.

Id.

Id.

Id.

Id.


Summary of H.R. 3838, supra note 12, at H12,438.


2. Unitary Tax

During 1985, proposed federal preemptory legislation, foreign retaliatory legislation, and corporate lobbyists intensified the movement for the repeal of the worldwide unitary apportionment method of taxation [unitary tax] existing in a minority of states. Two states, Colorado and Indiana, repealed unitary tax laws in 1985 and substituted methods of taxing multinational corporations on their

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43 The worldwide unitary apportionment method is an accounting method by which states estimate the percentage of a firm’s worldwide income earned in the state based on the number of workers employed in the state, the extent of sales activity in the state, and the amount of property located in the state.


In response to the failure of these seven states, particularly California,\footnote{California is the only remaining unitary tax state of significant commercial consequence. In 1984 the state collected two-thirds of the estimated $750 million raised by the unitary tax nationwide. Special Report: Outlook '85, DAILY TAX REP. (BNA) No. 9, at 39 (Jan. 14, 1985) [hereinafter cited as Special Report]. According to estimates, California would lose $258 million in revenue each year from the repeal of the unitary tax method and the enactment of the water's edge approach. Unitary Taxes: Apartheid Amendment Imperils California Unitary Reform Bill, DAILY TAX REP. (BNA) No. 179, at G-1 (Sept. 16, 1985).} to repeal the unitary tax method, and to foreign pressure for its repeal,\footnote{The Treasury Department is "anxious to resolve the unitary tax issue because [United States] trading partners complain the practice violates existing tax treaties by imposing a tax on income in more than one country." Unitary Taxes: Treasury Defers Decision to Recommend Federal Ban on State Taxation of Global Business Profits, DAILY TAX REP. (BNA) No. 160, at G-1 (Aug. 19, 1985). The adverse consequences of state unitary taxation have led to formal diplomatic complaints from such trading partners as Canada, the United Kingdom, West Germany, Belgium, the Netherlands, Italy, Switzerland, and Japan. 131 CONG. REC. S17,975 (daily ed. Dec. 18, 1985) (statement of Sen. Wilson) [hereinafter cited as Statement of Wilson]. See also infra notes 54-57 and accompanying text. According to Senator Pete Wilson, one of the sponsors of the Unitary Tax Repealer Act, the pressure from foreign governments and the potential for "serious disruption of international commerce" are the main reasons for federal preemptory legislation. Statement of Wilson, supra at S17,975.} members of the United States Senate and House of Representatives introduced on December 18, 1985 the Unitary Tax
This proposal would mandate taxation of multinational corporations by the "water's edge" approach. The Unitary Tax Repealer Act, which the Treasury Department prepared at the request of President Reagan, has three aspects. First, it would ban the states' use of the unitary tax method. Second, it would require multinational corporations to increase substantially the amount of financial information now provided to the Internal Revenue Service. The Service would share that information with states which use the water's edge approach to enable those states to determine accurately how much income a corporation produced in each state. Third, the legislation would prohibit states from taxing more than an equitable portion of the dividend income the corporations earn from other corporations which the water's edge approach excludes.

In July 1985, Great Britain enacted retaliatory legislation aimed at United States multinational corporations conducting business in unitary-tax states. If imposed, the British legislation would deny these

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54 For a description of Great Britain's retaliatory measures in its 1985 Finance Act, see Unitary Taxes: United Kingdom Adopts Retaliatory Move Against U.S.
firms a partial tax credit of United States Advance Corporation Tax, which Great Britain imposes under the United States-United Kingdom Double Taxation Treaty. The legislation would apply to most United States multinational corporations with subsidiaries in Great Britain. In November 1985 the British Government, responding to the proposed federal preemptory legislation, suspended implementation of the retaliatory measures until 1987 to provide the federal and state legislatures time to repeal unitary tax laws.

Representatives of both foreign and domestic multinational corporations lobbied in 1985 for legislative repeal, particularly at the state level. Foreign multinational corporations, wielding pledges of new investments, were instrumental in the repeal of unitary tax laws in Indiana in 1985 and Florida in late 1984.

States, DAILY TAX REP. (BNA) No. 133, at G-10 (July 11, 1985) [hereinafter cited as Retaliatory Move]; Unitary Taxes: Comments to Treasury Urge Stronger Federal Action to Curb States’ Use of Unitary Taxes, DAILY TAX REP. (BNA) No. 202, at G-3 (Oct. 18, 1985) [hereinafter cited as Comments to Treasury].

"Comments to Treasury, supra note 54, at G-4. See generally 3 TAX TREATIES (CCH) ¶ 8103W (regarding the elimination of double taxation under the current United States-United Kingdom treaty). Presently, dividends which foreign subsidiary corporations pay to domestic parent corporations, whether the latter resides in Great Britain or the United States, are not taxed by the government of the other country. "This refund under present law could amount to as much as 20 percent of the dividend remitted to a United States parent company by its British subsidiary." Comments to Treasury, supra note 54, at G-4. Under the retaliatory measures, target United States firms would lose their tax credit for dividends paid to them by their United Kingdom subsidiaries. Retaliatory Move, supra note 54, at G-10. The legislation could cost United States firms at least $680 million each year. Id.

Retaliatory Move, supra note 54, at G-10. Under the measure the British Government would target United States firms or the firms’ affiliates which meet one of three criteria: the location of 7.5% or more of the firm’s property, payroll, or sales in a unitary tax state; the subjection to state income tax within a unitary state; or the location of the firm’s principal place of business in a unitary state. Id.


Multinational corporations have expressed their support for federal legislation which would repeal the unitary tax. These corporations, however, may withdraw their support if California and other unitary tax states repeal their unitary tax laws. These corporations favor state taxation by the water’s edge method over the proposed federal legislation which would dramatically increase the information disclosure that the Internal Revenue Service requires of these firms. See Comments to Treasury, supra note 54, at G-3; Treasury Proposal, supra note 52, at G-1; Unitary Taxes: Fate of Bill to Bar State Unitary Taxes Linked to Action in California Legislature, DAILY TAX REP. (BNA) No. 245, at G-5 (Dec. 20, 1985).

The Japanese corporations were particularly aggressive advocates of Florida’s repeal, pledging as they did in other states to reward Florida with new factories. The Japanese firms similarly rewarded Indiana upon the repeal of its unitary tax
3. Tax and Trade Concessions

The House agreed to a compromise resolution on December 11, 1985 that would provide tax and trade concessions for Micronesia and the Marshall Islands. Among the provisions of the "Compact of Free Association" is the extension of the possessions tax credit to Micronesia and the Marshall Islands. The House approved the Senate's provisions to make the credit immediately available. The measure also would grant various imports from Micronesia and the Marshall Islands duty-free entry into the United States. The aim of the compromise approved by the House is to provide "incentives necessary for economic development in Micronesia and the Marshall Islands while protecting United States industry ... from any potential adverse import competition." Companion measures have been introduced in both Houses which would grant special tax and trade concessions to Bermuda. The measures would give the British commonwealth benefits similar to those awarded to its Caribbean neighbors under the United States Caribbean Basin Initiative. The tax and trade concessions are "in-

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61 Essentially, the extension of the possessions tax credit to Micronesia and the Marshall Islands would allow United States corporations operating there to claim the same possessions tax credit that is currently available to businesses operating in Puerto Rico. See I.R.C. § 936 (West Supp. 1985).

62 Imports from Micronesia and the Marshall Islands would be granted duty free treatment, subject to product content requirements prescribed under the so-called generalized system of preferences. Duty free entry would be allowed only if an item is substantially made locally and contains at least 35% of locally made items. Fifteen percent of that local content rule could come from the United States. H.R.J. Res. 187, supra note 60, at H11,820-22. Another tax component of the measure provides for the appointment of the Secretary of the Treasury to an arbitration panel to arrange replacement federal benefits in the event the possessions tax credit is scaled back. Id. See generally Tax Treaties: House Rules Panel Clears Compromise Micronesia Tax-Trade Measure for House Floor Action, DAILY TAX REP. (BNA) No. 238, at LL-1 (Dec. 11, 1985); Tax Treaties: House Approves Compromise Version of Micronesia Tax-Trade Measure, DAILY TAX REP. (BNA) No. 240, at LL-4 (Dec. 13, 1985).


tended to improve United States relations with Bermuda as it prepares
for independence, expected in the next five years."

B. Income Tax Treaties and Protocols

1. Instruments of Ratification Exchanged

During 1985 the United States exchanged instruments of ratification
regarding income tax treaties and protocols with France, Italy and
Cyprus. The exchange of instruments with France on August 23,
1985 involved the 1984 protocol that amends the income and property
tax convention currently in effect between France and the United
States. Among its provisions, the protocol amends the double tax-

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66 Trade Policy: Measures Would Give Tax, Trade Breaks to Bermuda, DAILY

21, 98th Cong., 2d Sess. (1984); 2 TAX TREATIES (CCH) ¶ 2836D [hereinafter cited
as Tax Protocol with France]. For an explanation of the protocol, see Report
of Joint Committee on Taxation, id. at ¶ 2836E [hereinafter cited as JCT-France]. See
also United States Treasury Department Technical Explanation, id. at ¶ 2836F; Report
of the Senate Foreign Relations Committee, id. at ¶ 2836G.

68 Convention for the Avoidance of Double Taxation and the Prevention of Fiscal
Evasion, Apr. 17, 1984, United States-Italy, U.S.T. — , T.I.A.S. No. — ,
reprinted in S. TREATY DOC. No. 28, 98th Cong., 2d Sess. (1984); 1 TAX TREATIES
(CCH) ¶ 4328. The Senate attached a reservation of a clarifying nature to the
instruments of ratification. The reservation clarifies that United States taxpayers are
not entitled to double foreign tax credits for Italian taxes paid by so-called “dual
resident” corporations. Highlights of the Italian Income Tax Treaty, id. at ¶ 4302
[hereinafter cited as Highlights of Italian Tax Treaty].

For explanations of the treaty and accompanying protocol, see Pearlman Discusses
Pending Treaties, 3 TAX TREATIES (CCH) ¶ 9881, at 9771-72 [hereinafter cited as
Statement of Pearlman]; Members of Joint Committee on Taxation Comment on
Treaties, id., ¶ 9882, at 9796-99 [hereinafter cited as Comments on Treaties]. See
also Joint Committee on Taxation, Explanation of Proposed Income Tax Treaty
(and Proposed Protocol) Between the United States and the Republic of Italy (JCS-
30-85), July 29, 1985, reprinted in DAILY TAX REP. (BNA) No. 146, at J-3 to J-18
(July 30, 1985).

69 Convention for the Avoidance of Double Taxation and the Prevention of Fiscal
Evasion, Mar. 19, 1984, United States-Cyprus, U.S.T. — , T.I.A.S. No. — ,
reprinted in S. TREATY DOC. No. 32, 98th Cong., 2d Sess. (1984); 1 TAX TREATIES
(CCH) ¶ 2001A. For explanations of the treaty, see Treasury Department Technical
Explanation, id. at ¶ 2036; Report of the Senate Foreign Relations Committee, id. at
¶ 2037 [hereinafter cited as Senate Report on Cypriot Tax Treaty]; Statement of
Pearlman, supra note 68, at 9774-75; Comments on Treaties, supra note 68, at 9788-
92. See also Joint Committee on Taxation, Explanation of Proposed Income Tax
Treaty Between the United States and the Republic of Cyprus (JCS-29-85), July 29,

70 JCT-France, supra note 67, at 2819-7ZC. For the text of the United States
ation provisions of the current convention. The protocol also modernizes the language of the treaty provision which sets forth the basic United States foreign tax credit rule, thereby bringing the provision into full conformity with the corresponding provision of the United States model income tax treaty. Furthermore, the protocol broadens the exchange of information article of the current treaty to conform more closely with that of the United States model. The provisions of the protocol became effective on October 1, 1985.

The new Italian income tax treaty, of which instruments were exchanged on December 30, 1985, comprehensively revises an older income tax treaty which United States and Italy negotiated in 1955. During the interval the income tax laws of both countries changed significantly. Under the new treaty, the provisions concerning dividends, interests, royalties and capital gains are more favorable to United States investors than those under the previous treaty. The treaty is patterned on model income tax treaties of the United States and the Organization of Economic Cooperation and Development (OECD). The provisions of the new treaty with respect to taxes withheld at the source will take effect for amounts paid or credited on or after February 1, 1986. The provisions concerning other taxes take effect for taxable periods beginning on or after January 1, 1985.

The new Cypriot income tax treaty, of which instruments were exchanged on December 31, 1985, replaces an older draft treaty which had to be renegotiated after Cyprus split into Greek and Turkish

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model income tax treaty, see Treasury Department's Model Income Tax Treaty of June 16, 1981, 1 Tax Treaties (CCH) ¶ 158 [hereinafter cited as United States Model Treaty].

71 JCT-France, supra note 67, at 2819-7ZK.
72 Id.
73 Tax Protocol with France, supra note 67, at 2819-7Q; 3 Tax Treaties (CCH) ¶ 9878.
74 Highlights of Italian Tax Treaty, supra note 68.
75 Statement of Pearlman, supra note 68, at 9771.
76 Id.
77 Id. See generally United States Model Treaty, supra note 70.
78 Statement of Pearlman, supra note 68, at 9771. For the text of the OECD model income tax treaty, see Organization for Economic Co-operation and Development Model Convention for the Avoidance of Double Taxation with Respect to Taxes on Income and Capital, 1 Tax Treaties (CCH) ¶ 151 [hereinafter cited as OECD Model Treaty].
79 Highlights of Italian Tax Treaty, supra note 68.
80 Id.
enclaves. The treaty's rules regarding the taxation of business profits and other forms of income are similar to those found in the United States model treaty and the OECD model treaty. The Cypriot treaty provides for maximum rates of tax at source on payments of dividends, interest, and royalties. Furthermore, the treaty includes exchange of information and anti-abuse provisions to curb tax haven advantages existing under current Cypriot law. The treaty's provisions take effect for calendar or taxable years beginning on or after January 1, 1986.

In addition, the United States Senate gave its advice and consent to ratification of the first income tax treaty with Barbados. The treaty replaces the United States-United Kingdom treaty under which the extension to Barbados was terminated effective in 1984. The treaty contains rules concerning the taxation of business profits and other forms of income as well as provisions for the avoidance of double taxation similar to those found in most United States tax treaties. It also includes a broad provision for the exchange of information and anti-abuse provisions directed toward investment and trade companies in the Barbados offshore sector.

The Treasury views the treaty with Barbados as significant for two reasons. It is the first treaty with a major Caribbean nation and therefore demonstrates United States interest in negotiating in the

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12 Statement of Pearlman, supra note 68, at 9774.
13 Id.
14 1 TAX TREATIES (CCH) ¶ 2033.
16 Statement of Pearlman, supra note 68, at 9772.
17 Id. at 9773-74.
18 Id. at 9773.
Furthermore, the agreement illustrates the importance of such treaties to developing countries seeking Treasury Department approval as hosts to foreign sales corporations.  

2. Tax Treaties Signed, Awaiting Senate Approval

As of the end of 1985, proposed treaties with the People’s Republic of China and Denmark, as modified by the proposed pro-
tocol," awaited Senate ratification. The Senate Foreign Relations Committee has approved both treaties; however, objections by two senators have stalled Senate ratification until perhaps the second half of 1986.44

Negotiators in 1985 signed new income tax treaties with Sri Lanka95 and Tunisia.96 If approved, each treaty would be the first between the United States and the respective countries.

3. Treaty Negotiations Completed, Awaiting Signature

The pace of negotiations for updated income tax treaties with major trading partners and new negotiations with developing countries slowed

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The proposed treaty with Denmark is similar in most respects to the OECD model treaty and the United States model treaty. Statement of Pearlman, supra note 68, at 9772. See generally OECD Model Treaty, supra note 78; United States Model Treaty, supra note 70. Several features, however, distinguish the proposed treaty and accompanying protocol from other United States model treaties. JCT-Denmark, supra at J-35 to J-37. Under the protocol Danish income tax imposed under the Danish Hydrocarbon Tax Act will be treated as a creditable income tax for United States foreign tax credit purposes. The Hydrocarbon Tax Act taxes income from the extraction of hydrocarbons, including oil, in Denmark and its portion of the continental shelf. Id. The treaty also provides certain United States shareholders in Danish corporations reduced withholding taxes as well as an imputation credit with respect to dividends which the Danish corporations distribute. Id.


44 Senator Jesse Helms requested the delay on the China pact to study the impact of its allegedly lenient treaty-shopping provisions. Helm's chief concern was that the treaty is a deliberate attempt to induce foreign investment in mainland China at the expense of that in Taiwan. See Tax Treaties: Senate Committee Okays Four Tax Accords, Postpones Action on U.S.-China Tax Pact, DAILY TAX REP. (BNA) No. 234, at G-2 (Dec. 5, 1985). Representatives of United States corporations engaged in trade with China are lobbying extensively for ratification. Ratification of the Treaty would result in lower China withholding tax rates for those corporations. Tax Treaties: Senate Fails to Act on China Pact Despite Business Lobbying, DAILY TAX REP. (BNA) No. 250, at G-1 (Dec. 30, 1985).

The Senate failed to vote on the Danish treaty because of objections raised by Senator Howard Metzenbaum. Metzenbaum objected to the foreign tax credit provision for United States oil companies as an offset to the Danish hydrocarbon tax. Id. Metzenbaum's objection also blocked the floor vote on the treaty in 1984. See supra note 92 (discussing the hydrocarbon tax provision).


96 Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion, June 17, 1985, United States-Tunisia, ____ U.S.T. _____, T.I.A.S. No. ____,
somewhat in 1985.\textsuperscript{97} This slowdown was partly attributable to the Treasury Department's concentration on matters such as tax reform\textsuperscript{98} and to conflicting tax policies between the United States and certain developing nations.\textsuperscript{99} The United States has completed formal negotiations on an income tax treaty with the country of Trinidad and Tobago.\textsuperscript{100} The treaty awaits signature. Income tax treaties with Austria, Finland and Sweden also await signatures as of the end of 1985.\textsuperscript{101}

4. Tax Treaties Under Active Negotiation

Active negotiations are at various stages for income tax treaties with Belgium, Germany, India, Indonesia, Ireland, Netherlands, Netherlands Antilles, Switzerland, Thailand, and Zambia.\textsuperscript{102}

5. Caribbean Basin Initiative Beneficiary Designation

On March 14, 1985, President Reagan designated the Bahamas as a beneficiary country under the Caribbean Basin Economic Recovery Act.\textsuperscript{103} Designation will entitle Bahamian products to duty-free treat-
ment, except for products statutorily excluded. As a beneficiary, the Bahamas will have the opportunity to become an eligible domicile of foreign sales corporations by entering into an exchange of information agreement with the United States on tax matters.\textsuperscript{104}

C. Regulations

1. Income from Sources Without the United States

The Service has amended temporary and proposed regulations under Treasury Decision 8046\textsuperscript{105} to permit United States bankers and others to sell overseas debt obligations backed by mortgages of United States citizens. The amendments liberalize earlier rules requiring certification that each interest payment was not being made to a United States taxpayer.\textsuperscript{106} Under the amended regulations, foreign branches of United States financial institutions and European clearing houses handling interest payments can certify on an annual basis.\textsuperscript{107} The amendments also clarify how United States-owned Eurobond clearing agencies and the public should comply with the certification procedures. Great demand is anticipated for investment vehicles backed by United States mortgages and could result in an influx of hundreds of millions of dollars from overseas.\textsuperscript{108}

The Service began work in 1985 on regulations in connection with transfer pricing rules for foreign sales corporations.\textsuperscript{109} According to a 1985 status report on IRS rules,\textsuperscript{110} the Service is scheduled to propose the transfer pricing rules by early 1986.

\begin{footnotes}
\item[\textsuperscript{104}] 3 TAX TREATIES (CCH) ¶ 9893. See generally id. at ¶ 175 (technical explanation of the Caribbean Basin Exchange of Information Agreement).

\item[\textsuperscript{105}] 1985-2 C.B. 61. The temporary regulations are proposed as final regulations under I.R.C. §§ 163, 871 and 881 (West Supp. 1985). Id.


\item[\textsuperscript{107}] 1985-2 C.B. 63.

\item[\textsuperscript{108}] Securities: IRS Permits Overseas Sales of Mortgage-Backed Debt, DAILY TAX REP. (BNA) No. 160, at G-3 (Aug. 19, 1985). Some United States commercial bankers, however, have commented that the proposed registration system would be burdensome because it would entail information reports on transactions not subject to federal income tax. Tax Compliance: Commercial Bankers Hit IRS Reporting Rules for Foreign Mortgage Interest Payments, DAILY TAX REP. (BNA) No. 210, at G-2 (Oct. 30, 1985).


\item[\textsuperscript{110}] Id.
\end{footnotes}
2. Withholding Taxes of Foreign Corporations and Nonresident Aliens

In Treasury Decision 8015\textsuperscript{111} the Service adopted final regulations specifying a new place where foreign corporations or foreign partnerships engaged in a trade or business within the United States may file requests for exemptions from withholding. The Office of International Operations has been reorganized and redesignated as the Foreign Operations District. As part of the reorganization, jurisdiction over all returns for withholding at the source was shifted from the Foreign Operations District to the district in which the related books and records are maintained.\textsuperscript{112} Therefore, a foreign corporation or foreign partnership must request an exemption from withholding from the district director in whose district the related books and records are kept.\textsuperscript{113}

3. Information and Returns

In Treasury Decision 8028\textsuperscript{114} the Service finalized regulations which require shareholders, directors and officers of foreign holding companies to file information returns. While the changes expand the number of persons required to file information returns, they also simplify the reporting requirements with respect to foreign personal holding companies. The regulations clarify changes made in sections 6035 and 6679\textsuperscript{115} of the Internal Revenue Code (I.R.C.) by section 340 of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA).\textsuperscript{116}

In Treasury Decision 8040\textsuperscript{117} the Service issued final regulations requiring information returns of foreign-owned companies with respect to United States earnings, and of United States persons with respect to certain foreign corporations. The regulations set forth the requisite information, the time and manner for filing the information returns, and penalties for failure to report information. The regulations amend existing regulations under I.R.C. sections 6038 and 6038A.\textsuperscript{118}

\textsuperscript{111} 1985-1 C.B. 293.
\textsuperscript{112} Id. at 294.
\textsuperscript{113} Id.
\textsuperscript{117} 1985-2 C.B. 291.
\textsuperscript{118} See id. (citing Treas. Reg. §§ 1.6038-2, 1.6038A-1). Among its provisions, T.D. 8040 clarifies and narrows the definitions of "reporting corporation" and "related
D. Revenue Rulings and Procedures

1. Foreign Tax Credit

In Revenue Ruling 85-3 the Service ruled that an affiliated group of domestic corporations, such as a parent and its subsidiaries which each own less than ten percent of a foreign corporation's stock, is not entitled to a deemed-paid foreign tax credit, even if the shares aggregate ten percent. Section 1502 of the Internal Revenue Code and the consolidated return regulations thereunder do not provide an exception to the requirement of I.R.C. section 902(a) that a domestic corporation own directly ten percent or more of the voting stock of the foreign corporation.

In Revenue Ruling 85-5 the Service held that the foreign tax credit reduction for Western Hemisphere trade corporations that join in filing a consolidated income tax return is eligible for the carryback and carryforward provisions of I.R.C. section 904(d) (now section 904(c)). The credit, however, may not be used to offset tax on foreign source income of corporations in the affiliated group which do not qualify as Western Hemisphere trade corporations.

2. Withholding of Tax on Foreign Corporations and Nonresident Aliens

The Service released Revenue Procedure 85-41 giving foreign investors of United States real property interests guidance for reducing or eliminating withholding through withholding certificates issued by the Service. The Tax Reform Act of 1984 provided for the withholding of tax on real property dispositions under I.R.C. section 1445. The

corporation" under Treas. Reg. § 1.6038A-1. In addition, T.D. 8040 either deletes or revises various "burdensome" filing requirements and provides guidance with respect to certain reporting methods under Treas. Reg. § 1.6038A-1.

119 1985-1 C.B. 222.
121 Id. at § 902(a).
122 1985-1 C.B. 223.
124 I.R.C. § 904(c) (West Supp. 1985).
125 1985-1 C.B. 323.
126 1985-2 C.B. 482.
revenue procedure describes circumstances in which certificates may be issued, including situations in which the amount to be withheld would exceed the transferor's maximum tax liability, reduced withholding would not jeopardize collection of tax, the transferor is exempt from United States tax, and an agreement for payment of the tax is reached. It also explains the method for obtaining and filing certificate applications. Furthermore, the revenue procedure provides sample forms of security instruments which "in most circumstances are acceptable to the Service to be used when requesting a withholding certificate." 

In Revenue Ruling 85-193 the Service ruled on the withholding procedures of tax on interest income of foreign corporations and nonresident aliens from obligations purchased between interest payment dates. Under the ruling some obligations were purchased at prices that reflected the principal plus interest accrued to the date of purchase. The Service held that such withholding pursuant to I.R.C. sections 1441-42 should be based on the gross amount of interest paid on the interest payment date, rather than on the amount of interest accrued from the date of purchase.

3. Domestic International Sales Corporations

In Revenue Ruling 85-86 and the companion Announcement No. 85-90, the Service addressed the tax consequences of a distribution by a former domestic international sales corporation (DISC) to its S corporation shareholders. Distributions made from accumulated DISC income derived before 1985 by a former DISC to its Subchapter S corporation shareholders should be treated as made from previously taxed income to the extent thereof. Such treatment is limited to DISC distributions made prior to July 1, 1985. The distribution of accumulated DISC income will increase the S corporation's accumulated adjustments account and the basis of stock held by the S corporation's shareholders. Distributions made after June 30, 1985

129 Id. at 488-93.
133 1985-1 C.B. 291.
135 See generally supra note 30 (describing DISC statutes).
137 Id. (citing I.R.C. §§ 1367(a), 1368(e)).
should be treated as made first out of current earnings and profits, and then out of previously taxed income.\textsuperscript{138}

New conditions and procedures are prescribed in cases in which intercompany prices and commissions between a DISC and its related supplier are redetermined by the Service. Revenue Procedure 85-45\textsuperscript{139} modifies the conditions and procedures previously prescribed in Revenue Procedure 84-3 to conform them to section 1.994-1(e)(5)(v) of the Income Tax Regulations.

4. No Rulings Lists

In Revenue Procedure 85-27\textsuperscript{140} the Service amended a no-rulings list, which Revenue Procedure 85-22\textsuperscript{141} established, by deleting an item relating to gain from exchanges of stock in foreign corporations.\textsuperscript{142} The Service amplified the same no-rulings list in Revenue Procedure 85-59\textsuperscript{143} to include rulings on certain original issue discount obligations issued by a domestic corporation and purchased by its controlled foreign corporation.\textsuperscript{144}

5. Miscellaneous

In Revenue Ruling 85-7\textsuperscript{145} the Service addressed whether Treasury Regulation section 1.882-5 applies to the determination of a foreign bank’s worldwide interest expenses allowed as deductions under Article 8(3) of the United States-Japan Income Tax Convention\textsuperscript{146} for purposes of computing the taxable income of the bank’s permanent United States establishment. According to the ruling, the applicability

\textsuperscript{138} 1985-25 I.R.B. 22.
\textsuperscript{139} 1985-2 C.B. 505. Under the prescribed procedures the DISC’s related supplier and shareholder may request an adjustment of accounts and a reclassification of actual distributions previously made with respect to all or part of the amount of the pricing or commission redetermination. \textit{Id.}
\textsuperscript{140} 1985-1 C.B. 580.
\textsuperscript{141} 1985-1 C.B. 550. The “no rulings” list sets forth areas in which the Internal Revenue Service will not issue advance rulings or determination letters. \textit{Id.}
\textsuperscript{142} See I.R.C. § 1248 (West Supp. 1985) for the applicable provision.
\textsuperscript{143} 1985-2 C.B. 741.
\textsuperscript{144} The Service explained that such rulings are too dependent on subsequent facts for the Service to determine in advance the substance of the transactions. \textit{Id.} See I.R.C. § 871(g)(1)(B) (West Supp. 1985) regarding original issue discount obligations issued by a domestic corporation and purchased by its controlled foreign corporation.
\textsuperscript{145} 1985-1 C.B. 188. The ruling involves a Japanese bank with a United States branch which constitutes a permanent establishment. The branch borrowed money from within the United States and Japan for use in its banking operations. \textit{Id.}
of this regulation conflicted with that of another regulation prescribed in a 1978 revenue ruling. The Service held that section 1.882-5, rather than section 1.861-8, will apply in determining the interest expenses allowed as deductions under the United States-Japan Income Tax Convention for federal income tax purposes.

In Revenue Procedure 85-23 the Service supplemented procedures set forth in Revenue Procedure 80-57 for resolving cases of double taxation between the United States and various territories to include American Samoa. The procedures address issues involving: (a) allocation of income, deductions, credits or allowances between related taxpayers; (b) determination of residency; and (c) determinations of the source of income and related expenses.

The Service held in Revenue Ruling 85-136 that it will no longer require application of the "fractional method without losses" for purposes of determining the "portion of the consolidated taxable income" attributable to members of an affiliated group that are Western Hemisphere trade corporations. In light of certain federal court decisions holding the method invalid and of the subsequent repeal of the statutory provisions involved, the Service concluded

\[\text{References:}\]

150 1985-1 C.B. 557.
152 1985-1 C.B. 558.
155 1985-2 C.B. 194. In American Standard, Inc. v. United States, 602 F.2d 256 (Ct. Cl. 1979), the United States Court of Claims declared invalid the last sentence of Treas. Reg. § 1.1502-25(c)(2) (1966), which requires the exclusion of loss members of an affiliated group filing a consolidated return from a formula used to determine the portion of consolidated taxable income attributable to those members of the group that qualify as Western Hemisphere trade corporations (WHTCs). American Standard, Inc. involved the calculation of the deduction allowed under I.R.C. § 922 (1954) against the income of the WHTCs. In Union Carbide Corp. v. United States, 612 F.2d 558 (Ct. Cl. 1979), the Court of Claims extended the same interpretation of the phrase "portion of consolidated taxable income attributable to such [WHTC]" to the computation of the foreign tax credit reduction required by I.R.C. § 1503(b)(1) (1954).
156 See supra note 154.
it will follow those decisions in cases presenting similar facts. The Service will adhere, however, to its position that the portion of the consolidated taxable income attributable to the members of the affiliated group that are Western Hemisphere trade corporations cannot exceed the total consolidated taxable income. Although the taxpayer may choose either the method prescribed in Treasury Regulation section 1.1502-25(c) or the method approved in this ruling, the taxpayer's choice may not vary from year to year according to whichever is more favorable.\footnote{157}

In Revenue Ruling 85-163\footnote{158} the Service modified earlier rulings that placed a thirty percent withholding tax on Eurobonds issued by United States corporations and loans made by foreign firms to United States affiliates that are handled by finance subsidiaries located in the Netherlands Antilles. The Service will not apply the earlier rulings, Revenue Ruling 84-153\footnote{159} for outbound Eurobonds and Revenue Ruling 84-152\footnote{160} for inbound foreign investments, retroactively. Instead, the Service will apply the rulings only to interest payments made on debt instruments issued after October 15, 1984. The ruling and announcement are significant because they eliminated a number of tax audit issues confronting certain foreign investors whose interest payments, involving millions of dollars, were under scrutiny.\footnote{161}

In Revenue Ruling 85-140\footnote{162} the Service held that a domestic corporation that is wholly owned by a nonresident alien, that invests in United States real property, and that receives interest income from United States sources is subject to the personal holding company tax. The Service imposed the tax because the corporation meets the income

\footnote{157}{1985-2 C.B. 195.}
\footnote{158}{1985-2 C.B. 349.}
\footnote{159}{1984-2 C.B. 383. In Rev. Rul. 84-153, 1984-2 C.B. 383, the Service held that the tax exemption provided by the United States-Netherlands Convention did not apply where the Antilles subsidiary sold bearer bonds to foreign bondholders and loaned the proceeds to the United States subsidiary. \textit{Id.} See generally note 102 (regarding the negotiation of related treaty provisions).}
\footnote{160}{1984-2 C.B. 381. In Rev. Rul. 84-152, 1984-2 C.B. 381, the Service held that interest payments by a United States subsidiary of a Swiss parent to that parent's Netherlands Antilles subsidiary, arising from loans by the parent to the Antilles subsidiary, which in turn loaned the funds to the United States subsidiary, were not exempt from United States tax under the United States-Netherlands Income Tax Convention. \textit{Id.} See generally note 102 (regarding the negotiation of related treaty provisions).}
\footnote{161}{Tax Shelters: IRS Eases Netherlands Antilles Treaty Shopping Rulings, \textit{DAILY TAX REP.} (BNA) No. 190, at G-6 to G-7 (Oct. 1, 1985).}
\footnote{162}{1985-2 C.B. 172.}
and stock ownership requirements of I.R.C. section 542(a),\textsuperscript{163} and because the corporation does not qualify for an exception under section 542(c)(7).\textsuperscript{164} Although the latter provision excepts from the personal holding company definition certain foreign corporations, it does not apply to domestic corporations wholly owned by nonresident aliens.\textsuperscript{165}

E. Announcements

1. Foreign Sales Corporations

In Announcement 85-65\textsuperscript{166} the Service issued interim guidelines for the estimation of tax payments by foreign sales corporations (FSCs).\textsuperscript{167} For purposes of estimating tax payments under the annualization exception of I.R.C. section 925,\textsuperscript{168} the Service will consider the income or deductions resulting from the transfer prices or commissions charged between an FSC and its supplier as items for which a reasonable estimate, based on existing data, may be used. Thus, for an interim period, an FSC will not lose its ability to benefit from the annualization exception solely on the ground that transfer prices and commissions established by subsequently published transfer pricing rules differ from the prices and commissions agreed upon between the FSC and the related supplier.\textsuperscript{169}

In Announcement 85-133\textsuperscript{170} the Service provided transition-period guidance for domestic international sales corporations (DISCs)\textsuperscript{171} now operating as FSCs. The guidance relates to the determination of the beginning and ending dates of initial tax years of FSCs formerly

\textsuperscript{162} I.R.C. § 542(a) (West Supp. 1985).
\textsuperscript{163} Id. at § 542(c)(7).
\textsuperscript{164} 1985-2 C.B. 173.
\textsuperscript{165} 1985-17 I.R.B. 25.
\textsuperscript{166} 1985-17 I.R.B. 25. For general information regarding FSCs, see supra note 24.
\textsuperscript{167} I.R.C. § 925 (West Supp. 1985).
\textsuperscript{168} 1985-17 I.R.B. 25. Under I.R.C. § 925 (West Supp. 1985), income from the sale of export property is divided between an FSC and its related supplier based on the transfer prices or the commissions on those sales. Under general estimated tax payment provisions, a corporation may be subject to a penalty if it fails to pay at least 90% of its tax for the year in quarterly installments. According to the announcement, a corporation not satisfying the 90% standard may still avoid the penalty if it paid a reasonably estimated tax computed by following the instructions for annualizing taxable income for periods before the due date of each quarterly payment. 1985-17 I.R.B. 25.
\textsuperscript{169} 1985-36 I.R.B. 58.
\textsuperscript{170} For general information regarding DISCs, see supra note 30.
operating as DISCs\(^{172}\) and the election of installment treatment for deemed distributions to DISC shareholders.\(^{173}\)

2. Rulings on Transfers of Property

Corporations that transfer property to overseas affiliates can now get rulings from the Internal Revenue Service on whether some of those transfers are non-taxable under I.R.C. section 367(a),\(^{174}\) according to Announcement 85-95.\(^{175}\) The announcement explains that regulations regarding such transfers are unavailable. For this reason and due to "the urgent need for guidance under section 367(a), the Service will entertain requests for rulings concerning the application of section 367(a) to the transfer of property to foreign corporations."\(^{176}\) The announcement further specifies certain principles that the Service will apply when considering such ruling requests.

3. New Forms

In Announcement 85-1\(^{177}\) the Service announced the availability of two forms for elections involving FSCs. Qualifying foreign corporations that wish to be treated as an FSC or small FSC must file new form 8279, "Election To Be Treated as a FSC or as a Small FSC." Qualifying domestic corporations, including existing DISCs, that wish to be treated as interest charge DISCs must file forms 8279 or 4876A.

The Service has developed new tax forms for use by FSCs and interest charge DISCs, according to Announcements 85-144\(^{178}\) and 85-145.\(^{179}\) The new FSC forms are the 1985 Form 1120-FSC, "U.S. Income Tax Return of a Foreign Sales Corporation;" Schedule P

\(^{172}\) Id. The Tax Reform Act of 1984, Pub. L. No. 98-369, § 805, 98 Stat. 1000, requires firms which qualified as DISCs on December 31, 1984, to close the 1984 tax year on that date, even if they reported on a fiscal year basis. According to the announcement, former DISCs now operating as FSCs are generally required to begin their 1985 tax year on January 1, 1985. These corporations, however, have a choice of dates on which to close the first tax year. They may select either the date on which the 1984 tax year would have closed but for the effect of the change in the law, or the end of the calendar year. 1985-36 I.R.B. 58.

\(^{173}\) 1985-36 I.R.B. 58. Taxpayers who failed to timely elect 10-year installment treatment for deemed distributions to DISC shareholders may make elections on amended returns filed prior to January 1, 1986. Once the election is made, however, the taxpayer may not change or revoke it. Id.


\(^{176}\) Id.

\(^{177}\) 1985-1 I.R.B. 42.

\(^{178}\) 1985-40 I.R.B. 32.

\(^{179}\) 1985-40 I.R.B. 33.
The new DISC forms are the 1985 Form 1120-IC-DISC, "Interest Charge Domestic International Sales Corporation Return;" Schedule K (Form 1120-IC-DISC); "Shareholder’s Statement of IC-DISC Distributions;" Schedule P (Form 1120-IC-DISC); and "Computation of Intercompany Transfer Price or Commission."

In Announcement 85-5180 the Service noted the availability of new IRS Forms 8288 and 8288-A for the imposition of the ten percent withholding obligation on a buyer or other transferee who acquires a United States real property interest from a foreign person. The Tax Reform Act of 1984 established the withholding requirements, which became effective in 1985.181 Forms 6659, 6660 and 6661 are now obsolete.

The Service also has developed new Form 5472, "Information Return of a Foreign Owned Corporation," for use by foreign-controlled corporations in reporting information concerning transactions between related companies. Announcement 85-151182 describes the method for obtaining and filing the form. Section 6038A of the Internal Revenue Code,183 which was added by the Tax Equity and Fiscal Responsibility Act of 1982,184 imposes the obligation to report this type of information.

F. Cases

1. Domestic International Sales Corporations

Of the five qualifying factors for domestic international sales corporation (DISC)185 tax treatment, the factor relating to "qualified export assets"186 was litigated in 1985 in at least three cases. The factor was litigated in two circuit courts of appeals and in one federal district court.

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180 1985-1 I.R.B. 42. See also supra notes 126-29 and accompanying text regarding new certification procedures for foreign investors’ reduction of withholdings on real property dispositions.
186 See I.R.C. § 993(b) (West Supp. 1985). The qualified export assets test requires that at least 95% of the adjusted assets of the domestic international sales corporation
In *CWT Farms, Inc. v. Commissioner*, the Eleventh Circuit Court of Appeals addressed three major issues in regard to qualified export assets of DISCs: first, whether certain loans evidenced by demand notes between the domestic parent corporation and the foreign subsidiary qualify as "producer's loans" and therefore as qualified export assets; second, whether regulations requiring payment of commissions receivable from a related party within sixty days are valid; and third, whether the Commissioner abused his discretion in applying those regulations retroactively.

CWT Farms, Inc. (Parent) was the sole shareholder of CWT International, Inc. (International), which elected to be treated as a DISC. During 1975-1977 International treated for tax purposes certain loans payable to Parent as producer loans and commissions receivable as qualified export assets. The United States Tax Court held in two related proceedings in 1982 that the loans did not constitute producer's loans.

The Eleventh Circuit affirmed the Tax Court's decisions. First, the court held that the demand notes were neither in strict nor in substantial compliance with the statutory five-year maturation provision for producer loans. Second, the court upheld the validity of regulations setting forth the sixty-day commission payment rule because of the clarifying nature of the regulations as to "accounts receivable" under the qualified export asset statute, and because of the regulations' consistency with the statute's origin and purpose. Third,
the court defended the Commissioner's discretion in applying the regulations retroactively because the regulations did not alter settled prior law, but rather addressed an existing ambiguity of the law, and because the petitioners were unjustified in disregarding the regulations prior to their final adoption. In sum, the court's refusal to treat the assets as qualified export assets resulted in the corporation's failure to satisfy the minimum requirements of a DISC.

In *Thomas International Ltd. v. United States*, the United States Court of Appeals for the Federal Circuit, following the rule of *CWT Farms, Inc. v. Commissioner*, reversed the Claims Court and upheld a regulation requiring a parent corporation to pay commissions to its domestic international sales subsidiary within sixty days after the close of the DISC's taxable year. Thomas International, Ltd. (Thomas) is a wholly owned subsidiary of Thomas Built Buses, Inc. (Parent), organized in 1973 to qualify as a commission DISC. Thomas accrued commissions on all of Parent's export sales. Thomas recorded its commissions as accounts receivable for tax years ending in 1977 and 1978. Thomas made these entries because Parent did not pay the commissions until over eight months after the close of Thomas' 1977 taxable year and sixty-two days after the close of its 1978 taxable year. Thomas paid no taxes for either year because it claimed qualification as a DISC.

The Service assessed deficiencies on Thomas based on its determination that Thomas held an insufficient proportion of qualified export assets for tax years 1977 and 1978 and therefore failed to qualify as a DISC for those years. The Service concluded that the commissions receivable did not constitute qualified export assets because Thomas did not receive payment within the required sixty days after the close of each taxable year. The Claims Court held that the sixty-day payment requirement for commissions receivable under

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194 *Id.* at 804.
195 *Id.* at 802-04. Prior to the final adoption of the regulations which set forth the 60-day commission payment provision, the petitioners inferred from a non-binding Treasury Department handbook that the Service would apply the regulations prospectively only. The court found this inference to be both imprudent and unjustified. *Id.* at 804.
196 773 F.2d 300 (Fed. Cir. 1985).
197 See *supra* notes 187-95 and accompanying text.
198 *Thomas Int'l Ltd.*, 773 F.2d at 304-05 (citing Treas. Reg. § 1.993-2(d)(2)).
199 *Id.* at 302.
200 *Id.*
201 *Id.*
the regulation was unauthorized by, and was contrary to, the DISC statutes.\textsuperscript{202}

In reversing the lower court, the Federal Circuit held that the sixty-day payment provision “validly implements the statutory purpose, and constitutes a permissible exercise of the Commissioner’s broad authority to prescribe ‘needful rules and regulations for the enforcement of’ the DISC provisions.”\textsuperscript{203} The court explained that because of the ambiguity of “accounts receivable” as a qualified export asset and of the uncertainty as to whether the statutory term encompasses “commissions receivable,” the Treasury Department had leeway to define and apply the statutory term in accordance with congressional intent.\textsuperscript{204} The court also rejected the taxpayer’s argument of substantial compliance with the regulation.\textsuperscript{205}

\textit{Tumac Lumber Co. v. United States}\textsuperscript{206} addresses whether a corporation’s foreign subsidiary qualifies as a DISC when a portion of the subsidiary’s qualified export assets are accounts receivable evidenced by promissory notes. Between 1976 and 1978 the parent corporation, Tumac Lumber Co. (Lumber), assigned export accounts receivable to its DISC subsidiary, Tumac Export (Export), and executed promissory notes during the same period allegedly to evidence the fact and the amount of the assignments. The Service assessed a deficiency against Lumber and Export on the ground that Lumber assigned promissory notes, which are not qualified export assets, rather than accounts receivable. Consequently, the Service argued, Export failed to qualify as a DISC during the years when it treated the assignments as qualified export assets.

The United States District Court for the District of Oregon held the notes were qualified export assets on the ground that the notes merely evidenced an assignment of export accounts receivable.\textsuperscript{207} According to the court, the corporation’s intent controls whether assignments of notes are deemed to be assignments of accounts of

\begin{itemize}
  \item \textsuperscript{202} See Thomas Int’l Ltd. v. United States, 6 Cl.Ct. 414 (1984). The Claims Court also stated that the Treasury Department may not write regulations to close loopholes by adding requirements which Congress failed to adopt, unless Congress specifically authorized the requirement. \textit{Id.} at 420.
  \item \textsuperscript{203} \textit{Thomas Int’l Ltd.}, 773 F.2d at 303.
  \item \textsuperscript{204} \textit{Id.} at 304.
  \item \textsuperscript{205} \textit{Id.} at 305.
  \item \textsuperscript{206} 625 F. Supp. 1030 (D. Or. 1985).
  \item \textsuperscript{207} \textit{Id.} at 1032.
\end{itemize}
receivable. Under the facts of *Tumac Lumber Co.*, the court found the necessary element of intent to assign accounts receivable.

2. Transfers Between Domestic and Affiliated Foreign Corporations

In *Gulf Oil Corp. v. Commissioner*, the United States Tax Court found that Gulf Oil Corp.'s assignment of oil interests in the United Kingdom sector of the North Sea to its wholly owned Liberian subsidiary, Kupan International Co. (Kupan), did not constitute a taxable transfer during the taxable year 1975. The court based its determination on the fact that the parties lacked the requisite government consent under British law. The assignment agreement was to be effective as of the close of business on December 31, 1975. Under British law, such an assignment is not effective until the requisite consent from the United Kingdom Department of Energy and the approval of the United Kingdom Inland Revenue are obtained. Neither party to the transfer satisfied these conditions before the end of the taxable year 1975. The court, applying British contract law, concluded that the assignment agreement did not effect a transfer of any interests from Gulf Oil Corp. to Kupan in the taxable year 1975 and therefore did not give rise to income.

3. Currency Exchange Rates

In *Durovic v. Commissioner* the United States Tax Court resolved whether the commercial rate of exchange was the proper rate for tax purposes for ascertaining amounts of foreign cost of goods sold. Taxpayer operated a partnership in business for the distribution of a cancer drug. Taxpayer purchased in Argentina the concentrate from

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208 Id.
209 Id.
211 According to the court, a "transfer within the taxable year 1975 is a necessary prerequisite for the application of section 367, I.R.C. 1954, as amended, in this case." Id. at 459.
212 Id. at 451-52.
213 Id. at 463-65.
214 See id. at 459-66.
215 Id. at 466.
216 84 T.C. 101 (1985). The issues relating to proper exchange rate and amount of cost of goods sold were previously decided in *Durovic v. Comm'r*, 54 T.C. 1364 (1970), aff'd in part, rev'd in part, 487 F.2d 36 (7th Cir. 1973); on remand, 65 T.C. 480 (1975), aff'd, 542 F.2d 1328 (7th Cir. 1976). In the present case, however, each party is petitioning the court to reconsider some of the conclusions reached in the previous litigation.
which the drug was prepared. The court held that the commercial exchange rate, rather than the rate established for assessment and collection of duties upon imports into the United States, was the proper currency exchange rate for the conversion of expenses from Argentine pesos to United States dollars.  

4. Inspection of Foreign Documents

In *The Hongkong & Shanghai Banking Corp. v. Commissioner*, the United States Tax Court addressed the issue of whether the court could grant the Service’s motion to compel an international bank with operations in the United States to produce records maintained at the bank’s foreign headquarters. The taxpayer is a Hong Kong corporation engaged in the banking business in countries worldwide, including the United States. For the tax years 1974-1976, the Commissioner disallowed the corporation various deductions for lack of substantiation on the grounds that the taxpayer denied the Commissioner’s agents access to the taxpayer’s original books in Hong Kong. The Commissioner filed a motion before the Tax Court under I.R.C. section 7456(b) to compel production of these records. The court granted the motion subject to four criteria: (1) the Commissioner’s agents must conduct the investigation pursuant to a legitimate purpose; (2) the inquiry must relate to the purpose; (3) the Commissioner must not possess the information sought; and (4) the Service must abide by I.R.C. section 7456(b) procedures during the course of the discovery. Representatives of the Justice Department and the Internal Revenue Service have recognized the decision as clear authority supporting the Service’s right to examine records of foreign headquarters for purposes of validating tax deductions. Critics have claimed that the decision is a major setback for bank secrecy laws.

5. Edge Act Corporations

In *Morgan Guaranty International Bank v. City of Houston*, the Supreme Court of the United States denied certiorari to the New York bank’s appeal of a Texas court ruling that allows Houston to

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217 Durovic, 84 T.C. at 116-17.
220 *The Hongkong & Shanghai Banking Corp.*, 85 T.C. at 709 (citing United States v. Powell, 379 U.S. 48, 57-58 (1964)).
222 *Id.*
tax a local branch of an Edge Act corporation based in Miami. Morgan Guaranty was seeking review of a ruling by the Texas Court of Appeals which held that an Edge corporation can be taxed by any state in which the international bank is doing business.\textsuperscript{224}

\textsuperscript{224} \textit{Id.} at 533.
TRADE CONTROLS

A. Export Controls

1. Export Administration Act

On June 27, 1985, Congress reauthorized the Export Administration Act of 1979 (EAA)\(^1\) when it passed the Export Administration Amendments Act of 1985.\(^2\) President Reagan signed the Act into law on July 12, 1985. The new Act extends the main trade law that regulates the export of United States goods, technology, and technical data through fiscal year 1989.\(^3\)

In addition to extending the EAA, the Act adds over fifty major revisions to the 1979 law.\(^4\) The major accomplishment of the new Act is to define the relationship of the Departments of Commerce and Defense in the licensing process.\(^5\) The Act also clarifies the relationship between the Department of Commerce and the Customs Service in enforcing the Act.\(^6\)

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\(^3\) Id.

\(^4\) Id.


\(^6\) Id. Section 113 of the new Act amends the 1979 Act regarding investigation and enforcement authorities. The new regulations delineate the enforcement powers of the Customs Service and the Commerce Department. Id.
In addition, the Act curbs the President's power to impose trade embargoes. It provides that the President shall consult with industry, other countries, and Congress when imposing trade embargoes.7 The new law's so-called "contract sanctity"8 provisions authorize the breaking of contracts only if the strategic interests of the United States are threatened, and ban retroactive application of foreign policy controls except in the most extreme circumstances.9

A similar EAA bill almost cleared Congress in 1984,10 but failed because of disputes over the inclusion of sections on sanctions against South Africa and Pentagon review of export licensing.11 This year Congress agreed to drop these provisions and the Act passed relatively quickly.12

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7 Id. Under § 6(c) of the amended Act, the President must consult with industry on foreign policy controls. Section 6(d) requires consultation with other countries, and 6(e) and (f) require the President to consult with Congress prior to imposition of foreign policy export controls. Particularly, 6(f) provides that the President may not impose, expand, or extend export controls until he specifies purpose, determinations, plans for consultation with industry, describing availability, etc. Id.

8 Id. at § 6(1).

9 Id. Section 6(1) provides in part:

The President may not, under this section, prohibit or curtail the export or re-export of goods, technology or other information . . . unless and until the President determines and certifies to Congress that—

(A) a breach of the peace poses a serious and direct threat of the strategic interest of the United States,

(B) the prohibition or curtailment of such contracts, agreements, licenses, or authorizations will be instrumental in remedying the situation posing the direct threat, and

(C) the export controls will continue only so long as the direct threat persists.

Id.


11 Id.

12 Separate bills to impose sanctions on South Africa were introduced in Congress in 1985. See infra notes 58, 61, and accompanying text. The debate over Defense Department review of export licensing ended because President Reagan issued a directive on Pentagon review of West-West licensing. 131 CONG. REC. S8921 (daily ed. June 27, 1985). The President issued his directive in a classified memo which outlined procedures for carrying out joint Defense-Commerce review of applications on certain strategic commodities. Sweden, South Africa Among non-COCOM Countries Said to be in Pentagon License Review Plan, 2 INT'L TRADE REP. (BNA) 160 (Jan. 30, 1985). Some members of Congress question the legality of this directive. Bonker Outlines Plans, supra note 4.
2. Distribution Licenses

On May 23, 1985, the Office of Export Administration (OEA) of the Department of Commerce issued final rules to amend the distribution license procedure. The regulations are designed to tighten controls over United States exports of controlled commodities without creating unnecessary delay for legitimate exports.

OEA's final rules require all licensees to have an effective internal control program. Specifically, licensee firms must have a clear statement of policy concerning their distribution license compliance. Moreover, firms must identify positions and people within the company and consignee firms charged with administration of the internal program. Furthermore, it is primarily the responsibility of the exporters to assure consignee reliability and provide specific guidance to consignees on OEA regulations.

The new regulations also provide for stiffer controls on drop shipments and on numbers of sales to authorized re-export territories. Additionally, the rules revise commodity descrip-
OEA will tighten its own controls by carefully screening new applicants and increasing audits of current distribution license holders. The new distribution license regulations, which are very similar to proposals released September 10, 1984, have received criticism from many different sectors. Foreign governments and consignees have expressed concern over the extraterritorial reach of OEA regulations. Many businesses see the internal control rules as biased against small and new businesses. The foreign policy and defense communities question whether the OEA can rely on internal controls to keep restricted goods out of unfriendly hands and are concerned because the OEA did not consult the Defense Department during the revisions.

3. Foreign Availability Regulations

On December 23, 1985, the Department of Commerce issued final rules to cover procedures for initiating and assessing foreign availability claims. Foreign availability assessments are intended to elim-

commodities [OEA's emphasis] in each country of the authorized re-export territory. 

19 Id. at 21,563.
20 Id. at 21,562.
21 Id. The OEA planned to make 33 audits in 1985, up from 18 in 1984. Wall St. J., May 23, 1985, at 35, col. 3. Likewise, the OEA's multiple export staff increased to 21 in 1985, up from three in 1983. Id.
23 European Community Hits Extra-territoriality of Proposed Distribution License Requirements, 1 INT'L TRADE REP. (BNA) 614 (Nov. 21, 1984). Regulations such as those contained in § 373.3(e)(2) which require consignees to certify the existence of internal control programs seem to require foreign citizens to comply with United States regulations.
24 Many businesses believe that the regulations concerning evidence of consignee reliability and numbers of shipments to licensed territories favor businesses with long track records of trade with distribution licenses. Moreover, they argue that firms with large exporting practices are in a better position than small firms regarding the cost of implementing comprehensive internal control programs. Strong Compliance Can Prevent Export Control Problems Seminar Told, 20 U.S. EXPORT WEEKLY (BNA) 352 (Nov. 29, 1983).
26 Senator Jake Garn, Chairman of the committee that oversees the Commerce Department's fulfillment of its obligations under the EAA, noted that "... these regulations were available to the Department of Defense at the same time they were available to the Soviet Embassy." 131 Cong. Rec. S8921, S8923 (daily ed. June 27, 1985) (statement of Senator Garn).
inadequate export controls which are ineffective because the controlled items are readily available on world markets.\textsuperscript{28}

Among the major changes in the regulations were new minimum standards for industry submission of foreign claims,\textsuperscript{29} a ninety-day period for submitting foreign availability information for license approval,\textsuperscript{30} and the establishment of more explicit procedures for publication of foreign availability claims.\textsuperscript{31}

Commerce issued the final regulations after considering comments received on proposals issued on March 15, 1985.\textsuperscript{32} There had been complaints that the proposed regulations placed the burden of proof on exporters.\textsuperscript{33} In the information accompanying the new regulations, Commerce said that it recognizes that it has primary responsibility in gathering and assessing information pertaining to foreign availability.\textsuperscript{34} The exporter, however, plays a critical role in the process by providing factual data in support of a claim.\textsuperscript{35}

\textsuperscript{28} Commerce says foreign availability exists when the Secretary of Commerce determines that a non-U.S. origin item of comparable quality is available to proscribed countries in quantities sufficient to satisfy their needs. United States exports of such items, thus, would not make a significant contribution to the military potential of such countries. \textit{Id.} at 52,914 (to be codified at 15 C.F.R. § 391.1(c)).

\textsuperscript{29} \textit{Id.} at 52,912. Section 391.3 sets the new criteria for determinations. Commerce requires all foreign availability submissions to be on items not of U.S. origin. \textit{Id.} (to be codified at 15 C.F.R. § 391.3). These provisions exclude from consideration a significant number of items produced in the United States which could end up in proscribed countries contrary to United States law. \textit{Rule on Foreign Availability Procedures, Criteria Issued in Final Form by Commerce, 3 INT'L TRADE REP. (BNA) 10} (Jan. 1, 1986) [hereinafter cited as \textit{Foreign Availability Procedures}]. In its comments accompanying the regulations, Commerce stated that it welcomed the submission at any time of specific information concerning the availability of U.S.-origin commodities or technical data to proscribed destinations so appropriate measures could be taken. 50 Fed. Reg. 52,912 (1985).

\textsuperscript{30} \textit{Id.} Section 391.4 sets forth the procedures for submission of foreign availability submissions. The regulations require, in part, that assessments of foreign availability will be initiated only when a license has been denied based solely on national security grounds, and a foreign availability submission is received no later than 90 days from the date of the license denial. \textit{Id.} (to be codified at 15 C.F.R. § 391.4(a)(1)(i), (ii)).

\textsuperscript{31} \textit{See id.} at § 391.4(a)(4), (5), and (b) (1985).


\textsuperscript{33} Proposed regulations required exporters to show that exports after decontrol would make no significant contribution to the military potential of proscribed nations. Industry commentators said the term "significant contribution to military potential" required them to estimate Warsaw Pact Military requirements; however, such information might not be available to them. The new regulations retained this wording but the accompanying comments stated that the exporter's submissions must include the best available evidence pertinent to foreign availability standards. \textit{Foreign Availability Procedures, supra} note 29.

\textsuperscript{34} 50 Fed. Reg. 52,912 (1985).

\textsuperscript{35} \textit{Id; see also supra} note 29.
The new rules only cover procedures and criteria to address foreign availability for commodities and technology under national security controls. Commerce intends to issue separate regulations on items under foreign policy controls.\textsuperscript{36}

\section*{B. Embargoes/Sanctions}

1. Nicaraguan Trade Embargo

On May 1, 1985, President Reagan announced a trade embargo and other economic sanctions against Nicaragua effective May 7, 1985.\textsuperscript{37} The President declared the embargo in response to "the emergency situation created by the Nicaraguan Government's aggressive activities in Central America."\textsuperscript{38}

The sanctions included a prohibition on imports from and exports to Nicaragua.\textsuperscript{39} The President's order also prohibited Nicaraguan air carriers from engaging in air transport to or from the United States and Nicaraguan vessels from entering United States ports.\textsuperscript{40} Additionally, the President announced the United States intent to terminate its Treaty of Friendship, Commerce, and Navigation with Nicaragua.\textsuperscript{41} The embargo did not include donations of food or other materials to be used to relieve human suffering.\textsuperscript{42} Finally, the President stated that the embargo was aimed at bilateral trade between the United States and Nicaragua and was not extraterritorial in scope.\textsuperscript{43}

In May of 1985, Nicaragua complained to the General Agreement on Tariffs and Trade (GATT) that the embargo violated GATT rules.\textsuperscript{44} Many Latin American countries, speaking as observers, said the United States acted wrongly and demanded the United States lift the sanctions.\textsuperscript{45} The United States claimed it legitimately imposed the

\begin{itemize}
\item \textsuperscript{33} Id; see also supra note 29.
\item \textsuperscript{36} 50 Fed. Reg. 10,501 (1985).
\item \textsuperscript{37} Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985).
\item \textsuperscript{38} N.Y. Times, May 2, 1985, at 1, col. 6.
\item \textsuperscript{39} Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985). The order calls for a prohibition on all imports and exports "except those destined for the organized democratic resistance, and transactions related thereto." Id.
\item \textsuperscript{40} Id.
\item \textsuperscript{41} Id.
\item \textsuperscript{42} President Reagan Imposes Trade Embargo, Other Economic Sanctions on Nicaragua, 2 Int'l Trade Rep. (BNA) 637 (May 8, 1985).
\item \textsuperscript{43} Id.
\item \textsuperscript{44} U.S., Nicaragua Unsuccessful in Getting GATT Action on Trade Embargo Dispute, 2 Int'l Trade Rep. (BNA) 765 (June 5, 1985).
\item \textsuperscript{45} Id. Countries demanding the lifting of sanctions included Cuba, Argentina, Peru, Columbia, Brazil, Chile, Uruguay, the Dominican Republic, Mexico, and Costa Rica. Id.
\end{itemize}
sanctions for national security reasons in accordance with the security exceptions provision of the GATT.\textsuperscript{46}

With respect to Nicaragua's complaint, the GATT appointed an investigatory panel in October.\textsuperscript{47} The panel began inquiries with the understanding that it could not examine the validity or motivation for the imposition of sanctions for national security reasons.\textsuperscript{48} In December the United Nations General Assembly passed a resolution calling for the end of the embargo.\textsuperscript{49} This non-binding resolution has little impact on United States policy.

2. South African Sanctions

On September 9, 1985, President Reagan issued an executive order announcing a number of measures against South Africa\textsuperscript{50} "designed and aimed against the machinery of Apartheid, without indiscriminately punishing the people who are victims of that system."\textsuperscript{51}

The President's order banned computer exports to agencies involved in the enforcement of apartheid.\textsuperscript{52} In addition, the order restricted most nuclear exports to South Africa\textsuperscript{53} and prohibited most bank

Nothing in this agreement shall be considered
(b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests
(iii) taken in a time of war or other emergency in international relations.

\textsuperscript{47} GATT Council Appoints Panel to Study U.S. Nicaraguan Embargo, Reviews Other Disputes, 2 INT'L TRADE REP. (BNA) 1313 (Oct. 16, 1985).

\textsuperscript{48} Id.

\textsuperscript{49} UN Calls for End to Nicaraguan Embargo, Although Move Seen as Having Little Impact, 3 INT'L TRADE REP. (BNA) 64 (Jan. 8, 1986). The vote was 91 for, six against, and 49 abstaining. Gambia, Grenada, Israel, St. Christopher, Nevis, and Sierre Leone were the six countries voting against the resolution. Id.


\textsuperscript{51} Text of Reagan's Sanctions Announcement, 43 CONG. Q. 1834 (Sept. 14, 1985).

\textsuperscript{52} Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985). In November, the Commerce Department issued export license regulations for computers and sales to military police implementing the Executive Order. 50 Fed. Reg. 47,363 (1985). Exceptions to the ban include medical and anti-hijacking equipment. The regulations list South African Government entities identified as enforcing apartheid and state that the list will be on continual review. Id.

\textsuperscript{53} Exec. Order No. 12,532, 50 Fed. Reg. 36,861 (1985). Exceptions to the ban include exports of technical programs for the purpose of reducing nuclear proliferation and those exports necessary for humanitarian purposes.
loans to the South African Government. Furthermore, the order banned government export assistance to United States firms in South Africa with more than twenty-five employees which do not adhere to comprehensive fair employment principles. The order also provides for a ban on the import of Krugerrands subject to an agreement by major United States trading partners.

The President’s action came in the wake of mounting domestic pressures to impose sanctions on South Africa. On August 1, 1985, House and Senate conferees filed their report on a sanctions package. The President’s order included most of the sanctions that the conference report contained, and in a series of votes on September 9, 10, 11, and 12, the Senate accepted Reagan’s plan by refusing to consider the sanctions bill. Many members of Congress, however, are not satisfied with the order because it does not include a threat of future sanctions.

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54 Id. The Order did not ban loans to improve and expand the economic welfare of those who have been disadvantaged by the apartheid system. Id. The Treasury Department issued regulations implementing the President’s ban on bank loans on Nov. 11, 1985. 50 Fed. Reg. 46,726 (1985). Critics of the President contend that this provision will make loans available to the government of South Africa to improve conditions in black townships and Bantustans, thereby strengthening the system of apartheid. Wall St. J., Sept. 10, 1985, at 26, col. 4.

55 50 Fed. Reg. 36,861 (1985). The fair employment principles, known as the "Sullivan Principles," require the following: desegregation of the races in the workplace; provision of equal employment opportunities; a pay system applied to all workers equally; establishment of a minimum wage based on appropriate minimum economic levels; increased numbers of people in managerial jobs who have been disadvantaged by apartheid; reasonable steps to improve employees’ lives outside the workplace; protection of fair labor practices; and encouragement of U.S. companies to extend their influence. Id.


57 The U.S. will have to obtain special dispensation from GATT to gain approval for the ban on Krugerrands. The procedure to obtain dispensation may take some time. EC Countries Reject Sanctions, U.S. will need GATT Dispensation on Krugerrands, 2 INT’L TRADE REP. (BNA) 1103 (Sept. 11, 1985).


60 Reagan Averts a Confrontation on South Africa, 43 CONG. Q. 1802 (Sept. 14, 1985).

61 H.R. 1460 contains a provision under which the President must impose tougher sanctions in 12 months unless he determines that Pretoria has made sufficient progress toward dismantling the apartheid system. H.R. 1460, 99th Cong., 1st Sess. (1985).
C. Import Controls

1. Textiles

a. Country of Origin Regulations

On March 5, 1985, the U.S. Customs Service issued final regulations governing the transformation requirements which determine the country of origin for imported textile and apparel goods. The regulations are aimed at preventing circumvention of export licensing requirements under various multilateral and bilateral agreements, and at facilitating the efficient and equitable administration of the United States textile program.

The final regulations are very similar to the interim regulations which had been in effect since September 7, 1984. The new regulations, however, make a major distinction between sewing and assembly of fabrics into a finished product and looping of knitted apparel. Substantial assembly by sewing together of fabric pieces will usually determine country of origin, while looping together of knit-to-shape pieces will not.

The interim regulations sparked a great deal of controversy with United States trading partners. Although the new distinction between

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63 Id.
65 50 Fed. Reg. 8710, 8715 (1985) (to be codified at 19 C.F.R. § 12.130(e)).
66 Relevant regulations read:

- 12.130(e)(1) an article or material usually will be a product of a particular foreign territory or country . . . when it has undergone prior to importation:
  - (v) Substantial assembly by sewing and/or tailoring of all cut pieces of apparel articles which have been cut from fabric in another foreign territory or country . . . into a completed garment.
67 Relevant regulations read:

- 12.130(e)(2) an article . . . usually will not be considered to be a product of a particular foreign territory or country . . . by virtue of merely having undergone . . .
  - (iii) Trimming and/or joining together by sewing, looping, linking, or other means of attaching otherwise completed knit-to-shape component parts produced in a single country . . .
sewing and looping quieted some protests, many trading partners, especially in the Far East, are still protesting. A complaint on the legality of the regulations is pending with the General Agreement on Tariffs and Trade.

b. Textile Bill Vetoed

On December 17, 1985, President Reagan vetoed major textile quota legislation. The bill, H.R. 1562, cleared both the House and the Senate by large majorities. The voting margins, however, fell short of the two-thirds majority necessary to override the veto. The House, by unanimous consent, immediately agreed to delay an override attempt until early August 1986, thereby keeping pressure on the

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69 A major beneficiary of the regulations on looping is Hong Kong. Hong Kong imports knit-to-shape parts from China and finishes them before export to the United States. Hong Kong said that, as a result of the interim regulations, orders for their knitwear were down fifty percent for the period October-December 1984. Hong Kong Expresses Concern Over Rules of Origin as Next Round of Talks Nears, 2 INT’L TRADE REP. (BNA) 295-96 (Feb. 27, 1985) [hereinafter cited as Hong Kong’s Concern].

70 China’s Ambassador to Washington has threatened retaliation over the new regulations. In letters to U.S. Trade Representative Brock and Treasury Secretary Baker, the Chinese Ambassador said that the new regulations presented a “grievous blow to Chinese industry, employment, trade, and economic development” and no justification supported differentiating country-of-origin based on looping of knit-to-shape garments. The new regulations, he said, threatened 60,000 Chinese jobs. Customs Publishes Controversial Textile Country of Origin Rules in Final Form, 2 INT’L TRADE REP. (BNA) 326, 327 (Mar. 6, 1985).

71 In February, the Textile Surveillance Board of the General Agreement on Tariffs and Trade postponed a hearing on a complaint by Turkey that the United States regulations unfairly restricted imports of Turkish acrylic spun yarn. Turkey filed its complaint pursuant to article 604 of the Multi-Fiber Arrangement, which governs international textile trade. Hong Kong had also submitted a letter of complaint over the “highly unsatisfactory” state of affairs between Washington and Hong Kong regarding the regulations. Hong Kong’s Concern, supra note 69, at 296.

72 President Vetoes Textile, Footwear Imports Limit Measure, Promises to Review Situation, 3 INT’L TRADE REP. (BNA) 5 (Jan. 1, 1986) [hereinafter cited as President Vetoes].


74 On November 13, 1985, the Senate voted 60-39 in favor of the bill. On December 3, the House approved the bill 255-161. President Vetoes, supra note 72.

75 A vetoed bill requires the support of 67 Senators and 281 members of the House to override a presidential veto.

76 The President vetoed the bill at 11 p.m. on December 18, 1985. Before adjournment that night, the House voted to delay the override attempt. President Vetoes, supra note 72.

77 Under congressional rules, there is no time limit within a Congress on when a veto override can occur. The August target date for the override attempt is for
Administration to negotiate a tougher Multi-Fiber Arrangement\textsuperscript{78} by the end of July.\textsuperscript{79}

H.R. 1562 began as an effort by Congress to protect domestic textile and apparel manufacturers' dwindling share of the United States market, and to address the problem of a record trade deficit.\textsuperscript{80} Congress also added provisions to the bill aiding producers of shoes and copper.\textsuperscript{81} In its final form, H.R. 1562 called for a roll-back of import levels for the top three Far Eastern suppliers\textsuperscript{82} as well as a political reasons. Proponents of the bill believe they will get the most support and publicity when international textile negotiations under the Multi-Fiber Arrangement (\textit{infra} note 78) will be well underway, and the 1986 elections will be only three months away. \textit{After Last-Minute Reagan Veto, Textile Forces Look to Rematch}, \textit{43 Cong. Q.} 2686 (Dec. 21, 1985) [hereinafter cited as \textit{Last Minute Veto}].

\textsuperscript{78} Multi-Fiber Arrangement, Dec. 20, 1973, 25 U.S.T. 1002, T.I.A.S. No. 7840. The Multi-Fiber Arrangement (MFA) was adopted in 1974 and extended in 1978 and 1982. The MFA was conceived as a temporary departure from GATT's basic rules of non-discrimination and equal treatment for all trading partners. The MFA allows industrialized countries to protect domestic textile industries through curbing cheaper imports from developing nations. \textit{Major Trading Nations Outline Their Positions As GATT Panel Has First MFA Renewal Meeting} \textit{2 INT'L TRADE REP. (BNA) 957-58} (July 24, 1985).

\textsuperscript{79} \textit{Last Minute Veto}, supra note 77.

\textsuperscript{80} Because of the prospect of a trade deficit of nearly 150 billion dollars, Congress shifted towards favoring a tough trade control policy. \textit{House Key Votes}, \textit{44 Cong. Q.} 36, 39 (Jan. 4, 1986) [hereinafter cited as \textit{House Key Votes}]. Throughout 1985, Congress introduced many bills controlling a variety of different kinds of trade. See, e.g., \textit{infra} notes 69-73 and accompanying text. H.R. 1562 became the leading bill for establishing trade controls and led President Reagan to adopt a tougher trade stance in September 1985. \textit{Congress Clears New Limits on Textile Imports}, \textit{43 Cong. Q.} 2556 (Dec. 7, 1985). The bill's sponsor, Representative Ed Jenkins (D-Ga.), stated that "for the first time we have gained the attention of the Administration and the world ... we have changed the course of thinking about international trade." \textit{Id.}


\textsuperscript{82} H.R. 1562, 99th Cong., 1st Sess. (1985). Title I of the bill, The Textile Trade Enforcement Act of 1985, limits imports based on percentum of imports in 1984 and in accordance with Multi-Fiber Agreements. \textit{Id.} Sections 105(1) and (2) limit imports from "major producing countries," which would include Taiwan, South Korea, and Hong Kong. \textit{House Key Votes}, \textit{supra} note 80. For the complex formula, see H.R. 1562, 99th Cong., 1st Sess. (1985) at 105(1), (2).
freeze on shipments from most other foreign suppliers.\textsuperscript{83} The bill also limited imports of footwear to sixty per cent of the domestic market\textsuperscript{84} and required the President to negotiate new copper agreements.\textsuperscript{85}

In his veto message, President Reagan, considering foreign retaliation against United States exports, loss of American jobs, losses to American business, and damage to the world trading system, stated that the economic and human costs of the bill ran too high.\textsuperscript{86} In his message President Reagan directed Treasury Secretary Baker to investigate import levels of textiles and apparel to determine if they exceeded limits agreed upon in international negotiations.\textsuperscript{87} In addition, the President directed the U.S. Trade Representative to renegotiate the Multi-Fiber Arrangement.\textsuperscript{88} Finally, the President directed the Secretary of Labor to provide an additional $100 million in Labor Department funds to retrain and relocate displaced workers.\textsuperscript{89}

2. Steel Agreement with the European Community

On October 31, 1985, the United States and the European Community (EC) reached agreement on an extension of the United States-EC steel accord\textsuperscript{90} and averted strict limits on steel im-

\textsuperscript{83} See H.R. 1562, 99th Cong., 1st Sess. (1985). Section 105(3) sets up different limits for “producing countries” \textit{Id.} § 105(3).


\begin{quote}
204. quantitative limitation on non-rubber footwear:
(1) During an 8-year period beginning at the enactment of the bill, “the aggregate number of pairs of non-rubber footwear which may be entered during any 1-year period shall not exceed 60 percentum of the estimated apparent domestic consumption of non-rubber footwear for such period.
\end{quote}

\textit{Id.; see also infra} notes 129-34 and accompanying text.

\textsuperscript{85} \textit{Id.} Title III of the bill, The Copper Free Market Restoration Act of 1985, requires the President to negotiate with all major copper producing countries for the purpose of obtaining voluntary restraint agreements. \textit{Id.}

\textsuperscript{86} \textit{President Reagan’s Veto Message on Textile Quotas, 43 CONG. Q. 2703 (Dec. 21, 1985)} [hereinafter cited as \textit{Veto Message}].

\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{Id.; see also supra} note 78.

\textsuperscript{89} \textit{Veto Message, supra} note 86. Reagan stated the $100 million allocated should come under the Job Training Partnership Act, which he said is more effective than the Trade Adjustment Assistance Act. \textit{Id.}

\textsuperscript{90} \textit{U.S., EC Reach Agreement on Accord Extension, Semifinished Level Still Remains Unresolved, 2 INT’L TRADE REP. (BNA) 1388 (Nov. 6, 1985)} [hereinafter cited as \textit{Accord Extension}]. In 1982, the United States and the EC negotiated a three-year agreement limiting nearly all steel shipments to the United States through 1985 to an average of 5.46% of the United States market for 10 categories of steel.
ports. The EC formally approved the new steel accord on December 10, 1985. The agreement, which will be in effect from January 1, 1986 through September 30, 1989, covers more than $2.5 billion worth of EC steel products.

The agreement restrains EC exports of all finished steel products to roughly 5.6% of United States consumption. This level marks a significant reduction from the 6.6% level for these goods prevailing through the first nine months of 1985. However, the new total is slightly more than the 5.46% level agreed upon in 1982.

The agreement came at the end of a year-long series of difficult negotiations. In July, talks on steel consultation product levels were going so badly that the Administration was ready to impose an embargo on all steel products for the rest of the year. Moreover, the EC reportedly prepared a list of retaliatory measures. On August 1, those threats were averted when the United States and EC agreed on levels of EC shipments for the remainder of the year. After

In exchange, United States steel producers agreed to withdraw the countervailing duty and anti-dumping petitions that they filed in January 1982. U.S., EC Reach Agreement on European Curbs, Complaints Withdrawn, 7 U.S. IMPORT WEEKLY (BNA) 99 (Oct. 27, 1982). For a text of the 1982 steel agreement, and for import limits on specific categories of steel, see Secretary of Commerce Malcolm Baldridge's Statement and Commerce Department Fact Sheet on U.S. Steel Agreement, 7 U.S. IMPORT WEEKLY (BNA) 124 (Oct. 27, 1982).

Accord Extension, supra note 90. The Administration threatened to prohibit EC shipments for the all American pipeline. The American Iron and Steel Institute threatened to bring cases against the EC under both § 301 and unfair trade statutes. Trautlein Urges Administration to Take Tough Action Against EC if October 31 Deadline Not Met, 2 INT'L TRADE REP. (BNA) 1359 (Oct. 30, 1985).

Britain Lifts Reserve on U.S.-EC Steel Pact, Enabling EC Ratification, Removal of Sanction, 2 INT'L TRADE REP. (BNA) 1542 (Dec. 11, 1985) [hereinafter cited as Britain Lifts Reserve].

Financial Times (London), Nov. 2, 1985, at 1, 28, col. 6.

Wall St. J., Nov. 4, 1985, at 29, col. 1. Under the new arrangement the EC will have an average 5.57% share of the United States market for the 10 products covered by the original quotas. The EC can now ship an additional 180,000 tons over previous agreement levels. Id.

Accord Extension, supra note 90.

See supra note 90.

Consultation products are products which were not subject to tonnage limits in the 1982 Accord, but only subject to consultation limits in the event of shipment surges. Financial Times (London), Nov. 2, 1985, at 1, col. 6.


Id.

The EC agreed to hold its exports to an annual rate of 475,000 tons for 1985.
the United States and EC agreed on the new accord, Britain withheld its approval until it received assurances from the Reagan Administration on shipments of semifinished steel products.\textsuperscript{101}

3. Quotas on Semifinished Steel

On December 30, 1985, the Reagan Administration announced the restriction of entries of semifinished steel to 600,000 tons per year beginning January 1, 1986.\textsuperscript{102} The restraints took effect the same day as the United States-EC steel agreement.\textsuperscript{103}

The steel agreement placed limits on most categories of EC steel products.\textsuperscript{104} The agreement did not, however, limit imports of semifinished steel.\textsuperscript{105} The agreement allows the United States to impose curbs on semifinished steel if it can show that imports have increased sharply, or that trade has been diverted from products subject to quotas.\textsuperscript{106}

The problem of semifinished steel import quotas was enmeshed with negotiations on the new steel accord throughout 1985.\textsuperscript{107} The United States and EC finalized the steel agreement only after both sides agreed to keep semifinished steel as a consultation product.\textsuperscript{108} Britain withheld approval for the steel accord until it received assurances that it would be able to ship 200,000 tons of semifinished steel to a plant it jointly owns in Tuscaloosa, Alabama.\textsuperscript{109} In late November, the Reagan Administration suspended immediate delivery

\textsuperscript{101} The 11 consultation products did not become a part of the new accord. \textit{Britain Lifts Reserve}, supra note 92; see also \textit{infra} note 106 and accompanying text.

\textsuperscript{102} \textit{EC Threatens to Retaliate Against U.S. Goods Following Imposition of Semifinished Quotas}, 3 \textit{INT'L TRADE REP.} (BNA) 51 (Jan. 8, 1986) [hereinafter cited as \textit{EC Threatens}]. Of the 600,000 tons covered under the restrictions, the U.S. Trade Representative will allocate 200,000 tons. The allocation will be 150,000 tons quarterly, which is above the 125,000 ton level of the 1982 benchmark. \textit{Id.}

\textsuperscript{103} \textit{Id.} For details fo the U.S.-EC Steel Agreement, see \textit{supra} notes 90-101 and accompanying text.

\textsuperscript{104} See \textit{supra} notes 90, 94 and accompanying text.

\textsuperscript{105} \textit{EC Threatens}, supra note 102.

\textsuperscript{106} \textit{Id.} The U.S. Trade Representative stated that the new limit was "to ensure the integrity of President Reagan's Steel Program. The recently extended U.S.-EC Steel Arrangement gives the U.S. the right to unilaterally restrict semifinished products if steel in other product categories subject to the agreement was being diverted into the semifinished category." \textit{Id.}

\textsuperscript{107} See \textit{supra} notes 97, 101 and accompanying text.

\textsuperscript{108} \textit{Id.}; see also \textit{Accord Extension}, supra note 90.

\textsuperscript{109} \textit{U.S., Britain Aiming to Resolve their Dispute Over Semis in Time for EC Ratification Vote}, 2 \textit{INT'L TRADE REP.} (BNA) 1517 (Dec. 4, 1985); see also \textit{Britain Lifts Reserve}, supra note 92.
privileges for EC steel products other than pipe and tube. The Administration took this action to pressure Britain to drop its demands on semifinished steel and accept the steel accord.

EC officials have threatened to retaliate against the imposition of semifinished steel quotas. The EC is angry because the United States made a unilateral decision instead of going through the consultation process.

4. Pasta and Citrus Dispute

On November 1, 1985, the United States substantially increased import duties on European pasta. The increase was in retaliation for preferential treatment given by the EC to Mediterranean citrus. Duties on pasta not containing egg rose from 0.5% ad valorem to 40%. Duties on egg-containing pasta rose from .25% to 25%.

The duty increases sprang from a long running trade dispute between the United States and the EC. The United States charged the EC with unfairly favoring imports of citrus from Mediterranean growers. Moreover, the EC refused to abide by a GATT dispute panel finding against this preferential treatment. President Reagan unilaterally imposed stiff tariffs on pasta imports on June 21. On June 24, the EC decided to more than double their tariffs on imports of United States walnuts and lemons in retaliation. By July 19,
both sides agreed to postpone these harsh measures until October 31 and to negotiate a settlement of the dispute.

The negotiations, however, broke down. Subsequently, the United States decided to renew the tariffs on pasta imports rather than accept a last minute offer from the EC. In Brussels, the EC announced that the United States actions were unfair and retaliated immediately with renewal of the higher duties on lemons and walnuts.

5. Footwear

On August 28, 1985, President Reagan formally rejected any import relief for the domestic footwear industry. Reagan stated that the restraints urged by Congress and the International Trade Commission (ITC) would injure the overall economy, invite retaliation from trading partners, and result in a "dangerous step down the road to a trade war." The President's decision came in spite of a June 12 ITC recommendation urging strong action to protect the United States footwear industry. The ITC had found that the United States footwear

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121 *Duties on Pasta*, supra note 114. U.S. Trade Representative Clayton Yeutter said the EC-negotiating proposal, which was not offered until the day of expiration, was "clearly inadequate." *Id.*

122 *Id.*. EC Commissioner for External Relations Willy De Clerq said the U.S. action was clearly in violation of GATT, calling it a "quasi-embargo striking harshly against a Community industry particularly important for one of our member states, Italy." *Id.*

123 EC duties on lemons rose from 8% ad valorem to 20%. Duties on walnuts rose from 8% ad valorem to 30%. *Id.* The total value of the trade affected by the U.S. measures and EC countermeasures is $62 million. Financial Times (London), Nov. 2, 1985, at 28, col. 3.


(a) After receiving a report from the Commission containing an affirmative finding under 2251(b) of this title that increased imports have been a substantial cause of serious injury or the threat thereof with respect to an industry, the President—

(1)(A) shall provide import relief pursuant to section 2253 of this title, unless he determines that provision of such relief is not in the national economic interest of the United States.


126 *ITC Majority Recommends Five Year Quota, Import License Auction for Imported Shoes*, 2 INT'L TRADE REP. (BNA) 814 (June 19, 1985) [hereinafter cited as *Five Year Quota*]. On May 22, 1985, the International Trade Commission (ITC) unanimously reversed an import injury vote taken a year earlier and found that
industry had been significantly injured by imports.\textsuperscript{127} Its recommended five year quota plan would cut imports of non-rubber footwear exceeding $2.50 in value from 575 million pairs in 1984 to 474 million pairs in the first year.\textsuperscript{128}

In response to the ITC finding and the President’s rejection of footwear quotas, Congress introduced legislation aimed at reducing the foreign share of the domestic market to fifty percent.\textsuperscript{129} The footwear import quota measures would allow no more than 450 million pairs of shoes to enter the United States annually over the next eight years.\textsuperscript{130} Footwear imports in 1984 totaled 726 million pairs and comprised seventy-one percent of the United States market.\textsuperscript{131} Congress later incorporated the footwear legislation into the textile import quotas bill.\textsuperscript{132}

President Reagan vetoed the legislation which included import quotas on footwear on December 17, 1985.\textsuperscript{133} He contends that footwear restraints would harm the consumer, hurt other United States industries, and would not help domestic shoe manufacturers.\textsuperscript{134} As a trade-off for his policy against footwear quotas, the President directed the U.S. Trade Representative to investigate bringing actions against foreign footwear industries through GATT.\textsuperscript{135}

\begin{itemize}
  \item imports of non-rubber footwear entering the U.S. since 1980 are the main reason for the domestic shoe industry’s woes. The ITC decided the case on a § 201 escape clause petition. \textit{ITC Reverses Previous Footwear Decision, Votes Affirmative on New Import Case, 2 INT’L TRADE REP. (BNA) 726} (May 29, 1985) [hereinafter cited as \textit{ITC Reverses}].
  \item Members of the ITC stated that revised Department of Commerce industry data supported the industry’s arguments for relief. Data showed the following: footwear imports had increased from 366 million pairs in 1980 to 726 million in 1984; unemployment in the shoe industry is 16.6%, and there were 84 plant closings in 1984 as compared to 14 closings in 1983, 11 closings in 1982 and 1981, and three closings in 1980. \textit{Id.}
  \item Wash. Post, Aug. 29, 1985, at 22, col. 1. The plan would allow import growth of 3% in the third year, 6% in the fourth year, and 9% in the final year. The plan also calls for an auction of import licenses. \textit{Five Year Quota, supra} note 126.
  \item \textit{Frustration on the Footwear Front, 43 CONG. Q. 1758} (Sept. 7, 1985).
  \item \textit{Id.}
  \item \textit{See supra} notes 72, 84 and accompanying text.
  \item \textit{Supra} note 71.
  \item President Rejects ITC’s Recommendation For Footwear Quotas, Citing Protectionism, 2 INT’L TRADE REP. (BNA) 1107-08 (Sept. 11, 1985).
  \item Wash. Post, Aug. 29, 1985, at 22, col. 1.
\end{itemize}
CUSTOMS

A. Interest Payments are not Dutiable

On July 8, 1985, the United States Customs Service announced that it would not consider most interest payments as part of the dutiable value of goods, provided certain criteria are met. The decision followed a 1984 determination by the Customs Valuation Committee of the General Agreement on Tariffs and Trade, and reversed the prior position of the Customs Service.

Under its new position, the Customs Service will not consider interest payments as part of dutiable value provided that the buyer identifies interest charges separately from the price actually paid for the goods. Additionally, the financing arrangement must be in writing. The buyer also must demonstrate that the goods are actually sold at the price declared, and that the rate of interest does not exceed a reasonable level.

B. Notice Requirements

On February 8, 1985, the Court of Appeals for the Federal Circuit ruled in Frederick Wholesale Corp. v. United States that bulletin notices of liquidation placed in a public room of a United States Customhouse were "sufficiently conspicuous" to meet statutory and regulatory requirements.

Previous Customs rulings held non-dutiable only those interest payments which were part of an "overall financing arrangement," or those which a buyer paid to a third party unrelated to a seller who did not accrue to the seller's benefit. Id. at 27,886.

The regulations state "the claimed rate of interest does not exceed the level for such transaction prevailing in the country where, and at the time, when the financing was provided." Id.

Frederick Wholesale Corp. v. United States, 754 F.2d 349 (Fed. Cir. 1985).

19 U.S.C. § 1500(e) provides in part: "The appropriate customs officer shall, under rules and regulations prescribed by the Secretary—

e) give notice of such liquidation to the importer, his consignee, or
The notices in question were stamped "liquidated" and filed in a binder at the New York customhouse. The binder was on a table in a third floor room for thirty days and afterwards was on a shelf in a nearby room. Both rooms were in a public corridor near elevators. There were, however, no signs anywhere in the customhouse that the notices were in that room.\(^9\)

The court held that methods of giving notice are evaluated according to the standard of a prudent importer or other interested person exercising a reasonable amount of diligence.\(^10\) The court found that the information office in the customhouse would be an adequate method of giving notice to a prudent importer.\(^11\)

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agent in such form and manner as the Secretary shall prescribe in such regulations." 19 U.S.C. § 1500(e) (1982).

19 C.F.R. § 159.9(b) provides:

The bulletin notice of liquidation shall be posted for the information of importers in a conspicuous place in the customhouse at the port of entry . . . or shall be lodged at some suitable place in the customhouse in such a manner that it can readily be located and consulted by all interested persons, who shall be directed to that place by a notice maintained in a conspicuous place in the customhouse stating where notices of liquidation of entries are to be found.

19 C.F.R. § 159.9(b) (1985).

* Frederick Wholesale Corp., 754 F.2d at 350.

\(^10\) Id. at 352.

\(^11\) The parties stipulated that plaintiff importer had a courtesy notice of liquidation which gave it actual knowledge of the impending liquidation. Plaintiff's authorized law firm and customhouse broker also had knowledge of which room in the customhouse maintained the notices. Id. at 351.
A. Eximbank Funding Cuts

In its budget recommendations for fiscal year 1986, the Reagan Administration proposed that an interest matching program (I-Match) replace the direct loan program of the United States Export-Import Bank (Eximbank).1 On December 19, 1985, Congress rejected this "budget cutting measure"2 by approving $1.11 billion for Eximbank's direct lending program in fiscal year 1986 (FY).3 Additionally, Eximbank's insurance and guarantee programs for export financing4

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1 H.R. REP. No. 89, 99th Cong., 1st Sess. 2 (1985). See also Trade Agencies Not Immune from "Freeze" Plan as President's 1986 Budget Sent to Congress, 2 INT'L TRADE REP. (BNA) 206 (Feb. 6, 1985). According to Eximbank President William Draper, I-Match would provide commercial banks with an opportunity to increase their participation in the export financing business. Under the I-Match program, instead of making direct loans, Eximbank would guarantee export loans made by private lending institutions. In addition to loan guarantees, Eximbank would subsidize the commercial lending institution's interest on export loans to allow the lender to offer a rate competitive with the Organization for Economic Cooperation and Development lending minimum. See New Eximbank Interest Rate "Buy-Down" Would Work As Well As Regular Lending, Draper Says, 2 INT'L TRADE REP. (BNA) 255 (Feb. 20, 1985). For an overview of amendments to the Eximbank direct lending program establishing a mixed credit program, see Annual Survey of Developments in International Trade Law: 1984, 15 GA. J. INT'L & COMP. L. 473, 541-43 (1986) [hereinafter cited as 1984 International Trade Law Survey].

2 See H.R. REP. No. 89, supra note 1, at 4. Eximbank direct loans are "on-budget," or recorded budget expenditures. I-Match loan guarantees, however, would be "off budget" and thus not be recorded as budget expenditures. The "off budget" status of I-Match would affect a substantial decrease in recorded budget expenditures. Furthermore, the government would continue to receive old loan payments without any new outlays.

3 Further Continuing Appropriations, 1985, Pub. L. No. 99-190, 1986 U.S. CODE CONG. & AD. NEWS (99 Stat.) 1185, 1303. The $1.11 billion represents a compromise between the House-approved $784 million and the Senate-approved $1.8 billion. 43 CONG. Q 2690 (Dec. 21, 1985). To some extent, these amounts are misleading since the Senate supported early administration efforts to eliminate Eximbank's direct lending program. See House Budget Committee Reaches First Money Resolution With $2.8 Billion for Eximbank, 2 INT'L TRADE REP. (BNA) 701 (May 22, 1985).

4 H.R. REP. No. 98, supra note 1, at 2. In addition to its direct loan program, Eximbank provides insurance and guarantee programs for private sector export loans. During the first two quarters of fiscal year 1985, Eximbank earmarked approximately $4 billion in guarantees and insurance for commercial export financing. Id.
received over $13 billion in FY 1986 funding.\(^5\)

During FY 1985, the total appropriation available for Eximbank’s direct lending program amounted to $3.865 billion.\(^6\) At the close of FY 1985, obligations for direct loans totaled only $672 million.\(^7\) Members of the House and Senate disagreed over why this large discrepancy between appropriations and expenditures occurred. House members associated the low level of direct loans with factors beyond Eximbank’s control such as worldwide recession, debt levels in Third World countries, and appreciation of the dollar.\(^8\) On the other hand, Senate members cited a “cautious hunkered down approach” to direct lending by Eximbank.\(^9\) Regardless, both Houses of Congress agreed that the ability of United States exports to compete with foreign exports that are financed with government subsidies depended on the continuation of Eximbank’s direct lending program.\(^10\)

B. Proposed Export Financing “War Chest”

Comporting with plans to eliminate Eximbank’s direct lending program,\(^11\) President Reagan recommended that Congress establish a $300 million export financing “war chest” under the control of the Department of the Treasury.\(^12\) The “war chest” would aid United

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\(^7\) \textit{Id}. In fiscal year 1984, Eximbank earmarked approximately $1.5 billion in direct loans. H.R. REP. No. 89, \textit{supra} note 1, at 2.

\(^8\) H.R. REP. No. 89, \textit{supra} note 1, at 2. The reduction in export financing is characterized by the House as being attributable to negative world economic factors. Thus, when world economic conditions improve, the demand for export financing will increase. \textit{Id}.

\(^9\) S. REP. No. 167, \textit{supra} note 6, at 142. The Senate did not attribute the decline in Eximbank direct loans to factors external to Eximbank. The Senate report criticized the performance of Eximbank’s leadership. In addition to a lack of aggressiveness, the report cited a misplaced emphasis on profits and minimal U.S. export promotion. \textit{Id}.

\(^10\) H.R. REP. No. 89, \textit{supra} note 1, at 2. The House report indicated that Eximbank export financing is “critical for the success of U.S. exporters whose competitors can offer official subsidized financing.” \textit{Id}. Moreover, the Senate report stated that “Eximbank’s direct lending program is the most effective, most efficient, and least costly way . . . to counter foreign government sponsored competition.” S. REP. No. 167, \textit{supra} note 6, at 142.

\(^11\) \textit{See supra} note 1 and accompanying text.

\(^12\) President Reagan announced the “war chest” in his speech on trade policy on
States exporters in competing against foreign export credit subsidies. Moreover, the Reagan Administration favored using the $300 million to pressure uncooperative countries into supporting United States efforts to raise the Organization for Economic Cooperation and Development’s (OECD) minimum grant aid threshold in mixed credit transactions. Although both the House and Senate considered several versions of the export financing “war chest,” it failed to pass Congress in 1985.

C. Overseas Private Investment Corporation Amendments of 1985

On December 11 and 12 of 1985, respectively, the House and Senate approved the Overseas Private Investment Corporation Amendments of 1985. The new legislation renewed and extended through September 30, 1988, the authority of the Overseas Private Investment Corporation (OPIC) to issue insurance, reinsurance, and guarantees for projects in lesser developed countries. OPIC’s reau-

September 23, 1985. For a summary of the President’s speech, including the text of the speech, see President Reagan Unveils “White Paper” Setting Out Major Free Trade Initiatives, 2 INT’L TRADE REP. (BNA) 1182, 1210-19 (Sept. 25, 1985) [hereinafter cited as White Paper]. Other trade initiatives outlined in the President’s speech are a “strike force” against unfair trade practices, GATT negotiations to enhance fair trade practices, domestic assistance for workers affected by world trade, and activities to ensure stable economic growth. Id.

13 See Bonker Questions Administration on New Mixed Credit Plan, Expresses Skepticism, 2 INT’L TRADE REP. (BNA) 1256 (Oct. 9, 1985); see also Treasury Sends Congress Draft Legislation for “War Chest” to Combat Predatory Lending, 2 INT’L TRADE REP. (BNA) 1229 (Oct. 2, 1985).

14 See White Paper supra note 12, at 1187-88. The Administration cited France as a country that often takes advantage of the use of official export financing, thereby using the minimum OECD level. The United States desires to raise the minimum grant-aid threshold in mixed credit transactions from 25% to 50%. Id.


17 131 CONG. REC. H11671, H11673 (daily ed. Dec. 10, 1985). Although OPIC operates as an independent agency, it technically is part of the State Department’s International Cooperation Development Agency. OPIC enhances development in lesser developed countries through the provision of insurance to protect private United States investment in Third World countries against the risks of: (1) nationalization, confiscation, or expropriation by the host government; (2) war, civil strife, revolution, or insurrection; and (3) foreign government restrictions on an investor’s conversion of local currency to United States dollars. H.R. REP. No. 359, 99th Cong., 1st Sess. 1-2 (1985) [hereinafter cited as OPIC Report]. The OPIC Report indicated that pursuant to 22 U.S.C. § 2191 (1982) Congress created OPIC: “To mobilize and facilitate the participation of United States private capital and skill in the economic and social development of less developed friendly countries and areas, thereby complementing the development assistance objective of the United States.” Id.
Authorization will not require passage of a separate appropriations bill since the corporation has operated profitably since 1984.19

Under one of the most important of the bill's amendments, OPIC received authority to issue broader insurance coverage for loss due to "business interruptions."20 In the past, OPIC only could insure applicants against the direct costs of the event.21 The new legislation also will protect a United States company against consequential costs of the event.22

In addition to the new business interruptions insurance, the bill approved a pilot program of facultative reinsurance to encourage greater availability of political risk insurance.23 The program will provide reinsurance to insurance companies, financial institutions, other persons, or groups thereof with respect to insurance issued by such insurers in excess of OPIC's normal liability limits.24 Within 180 days of the legislation's enactment, an advisory group shall conduct its first meeting on development and implementation of the pilot program.25

The new legislation also mandated that OPIC publish and make available to applicants for assistance the policy guidelines of the corporation governing its programs.26 Under preceding legislation, OPIC regulations were not available to the public or applicants for assistance.27

19 OPIC Report, supra note 18, at 2. In FY 1984, OPIC's net income totaled $97,200,000. Id. See also House, Senate Clear Three-Year OPIC Measure Including "Business Interruption" Program, 2 INT'L TRADE REP. (BNA) 1566 (Dec. 18, 1985) [hereinafter cited as House Senate Clear Three-Year OPIC Measure].
20 House, Senate Clear Three-Year OPIC Measure, supra note 19, at 1566.
21 OPIC Report, supra note 18, at 77. For example, under OPIC's war coverage, if a war resulted in damage to a company's supplier of a crucial raw material and thereby caused an interruption in the insured company's operations, past OPIC coverage generally offered no relief. Id.
22 Id. In the example given in note 21, OPIC's new "business interruption" insurance would provide relief for increased costs of raw material or reduced cash flow due to a scarcity of the raw material. Id.
23 131 CONG. REC. H11671, H11672 (Daily ed. Dec. 10, 1985). The pilot program must be established within one year from the enactment of the new legislation. To be eligible for the program, a company, institution, or other person must be an eligible investor as defined in 22 U.S.C. § 2198(C) (1982). Id.
24 Id. The bill authorizes a maximum of $150 million for the total program with a $50 million limit on obligations in any one country. Id.
25 Members of the advisory group will consist of three representatives from OPIC, four representatives from private insurers, and two representatives from eligible investors. Id. at H11673.
26 Id.
In one other new requirement, the legislation instructed that the General Accounting Office prepare a report on the impact of OPIC projects on employment in the United States. The study and report must be completed within one year of the new legislation's effective date.

D. Foreign Aid Assistance Reauthorization/Appropriations


When compared to total 1985 appropriations, the Act authorized only slightly less foreign aid funds for fiscal years 1986-87. However, with respect to President Reagan's 1986 budget request, the Act reduced total foreign aid funding, decreased military aid and funding for the Economic Support Fund, and increased development and other economic aid programs. In addition to these 1986-87...
authorizations, the new Act authorized two billion dollars in 1985 supplemental funds for Israel and Egypt.\textsuperscript{38}

In addition, the new Act established a Federal Coal Export Commission which was included in the budget for fiscal years 1986-87.\textsuperscript{39} Membership on the Commission will consist of thirty members with ten from the federal government and twenty from the private sector.\textsuperscript{40} The Commission will meet not less than four times per year during its two year tenure to discuss and examine measures to expand exports of coal.\textsuperscript{41} Within this two year period, the Commission will report to the President and Congress its findings and recommendations for increasing exports of coal.\textsuperscript{42}

Unlike the authorization legislation, Congress did not approve a separate appropriations bill for foreign aid programs;\textsuperscript{43} funds for fiscal year 1986 foreign aid programs were approved as part of an omnibus continuing resolution.\textsuperscript{44} The bill appropriated a total of $15.025 billion for foreign military, economic, and development aid programs in fiscal year 1986.\textsuperscript{45}

\textsuperscript{38} Id. at 216 n.10. The new Act authorized $1,500,000,000 for Israel and $500,000,000 for Egypt in 1985 supplemental funds. Id. Moreover, these amounts were approved in a supplemental appropriations bill and are to be spent as “cash grant transfers” over fiscal years 1985-86. Supplemental Appropriations Fiscal Year of 1985, Pub. L. No. 99-88, 1986 U.S. Code Cong. & Ad. News (99 Stat.) 293, 324.

\textsuperscript{39} International Security and Development Cooperation Act of 1985, supra note 30, at 282-83. Under § 1304, the Secretary of Commerce shall establish a Federal Coal Export Commission within 90 days after the enactment of the Act. Id. at 282.

\textsuperscript{40} Id. Ten members of the Commission will be appointed from among the Department of Energy, Department of State, Department of Transportation, Office of the United States Trade Representative, the International Trade Administration, and a federal agency engaged in export financing. Id. at 282. The 20 private sector appointments will include five representatives of export coal producers, five representatives of coal labor, five representatives of transporters of export coal, and five representatives of United States export coal financing. Id.

\textsuperscript{41} Id. at 282-83.

\textsuperscript{42} Id. at 283.

\textsuperscript{43} Foreign Aid Issues in 1985, supra note 30, at MLC-021. A foreign aid appropriations bill, unlike an authorizations bill, actually appropriates federal funds for expenditure. No separate foreign aid appropriations bill has been passed since 1981. Id.

\textsuperscript{44} Further Continuing Appropriations, 1985, supra note 3, at 1291-1315. Continuing appropriations resolutions do not require Congress to vote separately on foreign aid issues. Thus, Congress has less opportunity to become deadlocked over foreign policy issues. 43 Cong. Q. 2688 (Dec. 21, 1985).

\textsuperscript{45} Id. at 2692. This amount almost equalled President Reagan’s total request for 1986 of $15,032,241,934. Id.
In light of President Reagan's 1986 budget request, the major accomplishments of the continuing resolution were slightly increased military aid, decreased funding for the Economic Support Fund, and decreased funding for development and other economic aid programs. Egypt and Israel received the largest amount of assistance, and unlike the loans to a majority of other countries, Israel and Egypt will receive aid in the form of grants. In addition to the regular foreign aid programs, the legislation appropriated $1.11 billion for the Export-Import Bank's direct loan program. Also, the bill reauthorized and appropriated increased contributions to several international development banks.

E. Revision of Regulation K

In August of 1985, the Board of Governors of the Federal Reserve System revised Regulation K, which governs the activities of Edge Act corporations. The bill approved only a 3.9% increase for the three major military aid programs, which are the Foreign Military Sales Financing Program, the Military Assistance Program, and the International Military Education and Training Program. Between 1981-85, Congress increased these three military aid programs at an annual average of 20%. The bill reduced funding for the Economic Support Fund from $3.841 billion for fiscal 1985 to $3.7 billion for 1986. President Reagan had requested $4.024 billion for 1986. Development and other economic programs were funded with $2,717,060,730. Among these programs, the Agency for International Development's programs for agriculture and rural development received the greatest reduction from its fiscal 1985 level; Congress approved only $700,000,000 of the President's $792,000,000 budget request for 1986.

The following authorizations, as well as the first year of funding, were approved:
- $131 million over a two year period to the World Bank;
- $225 million over a three year period to the African Development Fund;
- $225 million over a three year period to the World Bank's International Development Association's "Special Facility" for Sub-Saharan Africa;
- $175.2 million over a four year period to the World Bank's International Finance Corporation.

Corporations. As pertains to Edge Corporations, the revisions affected United States operations, lending and investment limits, acquisition of ownership, and the divestiture requirement concerning investment in foreign companies by United States banking institutions. The Board also amended a regulation governing foreign banking institutions’ nonbanking operations in the United States.

With respect to domestic operations, the Board of Governors did not approve any substantial expansion of the activities of Edge Corporations in the United States. The Board revised Regulation K to allow Edge Corporations to provide full banking services to a limited class of companies that engage only in international business. Although included as part of the proposed revisions, the Board did not approve the following: domestic lending of nonbanking international

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53 50 Fed. Reg. 39,974 (1985) (to be codified in 12 C.F.R. pt. 211). United States banking institutions utilize Edge Corporations to compete in the international banking market. Edge Corporations, which are created and operated pursuant to The Edge Act, § 25(1) of the Federal Reserve Act (12 U.S.C. § 611 (1982)), function as federally chartered banking organizations that offer international banking services. 50 Fed. Reg. 39,974, 39,977 (1985). The Board of Governors of the Federal Reserve System is responsible for “chartering, supervising and examining” Edge Corporations. Id. at 39,977. Accordingly, the Board of Governors is required to review and revise its regulations concerning Edge Corporations every five years. Id. at 39,974.

For a summary of these revisions as originally proposed by the Board of Governors in June 1984, see 1984 International Trade Law Survey, supra note 1, at 546.

54 50 Fed. Reg. 39,974-75 (1985). Edge Corporations are restricted by statute to domestic activities that are “incidental” to international business. Id. at 39,974. The Board required that all Edge Corporation transactions with United States residents be based on international transactions. Revisions proposed in 1984 contained four possible modifications of this transaction approach. Only one of these, the provision of full banking services, gained Board approval. Id. at 39,974-75.

55 Edge corporations have per-customer lending limits. Id. at 39,976.

56 Id. at 39,977. See also Fed Expands Edge Act Corporations Foreign Banking Activities, supra note 52, at 1880. Here, it is reported that the Federal Reserve will focus on the financial character of the buyer, including the opportunity for money laundering. Id.

57 50 Fed. Reg. at 39,979 (1985). Regulation K does not permit investments by United States banking institutions in organizations that operate a business in the United States. Instead the revised regulations allow limited ownership of foreign companies that engage in business in the United States. Id.

58 Id. The amended regulation clarifies the regulation governing exemptions for United States nonbanking activities of foreign banks. Id.

59 Id. at 39,976. The Board of Governors cited administration and enforcement concerns among its reasons for not liberalizing the domestic banking requirements. Id.

60 Id. at 39,974-75. Under the revised regulations, Edge Corporations may provide deposits, loans, etc. to the specified companies. Id.
deposits;\textsuperscript{61} domestic lending to residents of the United States where at least seventy-five percent of the loan is for international purposes;\textsuperscript{62} or domestic lending to residents of the United States that conduct international business where seventy-five percent of the corporation's operations are international.\textsuperscript{63}

Moreover, the revisions raised the per-customer lending limit of Edge Corporations.\textsuperscript{64} Additionally, the revised regulations increased the dollar amount that Edge Corporations may invest in permissible activities without prior approval of the Board of Governors.\textsuperscript{65} The Board, however, left the "risk asset" standard for capital requirements unchanged.\textsuperscript{66}

Among other action taken by the Board, the regulations now require that any person intending to purchase twenty-five percent or more control in a corporation must provide the Board of Governors with sixty days' notice.\textsuperscript{67} Furthermore, the revised regulations affirmed the Board's authority to prohibit such purchases of voting shares.\textsuperscript{68} Under the regulations, the Board could allow such purchases but impose conditions to ensure proper banking practices.\textsuperscript{69}

One other revision changed the investment divestiture requirements to allow foreign branches of United States banking institutions to own up to five percent of a foreign company that operates a business

\textsuperscript{61} Id. at 39,975. Under the proposed revisions, this approach is titled the "limited branch" concept. In rejecting the modification, the Board expressed concern over whether the proposed revision's authorization of domestic transactions was consistent with the Edge Act.

\textsuperscript{62} Id. The proposed revisions cited this proposal as the "transactional leeway" approach. The Board stated that administrative problems outweighed the benefits of implementing such an approach. Id. at 39,976.

\textsuperscript{63} Id. at 39,975. This approach to domestic operations, the "modified transactional leeway" approach, also caused concerns regarding administrative problems on the part of the Board. Id. at 39,976.

\textsuperscript{64} Id. at 39,976-77. The Board raised the per-customer lending limit from 10\% to 15\% of the Corporation's capital and surplus. Id.

\textsuperscript{65} Id. at 39,978. The Board raised the dollar amount investment limit from $2 million to $15 million. Another specified limit on investment, five percent of the investor's capital or surplus, remained unchanged. Id.

\textsuperscript{66} Id. at 39,977. The regulation's capital requirement for Edge Corporations is seven percent of "risk assets" (total assets minus cash, funds due from United States banking institutions, Federal securities, and U.S. government funds sold).

\textsuperscript{67} Id. The Board attributed the need for this requirement to a significant increase in the number of Edge Corporations and Edge Corporation holdings since 1979, plus an increase of Edge Corporation activities in the U.S. economy and the international banking market. Id.

\textsuperscript{68} Id.

\textsuperscript{69} Id.
in the United States. Under the revised regulations, such investments may be made regardless of the operations of the company, since such investments are "incidental" to the foreign operations of the United States bank.

In addition to these revisions, the Board amended a regulation dealing with exempt United States nonbanking operations of foreign banking institutions. As clarified by the amendment, the regulation provides that a foreign banking organization may own foreign companies that conduct nonbanking activities in the United States only if the foreign banking institution controls a company overseas that conducts the same type of business as the United States company.

\footnote{Id. at 39,979. The Board approved this authority to enable foreign branches of United States banking institutions to operate consistently with local laws and regulations. \textit{Id.}}

\footnote{Id.}

\footnote{Id. The Board reported that the revision clarifies which companies are eligible for an exemption.}

\footnote{Id.}
A. Generalized System of Preferences: Least-developed Beneficiary Developing Countries

On July 1, 1985, President Reagan designated thirty-two countries as least-developed beneficiary developing countries. The President's designation exempts those countries considered the poorest countries in the Third World from the competitive need limits provided under provisions of the Generalized System of Preferences Program. The designated countries are also entitled to duty-free treatment on articles imported on or after January 1, 1976, and entered or withdrawn from warehouse for consumption on or after July 4, 1985.

B. United States-Israel Free Trade Area

On August 19, 1985, the Agreement on the Establishment of a Free Trade Area between the Government of the United States of

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1 Exec. Order No. 12,524, 50 Fed. Reg. 27,409 (1985); see also Amending the Generalized System of Preferences 21 WEEKLY COMP. PRES. DOC. 867 (July 8, 1985).
2 Id. The following countries received designation as least-developed beneficiary developing countries: Bangladesh; Benin; Bhutan; Botswana; Burkina Faso; Burundi; Cape Verde; Central African Republic; Chad; Comoros; Djibouti; Equatorial Guinea; Gambia; Guinea; Guinea-Bissau; Haiti; Lesotho; Malawi; Maldives; Mali; Nepal; Niger; Rwanda; Sao Tome and Principe; Sierra Leone; Somalia; Sudan; Tanzania; Togo; Uganda; Western Samoa; Yemen Arab Republic (Sanaa).

In a related matter, final addition and deletions to the annual GSP eligibility listing are contained at 50 Fed. Reg. 26,423 (1985). USTR Announces Final Additions Deletions to Annual GSP Eligibility Listing, 2 INT'L TRADE REP. (BNA) 862 (July 3, 1985).
4 Exec. Order No. 12,524, supra note 1.
America and the Government of Israel became effective.\(^5\) The new Agreement provides for duty-free treatment on all trade between the United States and Israel by January 1, 1995.\(^6\) The Agreement also affects several nontariff trade barriers between the two countries.\(^7\)

C. United States-China Peaceful Nuclear Cooperation Agreement

On July 23, 1985, Energy Secretary John Herrington and Chinese Vice Premier Li Peng signed a proposed Agreement for Cooperation Between The Government of the United States of America and The Government of the People's Republic of China Concerning Peaceful Uses of Nuclear Energy [hereinafter the Nuclear Cooperation Agreement].\(^8\) Congress subsequently enacted legislation approving the Nu-


\(^7\) Free Trade Agreement, *supra* note 6, at 654. For an analysis of the new Agreement's effect on nontariff trade barriers, see Recent Development, *supra* note 5, at notes 18-61 and accompanying text.

clear Cooperation Agreement prior to adjournment but imposed conditions on the implementation of nuclear exports to China. The

of the Nuclear Cooperation Agreement is to provide the legal framework to give companies in the United States the opportunity to sell nuclear power reactors, components, materials, and technology to China. Id. at 84. The Chinese plan to construct ten nuclear power plants by the year 2000 with a total capacity of 10,000 megawatts. Id. at 94. Given this objective, the Chinese need improved technology in advanced fuel fabrication, instrumentation, and construction management. Id. at 35. China is obtaining commercial consultations on its nuclear program from a number of countries, but United States companies cannot participate unless a nuclear cooperation agreement is in force. Moreover, technology used in French, German, and Japanese nuclear reactor systems originated in the United States. Knowledge of these previous technology transfers by the United States increased China's interest in American nuclear technology. Id. at 32-33.

9 Pub. L. No. 99-183, 99th Cong., 1st Sess. 1, 1986 U.S. CODE CONG. & AD. NEWS (99 Stat.) 1174. Before a Nuclear Cooperation Agreement becomes valid, it is submitted to Congress by the President for a period of 90 days, 30 days in the Foreign Affairs and Foreign Relations Committee, and 60 days of congressional review. The President has determined that the Nuclear Cooperation Agreement did not require an exemption from the relevant sections of the Atomic Energy Act. Since Congress did not adopt a joint resolution of disapproval, the signed agreement becomes effective at the end of the 90-day period. OTA Memorandum, supra note 8, at 54. See also Nuclear Cooperation with Red China: A Say for Congress, Congressional Research Service Review 12-14 (Nov./Dec. 1985). Although the Nuclear Cooperation Agreement required no congressional approval, Congress adopted a joint resolution on December 11, 1985 that approved the Agreement. Pub. L. No. 99-183, 99th Cong., 1st Sess. 2, 1986 U.S. CODE. CONG. & AD. NEWS (99 Stat.) 1174. The legislation, however, stipulated that no license may be issued for export under the agreement:

(1) until the expiration of a period of thirty days of continuous session of Congress after the President has certified to the Congress that—

(A) the reciprocal arrangements made pursuant to Article 8 of the Agreement have been designed to be effective in ensuring that any nuclear material, facilities, or components provided under the Agreement shall be utilized solely for intended peaceful purposes as set forth in the Agreement;

(B) the Government of the People's Republic of China has provided additional information concerning its nuclear nonproliferation policies and that, based on this and all other information available to the United States Government, the People's Republic of China is not in violation of paragraph (2) of section 129 of the Atomic Energy Act of 1954; and

(C) The obligation to consider favorably a request to carry out activities described in Article 5(2) of the Agreement shall not prejudice the decision of the United States to approve or disapprove such a request; and

(2) until the President has submitted to the Speaker of the House of Representatives and the Chairman of the Committee on Foreign Relations of the Senate a report detailing the history and current developments in
Nuclear Cooperation Agreement represents the United States first peaceful nuclear cooperation agreement with a communist state and its only such bilateral agreement with a nuclear-weapon state.\(^\text{10}\)

The duration of the Nuclear Cooperation Agreement is thirty years from its effective date.\(^\text{11}\) Under the agreement, cooperation is limited to the use of nuclear energy for "peaceful purposes."\(^\text{12}\) Article 1, paragraph 4 of the agreement states that "peaceful purposes include the use of information, technology, material, facilities, and components in such fields as research, power generation, medicine, agriculture and industry but do not include the use in research specifically on or development of any nuclear explosive device, or any military purpose."\(^\text{13}\) Moreover, transfers may occur directly between the parties to the Nuclear Cooperation Agreement or through authorized persons.\(^\text{14}\) Additionally, transfers of material, facilities, and components require confirmation from the government authority that the transferred items are subject to the provisions of the Nuclear Cooperation Agreement, and that the proposed recipient is an authorized person.\(^\text{15}\)

Each party must implement the treaty in accordance with its respective treaties, laws, and licensing requirements governing the use of nuclear energy for peaceful purposes.\(^\text{16}\) The Nuclear Cooperation Agreement excludes the export of plutonium and highly enriched uranium except in small amounts for use as samples, and also prohibits the transfer of "sensitive nuclear facilities" for production of such material.\(^\text{17}\)

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\(^{10}\) OTA Memorandum, supra note 8, at 40.

\(^{11}\) President's Message, supra note 8, at 12. Article 10 of the Nuclear Cooperation Agreement provides that the United States and China may extend the Agreement in accordance with each party's applicable procedures. Id.

\(^{12}\) Id. at 4. Article 2 of the Agreement provides that the parties shall cooperate in the use of nuclear energy for peaceful purposes. Id.

\(^{13}\) Id. at 2.

\(^{14}\) Id. at 5.

\(^{15}\) Id.

\(^{16}\) Id. at 4.

\(^{17}\) Id. at 6-7.
Only low enriched uranium (less than 20% of the isotope 235) may be transferred in accordance with the agreement.  

D. Trade Adjustment Assistance

When Congress adjourned on December 20, 1985, the future of the Trade Adjustment Assistance program remained undecided. Moreover, authorization for the Trade Adjustment Assistance program expired at midnight on December 19, 1985. The major Trade Adjustment Assistance proposals in 1985 included the following: a proposed extension of the program with slight changes as part of the Deficit Reduction Amendments of 1985; the Trade Adjustment Assistance Reform and Extension Act of 1985; the Job Security Bank Act of 1985; and the Reagan administration’s proposed elimination of the Trade Adjustment Assistance program.

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18 Id. at 4-5.
The Deficit Reduction Amendments of 1985 would reauthorize the Trade Adjustment Assistance programs for workers and firms under the Trade Act of 1974, as amended, until September 30, 1989. The legislation would, however, change several provisions of both programs. Unlike the program in past years where eligibility for workers who were laid off due to plant relocations overseas depended on a showing of decreased exports or increased imports, the amendments would base worker eligibility on the closing of the plant and the transfer of plant manufacturing overseas. The legislation also would liberalize worker qualifying requirements by increasing the maximum number of weeks of disability, and/or leave that apply as weeks of employment towards the twenty-six week minimum. Additionally, the amendments would increase the period during which a worker may collect cash benefits, make the statutory provisions concerning worker training programs consistent with United States Department of Labor regulations, and strengthen state employment security agencies' responsibilities concerning worker training opportunities.

Other provisions of the Deficit Reduction Amendments would change the Trade Adjustment Assistance program for firms. Under the pro-


Under current law, groups of workers petition the Secretary of Labor for certification of eligibility to apply for trade adjustment assistance benefits. If the Secretary finds that increased imports "contributed importantly to significant worker layoffs, or the threat thereof, and to production and/or sales decline in the worker's firm or subdivision of a firm," a certification of eligibility should follow. Id. at 47. Certified workers may then apply to state employment security agencies for trade readjustment allowances (cash benefits), approved training, and job search and relocation allowances. Id.

Trade adjustment assistance for firms requires that individual firms petition the Secretary of Commerce for certification of eligibility. The Secretary must then make a determination of eligibility "based on whether increased imports 'contributed importantly' to significant worker layoffs, or the threat thereof, and to production and/or sales declines of the firm." Id. at 48. Certified firms are eligible to apply to the Secretary of Commerce for technical assistance in preparing and/or implementing adjustment assistance proposals, and/or financial assistance in the form of direct loans or loan guarantees. Id. Additionally, technical assistance is available to an entire industry in developing a new product, process or export market. Id.


28 Id. at 48-49.

29 Id. at 49.

30 Id. at 49-50. Applicable legislation titled those cash benefits trade readjustment allowances. Id.

31 Id. at 50.

32 Id. at 50-51.
gram in past years, a firm’s eligibility depended upon a finding that the firm’s total sales and/or production had decreased absolutely.\textsuperscript{33} The amendments would allow adjustment assistance to firms when sales in a critical product line decline due to increased imports.\textsuperscript{34} The amendments also would eliminate the matching requirement on firms for twenty-five percent of the cost of technical assistance provided by private concerns in preparing petitions and Trade Adjustment Assistance proposals.\textsuperscript{35}

Unlike the Deficit Reduction Amendments, the Trade Adjustment Assistance Reform and Extension Act of 1985 would change the worker assistance program into a worker retraining program.\textsuperscript{36} The bill also limits adjustment assistance for firms to technical assistance.\textsuperscript{37} Moreover, the amendments would discontinue loans or guarantees of loans that were available to firms in past years.\textsuperscript{38} The Act would extend program author’s action through 1988.\textsuperscript{39}

To fund the cost of the program, the Trade Adjustment Assistance Reform and Extension Act would impose a uniform ad valorem duty on all imports.\textsuperscript{40} In the past general revenues have funded Trade Adjustment Assistance programs.\textsuperscript{41} Under the proposed legislation, funds from the duty on imports would be deposited in a Trade Adjustment Assistance Trust Fund in the Department of the Treasury.\textsuperscript{42} These funds would offset the cost of the program.\textsuperscript{43}

\textsuperscript{33} Id. at 51.
\textsuperscript{34} Id.
\textsuperscript{35} Id. at 51-52.
\textsuperscript{36} S. 1544, supra note 23, at § 2. Under section 2 of the Act, cash assistance to a worker would be conditioned on the worker enrolling in and/or completing a training program for which a worker is available. Vouchers in the amount of $4,000 would be available for approved government and private sector training programs. Id.
\textsuperscript{37} Id. at § 4.
\textsuperscript{38} Id. Under current law certified firms apply for financial assistance in the form of loans ($1 million maximum) or loan guarantees ($4 million maximum with up to 90% guaranteed). H.R. Rep. No. 241, supra note 22, at 48.
\textsuperscript{39} S. 1544, supra note 23, at § 6.
\textsuperscript{40} Id. at § 7. Section 7 of the Act would require the President to negotiate an agreement through the General Agreement on Tariffs and Trade to provide for the levy of the duty. If the President has not completed an agreement with GATT within one year, excepting Congressional suspension, the duty would automatically become effective. The duty would be one percent ad valorem or such amount as is necessary to support the program. Id.
\textsuperscript{41} H.R. Rep. No. 241, supra note 22, at 47-48. “Such sums as may be necessary” were authorized. The projected costs for the Trade Adjustment Assistance Program during 1985 totaled $96,000,000. Id.
\textsuperscript{42} S. 1544, supra note 23, at § 6.
\textsuperscript{43} Id.
Another proposal considered by Congress in 1985, the Job Security Bank Act, would shift the worker assistance program towards worker retraining. The bill also proposes the use of a voucher system. Additionally, adversely affected workers must agree to repay certain sums as a precondition to cash assistance.

Funding under the Job Security Bank Act would include the imposition of a duty on all imports. Under the Act, an ad valorem duty between two-thirds of one percent and one percent would be levied. Funds generated by the duty would be deposited in trust in the treasury and used towards the cost of the program.

Unlike the congressional proposals, the Reagan administration opposed reauthorization of the Trade Adjustment Assistance program. The administration proposed that cash benefits to adversely affected workers be eliminated since the Regular Unemployment Insurance Program provides benefits for such workers. Under the administration’s proposal, needs created by termination of the Trade Adjustment Assistance Program would be satisfied by training and other adjustment activities under the Dislocated Worker Program authorized by Title III of the Job Training Partnership Act.

E. U.S. Dollar Rate of Exchange—Government Intervention

A heightened awareness of the effects of an extraordinary appreciation in the value of the dollar relative to other major currencies prompted Congress to take steps during 1985 towards mandated

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44 S. 1459, supra note 24, at § 2.
45 Id. Vouchers in the amount of $3,000 would be available for approved government and private sector training programs. Id.
46 Id. The “applicable repayment amount” is eight percent of the amount over the poverty level of a worker’s salary over the course of the first year of full-time employment. Id.
47 Id. at § 6.
48 Id.
49 Id. at § 2.
50 Trade Hearings, supra note 25, at 239. The Administration cited “disincentive for effective job search” and the current budget situation among the reasons that the Trade Adjustment Assistance Program should be discontinued. Id. at 240.
51 Id.
52 Id.
government intervention to stabilize the dollar.54 Among the most popular congressional proposals concerning such government intervention were the Strategic Capital Reserve Act55 and the Trade Enhancement Act.56 Although these bills differed in scope, both provided for facilitation of coordinated exchange rate policies between the United States, the United Kingdom, Japan, France, and West Germany (G-5 countries),57 and creation of a reserve within the United States Treasury for the purchase or sale of foreign currencies as a means of affecting intervention.58

As approved by the House Banking Committee on December 12, 1985, the Strategic Capital Reserve Act would establish a "Strategic Capital Reserve" within the United States Treasury for the purchase or sale of foreign currencies.59 Under this bill, when certain conditions

54 See H.R. 3498, 99th Cong., 1st Sess (1985). The House of Representatives developed a bill that had as its sole purpose affecting the value of the dollar relative to other major currencies. Id. The Senate included provisions in its omnibus trade bill that authorized government intervention by the Treasury Department to stabilize the value of the dollar. See S. 1860, 99th Cong., 1st Sess. (1985).

55 See H.R. 3498, supra note 54; see also House Banking Panel Approves Bill to Require U.S. Intervention to Stabilize U.S. Dollar, 2 INT'L TRADE REP. (BNA) 1581 (Dec. 18, 1985).

56 See S. 1860, supra note 54; see also Major Trade Bill to Overhaul U.S. Trade Law, Authorize MTN Negotiations Offered in Senate, 2 INT'L TRADE REP. (BNA) 1489-90 (Nov. 27, 1985).

57 H.R. 3498, supra note 54; S. 1860, supra note 54. Section 6 of the Strategic Capital Reserve Act would require consultation with other G-5 countries. See H.R. 3498, supra note 54, at 6. Sections 502 and 503 of the Trade Enhancement Act respectively recognize the importance of coordinated monetary policies among G-5 countries and require the President to begin negotiations with G-5 countries in pursuance of such coordination. S. 1860, supra note 54, at §§ 502-03. For an overview of the monetary policies that the G-5 countries agreed to pursue, see Finance Ministers, Central Bank Governors Discuss Economic Policies, 85 DEPT. ST. BULL. 46 (Nov. 1985).


59 131 CONG. REC. 101,519 (daily ed. Dec. 12, 1985). The reserve would be available to the Board of Governors of the Federal Reserve System and the Secretary of Treasury for the purchase or sale of foreign currencies. H.R. 3498, supra note 54, at § 2. Under section 3 of the House bill, when "the current account deficit has exceeded one and one-half percent of the gross national product for the most recent four consecutive quarters, and the trade-weighted exchange rate of the dollar is 15 percentum or more above the equilibrium rate," the Department of Treasury shall buy foreign currencies in increments of 3 billion dollars or greater. Such purchases are limited to the value of the current account deficit for the preceding quarter. Id.
exist over a specified period of time, the reserve would be used to intervene in the international monetary markets to achieve a satisfactory exchange rate. In conjunction with domestic intervention, the legislation would require consultations with other G-5 countries at least quarterly to ensure that coordinated exchange rate policies continue.

Not unlike the House bill, Title V of the Trade Enhancement Act would establish a "Strategic Exchange Reserve" in the United States Treasury to maintain a favorable exchange rate for the dollar. The bill, however, instead of specifying the conditions under which intervention is appropriate, would give the Treasury Department discretion to use the reserve as necessary. The legislation would also mandate that the President begin negotiations with other G-5 countries within six months of its effective date concerning coordinated monetary policies and reciprocal investment opportunities.

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60 For the conditions that trigger purchases of foreign currencies, see supra note 59. See also H.R. 3498, supra note 54, at § 3.
61 H.R. 3498, supra note 54, at § 6.
62 S. 1860, supra note 54, at § 503.
63 S. 1860, supra note 54, at §§ 501-03; see House Banking Panel Approves Bill to Require U.S. Intervention to Stabilize U.S. Dollar, supra note 55, at 1581. Here, the Senate bill's provisions on intervention to stabilize the value of the dollar are characterized as "weaker than the House Banking Committee Measure." Id.
64 S. 1860, supra note 54, at §§ 502-03.
UNFAIR TRADE PRACTICES

A. Antitrust

1. Foreign Arbitration of Claims

The United States Supreme Court decided in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.* that antitrust claims arising under the Sherman Act which are encompassed within a valid arbitration clause in an international commercial contract may be subject to foreign arbitration. The Court ruled that such antitrust claims may be arbitrable under the Arbitration Act. The Court added, however, that United States courts "have the opportunity at the award enforcement stage to ensure that the legitimate interest in the enforcement of the antitrust laws has been addressed."

The *Mitsubishi* dispute involved a 1979 sales agreement among Soler Chrysler-Plymouth, Inc. (Soler), Chrysler International, S.A. (Chrysler), and Mitsubishi Motors Corp. (Mitsubishi). The agreement provided that any dispute arising out of certain provisions within the agreement would be settled by arbitration in Japan. In 1981 a dispute developed between the parties over Mitsubishi's refusal to allow Soler to transship a quantity of its vehicles to the United States.

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3 *Mitsubishi Motors Corp.*, 105 S. Ct. at 3360.

4 Soler Chrysler-Plymouth, Inc. is an automobile dealership incorporated under the laws of Puerto Rico. *Id.* at 3349.

5 Chrysler International, S.A. is a Swiss corporation wholly owned by Chrysler Corp. of the United States. *Id.*

6 Mitsubishi Motors Corp. is a Japanese manufacturer of automobiles. The corporation is the product of a joint venture between Chrysler International, S.A. and Mitsubishi Heavy Industries, Inc., a Japanese corporation. *Id.*

7 Paragraph VI of the sale agreement provides: "All disputes, controversies or differences which may arise between [Mitsubishi] and [Soler] . . . shall be finally settled by arbitration in Japan in accordance with the rules and regulations of the Japan Commercial Arbitration Association." *Id.*
and Latin America. Mitsubishi filed suit under the Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards to compel Soler to arbitrate as prescribed by the agreement. Soler counterclaimed against Mitsubishi and Chrysler on several grounds, including violation of the Sherman Act. The district court ruled in favor of Mitsubishi and ordered arbitration. The First Circuit Court of Appeals reversed the district court’s ruling on the antitrust claims on the ground that such claims are nonarbitrable as a matter of law.

The Supreme Court rejected Soler’s contention that an arbitration agreement may not encompass claims arising out of statutes designed to protect a class to which the party resisting arbitration belongs unless the parties expressly agree to arbitrate those claims. The Court found no basis within the Arbitration Act for inferring a presumption against arbitration of statutory claims. Instead, it noted the “liberal federal policy” favoring arbitration agreements and guaranteeing the enforcement of private contractual arrangements.

The Supreme Court resolved two issues in holding that the parties may be compelled to arbitrate. First, the Court held that legal constraints do not prohibit the arbitration of certain antitrust claims if those claims are included within the arbitration clause of a valid contract. Second, and more importantly, the Court found that certain antitrust claims are arbitrable as a matter of law. As to the latter issue, the Court admitted that antitrust claims involving domestic litigants are inappropriate for arbitration. In terms of antitrust disputes involving international parties, however, the Court concluded that “concerns of international comity, respect for the capacities of

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8 Mitsubishi Motors Corp., 105 S. Ct. at 3349-50.
9 Supra note 2.
11 Mitsubishi Motors Corp., 105 S. Ct. at 3350-51. Soler alleged that Mitsubishi and Chrysler had conspired to divide markets in restraint of trade. According to Soler, Mitsubishi and Chrysler effectuated their conspiracy by refusing to permit Soler to resell to buyers throughout the Western Hemisphere vehicles it had obligated itself to purchase from Mitsubishi. Furthermore, Soler claimed that Mitsubishi had refused to ship Soler the parts necessary to adapt the vehicles for transshipment, and that Mitsubishi had coercively attempted to replace Soler with a wholly-owned subsidiary. Id.
13 Mitsubishi Motors Corp., 105 S. Ct. at 3353.
14 Id.
15 Id. at 3355.
foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" require the Court's enforcement of the agreement.\textsuperscript{16} The Court reserved for United States courts the responsibility at the award enforcement stage to ensure that the arbitrations address the interest of United States antitrust law.\textsuperscript{17}

2. Jurisdictional Rule of Reason

The Supreme Court of the United States denied certiorari in \textit{Timberlane Lumber Co. v. Bank of America National Trust & Savings Association},\textsuperscript{18} based on comity grounds under a tripartite jurisdictional "rule of reason" test. The dispute involved Timberlane Lumber Co.'s attempted buy-out of a Honduras lumber mill in which Bank of America owned a partial interest. Bank of America's actions in connection with the other interest holders formed the basis of the alleged anticompetitive conduct. During the procedural course of the dispute, petitioners appealed twice to the Ninth Circuit Court of Appeals.\textsuperscript{19} The Ninth Circuit, which formulated and applied the tripartite jurisdictional rule of reason test in its \textit{Timberlane} rulings, ultimately found that the district court's dismissal was appropriate on comity grounds, one of the test's prongs.\textsuperscript{20}

\textsuperscript{16} \textit{Id.}
\textsuperscript{17} \textit{Id. at} 3360.
\textsuperscript{18} 749 F.2d 1378 (9th Cir. 1984), \textit{cert. denied}, 105 S. Ct. 3514 (1985).
\textsuperscript{19} In \textit{Timberlane I} the district court dismissed the antitrust suit on the ground that the act of state doctrine prevented the federal courts from hearing the case. On appeal the Ninth Circuit vacated the district court's dismissal and remanded the case for further proceedings. Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597 (9th Cir. 1976). In vacating the district court's decision, the Ninth Circuit established a tripartite test for determining the extent of federal jurisdiction in cases alleging anticompetitive behavior abroad. The court's test essentially involves the analysis of three issues: whether the alleged restraint affects, or was intended to affect, the foreign commerce of the United States; whether the alleged restraint is of such a type and magnitude so as to be cognizable as a violation of the Sherman Act; and whether United States courts should assert extraterritorial jurisdiction in view of international comity and fairness. \textit{Id.}


\textsuperscript{20} Timberlane Lumber Co., 749 F.2d at 1383-86.
B. Dumping

1. Reasonable Indication of Injury

In *Jeannette Sheet Glass Corp. v. United States*,\(^{21}\) the Court of International Trade (CIT) held that the International Trade Commission (ITC) should not weigh conflicting evidence in its preliminary determination on the "reasonable indication of injury."\(^{22}\) The case arose in 1983 when Jeannette Sheet Glass Corporation filed petitions with the ITC and the Department of Commerce alleging injury of the domestic glass industry caused by foreign imports. The petitioner claimed that imports of thin sheet glass from Belgium and West Germany were injuring the domestic "regular quality" thin sheet glass industry\(^{23}\) and were retarding the establishment of a "high quality" thin sheet glass industry\(^{24}\) in the United States. The ITC found no reasonable indication of injury to the domestic regular quality industry. Furthermore, it found no reasonable indication of material retardation in the establishment of a domestic high quality industry by imports allegedly being sold at less than fair value (LTFV). Petitioner then filed this action challenging the ITC determinations.

The CIT analyzed the ITC's two determinations separately. In regard to the ITC's preliminary negative determination of injury to the regular quality industry, the CIT found the ITC erred by weighing conflicting evidence. The CIT stated that "Congress never intended the [ITC] at the initial stage of the antidumping proceedings to summarily reject petitions simply because the agency has knowledge of conflicting evidence."\(^{25}\) The CIT added that Congress intended the "reasonable indication" standard to be administered as a very low evidentiary threshold for an affirmative preliminary determination.\(^{26}\) According to the CIT, the ITC did not address the proper


\(^{22}\) Id. at 129. See 19 U.S.C. § 1673b(a) (1982), which embodies the "reasonable indication of injury" standard. Under 19 U.S.C. § 1673b(b) (1982), the Commerce Department's preliminary determination as to "less than fair value" sales must be affirmative when it has "a reasonable basis to believe or suspect" that exporters are selling the merchandise under investigation at less than fair value.

\(^{23}\) "Regular quality" thin sheet glass is used primarily in the production of microscope slides, cosmetic mirrors, and lantern slides for slide projectors. *Jeannette Sheet Glass Corp.*, 607 F. Supp. at 126.

\(^{24}\) "High quality" thin sheet glass is used primarily as optical coating glass and photographic slide glass. Id.

\(^{25}\) Id. at 129.

\(^{26}\) Id.
standard of reasonable indications of injury, but rather sought to definitively resolve the issues by weighing the conflicting evidence.\textsuperscript{27}

The CIT affirmed the ITC’s negative determination as to the issue of “material retardation”\textsuperscript{28} of the establishment of the high quality industry, citing with approval the ITC’s application of the “substantial commitment” test.\textsuperscript{29} Thus, the court remanded the case to the ITC for reconsideration of its preliminary determination regarding the reasonable indication of injury to the domestic regular quality industry.

In \textit{Armstrong Rubber Co. v. United States},\textsuperscript{30} the CIT reversed a negative ITC determination as to injury in a dumping investigation of passenger car tires from Korea. The court ruled that the Commission had applied an excessively stringent standard in its preliminary assessment of an indication of injury or threat of injury.\textsuperscript{31} The court added that the ITC did not concentrate on whether the possibility of injury existed, but rather erred by conducting “a final investigation in the guise of an entirely different and more rudimentary proceeding.”\textsuperscript{32}

2. Price of Exports from a State-Controlled Economy

In \textit{Four “H” Corp. v. United States},\textsuperscript{33} the Court of International Trade established guidelines for determining the “purchase price” of goods exported from a state-controlled economy for antidumping purposes.

In assessing the antidumping duties on canned mushrooms exported from the People’s Republic of China, the International Trade Admin-
istration (ITA) determined a purchase price based on transactions between CEROILS, \textsuperscript{34} an import/export trading company controlled by the Chinese Government, and United States importers. Petitioners contended that the ITA should have based the price on the preceding transactions between the Chinese canneries and CEROILS. They argued that the ITA cannot consider CEROILS the seller in sales transactions which determine United States purchase price because CEROILS is neither a manufacturer nor producer. Thus, according to petitioners, the corporation does not fit within the literal words of 19 U.S.C. section 1677a(b) governing the valuation of the goods. \textsuperscript{35}

The CIT found that the ITA ruled properly in this case, despite the absence of an explicit statutory provision relating to this situation. \textsuperscript{36} According to the court, product values derived from transactions totally internal to a nonmarket economy country are unreliable because "the state-controlled nature of the economy prevents ordinary market forces from setting prices." \textsuperscript{37} The CIT concluded that the ITA, in determining the United States purchase price for antidumping purposes, properly adjusted its procedures in order to arrive at a more appropriate price. \textsuperscript{38}

3. Modification of Treasury Order

In \textit{Alsthom Atlantique v. United States}, \textsuperscript{39} the Court of International Trade settled the issue of whether the Commerce Department has the authority to modify the scope of an antidumping duty order of the Treasury Department during a section 751 review. \textsuperscript{40} The case arose from a 1970 dumping proceeding involving large power transformers

\textsuperscript{34} "CEROILS" is the abbreviated name used by the court in reference to the China National Cereals, Oils, and Foodstuffs Import & Export Corp. \textit{Id.}

\textsuperscript{35} \textit{Id.} at 983. Both parties agree that 19 U.S.C. § 1677a(b) (Supp. IV 1980) governed the case. Nevertheless, Congress amended that statute in 1984 by specifically codifying the methodology that the International Trade Administration (ITA) employed in this case. The statute now provides that the reseller's price may be used alternatively with the manufacturer or producer's price in determining United States purchase price. 19 U.S.C. § 1677a(b) (Supp. III 1985).

\textsuperscript{36} \textit{Four "H" Corp.}, 611 F. Supp. at 984.

\textsuperscript{37} \textit{Id.} at 985.

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} 604 F. Supp. 1234 (Ct. Int'l Trade 1984).

exported from France. In 1971 the Treasury amended its notice of antidumping proceedings regarding such transformers to include shunt reactors. After receiving the authority in 1980 to administer the antidumping provisions, the International Trade Administration determined that the scope of the original Treasury determination included shunt reactors. Moreover, the ITA concluded that the scope of the Treasury's dumping finding could not be changed during a section 751 administrative review. Alsthom Atlantique, a French manufacturer of shunt reactors, brought this action to challenge the ITA's conclusion.

The CIT held that the ITA erred in its finding. The CIT found that although Congress did not define the scope of review under section 751, Congress did intend to authorize the Commerce Department's review of such LTFV determinations underlying the Treasury order. The CIT also reasoned that to require plaintiff to seek review of an antidumping duty order from an agency which no longer administers the antidumping laws would be against the interest of justice. The CIT remanded the case to the ITA for a determination of whether the class of merchandise encompassed by large power transformers includes the shunt reactors.

C. Countervailing Duties

1. Commercial Considerations Rule

The Court of International Trade ruled in British Steel Corp. v. United States, a case with "far-ranging implications in international trade," that certain British Government investments made in restructuring that country's steel production facilities constitute countervailable subsidies. The International Trade Administration found in 1983 that the United Kingdom was subsidizing British Steel Corporation (BSC), a nationalized company, in the form of counter-

41 Despite the Treasury's amendment to include shunt reactors, no shunt reactors were imported into the United States during the investigatory period, and the antidumping duty order did not refer to shunt reactors specifically. Alsthom Atlantique, 604 F. Supp. at 1235.
42 Id. at 1237.
43 Id.
45 Id. at 287.
46 The British Government established BSC in 1967 by combining 14 steel firms into one nationalized company. Upon the consolidation, the British Government reimbursed shareholders and absorbed substantial debts of the individual companies. The government in subsequent years converted the bulk of the debt into equity. See id. at 289.
available loans, grants and capital contributions. BSC subsequently appealed the ITA finding to the CIT.

The primary issue confronting the CIT was whether the British Government made loans and capital payments to BSC on terms inconsistent with the statutory "commercial considerations" standard.\textsuperscript{47} The CIT, noting the dismal financial status of BSC and the imprudence of the British Government's investments in the firm, agreed with the ITA's affirmative finding on this issue.\textsuperscript{48} The CIT rejected plaintiff's contention that the court must weigh the government's rationality of the restructuring in applying the commercial considerations test. The CIT stated that although the government investment may be rational in terms of national policy, the investment may be inconsistent with commercial considerations.\textsuperscript{49} The CIT also rejected BSC's contentions that funds provided for the closure of inefficient operations and the discharge of "redundant" work force are not countervailable subsidies.\textsuperscript{50}

2. Generally Available Benefits Rule

In \textit{Cabot Corp. v. United States},\textsuperscript{51} the Court of International Trade clarified the "generally available benefits" rule in countervailing duty suits. The CIT held that a government benefit, even if generally available to any enterprise or industry, may be countervailable if the benefit conferred a competitive advantage on specific enterprises or industries.

The case developed from a 1982 International Trade Administration investigation as to whether various Mexican Government programs were providing countervailable bounties or grants to Mexican producers or exporters of carbon black. Concluding affirmatively as to

\textsuperscript{47} \textit{Id.} at 290-93 (citing 19 U.S.C. § 1677(5) (1982)). The statute treats as countervailable any subsidy "bestowed directly or indirectly on the manufacture, production, or export of any class or kind of merchandise," including "[t]he provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations." 19 U.S.C. § 1677(5)(B)(i) (1982).

\textsuperscript{48} \textit{British Steel Corp.}, 605 F. Supp. at 290-93. The court reasoned that "[c]learly, given BSC's deteriorating financial condition and precarious situation, no private sector investor expecting a reasonable return on his investment within a reasonable time would have given any consideration whatever to investing in BSC during the period of its restructuring." \textit{Id.} at 293.

\textsuperscript{49} \textit{Id.} According to the court, "[n]either the reasonableness of the action taken by the government, nor the results ultimately achieved, . . . are pertinent to the 'commercial considerations' test." \textit{Id.}

\textsuperscript{50} \textit{Id.} at 293-95.

three programs, the ITA imposed duties. Among the programs found not to constitute subsidies was Mexico's program of providing carbon black feedstocks and natural gas to Mexican enterprises at prices below world market prices. The ITA justified this negative determination on the ground that Mexico's program provided the carbon black feedstocks on a non-preferential basis and that, as a rule, benefits which are generally available to all companies and industries within an economy are not countervailable.

In remanding the case the CIT found the generally available benefits rule, as developed by the ITA, to be an unacceptable legal standard for determining the countervailability of benefits. The CIT distinguished governmental "generalized benefits," which are not countervailable, from "generally available benefits," which, if actually accrued to specific recipients, are countervailable. Accordingly, the CIT ruled that the appropriate standard under the generally available benefits rule "focuses on the de facto case by case effect of benefits

32 The ITA found that three of Mexico's programs provided carbon black producers and exporters various loans at preferential interest rates and utility discounts which constituted countervailable subsidies. Id. at 726.

33 Id. at 730-31.

34 The court's examples of such generalized benefits include the provisions of national defense, education and infrastructure. Id. at 731.

35 Id. The CIT found "considerable controversy" surrounding the "generally available benefits" rule prior to Cabot Corp. The rule as the ITA applied it, under which all generally available benefits are not countervailable, was adopted by the CIT in Carlisle Tire & Rubber Co. v. United States, 564 F. Supp. 834 (Ct. Int'l Trade 1983). Two subsequent decisions of the CIT, however, rejected the rule as contrary to the countervailing duty statutes. See Agrexco, Agricultural Export Co. v. United States, 604 F. Supp. 1238 (Ct. Int'l Trade 1985) (see infra notes 58-61 and accompanying text); Bethlehem Steel Corp. v. United States, 590 F. Supp. 1237 (Ct. Int'l Trade 1984). The court in Bethlehem Steel Corp. described as "absurd" a law that would transform an obvious subsidy of a foreign government into a non-countervailable benefit merely because the subsidy was available to the entire economy. Id. at 1246.

The CIT described its reason for rejecting the ITA's mechanical application of the "generally available benefits" rule:

Apparently the ITA and the court in Carlisle view the noncountervailability of generally available benefits as the opposite side of the coin from the countervailability of benefits conferred upon a specific class. There is a distinction, however, which has not been clearly deciphered by the ITA or in prior judicial opinions, but which disrupts the apparent symmetry of the two sides of the coin.

The distinction that has evaded the ITA is that not all so-called generally available benefits are alike—some are benefits accruing generally to all citizens, while others are benefits that when actually conferred accrue to specific individuals or classes.

provided to recipients rather than on the nominal availability of benefits."  

Moreover, the CIT proffered two points of analysis in applying the proper standard: first, whether the government bestowed the benefits upon a specific class; and second, whether the benefits amounted to a competitive advantage.  

In *Agrexco v. United States*, the CIT held that the Commerce Department erred in concluding that Israel’s provision of various government services, which it disseminated to the general public but targeted to the rose growing industry, did not constitute countervailable subsidies. The case involved an ITA countervailing duty investigation of Israel’s alleged subsidies to its rose producing and exporting industries through twenty separate government programs. Both parties appealed before the CIT the ITA’s findings regarding fifteen of the government programs.  

The CIT remanded findings regarding several of Israel’s programs for redetermination because of the ITA’s improper application of the generally available benefits rule. The court admitted that such programs generally available to the public are usually found not countervailable. Nevertheless, the focal point of the test, according to the CIT, is not whether the benefits are disseminated to all groups, but whether the benefits are targeted to assist a particular, rather than a general, industry.  

3. Duties on Nonmarket Economy Exports  

In *Continental Steel Corp. v. United States*, a case that could significantly affect the impact of United States countervailing duty

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56 *Cabot Corp.*, 620 F. Supp. at 732.  
57 *Id.*.  
59 *See id.* at 1240-41 (enumerating the programs involved).  
60 The ITA findings remanded for redetermination include: the ITA’s valuation of a grant, for which it utilized a period of half the accounting life of a capital asset; the finding that the government’s provisions of extension services and research and development results are not a subsidy; the finding of the value of the minimum price program, which was based on “speculative” evidence; the finding of the value of property tax exemptions; and the finding of the value of the sales promotion budget. *Id.* at 1241-45.  
61 *Id.* at 1241-42 (citing Bethlehem Steel Corp. v. United States, 590 F. Supp. 1237 (Ct. Int’l Trade 1984)).  
laws, the Court of International Trade settled the issue of whether countervailable duty laws apply to subsidies on imports from non-market-economy countries. The CIT ruled that the language and the purpose of the countervailing duty statutes provide for the statutes’ application to such imports.

The case involved the alleged subsidization of carbon steel wire rod imported from Poland and Czechoslavakia. The Commerce Department determined that neither Poland nor Czechoslavakia had subsidized the manufacturers, producers, or exporters of the rod because as a matter of law, subsidies cannot exist in countries which have nonmarket economies.

The CIT rejected the Commerce Department’s rule on the ground that it violated the “plain meaning and purpose” of the countervailing duty law, which makes no distinctions based on the form of a country’s economy. According to the CIT, the language of the law

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63 The impact of Continental Steel Corp. could have far-reaching implications. For instance, [the ruling could make the filing of countervailing duty petitions against Soviet bloc countries more attractive as such countries are not entitled to an injury test before the International Trade Commission. The United States textile industry, concerned with import levels from China, may pursue countervailing duty cases against that country.](CIT Reverses Commerce, Rules Countervailing Duty Law Does Apply to Non-Market Economies, 2 INT’L TRADE REP. (BNA) 998, 999 (Aug. 7, 1985). According to Alan Holmer, former deputy assistant secretary for import administration and present general counsel to the United States Trade Representative, the Commerce Department will probably avoid applying the CIT’s decision pending an appeal to the Court of Appeals for the Federal Circuit. BNA Interview with Alan Holmer, Former Commerce Department Deputy Assistant Secretary for Import Administration, 2 INT’L TRADE REP. (BNA) 1016, 1017 (Aug. 7, 1985).

64 The Commerce Department defines a nonmarket economy as one which operates on principles of nonmarket cost or pricing structures so that sales or offers for sale of merchandise in that country, or to other countries, do not reflect the market value of the merchandise. In short, a nonmarket economy is said to be one in which the price of merchandise does not normally reflect its market value.

Continental Steel Corp., 614 F. Supp. at 549.

65 The Commerce Department rationalized its conclusion in several ways. Primarily, it claimed that government activity in a nonmarket economy cannot confer a subsidy, because a subsidy, by definition, is an act which distorts the operation of a market. The existence of a subsidy, therefore, is contingent upon the existence of a free market to provide an independent, essential reference point for measuring whatever is allegedly a “subsidy” to a particular enterprise. In addition, the Commerce Department cited Congress’ silence regarding the application of countervailing duty laws to nonmarket economies, the academic consensus that such laws should be inapplicable to nonmarket economies, and its broad discretion to determine the existence of subsidies as reasons supporting its determination. Id. at 549-50.

66 Id. at 550.
shows a "meticulous inclusiveness and an unswerving intention to cover all possible variations of the acts sought to be counterbalanced." The court further stated that the purpose and historical background of the countervailing duty statutes clearly indicate that "variation in the extent of control exercised by the foreign government over the economy is not a factor impeding the enforcement of the law." The court remanded the case to the International Trade Administration for redetermination consistent with its ruling.

4. Cumulation of Imports

In *American Grape Growers Alliance for Fair Trade v. United States*, the Court of International Trade addressed two issues: first, whether the International Trade Commission should have cumulated the imports of table wine from France and Italy instead of examining them separately during a preliminary determination of injury; and second, whether the ITC applied an erroneous legal standard in finding an absence of any "reasonable indication" of injury or threat of injury. The CIT concluded that the ITC actions were not in accordance with the law on either issue.

The action involved the plaintiffs' challenge to the ITC's preliminary negative determination in the countervailing duty and antidumping investigations of table wine from France and Italy. The ITC decided not to cumulate the imports from France, which were concentrated in the traditional white wine category, and those of Italy, which were of an effervescent type. The ITC found that collectively these wines did not exhibit an injurious effect on the domestic table wine industry. The ITC also found no reasonable indication that the allegedly subsidized imports either materially injured or threatened to materially injure the domestic industry.

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67 Id. at 551 (citing 19 U.S.C. § 1303 (1982)). The court added, "the language of this law is perfectly indifferent to forms of economy. The language plainly shows the strongest possible desire to prevent evasion either by means of technicalities of status, or by technicalities of form, or by technicalities of relationship." Id.


70 The statutory criteria for the determination by the ITC of "reasonable indication of injury" include a reasonable indication that an industry in the United States is materially injured or is threatened with material injury. Id. at 604, n.2 (noting 19 U.S.C. § 1671b(a)(1) (1982)).
In reversing the ITC on the cumulation issue, the court reasoned that "it was error to use one standard to define the borders of the investigation and another, more stringent standard, to justify combined analysis of the effect of articles already within those borders." The court noted that the statutory definition of "like product" is integral to both standards and should be applied to each consistently.

In reversing the ITC determination regarding the threat of injury, the CIT held that the standard for finding a reasonable indication of injury is a mere possibility of injury, instead of a proven causation between the imports and the alleged injury. According to the CIT, the ITC erred by conducting a detailed analysis of conflicting and incomplete evidence at an improper stage of the proceeding. The CIT commented that foreign over-production and established importation channels are sufficient evidence from which to infer a possibility of injury.

D. Legislation

The United States Congress proposed numerous bills in 1985 designed in full or in part to combat foreign unfair trade practices. In addition to increasing the protection of domestic industries, the dominant themes of the proposals included expanding the authority of the President and the United States Trade Representative (USTR) to act against foreign unfair trade practices and providing expeditious treatment of petitions for relief. Nevertheless, Congress did not enact any of the various foreign trade bills proposed during the 1985 session.

On November 20, 1985, a bipartisan group of senators introduced the Omnibus Trade Bill of 1985 in an attempt to comprehensively reform international trade law. The plan's major goals are to strengthen

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71 Id. at 605.

72 ""Like product"" is defined as ""a product like the article subject to investigation."" Id. at 605-07 (citing 19 U.S.C. § 1677(10) (1982)). The court commented: The coherence of an investigation depends on a uniform definition of the like product and this definition should not be tampered with unless it is modified due to indisputable preliminary facts, or fully developed final investigative facts. If imported articles match the definition of the 'like product' they should be considered together and further distinctions based on national origin or variations in character are artificial and irrelevant. Id. at 605.

73 Id. at 607.

74 Id.

75 Id. at 608.

the campaign against unfair trading practices by other countries, expand assistance to domestic industries injured by import competition, and provide new presidential authority to reach agreements with other industrialized countries in setting international monetary policy. Among the major elements of the bill is the mandate that the President initiate action against foreign trade restrictions and retaliate against nations refusing to compromise. The bill also would provide new forms of aid, such as limited antitrust exemptions, for import-troubled industries.

The Foreign Trade Antitrust Improvements Act of 1985, which proposes to modify the application of the Sherman Act and Clayton Act to international commerce, was introduced February 6, 1985. The bill would amend the Clayton Act by clarifying the procedure by which subject matter jurisdiction is to be tested in antitrust actions involving commerce with foreign nations. In addition, the bill would codify the jurisdictional rule of reason and would permit court application of the doctrine of forum non conveniens in antitrust suits involving trade or commerce with foreign nations.

Senator Bob Packwood proposed legislation on July 9, 1985, which specifically addresses the United States trade deficit with Japan. The bill would require the President to use his authority to eliminate alleged unfair trade practices of Japan, or in the alternative, to offset the effect of Japanese barriers on the merchandise trade balance.

Senator John Heinz introduced a bill on July 25, 1985, to make litigation under existing dumping and countervailing statutes "less complex, expensive, and arbitrary, yet more certain, expeditious and

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78 Under this rule the United States courts would consider several factors before providing jurisdiction, including the relative significance of the alleged violation conducted within the United States as compared to that conducted abroad, the nationality of the parties, and the principal place of business of corporations. S. 397, 99th Cong., 1st Sess. (1985). This rule was enunciated in Timberlane Lumber Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n, 549 F.2d 597 (9th Cir. 1976). See supra notes 18-20 and accompanying text.


In addition, the bill would amend section 201 of the Trade Act of 1974 by conforming existing import injury standards for injury claims to the lesser standards required by the General Agreement on Tariffs and Trade. The bill also would place section 301 reviews under more stringent time limits.

The Senate reintroduced legislation on January 22, 1985, that would provide United States firms direct access to the federal courts for the prevention and compensation of foreign dumping. Under the Unfair Foreign Competition Act of 1985, domestic companies would have the right to obtain court injunctions to prevent dumping and to seek damages where injury has occurred.

Bipartisan groups introduced the Trade Law Modernization Act of 1985 in both the House and the Senate on April 3, 1985. Among its provisions, the bill would modernize procedures for obtaining relief from imports causing economic harm and would develop certain national trade policies and negotiation objectives.

On October 8, 1985, House Republicans introduced the Trade Partnership Act of 1985 as a “fair trade” alternative to the “pro-

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87 The bill would modernize procedures in two ways. First, it would ease the standard for determining economic harm to conform to the less ambiguous and stringent international standard of the General Agreement on Tariffs and Trade (GATT). Second, it would make the enhancement of industry competitiveness a purpose of action, combining trade relief with other self-help measures. Reform Bill, supra note 86, at 837.
tectionist" stand which a number of Democratic representatives took in 1985. The bill's provisions include support for mixed-credit financing to combat that used by other governments; stronger protection for United States patents; and greater authority for the USTR in relation to sections 201 and 301 of the Trade Act of 1974.

A bill was introduced in the House on May 23, 1985, which would strengthen section 301 reviews. Under the proposal the USTR, instead of the President, would have the power to approve a section 301 petition. Furthermore, the bill would establish a sixty-day limit on USTR disapprovals and would require the USTR to submit his reasons for disapproval to Congress within another fifteen days.

E. Commerce Department Rules and Guidelines

1. Export Trade Certificates of Review

The International Trade Administration issued in January 1985 a final rule implementing Title III of the Export Trading Company Act of 1982 and guidelines for the issuance of certificates of review under the Act.

The final rule, which became effective January 11, 1985, establishes procedures under which businesses may apply for export trade certificates of review, and explains the circumstances under which the Secretary of Commerce will issue such certificates. The certificates of review provide recipient businesses with limited antitrust immunity. The final rule contains several changes from the interim rule. The changes include an expanded list of definitions; clarifications regarding the application procedures; revisions regarding amendments, modifications, and revocations of certificates; and revisions in the judicial review of the certificates.

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89 Republican Trade Bill, supra note 88, at 1289.
90 See supra notes 82-83.
92 See supra note 83. See generally infra note 102 (describing the § 301 review).
Under the Export Trading Company Act of 1982, the Secretary of Commerce may issue an export trade certificate of review granting protection to its holder and members from private treble damage actions. This certificate also grants protection against government criminal and civil suits under federal and state antitrust laws for the export conduct specified in the certificate and carried out during its effective period in compliance with its terms and conditions.
The guidelines\(^{95}\) set forth the eligibility requirements, certification standards, and analytical approach which the Departments of Commerce and Justice will use in determining whether to issue an export trade certificate of review. These guidelines also suggest the factors a firm should consider in deciding whether to apply for a certificate as well as the alternatives to certification under the Export Trading Company Act.

2. Administration of Trade and Tariff Act of 1984

The Commerce Department issued interim rules\(^{96}\) on February 12, 1985, relating to the effective dates of changes made in the antidumping and countervailing duty laws-under the Trade and Tariff Act of 1984 (1984 Act).\(^{97}\) According to the Commerce Department, the rules would allow the Department "to retain limited flexibility in determining when amendments of the 1984 Act take effect."\(^{98}\) The rule provides an effective date of October 30, 1984, for the amendments, except for provisions relating to various investigations and judicial review.

F. Trade Agreements

The Governments of the United States and Mexico formally agreed on April 23, 1985, to establish a bilateral framework concerning the treatment of subsidies and countervailing duties.\(^{99}\) The agreement will not prevent the Government of Mexico from adopting measures to assist its economy's industries, including those in the export sector. It does require, however, that Mexico reduce or eliminate export subsidies when the use of such export subsidies is inconsistent with its competitive and developmental needs.\(^{100}\) Under the agreement the United States promises not to presume that incentives granted by

\(^{100}\) Mexico agrees that export subsidies on its products shall not be used in a manner which causes serious prejudice to the trade or production of the United
Mexico's Government result in adverse effects to the trade or production of the United States. Instead, the United States agrees to apply a new injury test in the investigation of the countervailing duty charges. The United States also promises to provide Mexican products with treatment no less favorable than that accorded to the products of other countries.

G. Section 301 Complaints

1. Satellite Launching Services

Pursuant to his powers under section 301 of the Trade Act of 1974, President Reagan announced on July 17, 1985, his determination that the practices of the member states of the European Space Agency (ESA), with respect to the commercial satellite launching services of Arianespace, S.A., are not unreasonable or burdensome to United States commerce. The President cited various reasons for his decision, including the absence of evidence that either the ESA or its member states provided the foreign company with offsets, insurance, or loans. According to Reagan's announcement, market forces are primarily responsible for ESA's current low launch prices.

2. Semiconductor Industry

The United States Trade Representative announced on July 11, 1985, the initiation of a section 301 investigation based on a petition of the Semiconductor Industry Association (SIA). SIA alleged that the Government of Japan's implementation of various policies during States. Among its provisions, the Understanding requires Mexico to avoid establishing or maintaining preferential pricing for energy or petrochemical industries, to restrain its pre-export and export financing, and to avoid establishing or maintaining any program which constitutes an export subsidy. U.S.-Mexican Understanding, supra note 99, at 590-91.

103 Under the injury test, the United States must demonstrate adverse effects by positive evidence and formal investigation procedures. The test is applicable to all countervailable duty investigations in progress as of the date of the signing of the agreement. Id. at 591.

102 19 U.S.C. § 2411(a) (Supp. III 1985). This section, with its companion sections 2412-16, provides for the enforcement of United States rights in response to unfair foreign trade practices. Under these procedures a party may file a complaint with the United States Trade Representative requesting the President to take appropriate action to counter the discriminatory practices of which the party has complained.

1974-75 created a semiconductor market structure in which a few companies having strong interlocking ties with respect to research and development dominated the industry. The Government of Japan has subsequently filed a rebuttal to the action.\textsuperscript{105}

\textsuperscript{105} Commerce Self-Initiates Investigation on 256K Chips, Finds Dumping Margins in 64K Chip Case, 2 INT'L TRADE REP. (BNA) 1543, 1544-45 (Dec. 11, 1985).
AGRICULTURE

A. Omnibus Farm Bill

On December 23, 1985, President Reagan signed the five-year Omnibus Farm Bill. The new legislation outlines a number of programs designed to enhance United States exports. The bill also extends and broadens food assistance programs, current export credit programs, cargo preference rules, and controversial quotas on sugar and dairy products.

The export provisions of the law require the United States Department of Agriculture (USDA) to use $2 billion worth of surplus commodities to subsidize United States exports over a three-year period. Additionally, the USDA must set aside $325 million in direct funds or equivalent commodities to offset subsidized export competition. The law further requires the USDA to allocate at least $5 billion for short-term and intermediate export guarantees, and reauthorizes and extends market development programs and agricultural export credit revolving funds.

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2 For a summary of the Farm Bill, including both export and domestic provisions, see Major Provisions of Farm Bill Conference Report, 43 Cong. Q. 2678 (Dec. 21, 1985) [hereinafter cited as Provisions of Farm Bill].
3 Id.
4 Id. This provision is one of the more controversial parts of the bill. President Reagan Signs Five-year Farm Bill but Plans to Seek Market Oriented Pricing, 3 Int'l Trade Rep. (BNA) 7, 8 (Jan. 1, 1986) [hereinafter cited as Reagan Signs Farm Bill].
5 Provisions of Farm Bill, supra note 2, at 2682. Subsidized export competition primarily is coming from the EC. Reagan Signs Farm Bill, supra note 4, at 8; see also infra notes 36, 41, 42 and accompanying text.
6 The law requires the Commodity Credit Corporation (CCC), see infra note 23, to make available at least $5 billion a year in short-term export guarantees. It also broadens the existing program of loan guarantees and requires the Secretary to make at least $500 million a year available in the intermediate credit program through 1988 and up to $1 billion in 1989. Provisions of Farm Bill, supra note 2, at 2682.
7 The legislation extends through 1990 the authority for creation of an agricultural export revolving fund which would be fed by repayments of direct export credit loans. Id.
The new legislation continues food assistance programs by extending export sales and grant programs under Food-for-Peace. It also authorizes the Secretary of Agriculture to lend foreign currency generated from foreign sales and maintain minimum donations programs.

Furthermore, the legislation clarifies the Cargo Preference Program by exempting certain USDA programs and increasing requirements of percentages in other programs.

The Reagan Administration failed in its attempt to overturn the sugar import program. The legislation establishes a minimum support price for sugar and requires the President to use his complete powers, including imposition of stiffer import quotas, to forestall domestic forfeiture of crops.

Another controversial provision of the law sets up a dairy export bonus program from surplus stocks. The provision allows the USDA to set rules for dairy exports to provide the exporter with payment-in-kind for overseas sales.

Congress worked all year to pass the Omnibus Farm Bill, yet when approved on December 18, even its supporters said the legislation

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8 The law extends export and sales under Food-for-Peace through fiscal year 1990. Id. at 2681; see also Food-for-Peace Act of 1966, Pub. L. No. 89-808, 80 Stat. 1526.

9 Provisions of Farm Bill, supra note 2, at 2681. At least 10% of the sales in Food-for-Peace agreements must be made in foreign currencies. Id. The law allows the Secretary to lend the currency to a financial intermediary in that country for the purpose of making loans to finance private enterprise investment at reasonable rates of interest. Id.

10 Id. The bill requires the Secretary to donate up to 650,000 metric tons of commodities. Between 75,000 and 500,000 tons of donations per year will aid and promote private enterprise in the recipient country. At least five percent of the donation will be made to private voluntary organizations. Id. at 2681-82.

11 Id. at 2682. For a more detailed account of the Cargo Preference provisions and their purpose, see infra notes 32-34 and accompanying text.

12 Reagan Signs Farm Bill, supra note 4, at 9. The Administration believes that the sugar import program has had a devastating impact on sugar-growing economies of South and Central America, and the Caribbean. Id.

13 The minimum support price is 18 cents per pound for raw sugar cane. The law also establishes minimum sugar beet prices. Id.; see also Provisions of Farm Bill, supra note 2, at 2681.

14 Id.

15 Reagan Signs Farm Bill, supra note 4, at 8.

16 For details of the dairy provisions, see Provisions of Farm Bill, supra note 2, at 2680.

17 Id.
deserved only grudging support.\textsuperscript{18} Moreover, President Reagan had threatened to veto the bill because it was too costly.\textsuperscript{19} When signing the bill, the President vowed to seek changes in the provisions on dairy and sugar export programs.\textsuperscript{20} Congressional farm leaders expect deteriorating economic conditions on United States farms to force Congress to revise commodity programs in 1986.\textsuperscript{21}

**B. Cargo Preference/Blended Credit Sales of Agricultural Products**

On February 21, 1985, the United States District Court for the Federal Circuit ruled in *Transportation Institute v. Dole*\textsuperscript{22} that blended credit\textsuperscript{23} sales come under the Cargo Preference laws.\textsuperscript{24} The court found that the Cargo Preference laws required that fifty percent of United States commodities delivered to foreign countries under United States concessional programs must be shipped in United States bottoms. The court considered sales pursuant to the blended credit program concessional; therefore, the Cargo Preference Act should apply.\textsuperscript{25}

Following the ruling, the USDA announced it would cease all blended credit shipments because shipping those commodities in United States bottoms would make the cost of the program prohibitive.\textsuperscript{26}

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\textsuperscript{18} *Reagan Signs Farm Bill*, supra note 4, at 8. The House passed the bill 325-96. The Senate passed the bill by a vote of 55-38. Despite the wide margins of victory, the results of the final conference pleased few. *Farm Bill Offers Limited ‘Win’ for All Sides*, 43 Cong. Q. 2673 (Dec. 21, 1985).

\textsuperscript{19} President Reagan threatened to veto any bill that provided for more than $50 billion in price and income supports. *Id.* The Administration estimates that the new legislation's support program will cost $52 billion over three years. *Id.*

\textsuperscript{20} *Reagan Signs Farm Bill*, supra note 4, at 7.

\textsuperscript{21} *Id.* at 8.


\textsuperscript{23} The blended credit program combines commercial credit guarantees with direct CCC credits to reduce the effective rate of interest. 15 U.S.C. § 714(c) (1982). The CCC is a federal agency within the United States Department of Agriculture (USDA) established pursuant to the Commodity Credit Corporation Charter Act. 15 U.S.C. § 714 \textit{et seq.} (1982). The two programs at issue in this case were the CCC Export Sales Program (GSM-5), and the CCC Export Credit Guarantee Program (GSM-102). For a description of the programs and cases, see Transp. Inst., 603 F. Supp. at 891.

\textsuperscript{24} See \textit{supra} note 23 and accompanying text.

\textsuperscript{25} Transp. Inst., 603 F. Supp. at 907.

\textsuperscript{26} The USDA immediately suspended $536 million of exports under CCC blended credit programs. *Administration Officials at Odds On Cargo Preference Strategy, Block Supports Bills*, 2 Int'l Trade Rep. (BNA) 513 (Apr. 10, 1985).
The United States government is appealing the decision. In a brief filed in July, the government asserts that the Cargo Preference Act does not apply to blended credits, and also that it would be "impracticable" to apply the Act to blended credit shipments. The government contends that the ruling changes the blended credit program from an export promotion program to a maritime subsidy program.

The 1985 Farm Bill contains a compromise on the cargo preference issue. Specifically, the legislation exempts USDA blended credit and export enhancement programs from cargo preference laws. The Farm Bill increases from 50 percent to 75 percent the cargo preference requirements for the USDA's concessional programs such as Food-for-Peace. The Department of Transportation will pay for the increased cost. The legislation, however, provides for the revocation of these provisions and the reinstatement of the current law, if funding is not available from the Department of Transportation within ninety days.

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27 Administration is Appealing Court's Cargo Preference Law Ruling on Blended Credits, 2 INT'L TRADE REP. (BNA) 1010 (Aug. 7, 1985) [hereinafter cited as Cargo Appeal].

28 Id. The government asserts that applying cargo preference rules to blended credit shipments would increase the total delivered cost of commodities by 15%. The added costs would have "a drastic and adverse effect on the competitive purpose and nature of export promotion programs in a fiercely competing international export market." Id.

29 Id.

30 See supra note 1 and accompanying text.

31 Exemptions include programs that use CCC stocks to enhance agriculture exports and programs under which CCC guarantees of commercial credit blend with CCC direct credits. Also exempted are short term credit programs and programs undertaken for the purpose of promoting United States agriculture exports, provided the Secretary of Agriculture determines that such activities are necessary to keep United States commodities competitive in international trade. Provisions of Farm Bill, supra note 2, at 2682.

32 Id. Congress increased from 50% to 75% United States Government-guaranteed agricultural shipments that must be carried on United States flag vessels to appease both maritime and agricultural interests in conflict over the application of the Cargo Preference Act after Transportation Inst. v. Dole. See, e.g., Cargo Appeal, supra note 27. Proponents of the provision argue it will defend national security interests by strengthening the maritime industry while protecting the USDA from increased budget outlays. Senate Passes Cargo Preference Compromise During Consideration of Farm Bill Renewal, 2 INT'L TRADE REP. (BNA) 1360 (Oct. 30, 1985). Opponents argue the provisions will cost the government up to $60 billion per year in additional ocean freight payments. Id.

33 Provisions of Farm Bill, supra note 2, at 2682.

34 Id.
C. USDA Bonus Sale Program

In May 1985, the USDA initiated export bonus sales of surplus United States commodities to offset subsidized agricultural exports from the European Communities (EC).35 The EC subsidies had substantially lowered the United States share of the Middle Eastern wheat market.36

In June, the United States offered Algeria one million metric tons of wheat at bonus prices.37 On July 2, the USDA offered Egypt 600,000 metric tons of wheat flour under the Commodity Credit Corporation bonus plan.38 The USDA announced on August 20 that the Yemen Arab Republic would have the opportunity to purchase up to 50,000 metric tons of wheat under the program.39 Finally, in October, the USDA offered United States exporters an opportunity to sell up to 500,000 metric tons of wheat to Turkey under the export bonus program.40

In September, the EC raised its subsidies in response to the United States program in order to protect its traditional markets.41 It is estimated that the United States and EC have a combined surplus of 65 million metric tons of wheat.42

35 USDA Announces Details of $2 Billion Export Commodity Bonus Program, Algeria First Use, 2 INT'L TRADE REP. (BNA) 750 (June 5, 1985) [hereinafter cited as Algeria First Use].

36 Agriculture Department Announces Second Export Bonus Deal, This Time to Egypt, 2 INT'L TRADE REP. (BNA) 901 (July 10, 1985)[hereinafter cited as Second Export Deal]. Before the EC's recent push, the United States had approximately 50% of the world flour market. Now the U.S. share of the world market is approximately 15%. The EC has increased its market share from approximately 20% to over 50%. Id.

37 Algeria First Use, supra note 35.

38 Second Export Deal, supra note 36. On July 26, USDA offered Egypt another 500,000 metric tons. Agriculture Announces Third Export Bonus Sale, Offering Wheat Incentives to Egypt, 2 INT'L TRADE REP. (BNA) 978 (July 28, 1985).

39 Yemen Third Country to Receive U.S. Offer of Free Wheat Under Export Bonus Program, 2 INT'L TRADE REP. (BNA) 1048 (Aug. 21, 1985). On Aug. 14, 1985, USDA announced that Egypt was the first country to bid for wheat, asking for 150,000 metric tons. Id.

40 USDA Offers Turkey Bonus Commodity Wheat, Algeria Accepts Tenders on 135,000-Ton Sale, 2 INT'L TRADE REP. (BNA) 1338 (Oct. 23, 1985).

41 EC Hikes Subsidies on Mediterranean Wheat to Counter U.S. Export Bonus Sale to Egypt, 2 INT'L TRADE REP. (BNA) 1191 (Sept. 25, 1985).

42 Id.
A. Mask Work Protection Regulations


The interim regulations entered into force immediately because owners of mask works were entitled to file for applications on January 7 under the Semiconductor Chip Protection Act of 1984. The interim regulations limited registration to mask works comprising at least twenty percent of the intended final form of the semiconductor chip product. The interim regulations also dealt with the question of eligibility for registration under a transfer of rights.

As one of the tests of eligibility, section 902(a)(1) of the regulations required the owner to be a national or domiciliary of the United States. In addition, the interim regulations permitted foreign applicants to file registration applications prior to receiving protection orders from the Patent Office.

In the final regulations, the Copyright Office responded to the controversy over the twenty percent rule by eliminating twenty percent

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2 Id.


5 Copyright Office Issues Final Rules Implementing Semiconductor Chip Act, 2 INT’L TRADE REP. (BNA) 908 (July 10, 1985). The Copyright Office explained that "absent examination of the prior art, it must be presumed that a mask work comprising twenty percent of the final chip is de minimis, and an unoriginal combination of staple elements, commonplace in the industry." 50 Fed. Reg. 263 (1985).

6 Id.

7 Id.
as an absolute bar to the registration of mask works fixed in intermediate form. The Copyright Office maintained its position on section 902 eligibility of rights, but changed section 914 orders to allow broader protection for foreigners.

B. Grey Goods Litigation

In Duracell, Inc. v. United States, the Court of Appeals for the Federal Circuit concluded that the President’s disapproval of an International Trade Commission (ITC) decision is not appealable where the President said that he acted for policy reasons.

In November 1984, the ITC ruled in In re Certain Alkaline Batteries that the import of foreign Duracell batteries violated section 337 of the Tariff Act of 1930. In January, President Reagan disapproved the Commission’s determination because it was at odds with the Customs Service’s longstanding interpretation of section 42 of the Lanham Act, and because he was concerned that the Commission’s determination would prejudice the Administration’s efforts to review its position on the grey goods issue. Subsequently, Duracell appealed the President’s disapproval, arguing that it was improper because it was not for policy reasons.

The court of appeals determined that the President acted in accordance with the law because he had acted in a timely manner. The court also stated reasons other than the merits of whether there had been a violation of section 337 of the Tariff Act. Nothing in section

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8 50 Fed. Reg. 26,714 (1985). The Copyright Office established a full disclosure deposit to apply to instances where registration is sought for a mask work contribution consisting of less than 20%. Id. at 26,720 (to be codified at 37 C.F.R. § 211.5(b)(2)(i)).
11 Id.
14 50 Fed. Reg. 1655 (1985). For background on President Reagan’s determination and the grey goods cases which led to it, see 1984 Trade Law Survey, supra note 1, notes 391-411 and accompanying text.
16 See supra note 14.
the court concluded, gave the litigant the right to appeal the President's decision.\(^{19}\)

In three other grey goods cases, various courts provided conflicting rulings on grey goods issues. In \textit{Vivitar Corp. v. United States},\(^ {20}\) the Court of Appeals for the Federal Circuit decided that although the Customs Service is not required by section 526 of the Tariff Act of 1930 to exclude all grey goods \textit{sua sponte},\(^ {21}\) when such goods are not excluded, the United States trademark owner may pursue a determination of its rights in federal district court.\(^ {22}\) The court ruled that current customs regulations are valid but not controlling.\(^ {23}\) The court stated that while it had rejected the government's argument that section 526 must be interpreted as limited by the regulations, the statute may not have \textit{any} implied limitations.\(^ {24}\)

In \textit{Olympus Corp. v. United States},\(^ {25}\) the District Court for the Eastern District of New York declined to follow the Federal Circuit Court of Appeals' decision in \textit{Vivitar Corp.},\(^ {26}\) and held that section 526 should be given a limited construction. The district court upheld Customs' allowance of importation into the United States by third parties of goods bearing the Olympus trademark.\(^ {27}\) Customs based its decision on 19 C.F.R. \S 133.21, which provides that certain restrictions on the importation of trademarked goods do not apply when the foreign and domestic trademark owners are parent and subsidiary companies.\(^ {28}\)

In \textit{Weil Ceramics & Glass, Inc. v. Dash},\(^ {29}\) the United States District Court for New Jersey followed the Federal Circuit's \textit{Vivitar Corp.}\(^ {30}\) ruling and determined the case on the scope of section 526 instead

\(^{19}\) \textit{Id.}

\(^{20}\) \textit{761 F.2d 1552 (Fed. Cir. 1985), cert. denied, 54 U.S.L.W. 3460 (1986).}

\(^{21}\) \textit{Supreme Court Asked to Resolve Gray Market Import Issue in Vivitar Case, 2 INT'L TRADE REP. (BNA) 1199 (Sept. 25, 1985).}

\(^{22}\) \textit{Vivitar Corp., 761 F.2d at 1570.}

\(^{23}\) \textit{Id. The court held that Customs regulations are a "reasonable exercise of administratively initiated enforcement of section 526." Vivitar Corp., 761 F.2d at 1571.}

\(^{24}\) \textit{Id.}

\(^{25}\) \textit{Olympus Corp. v. United States, No. CV-84-0920 (E.D.N.Y. Aug. 22, 1985).}

\(^{26}\) \textit{Vivitar Corp., 761 F.2d at 1552.}

\(^{27}\) \textit{Grey Goods Regulation is not Ultra Vires, 30 PAT. TRADEMARK & COPYRIGHT J. (BNA) 633 (Oct. 17, 1985).}

\(^{28}\) \textit{Id.}

\(^{29}\) \textit{Weil Ceramics & Glass, Inc. v. Dash, No. 84-2157D (D.N.J. Sept. 12, 1985).}

\(^{30}\) \textit{See supra note 20 and accompanying text.}
of current Customs Service regulations. The district court considered the import regulation of grey goods when the United States markholder is related to the foreign markholder and/or manufacturer under section 33 and section 42 of the Lanham Act and section 526 of the Tariff Act of 1930. When such goods are denied entry, the plaintiff must establish both confusion and a "separate factually distinct goodwill" in its product to recover.

C. Generic Terms in Foreign Languages Unregistrable

In the case of In re Le Sorbet, the Trademark Trial and Appeal Board held that "le Sorbet" is generic, and therefore unregistrable under section 2 (e)(l) of the Lanham Act. The Board held that fair competition in the international movement of goods would be greatly impaired if generic terms in foreign languages were treated differently than their English language counterparts.

The applicant sought to register the name "le Sorbet" for fruit ice, contending that "sorbet" is English and the use of the French article "le" imparts a French "flavor." The Board held that the word "sorbet" is French and so the entire term is unquestionably French. The Board distinguished this from other registrations such as "le car" and "le case" (for a jewelry box), which use a French article in front of an English word.

The rationale for the refusal is that registration of generic terms as trademarks would interfere with the free flow of international

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31 See supra note 29.
34 In re Le Sorbet, Inc., No. 295,817 (TTAB Nov. 5, 1985).
No trade-mark by which the goods of the applicant may be distinguished from the goods of others shall be refused registration on the principal register on account of its nature unless it—
(e) Consists of a mark which, (1) when applied to the goods of the applicant is merely descriptive or deceptively misdescriptive of them.
Id.
36 See "Le Sorbet" for Fruit Ice is Generic, 31 PAT. TRADEMARK & COPYRIGHT J. (BNA) 26 (Nov. 14, 1985) [hereinafter cited as Le Sorbet].
37 Id.
38 Id.; see also In re Universal Package Corp., 222 USPQ 244 (TTAB 1984).
trade in products known by that given term. The United States Departments of State and Commerce have protested the registration in foreign countries of generic English terms.

39 Le Sorbet, supra note 36, at 27.
40 Id.
JURISDICTION

A. Court of Appeals for the Federal Circuit

1. CIT Jurisdiction in Grey Market Goods Case Affirmed

The United States Court of Appeals for the Federal Circuit affirmed the Court of International Trade (CIT) ruling in Vivitar Corp. v. United States.1 In Vivitar, the CIT asserted subject matter jurisdiction over a trademark owner's claim seeking to invalidate Customs Service regulations that, in the owner's view, improperly allowed importation of grey market goods.2 On appeal, the government argued that the CIT possessed only exclusive jurisdiction. Since the district courts exercise jurisdiction over trademark claims, the government contended that the CIT could not exercise concurrent jurisdiction over claims based on a federal statute relating to trademarks.3 The court of appeals rejected this argument, holding that the CIT had jurisdiction over the subject matter of the claim under 28 U.S.C. § 1581(a), (i)(3), and/or (i)(4).4

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1 Vivitar Corp. v. United States, 761 F.2d 1552 (Fed. Cir. 1985). The trademark owner sought to require the Customs Service to bar the importation of any foreign-manufactured goods bearing its United States registered trademark unless the trademark owner gives specific consent to such importation. Id. at 1555. See also Annual Survey of Developments in International Trade Law: 1984, 15 GA. J. INT'L L. 473, 588 (1985). The challenged Customs Service regulations excepted products from Customs Service restriction "when both foreign and United States trademarks are owned or under the control of the same entity or when that trademark was applied under authorization of the United States owner." Id. (citing 19 C.F.R. § 133.21 (1984)).


3 Vivitar Corp., 761 F.2d at 1557-58. The United States argued that authority at the federal district court level denied the CIT jurisdiction over such claims because the districts courts had jurisdiction under 28 U.S.C. §§ 1331 and 1338(a) over claims based on a federal statute relating to trademarks. Id. at 1559. The court of appeals by implication rejected the district court's exercise of jurisdiction in Coalition to Preserve the Integrity of American Trademarks v. United States, 598 F. Supp. 844 (D.D.C. 1984).

4 Vivitar Corp., 761 F.2d at 1560. 28 U.S.C. § 1581(a), (i) provides:
   (a) The [CIT] shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.
   (i) In addition to the jurisdiction conferred upon the [CIT] by subsections (a)-(h) of this section and subject to the exception set forth in subsection
In deciding this jurisdictional issue, the court of appeals stated that "it is faulty analysis" to base the jurisdiction of the CIT on the jurisdiction of the federal district courts. Instead, the court looked to Congress' intent in enacting the Customs Court Act of 1980. The court held that the 1980 Act placed claims against the government in international trade matters within the exclusive jurisdiction of the Court of International Trade. A challenge of the validity of the Customs Service regulations governing exclusion of goods is within both the CIT's protest jurisdiction and its jurisdiction over cases against the United States arising from an embargo or quantitative restriction on goods.

2. President's Disapproval of ITC Section 337 Determinations

In the case of Duracell, Inc. v. United States International Trade Commission, the Court of Appeals for the Federal Circuit held that

(j) of this section, the [CIT] shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for —

1. revenue from imports or tonnage;
2. tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
3. embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
4. administration or enforcement with respect to matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.


Vivitar Corp., 761 F.2d at 1560.


Vivitar Corp., 761 F.2d at 1560. The court's exclusive jurisdiction over grey market goods cases extends only to cases against the United States Government. Private party actions remain within the jurisdiction of the federal district courts. Id.

Id.

Duracell, Inc. v. United States International Trade Commission, No. 85-2072, slip op. (Fed. Cir. Dec. 9, 1985). The case involved an earlier ITC determination in which the Commission held that importation of specified "grey market" alkaline batteries constituted a § 337 violation. Moreover, the ITC had held that as a result of such importation, a U.S. battery manufacturer suffered "substantial injury." Id. at 2. Subsequently, the President disapproved the ITC's determination for policy
the President's disapproval of an International Trade Commission (ITC) section 337 determination is not appealable. Specifically, the court of appeals construed statutory authority to require the President's approval, or the expiration of the statute's sixty-day period without the President's disapproval, before section 337 determinations are final for appeal purposes. Furthermore, notwithstanding its denial of the appeal, the court of appeals indicated that the President acted "according to law" in disapproving the ITC section 337 determination for policy reasons.

B. Court of International Trade

1. Writs of Attachment Prior to Judgment

In the case of United States v. Mizrahie, the CIT ruled on its power to issue a writ of attachment prior to judgment. Deciding reasons pursuant to 19 U.S.C. § 1337(g)(2). On appeal, the U.S. battery manufacturer argued that the President's disapproval lacked a policy foundation and, thereby, deserved reversal. Id. at 2-3. See also In re Certain Alkaline Batteries, No. 337-TA-165 (USITC Pub. 1616, Nov. 5, 1984). For additional information on this case, see Annual Survey of Developments in International Trade Law: 1984, 15 GA. J. INT'L & COMP. L. 473, 540-41 (1986).

Tariff Act of 1930 § 337, 19 U.S.C. § 1337 (1982). Section 337 provides that the International Trade Commission shall conduct investigations and issue determinations concerning allegations of unfair trade practices in the importation of merchandise into the United States. Subject to the President's disapproval, the ITC, upon a finding of unfair competition, may issue orders to exclude such articles from entering the United States. Id.

"Duracell, Inc., No. 85-2072, slip op. at 1. The court of appeals stated that "as the statute is designed, the decision by the President is not reviewable either directly or indirectly in this court." Id. at 2.

Id. at 4-5. The court explained that the appellant had no right under 19 U.S.C. § 1337(g)(2) since the President's disapproval prevented the ITC determination from becoming final. Also, because the Commission intended no further action regarding the case, the court held that the U.S. battery manufacturer lacked standing to sue. Id. at 5.

Id. at 7-8. Appellant argued that the President failed to provide policy reasons justifying his disapproval. The court of appeals indicated that "[i]n as much as the President acted timely, stated that he was acting for policy reasons, and stated reasons other than the merits of whether there had been a violation of section 337, our inquiry must end." Id. at 8.

United States v. Mizrahie, 606 F. Supp. 703 (Ct. Int'l Trade 1985). This action resulted when, pursuant to 19 C.F.R. § 12.80(e), the Customs Service released vehicles to the defendants that did not conform to federal motor vehicle safety standards. As a precondition of the Customs Service's releasing the vehicles, plaintiff insurance company posted a surety bond on behalf of the defendants equaling the vehicles' value plus any duties and taxes. When defendants failed to meet the requirements for release of the bond, the government moved for liquidated damages in the amount of the bond. Subsequently, the insurer cross-claimed against defendants seeking the common law right of indemnification. This action seeks a writ of attachment against the defendant's home. Id. at 705-706, 712.
this novel issue in the affirmative, the CIT held that where a party asserts a claim to recover on an import bond, the court possesses both the exclusive jurisdiction and the equitable power to issue a writ of attachment prior to judgment. The CIT held that "in support of [the] Court's jurisdiction and to effectuate its judgment, the Rules of [the] Court permit the attachment of property, prior to judgement, in accordance with, and to the extent permitted by state law." The CIT asserted jurisdiction in the case based on statutory authority which provides that the court has exclusive jurisdiction over a cross-claim of any party to recover on a bond related to the importation of merchandise. Moreover, the court explained that Congress granted the CIT the same powers in law and equity as a district court of the United States. Thus, the court's power to issue a writ of attachment in a civil proceeding is "coextensive" with that of a federal district court.

2. Pendent and Ancillary Jurisdiction - Civil Forfeiture Claims

In the case of United States v. Tabor, the CIT declined to exercise pendent or ancillary jurisdiction over a claim for in rem civil forfeiture

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15 Id. at 709.
16 Id. at 708. The court limited its ruling to cases that satisfy the requirements of Rule 64 of the Federal Rules of Civil Procedure. The CIT emphasized that "the issuance of a writ of attachment in this case in no way threatens the jurisdiction of any state.... Moreover, a writ of attachment will issue only in conformance with state law." Id. (citing U.S.C.I.T. Rule 64; Fed. R. Civ. P. 64).
17 Id. at 706-707 (quoting 28 U.S.C. § 1583 (1982)). Section 1583 provides that "the CIT has exclusive jurisdiction over any counterclaim, cross-claim, or third party action of any party to recover on a bond related to the importation of merchandise that is the subject of the civil action." Id. at 707.
18 Id. at 707 (quoting 28 U.S.C. § 1585 (1982)). Section 1585 provides that the CIT has "all the powers in law and equity of, or as conferred by statute upon, a district court of the United States." 28 U.S.C. § 1585 (1982).
19 Mizrahi, 606 F. Supp. at 707.
20 United States v. Tabor, No. 85-53, slip op. at 1 (Ct. Int'l Trade May 3, 1985). Defendants allegedly attempted to import into the United States an automobile which did not comply with Environmental Protection Agency emission standards, and thereby violated the requirements of the Clean Air Act. Id. at 1, 14. Plaintiff United States sought the value of the automobile and an in rem civil forfeiture of the automobile. Id. at 1.

The court indicated that the differences between ancillary and pendent jurisdiction are "unclear." Id. at 9 n.5. Although the decision focused on the government's motion for pendent jurisdiction, the court also held that ancillary jurisdiction would be inappropriate. Id. at 12.

With respect to the ancillary jurisdiction issue, the CIT followed the authority of Owen Equip. and Erection Co. v. Kroger, 437 U.S. 365, 376 (1978), which
under 18 U.S.C. § 545. Specifically, the CIT held that in conjunction with considerations of judicial economy, the court also must consider the necessity of the jurisdiction. Where alternative relief is available, there is no sufficient showing of necessity for pendent or ancillary jurisdiction purposes. Additionally, the court ruled that the jurisdictional framework established by the Customs Courts Act of 1980 made pendent jurisdiction over section 545 in rem civil forfeiture claims inappropriate.

The government argued that the district courts do not exercise exclusive jurisdiction over section 545 in rem civil forfeiture claims. Furthermore, since the CIT does exercise exclusive jurisdiction over section 592 civil penalty claims, the government asserted that judicial

states that: "'[A]ncillary jurisdiction typically involves claims by a defending party haled into court against his will, or by another person whose rights might be irretrievably lost unless he could assert them in an ongoing action in a federal court.'" Tabor, No. 85-53, slip op. at 9-10.

21 Tabor, No. 85-53, slip op. at 12, 15-16. Section 545 provides in relevant part:

Whoever fraudulently or knowingly imports or brings into the United States, any merchandise contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such merchandise after importation, knowing the same to have been imported or brought into the United States contrary to law —

Shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Proof of defendant's possession of such goods, unless explained to the satisfaction of the jury, shall be deemed evidence sufficient to authorize conviction for violation of this section.

Merchandise introduced into the United States in violation of this section, or the value thereof, to be recovered from any person described in the first or second paragraph of this section, shall be forfeited to the United States.


22 Tabor, No. 85-53, slip op. at 15-16.

23 Id.

24 Id. at 11-12.

Id. at 9. 28 U.S.C. § 1355 (1982) provides:

The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

Id.


[(a)(1)] (A) may enter, introduce, or attempt to enter or introduce any
The court agreed with the government's argument that judicial economy is a factor affecting pendent jurisdiction. The court, however, explained that the necessity of the pendent jurisdiction also must be considered. Since the plaintiff may pursue the section 545 in rem civil forfeiture claim in the district court, the government failed to show a necessity sufficient to justify the exercise of pendent or ancillary jurisdiction.

In addition to its rejection of the government's arguments, the CIT restricted any future jurisdiction over section 545 claims. The court explained that although Congress had granted the CIT exclusive jurisdiction over section 592 penalty claims under the Customs Court Act of 1980, Congress impliedly also had denied the CIT jurisdiction over section 545 in rem claims. Given this congressional denial of section 545 jurisdiction, the CIT in a *Gibbs* analysis would not "ordinarily be expected to try [both claims] in one judicial pro-

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merchandise into the commerce of the United States by means of
(i) any document, written or oral statement, or act which is material and false, or
(ii) any omission which is material, or
[(B)] may aid or abet any person to violate subparagraph (A). . . .
[(c)(1)] A fraudulent violation of subsection (a) of this is punishable by a civil penalty in an amount not to exceed the domestic value of the merchandise.


27 *Id.* at 9, 15-16.

28 Id.

30 *Id.* at 11.

31 *Id.* at 10-11. The CIT stated that "Congress has had a recent opportunity to review the jurisdiction of this court...Congress did not give the CIT, vis-a-vis the district court, either concurrent or exclusive jurisdiction over § 545 in rem forfeiture actions. . . . Rather, it gave this court jurisdiction over § 592 penalty claims." *Id.* at 11.

32 *Id.* at 6. In reviewing the government's motion for pendent jurisdiction concerning the section 545 claim, the CIT applied United Mine Workers v. Gibbs, 383 U.S. 715 (1966). Under the *Gibbs* analysis, the court required that the claims involve a "substantial" claim arising under federal law, "derive from a common nucleus of operative fact," and be sufficiently related so that one would "ordinarily be expected to try [both claims] in one judicial proceeding." *Tabor*, No. 85-53, slip op. at 6. (quoting *Gibbs*, 383 U.S. at 725).

The court conceded that the claims satisfied the "substantial claim" and "common nucleus" criteria. The CIT, however, failed to find the third *Gibbs* criterion that plaintiff would "ordinarily be expected to try [both claims] in one judicial proceeding." *Tabor*, No. 85-53, slip op. at 11.
ceeding." Thus, the court reasoned that pendent jurisdiction over section 545 claims was inappropriate.

3. Steel Import Stabilization Act - Review of Department of Commerce Short Supply Determinations

In the case of *Sacilor, Acieries et Laminors de Lorraine v. United States*, the CIT explained its power of review regarding a Department of Commerce determination made pursuant to the short supply provision of the Steel Import Stabilization Act (SISA). The CIT ruled that the Secretary of Commerce’s short supply determinations constituted foreign affairs functions within the discretion of the executive branch. Thus, the court held that its review of short supply determinations is limited to whether the agency followed the authorizing

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33 *Tabor*, No. 85-53, slip op. at 11-12.
34 *Id.*
35 *Sacilor, Acieries et Laminors de Lorraine v. United States*, No. 85-66, slip op. at 1 (Ct. Int’l Trade June 21, 1985). Plaintiffs, European manufacturers of steel pipe, desired to fulfill a contract with a U.S. pipeline company for specially made pipe to be used in the construction of an oil pipeline from California to the Gulf Coast. Section 805(b) of the Steel Import Stabilization Act (SISA) mandated that the Secretary of Commerce maintain the specified level of imported pipes and tubes provided for in an October, 1982 agreement between the European Economic Community (EEC) and the U.S. Under this agreement as clarified by a January 10, 1985 agreement between the U.S. and the EEC (the Arrangement), the entry level for U.S. imports of specified steel pipes and tubes is 7.6% of U.S. consumption for 1985 and 1986. Additionally, the Arrangement set a level of 10% of U.S. apparent consumption for tubular goods. Both § 805(b) of the SISA and article 8 of the Arrangement recognize an exemption from these limitations when the Secretary of Commerce determines that a short supply of a product exists in the U.S. *Id.* at 2-4.

Although the EEC had submitted a claim on behalf of the European manufacturers under the short supply provisions, the Department of Commerce (DOC) determined that the pipe in question could be provided by three U.S. manufacturers. *Id.* at 4-5. Thus, the DOC refused the EEC’s request to allow the European pipe to enter the U.S. under the short supply exemption. *Id.* at 5. Subsequently, the European manufacturers of steel pipe brought their case to the CIT alleging that the DOC’s “determination was arbitrary, capricious, an abuse of discretion, and a denial of plaintiffs’ due process rights.” *Id.* The CIT granted jurisdiction based on 28 U.S.C. § 1581 (i)(4) (1982) and 28 U.S.C. § 1581 (1)(3) (1982). *Id.* at 6.

36 *Id.* at 12-14. Plaintiffs argued that since the President did not act on short supply determination, the determinations were not foreign affairs functions of the executive branch. *Id.* at 13 n.6. The court explained that Congress left short supply determinations to the complete discretion of the Secretary of Commerce. In support, the court noted that § 805(b)(3) of the SISA contains no standards, no restrictions, and no publication requirement governing the Secretary’s short supply determinations. *Id.* at 12-14.
Moreover, the court construed the SISA to deny any “intention to establish direct, affirmative, and judicially enforceable rights for private parties in the position of plaintiffs.” Since “there is no generally available, protectable interest to engage in foreign trade,” the CIT dismissed plaintiff’s claim.

4. Protests of Customs Decisions - Timely Filing

In the case of Pagoda Trading Co. v. United States, the CIT exercised jurisdiction over a protest that raised an issue in a supplemental letter after the time for filing a protest but before the resolution of the original protest. The importer’s original protest questioned appraisement and classification of entries while its supplemental letter asserted a “deemed liquidation” challenge. Neither party to the case

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37 Id. at 13-14. The Secretary may use “any reasonable means” to complete a short supply determination. Id. at 12-13. Foreign affairs functions fall within a limited exception to court review under the Administrative Procedures Act concerning “agency action committed to the agency discretion by law.” Id. at 11, 14 (citing 5 U.S.C. § 71(a)(1982)).

38 Id. at 8, 13-15 (construing the Steel Import Stabilization Act, 19 U.S.C.A. § 2253 note (West 1980 & Supp. 1985)). If private parties are to assert rights under an international agreement, the agreement must be construed to include provision for the assertion of private rights. Id. at 8. The CIT found no private rights in article 8 of the Arrangement or § 805(b)(3) of the SISA. Moreover, the court cited the legislative history of the SISA which states that the short supply provision is “designed to protect domestic purchasers of steel products.” Id. at 8 (quoting H.R. REP. No. 1156, 98th Cong., 2d Sess. 200, reprinted in 1984 U.S. CODE CONG. & AD. NEWS 5220, 5317.


41 Id. at 97. The case involved an appeal by an importer of footwear claiming that specific merchandise met the requirement for deemed liquidation pursuant to 19 U.S.C. § 1504(a) (1982). Section 1504 provides that merchandise not liquidated within a year of the date of entry shall receive “deemed liquidation” according to applicable law at the time of entry. Id. The government asserted the following: (1) the “deemed liquidated” challenge was not filed in a timely manner; and (2) in the alternative, “deemed liquidation” could not have occurred since the government had previously suspended liquidation. Pagoda Trading Co., 617 F. Supp. at 96. The CIT rejected both of the government’s arguments and granted plaintiff importer’s motion for summary judgment. Id. at 97.

42 Id. A protest of a decision of the Customs Service should be filed within 90 days after liquidation of the subject matter of the complaint. 19 U.S.C. § 1514(c)(2) (1982). The relevant dates in Pagoda were as follows: (1) on Feb. 26, 1982, Customs
disputed that the supplemental letter had been filed after the time limit for filing of protests.43

In rejecting the government’s argument that the importer had not filed the “deemed liquidation” challenge in a timely manner, the CIT viewed the supplemental letter as raising “[n]ew grounds in support of objections raised by a valid protest.”44 Furthermore, the CIT ruled that such new grounds “may be presented . . . at any time prior to the disposition of the protest.”45 Thus, the CIT found the importer’s protest and supplemental letter to be within the court’s section 1581(a) jurisdiction.46