ANNUAL SURVEY OF DEVELOPMENTS IN INTERNATIONAL TRADE LAW: 1984

As the volume of world trade burgeons, the demands on private international law associated with the trend toward a world economy escalate accordingly. 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 1984, 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 1985 will be published in the spring of 1986.

—the 1985-86 Managing Board—
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On July 18, 1984, President Reagan signed the Foreign Sales Corporation Act of 1984\(^1\) into law as part of the Deficit Reduction Act of 1984.\(^2\) Effective January 1, 1985, newly created Foreign Sales Corporations (FSCs)\(^3\) replaced the heavily criticized Domes-

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\(^3\) FSC Act, § 805, 98 Stat. 1000. A DISC is a United States corporation engaged in exporting property produced in the United States. In the past, DISCs have been allowed to defer 42.5% of their income exceeding the average DISC income for a base period. Deferral is allowed for both export profits and investment income. So long as the corporation qualifies as a DISC, the amount of untaxed DISC income may be deferred until actual distribution of the income.

An FSC, unlike a DISC, must be a foreign corporation which meets specific foreign management and economic operation tests. A portion of the FSC’s export profits, but not its investment income, is tax exempt. In addition, FSCs award outright exemptions on a per-
tic International Sales Corporations (DISCs). The new tax incentive program is designed to eliminate numerous complaints from United States trading partners in the General Agreement on Tariffs and Trade (GATT) alleging that DISCs are illegal export subsidies because they allow the deferral of taxes by United States corporations exporting property produced in the United States.\(^4\)

Under the new Act, United States exporters are allowed to establish FSCs in: (a) a United States possession,\(^5\) (b) a Caribbean

centage of foreign income rather than providing for indefinite deferrals like DISCs. Generally, the amount of the exemption will approximately equal 15% of the combined taxable income of the FSC and its related taxpayer. \textit{Transition Rules for DISCs and FSCs}, 25 \textit{TAX NOTES} 218 (Oct. 15, 1984).

Section 801(a) of the Deficit Reduction Act adds the new FSC §§ 921-927 to the Internal Revenue Code and amends the old DISC provisions, §§ 991-997 and § 291(a)(4). \textit{Foreign Sales Corporation Act Replaces DISC Tax Incentive, 7 BUS. AM. 17} (Aug. 6, 1984) [hereinafter cited as \textit{Tax Incentive}]. Approximately 4,000-6,000 FSCs will be established by United States corporations to compensate for the elimination of the previous DISC tax breaks for exports. \textit{Confusion Over IRS Requirements, Foreign Tax Laws Slowing Conversion From DISCs to FSCs}, 1 INT'L TRADE REP. 615, 616 (Nov. 21, 1984).

On October 5, 1985, the Treasury Department issued temporary regulations implementing the transition rules for DISCs and FSCs. T.D. 7983, 47 C.B. 20 (1984), \textit{announced in} 49 Fed. Reg. 40,011 (1984). In general, these regulations cover elections for FSC and small FSC status, requirements for the conformity of accounting periods for FSCs and their principle shareholders, rules governing the termination of DISCs, and information regarding the forgiveness of tax on accumulated DISC income.


\(^4\) Criticism of DISCs began shortly after their creation in 1971. Both Canada and the European Economic Community (EC) have consistently complained that DISCs violate the anti-subsidy rules of the GATT. Under the GATT rules, countries are allowed to exempt from taxation only that income which comes from economic processes taking place outside their territorial boundaries. In 1976, a GATT panel of experts held that DISCs, along with certain practices of France, Belgium, and the Netherlands, were in fact violations of the GATT's anti-subsidy rules. After several years of dispute, the Reagan administration committed itself in 1982 to developing an alternative to DISCs which would comply with GATT guidelines. Accordingly, on August 4, 1983, the Reagan administration proposed identical bills (H.R. 3810 and S. 1804) which provided for the FSC export tax incentive. \textit{Tax Incentive, supra} note 3, at 17. By requiring that the majority of the FSC's economic processes occur outside the United States customs territory, FSCs would not only meet GATT requirements, but would also preserve the competitive posture of United States exporters in the international arena. \textit{FSC Hearings, supra} note 1, at 67. \textit{See also Of DISCs and FSCs, 24 TAX NOTES 8} (July 2, 1984).

\(^5\) FSC Act, § 801(a), 98 Stat. 986 (to be codified at 26 U.S.C. § 922(a)(1)(A)(ii)). A United States possession is defined as the United States Virgin Islands, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands. FSC Act, § 801(a), 98 Stat. 993 (to be codified at 26 U.S.C. § 927(d)(5)). Three of these four possessions have recently enacted legislation designed to attract United States companies taking advantages of the new FSC provisions. \textit{Three U.S. Possessions Eligible to be Bases for FSCs Pass Laws Designed
country which has signed an exchange of tax information agreement with the United States, or (c) a country which signed a bilateral income tax treaty with the United States and is on the Treasury Department's list of eligible countries. The FSC may then obtain a corporate tax exemption on earnings attributable to export profit, but not on export investment income.

To qualify as an FSC entitled to special tax benefits, the corporation must satisfy certain foreign presence requirements. The FSC must be incorporated and have its principle office in a foreign country or United States possession. The FSC must have at least one director who is not a United States resident and must keep at least one set of its books of account at its principal overseas office. The FSC may have no more than twenty-five shareholders nor have any preferred stock outstanding. The FSC must conduct at least 50% of its sales activities abroad and incur a

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to Attract Firms, 1 INT'L TRADE REP. (BNA) 531 (Oct. 31, 1984).


On November 6, 1984, the Treasury Department released a list of 23 countries approved as host countries for FSCs. 49 Fed. Reg. 44,844 (1984). Included on the list were: Australia, Austria, Belgium, Canada, Denmark, Egypt, Finland, France, West Germany, Iceland, Ireland, Jamaica, Korea, Malta, Morocco, the Netherlands, New Zealand, Norway, Pakistan, Philippines, South Africa, Sweden, Trinidad & Tobago. Excluded from the list were three major United States trading partners: the United Kingdom, Japan, and Italy. The Treasury Department announced that exclusion from the list was not a reflection on the status of existing tax treaties with those countries, and that other countries could be added to the list at any time. 49 Fed. Reg. 44,844-45. See also Treasury Department Issues List of Eligible Countries for FSC Bases, United Kingdom, Italy Excluded, 1 INT'L TRADE REP. (BNA) 584 (Nov. 14, 1984).

8 FSC Act, § 801(a), 98 Stat. 990 (to be codified at 26 U.S.C. § 924(f)(2)).

9 Id. § 801(a), 98 Stat. 986 (to be codified at 26 U.S.C. § 922(a)(1)(A)).

10 Id. § 801(a), 98 Stat. 986 (to be codified at 26 U.S.C. § 922(a)(1)(D)).

11 Id. § 801(a), 98 Stat. 986 (to be codified at 26 U.S.C. § 922(a)(1)(E)).

12 Id. § 801(a), 98 Stat. 986 (to be codified at 26 U.S.C. § 922(a)(1)(D)(ii)).

13 Id. § 801(a), 98 Stat. 986 (to be codified at 26 U.S.C. § 922(a)(1)(B)).

14 Id. § 801(a), 98 Stat. 986 (to be codified at 26 U.S.C. § 922(a)(1)(c)).

15 Id. § 801(a), 98 Stat. 986 (to be codified at 26 U.S.C. § 924(a)(5)).
minimum of 50% of its overhead costs outside the United States. \(^{16}\) The FSC must conduct all shareholders and board of directors meetings abroad and maintain its primary bank accounts overseas. \(^{17}\) Small FSCs, corporations with less than five million dollars per year in export income, are not required to satisfy the foreign presence requirements for management activities. \(^{18}\)

Qualifying FSCs may exempt 32% of their foreign trade income from United States corporate taxation so long as the FSC buys its materials from independent suppliers. \(^{19}\) In the case of purchases from related entities, specific transfer pricing rules apply. \(^{20}\)

The most controversial aspect of the new legislation is the provision allowing corporations to treat their accumulated DISC income prior to January 1, 1985 as previously taxed \(^{21}\) for purposes of making tax-free distributions. This provision is expected to forgive approximately twelve billion dollars in deferred taxes on corporations utilizing the DISC program. \(^{22}\)

B. Unitary Taxation

In June 1983, the United States Supreme Court upheld the con-

\(^{16}\) Id., § 801(a), 98 Stat. 989 (to be codified at 26 U.S.C. § 924(d)(1)(B)). These overhead activities include advertising, sales, promotion, order processing, transportation, collection of payments, and the assumption of credit risks. Id. § 801(a), 98 Stat. 989 (to be codified at 26 U.S.C. § 924(e)). An FSC will be treated as having met the 50% overhead requirement if at least two of these activities equal or exceed 85% of the total direct costs attributable to any transaction. Id. § 801(a), 98 Stat. 989 (to be codified at 26 U.S.C. § 924(d)(2)). For a discussion of the 50% sales activity test, see IRS Makes Life Simple For U.S. Companies Up Setting FSC, 31 Bus. Int'l. 393 (Dec. 14, 1984).

\(^{17}\) FSC Act, § 801(a), 98 Stat. 988 (to be codified at 26 U.S.C. § 924(c)).

\(^{18}\) Id. § 801(a), 98 Stat. 988 (to be codified at 26 U.S.C. § 924(b)(2)(B)(i)).

\(^{19}\) Id. § 801(a), 98 Stat. 986-87 (to be codified at 26 U.S.C. § 923).

\(^{20}\) Id. § 801(a), 98 Stat. 990 (to be codified at 26 U.S.C. § 925). Generally, two pricing rules are available. The first allows an FSC to derive taxable income from such sales equal to 23% of the combined taxable income of the FSC and the related supplier. Id. § 801(a), 98 Stat. 990 (to be codified at 26 U.S.C. § 925(a)(2)). If the FSC then conducts the required minimum activity outside the United States, an additional 16% of the combined income would be tax exempt. See Tax Incentive, supra note 3, at 18. The second alternative allows FSCs to derive taxable income from sales equal to 1.83% of the gross receipts, FSC Act, § 801(a), 98 Stat. 990 (to be codified at 26 U.S.C. § 925(a)(1)), but this amount cannot exceed 46% of the combined income of the FSC and its related supplier. Id. § 801(a), 98 Stat. 990 (to be codified at 26 U.S.C. § 925(d)). If the FSC then complying with the foreign activity requirements, up to 1.27% of the gross receipts would be eligible for tax exemption. See Tax Incentive, supra note 3, at 18.


\(^{22}\) Congress Clears Foreign Sales Corporation DISC Substitute As Part Of Deficit Package, 1 Int'l Trade Rep. (BNA) 6, 7 (July 4, 1984).
stitutionality of the worldwide unitary method of taxation\textsuperscript{23} in \textit{Container Corporation of America v. Franchise Tax Board}.\textsuperscript{24} In response to strong criticism of the unitary method from members of the business community\textsuperscript{25} and major United States trading partners,\textsuperscript{26} the Reagan administration appointed a Worldwide Unitary

\textsuperscript{23} Under the worldwide unitary method, the income from both domestic and foreign corporations which form a "unitary" business are combined to determine the total income of the entire corporate group. A formula comprised of the total sales, payroll, and assets of the corporation is used to assign a portion of this income to the unitary tax state. \textit{Text of Report by Treasury's Unitary Task Force}, 23 Tax Notes 637 (May 7, 1984) [hereinafter cited as \textit{Text}].

The alternative to worldwide unitary taxation is separate accounting. Under this system, the income of commonly controlled corporations is determined on a corporation-by-corporation basis without any consideration of affiliated corporations not doing business in the taxing state. This method is used by the federal government, most foreign governments with which the United States trades, and by 33 of the 45 states which impose a corporate income tax. \textit{Id.}


The Supreme Court's denial of review means that the issue of the constitutionality of the unitary method as applied to foreign multinationals must be resolved first in the state courts. The Supreme Court will address the issue only after the highest court of a state has ruled against the multinational. \textit{Supreme Court Denies Review of Unitary Tax Case Issue on Foreign Multinationals}, 20 U.S. Export Weekly (BNA) 548 (Jan. 17, 1984).

\textsuperscript{25} Business representatives argue that unitary taxation is a deterrent to corporate investment and interferes with the free flow of foreign investment capital into the United States. \textit{Dorgan Says Congress is Unlikely to Pass Bill Limiting State Unitary Tax}, 1 Int'l Trade Rep. (BNA) 320 (Sept. 19, 1984) [hereinafter cited as \textit{Dorgan}]. Furthermore, foreign-based multinationals argue that the unitary method imposes substantial administrative burdens on the corporations because it requires the translation of their entire foreign operations into United States currency and requires their use of United States accounting methods. See \textit{Text, supra} note 23, at 637.

\textsuperscript{26} United States trading partners, particularly Japan and the United Kingdom, object to the unitary method as being contrary to the internationally accepted separate accounting method and accuse it of imposing a double tax on their corporations. In April 1984, the British threatened to "strike back" against the imposition of unitary taxation by revoking tax breaks for United States businesses operating in the United Kingdom. By withdrawing the right of United States corporations to claim refunds on the advance corporate taxes paid on profits of companies incorporated in unitary tax states, the British proposal would eliminate the recovery of substantial refunds which have totalled over one billion dollars in the past three years. \textit{British Tax Proposal Would Retaliate Against Unitary Tax Imposition}, 20 U.S. Export Weekly (BNA) 854 (Apr. 10, 1984).

Similarly, a group of Japanese corporate executives visiting the United States in February
Taxation Working Group in November 1983 to resolve many of the fundamental questions concerning state taxation of the worldwide projects of multinational corporations.27

After several months of deliberation, the Working Group issued a report28 in July 1984 advocating a "water's edge"29 approach to unitary taxation. This approach encourages states to refrain from taxing the worldwide profits of corporate operations in return for greater federal assistance in gaining access to foreign corporate records.30 The Working Group, chaired by Treasury Secretary Donald Regan, advised against enacting legislation which would ban the unitary system. Nonetheless, Regan warned that unless "appreciable progress" is made toward the repeal of laws in the twelve states using the unitary method, he would recommend that the Administration enact legislation which would give effect to a

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1984 warned that strained relations with Japan would worsen if the United States failed to curb the use of the unitary method of taxation. The leader of the Kerdanren delegation, a group representing over 900 firms and trade associations in Japan, cautioned that he would advise 175 of Japan's major corporations to cease investments in any unitary tax state. Further, he warned that he was considering advising corporations currently operating in unitary states to withdraw their investments if action was not taken in the immediate future. Japanese Executives Visit States to Explore Investment, Attempt to Eliminate Unitary Tax, 20 U.S. EXPORT WEEKLY (BNA) 1103 (June 26, 1984); U.S. Trading Partners Pressure Treasury Working Group to Stop Global Tax System, 20 U.S. EXPORT WEEKLY (BNA) 672 (Feb. 21, 1984).

7 The Reagan administration established the Working Group on October 21, 1983. The Group held its first meeting on November 2, 1983. 48 Fed. Reg. 49,570 (1983). Donald T. Regan, Secretary of the Treasury, chaired the 20 member committee consisting of three governors, eight corporate chairmen or presidents, two states' House speakers, tax commissioners and administration representatives. Id. See also MNCs Will Not Sink or Swim When States Stop Unitary Tax at U.S. "Water's Edge," 31 Bus. INT'L 143 (May 4, 1984).

For a detailed account of the Working Group's early activities, see Text, supra note 23, at 638-45.

8 At its first meeting in November 1983, the Working Group established a technical-level task force to review the relevant issues and to develop options for the full Working Group to consider in solving problems with the unitary and separate accounting methods. For a complete discussion of the task force's six options, see Text, supra note 23, at 639-45.

9 A "water's edge" approach determines a corporation's taxable income solely on the basis of its activities within the United States and ignores corporate activity worldwide. California Legislature Adjourns Without Changing State's Unitary Tax Legislation, 1 INT'L TRADE REP. (BNA) 275 (Sept. 12, 1984).

The water's edge approach allows states greater access to Internal Revenue Service (IRS) tax data, an arrangement which is currently barred by many tax treaties between the United States and other nations. Proponents of the water's edge approach argue that greater access to IRS data is necessary to verify that corporations operating in the United States are correctly reporting tax information. Congress Is Expected to Pass Few Trade Bills During Short Election-Year Term, 20 U.S. EXPORT WEEKLY (BNA) 550, 553 (Jan. 17, 1984).
Public reaction to the Working Group's report has generally been negative since many major issues, including the taxation of foreign dividends and the treatment of 80/20 corporations, remain unresolved. Furthermore, implementing the Working Group's proposal will require the rewriting of laws of the unitary states and will necessitate renegotiation of most of the major United States income tax treaties.

As of December 31, 1984, eight states were using the worldwide unitary method of taxation. These states include: Alaska, California, Colorado, Idaho, Montana, New Hampshire, North Dakota, and Utah. Oregon, Massachusetts, and Indiana have recently repealed their unitary systems. Massachusetts High Court Strikes Down State's Use of Unitary Taxation Method, 2 INT'L TRADE REP. (BNA) 17 (Jan. 2, 1985); Oregon Legislature Repeals Unitary System, California Senate Panel Okays "Water's Edge," 1 INT'L TRADE REP. (BNA) 129 (Aug. 1, 1984); Unitary Tax Foes Win Indiana Victory as Sony Plans to Build Plant After Repeal Pledged, 20 U.S. EXPORT WEEKLY (BNA) 1058 (Jan. 12, 1984). In December 1984, the Florida legislature voted to repeal its unitary system. Florida Legislature Approves Bill to Repeal Unitary Tax, Governor Expected to Sign Law, 1 INT'L TRADE REP. (BNA) 774 (Dec. 19, 1984). In addition, legislation to repeal the unitary tax system failed in California, but the California legislature is expected to reconsider adoption of the water's edge approach in 1985. California Legislature Adjourns Without Changing State's Unitary Tax Legislation, 1 INT'L TRADE REP. (BNA) 275 (Sept. 12, 1984).

An 80/20 corporation, as defined by the Working Group, is a United States corporation with at least 80% of its payroll and property outside the United States. This definition differs from the definition used by the federal government, which is based on the percentage of foreign income measured by federal source rules. Chairman's Report on the Worldwide Unitary Taxation Working Group: Activities, Issues, and Recommendations, 24 TAX NOTES 581, 586 (Aug. 6, 1984) [hereinafter cited as Chairman's Report].

Because the Working Group was unable to reach a compromise on the issues of taxing foreign dividends and the status of 80/20 corporations, the report included both state and business positions. Similarly, a dispute remains as to how and when IRS resources will be expanded to allow greater access to tax information. Furthermore, the report lacks a specific time frame within which states should act to reform these laws. Id. See generally Chairman's Report, supra note 32.
C. Tax Treaties

1. United States-People’s Republic of China

On April 30, 1984, the United States and the People’s Republic of China signed a new income tax treaty designed to prevent income tax evasion and to avoid the double taxation of nationals working abroad. The new agreement is the first complete income tax treaty between the two countries and is based on model income tax treaties created by the United States, the United Nations, and the Organization for Economic Cooperation and Development.

In general, the treaty sets forth clear guidelines for determining the extent to which each country may tax income earned in that

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38 United States Model Treaty, supra note 35, at 695.


36 During the post-World War II era, increased economic interdependence and expanding international trade practices have resulted in the conclusions of several bilateral income tax treaties among the nations of the world. As the number of states involved in treaty negotiations has increased, the need for “model” treaties has also increased. Such model treaties provide the opportunity for greater harmonization of treaties and greater reliability of treaty interpretations. Burke, Report on Proposed United States Model Income Tax Treaty, 23 Harv. Int’l L.J. 200, 219 (1983) [hereinafter cited as U.S. Model Treaty].


country by nationals of the other country. In particular, the agreement reduces the tax which must be paid on certain types of income, such as interest, dividends, and royalties. The treaty also provides limited exemptions for visiting researchers, professors, and students. All provisions in the agreement are reciprocal.

Under the treaty, each country pledges to impose its taxes in a nondiscriminatory manner and agrees to provide a foreign tax credit for income taxes paid to the other country. The treaty also provides a mechanism for cooperation between the tax authorities of the two countries should the possibility of double taxation arise.

The treaty, submitted to the Congress for ratification on August 10, 1984, is expected to improve the possibility of joint ventures between American and Chinese companies because of the certainty and improved communication it affords the two countries.

2. United States-Canada

The United States and Canada signed a new income tax convention and accompanying protocols on August 16, 1984. The treaty supersedes an earlier income tax treaty signed in 1942 and

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42 US-PRC Agreement, supra note 35, arts. 6-18.
43 The agreement provides for a maximum tax of ten percent on the gross amount of dividends, interest, and royalties. Id. arts. 9, 10, 11, respectively.
44 Id. arts. 19-20.
46 US-PRC Agreement, supra note 35, art. 23.
47 Id. art. 22.
48 Id. arts. 24-25.
49 Aug. 10th Letter, supra note 45.
54 Convention and Protocol for the Avoidance of Double Taxation, Mar. 4, 1942, United

The new treaty provides that the profits of a business entity of one country will not be taxed by the host country unless the entity has a permanent establishment in the host country. The treaty establishes maximum rates of withholding for dividends, interest, and royalties earned in the source country. The treaty also modifies previous rules relating to gains from capital assets and the treatment of personal service income.

The first protocol resolves some technical problems in the wording of the treaty text by clarifying the treaty language. The second protocol exempts Canadians from a new fifteen percent withholding tax on social security benefits paid to nonresident aliens.

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59 Id.
60 Convention with Canada, supra note 51, arts. X-XII. In general, the treaty reduces the maximum tax rate at source on direct investment dividends from 15 to 10%. Id. art. X, para. 2(a). The maximum tax rate on portfolio dividends and interest remains 15%. Id. art. X, para. 2(b); art. XI at 2. Artistic royalties other than motion picture royalties, will continue to be exempt at source. Id. art. XII, para. 3. All other royalties, however, are taxed at a maximum rate of 10%. Id. art. XII, para. 2.
61 Id. art. XIII.
62 Id. arts. XIV-XV.
63 For a brief summation of the clarifications, see Letter of Submittal, S. Treaty Doc. No. 7, 98th Cong., 1st Sess., at V. The first protocol also made necessary changes regarding pensions, annuities, and alimony. See First Protocol, supra note 52, arts. VIII-IX. Furthermore, the protocol amends the 1980 Convention to allow the United States to exercise its full taxing rights under the Foreign Investment in Real Property Act (FIRPTA), 26 U.S.C. § 897 (1984). First Protocol, id. art. VI. For a discussion of FIRPTA, see infra notes 101-06 and accompanying text. The first protocol also adds a new rule protecting athletes of one country who receive bonuses from an employer in the other country. The new rule limits the maximum rate of tax in the employer's state to 15% of the bonus. First Protocol, supra note 52, at art. VII.
64 After the original convention and first protocol were negotiated and submitted to the Senate for advice and consent to ratification, the Social Security Amendments of 1983 were enacted. Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983). The amendments provide, in part, that social security benefits paid to nonresident aliens be subject to a 15% withholding tax. The second protocol makes clear that the pending tax con-
3. United States-Italy

On April 17, 1984, the United States and Italy signed a new income tax convention and accompanying protocol at Rome. If ratified, the new treaty will replace the existing tax treaty between the two countries which has been in force since 1956.

Among the treaty's features are the inclusion of Italian local taxes in the Convention's coverage and a two-tiered system for determining the maximum permissible tax on dividends. The treaty introduces a limit on the taxation of interest paid to residents of the other country and provides a maximum rate of tax of ten percent at source on most royalties.

The accompanying protocol limits benefits of the Convention to residents of the two countries and clarifies certain specific provisions of the Convention.

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vention exempts Canadian residents from the 15% withholding tax. Second Protocol, supra note 52, art. 1. In addition, the second protocol provides that each country tax its own residents on only one-half of the social security benefits derived from the other country. Id. art. II. The United States will continue to tax United States citizens residing in Canada to the extent provided under United States law. Id. at III.


Italian Treaty, supra note 65, art. 2. Inclusion of Italian local income taxes is significant because the local tax is imposed on royalties derived by United States residents and was not previously covered by the 1955 treaty. For the treaty's provisions regarding royalties, see infra note 70.

Under the two-tiered system, two different tax rates apply when the beneficial owners of the dividends are residents of the other country. The tax rate on dividends paid to a company owning 10 to 50% of the voting stock of the paying company is 10% at source, while the tax rate on dividends paid to a company owning 50% or more of the voting stock of the paying company is 5% at source. The 5 and 10% rates will not apply if the recipient country receives more than a certain percentage of the company's income from passive investments. All other dividends paid to residents of the other country will be taxed at a maximum rate of 15% at source. Italian Treaty, supra note 65, art. 10, para. 2.

Unlike the 1955 treaty, the new convention limits taxation at source of interest paid to residents of the other country. In general, the limit will be 15%, but certain exemptions apply in the cases of interest derived by the other government and interest denied by a citizen of the other country on a debt guaranteed by that government. Id. art. 11.

Id. art. 12. The treaty provides lower rates of 5 and 8% on copyright royalties and on income derived from film rentals, respectively.

4. **United States-French Protocol**

On January 17, 1984, the United States and France signed an additional protocol\(^7\) to the existing 1967 tax treaty\(^7\) between the two countries. The protocol is designed to exempt from a recently enacted French wealth tax the assets owned by a United States citizen temporarily residing in France.\(^7\) It also provides an exemption from tax at source on interest derived by citizens of one country from the other.\(^7\) The protocol amends various provisions of the 1967 treaty\(^7\) and adds a new article specifically limiting treaty benefits to residents of the two countries.\(^7\)

5. **United States-Cyprus Convention**

The United States and Cyprus signed a new tax treaty\(^7\) at Nicosia on March 19, 1984. The treaty will replace a previous unratified convention signed by the two countries in 1980.\(^7\) The new treaty incorporates the provisions of the 1980 convention and adds new provisions designed to prevent abuse by third country residents seeking treaty benefits.\(^8\) The treaty also provides for maximum

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\(^7\) The protocol defines "temporary" residence as a residence used for not more than five years. **Id.** art. 10, para. 7 (adding new article 22A).

\(^7\) Id. art. 10. The term "interest" as used in the protocol means "income from indebtedness of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities, and income from bonds or debentures, including premiums or prizes attached to such securities, bonds, or debentures." **Id.** art. 10, para. 3.


\(^7\) French Protocol, supra note 72, arts. 1, 10. The protocol defines "temporary" residence as a residence used for not more than five years. **Id.** art. 10, para. 7 (adding new article 22A).

\(^7\) Id. art. 10. The term "interest" as used in the protocol means "income from indebtedness of every kind, whether or not secured by mortgage, and whether or not carrying a right to participate in the debtor's profits, and in particular, income from government securities, and income from bonds or debentures, including premiums or prizes attached to such securities, bonds, or debentures." **Id.** art. 10, para. 3.


\(^7\) Tax Convention with Cyprus, Mar. 26, 1980, United States-Cyprus, \_ U.S.T. \_, T.I.A.S. No. \_, reprinted in S. Ex. Doc. I, 96th Cong., 2d Sess. (1980). The Senate returned the 1980 treaty for renegotiation in December 1981. The Senate Committee on Foreign Relations found that the 1980 convention was subject to abuse by third-country residents who could channel income through an entity established in one of the treaty states to obtain treaty benefits. Letter of Submittal, S. TREATY Doc. No. 32, 98th Cong., 2d Sess., at V.

\(^8\) The 1984 treaty curbs abuses by third-country residents by denying treaty benefits if
tax rates at source on payments of dividends, interest, and royalties.\footnote{81}

6. Cancellation of United States-United Kingdom Double Taxation Treaty

On June 28, 1983, the United States Department of State sent a series of cables to the United Kingdom and various Caribbean countries stating its intention to cancel the existing double taxation treaty\footnote{82} with the United Kingdom as of January 1, 1984.\footnote{83} The cable stressed that the 1945 treaty no longer properly reflected economic relations between the treaty partners. It also stated that current minimal use of the treaty could no longer justify its continuation, especially in light of the many opportunities for abuse in-

\footnote{81} The United States tax on dividends paid to residents of Cyprus may not exceed 15\% on portfolio dividends, \textit{id.} art. 12, para. 2(a), and 5\% on direct investment dividends, \textit{id.} art. 12, para. 2(b). Similarly, a maximum tax rate of 10\% at source is applied on all interest income. \textit{id.} art. 13. Royalties are reciprocally exempt from taxation at source. \textit{id.} art. 14.


\footnote{83} In December 1958, the treaty was extended to certain specified British territories in accordance with the provisions of article XXII of the 1945 Convention, as amended by the Supplementary Protocol of May 25, 1954. Agreement Concerning the Application of the 1945 Tax Convention to Specified British Territories, Dec. 3, 1958, United States-United Kingdom, 9 U.S.T. 1459, T.I.A.S. No. 4141. Specifically, article XXII of the 1945 Convention provides that either party may extend the convention to any or all of its colonies, overseas territories, protectorates, or mandates which impose taxes substantially similar to those which are the subject of the convention. U.S.-U.K. Treaty, \textit{supra} note 82, art. XXII, at 1387.


\textit{Treasury Files Notice of Intent to Terminate Treaty Extensions}, 20 Tax Notes 175 (July 11, 1983).
herent in the terms of the treaty. Although the cable left open the possibility of negotiations for a new treaty, it also noted that such negotiations could not be given high priority. Since cancellation of the treaty, the United States and Barbados have signed an agreement to exchange tax information; in addition, Dominica, St. Vincent, and the Grenadines have formally requested the negotiation of a new treaty with the United States. Similarly, the Organization of Eastern Caribbean States (OECS), a group of seven Caribbean countries, has recently requested that the United States negotiate a single treaty with the entire group of countries.

D. Proposed Changes in Eligibility Requirements for Tax Treaty Benefits

On September 5, 1984, the Internal Revenue Service (IRS) proposed new eligibility requirements relating to withholding on certain items of income subject to a reduced rate of, or exemption from, United States tax under an existing tax treaty. The proposed changes in the existing regulations are designed to curb

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84 Id. In response to a December 27, 1983 letter from Sen. William V. Roth (R-Del.), then-Treasury Secretary Donald T. Regan stated that one of the major reasons for the cancellation was the fear of treaty shopping abuses in Caribbean Basin countries. Secretary Regan stated that due to low taxes and favorable tax legislation in many of the Caribbean countries, the potential for abuse was high. Thus, Treasury wanted to prevent the abuses "before such abuses became widespread and these jurisdictions became dependent upon income deriving from such [offshore business] activities." Secretary Regan on Termination of Caribbean Tax Treaties, 22 TAX NOTES 641 (Feb. 13, 1984) [hereinafter cited as Regan Memorandum]. For a general discussion of treaty shopping by third countries, see Third Country Use of U.S. Tax Treaties: An Introduction to the Issues, 19 TAX NOTES 5 (Apr. 4, 1983).

85 Regan Memorandum, supra note 84, at 642.


87 Regan Memorandum, supra note 84, at 642.

88 The OECS consists of Grenada, Antigua and Barbudo, Dominica, Montserrat, St. Kitts-Nevis, St. Lucia, and St. Vicent and the Grenadines. Secretary Regan has stated that the United States will respond favorably to the request so long as the OECS can assure the United States of its authority to bind member states by its decisions. Id.


90 26 C.F.R. §§ 1.1441, 1.1461, 301.6402 (1984). Under § 1.1441-6 of the existing regulations, nonresident alien individuals, foreign corporations, and partnerships, trusts, and estates which receive United States source income subject to withholding under 26 U.S.C. §§ 1441-42 are allowed to claim tax treaty benefits at source. These benefits include the reduction of, or exemption from, tax on certain types of income paid to the residents of the other treaty country. In the case of tax reduction, the amount of withholding is reduced from the statutory rate to the applicable tax treaty rate at the time the income is paid. 26 C.F.R. § 1.1441-6(a) (1984).
abuses by United States taxpayers of reduced withholding tax rates in United States tax treaties and to ensure that treaty benefits are enjoyed by only the intended beneficiaries.91

The proposed rules require foreign recipients of certain forms of passive income seeking reduced tax rates to file both an eligibility form and certificate of residence on or before the payment of income.92 United States treaty partners are required to verify the legitimacy of the filer's residence on the certificate of residence.93 If the treaty partner has not yet established a certification procedure and, therefore, cannot comply with the proposed regulations, the IRS will be allowed to negotiate individual procedures with that particular country.94

E. Repeal of Thirty Percent Withholding Tax on Foreign Portfolio Interest

Section 127 of the Tax Reform Act of 198495 repealed the thirty

For income other than dividends, a foreign person may obtain a tax treaty reduction of, or exemption from, tax at source by filing an ownership, exemption, or reduced rate certificate (Form 1001). The certificate must contain a statement that the owner of the income is entitled to tax treaty benefits. 26 C.F.R. § 1.1441-6(c) (1984). For dividend income, a foreign person with an address in a country which is party to a United States income tax treaty is entitled to withholding at the tax treaty rate without filing a form to establish eligibility. 26 C.F.R. § 1.441-3(3) (1984).

91 Under the current regulations, a large number of United States taxpayers are improperly using foreign addresses to obtain the reduced tax treaty rates on dividends. In particular, nonresident aliens who are not actual residents of treaty countries have established nominee accounts and post office boxes in countries with United States tax treaties for the sole purpose of qualifying for treaty benefits. As a result, the United States has lost a significant amount of taxes on payments made to persons not entitled to the reduced treaty rates. 49 Fed. Reg. 35,511-12. See also IRS Proposes Stricter Eligibility Regulations for Tax Treaty Benefits, 1 INT'L TRADE REP. (BNA) 281 (Sept. 12, 1984).

92 Although foreign persons must file a Form 1001, supra note 90, before receiving withholding at a reduced rate on nondividend income, the form does not contain a separate verification of eligibility. The proposed regulations extend the Form 1001 requirements to dividend income as well. In addition, the proposed regulations provide that each form is to be executed under penalty of perjury. 49 Fed. Reg. 35,512.

Furthermore, the proposed regulations provide that foreign persons seeking exemptions or a reduced rate of withholding must file an additional Certificate of Residence (Form 8306) before the date of payment of the income in order to receive the tax treaty benefits. Id.

93 The proposed regulations also provide that the Certificate of Residence be certified by the competent authority of the tax treaty partner-country. Such certification will indicate that the beneficial owner of the income is a resident of the foreign country for tax law purposes. Residence will be determined by the terms of the appropriate tax treaty. Id.

94 Id.

percent withholding tax on interest payments to foreign persons on portfolio interests when certain compliance requirements are met. The goal of the repeal legislation is to improve access to foreign capital markets by United States borrowers and to protect against tax evasion by United States residents. One striking effect of the new legislation is that United States firms will no longer need to set up foreign subsidiaries in tax havens to sell their debts to foreign persons unwilling to pay United States income taxes on interest, dividends, rents, salaries, and other fixed or determinable gains received by foreign persons if the payments are not adequately connected with a United States trade or business conducted by the foreign entity. 26 U.S.C. § 871(a) (1982).

Portfolio interests are defined in 26 U.S.C. §§ 871(h)(2)(A), 881(c)(2)(A) (1982). Interest on a bearer obligation will meet the definition of a portfolio interest if the obligation is a "registration-required obligation" under 26 U.S.C. § 163(f)(2)(A) or would be a "registration-required obligation" but for the fact that the obligation is described in 26 U.S.C. § 163(f)(2)(B). 26 U.S.C. § 163(f)(2)(A) defines a "registration-required obligation" as any obligation other than an obligation which is issued by a natural person, is not of a type offered to the public, has a maturity of not more than one year, or is described in § 163(f)(2)(B). Section 163(f)(2)(B) describes certain obligations for which there are arrangements designed to reasonably ensure that the obligation will be sold only to non-U.S. residents. Section 163(f)(2)(B) also provides that interest on unregistered obligations must be paid outside the United States and its possessions. In addition, such obligations must contain a statement on their face that any United States holder will be subject to limitations under the United States income tax laws. 26 U.S.C. § 163(f)(2)(B)(ii)(I)-(II) (1982). Under the new law, if an obligation meets the foregoing description, it will be exempt from the 30% withholding tax.

Portfolio interests do not, however, include interests paid to a foreign person owning 10% or more of an issuing corporation's voting stock. Similarly, portfolio interests do not include interests paid to a foreign person owning 10% or more of a partnership's capital or profits interest. Deficit Reduction Act § 127(a), 98 Stat. 649 (to be codified at 26 U.S.C. § 871(h)(3)).

Section 127(b) provides for the repeal of a tax on interest of foreign corporations received from certain portfolio debt investment. Id. § 127(b), 98 Stat. 650 (to be codified at 26 U.S.C. § 881(c)). For a complete discussion of the Treasury Department's implementing regulations, see T.D. 7967, 39 C.B. 11 (1984). See also U.S. Tax Regulations Implement Withholding Tax Repeal, INT'L FIN. L.R. 26 (Oct. 1984).

the interest income. Instead, United States firms will now be able to sell their obligations directly to foreign investors in a competitive market. According to Treasury Secretary Regan, the new improved access to the international capital market will "contribute to increased capital formation and sustained economic growth in the United States."

F. New FIRPTA Withholding Requirements

Section 129 of the Tax Reform Act of 1984 brought about changes in the withholding rules of the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA). Effective January 1, 1985,

** Under the previous tax structure, many foreign persons refused to buy obligations on which a 30% tax was withheld from the interest payments. Thus, to attract foreign capital, United States firms would create foreign finance subsidiaries in tax havens, such as the Netherlands Antilles, in order to sell their bonds in the Eurobond market without the imposition of the 30% tax. Not only did such arrangements result in the abuse of existing United States foreign tax treaties, but they also resulted in foreign tax credits being claimed by the United States corporations for taxes paid to the tax haven governments. *Withholding, supra* note 97, at 7.

By limiting the repeal legislation to portfolio interest paid on obligations issued after the date of enactment, United States corporations will no longer be able to assume the existing obligations of their finance subsidiaries to avoid the 30% tax. Furthermore, by introducing the new compliance features, the chances that United States persons will hold obligations outside the United States to evade United States taxes will be minimized. Thus, the effect of the legislation will be to eliminate the evasion of United States taxes through the use of foreign addresses by United States investors. *Tax Reform Act Permits Eurobond Investors to Buy From New York,* 24 Tax Notes 6, 7 (July 2, 1984). See generally *Tax Evasion, supra* note 97.


On December 26, 1984, the IRS issued final regulations defining relevant terms, establishing procedures for establishing whether a corporation is a United States real property holding corporation, and providing rules for two elections foreign corporations may make to be treated as domestic corporations. T.D. 7999, 3 C.B. 4 (1955). For the complete text of the final regulations, see 49 Fed. Reg. 50,689 (1984).

The IRS also issued temporary regulations setting forth the implementing rules for changes to the FIRPTA. The temporary regulations were open for comment until March 5, 1985. T.D. 8000, _ C.B. _ For the full text of the implementing rules, see 49 Fed. Reg. 50,667 (1984).

101 Foreign Investment in Real Property Act of 1980, Pub. L. No. 96-499, 94 Stat. 2682 (codified at 26 U.S.C. §§ 897, 6039C (1982)). The original FIRPTA legislation was enacted at a time when there was concern in the United States over the number of foreign acquisitions of United States agricultural lands. Many domestic purchasers of land complained that foreign investors enjoyed a more favorable tax status which enabled them to outbid domestic buyers. Today, however, the concept has changed so that the FIRPTA rules now apply to all real estate and stock interests in which foreign investors hold over five percent
a ten percent tax\textsuperscript{102} will be withheld on gains realized from the sale of real property by a foreign person in the United States unless one of several exemptions applies.\textsuperscript{103} The new ten percent tax basically replaces the old FIRPTA reporting requirements as the primary enforcement mechanism.\textsuperscript{104}

The new section 129 also amends the reporting requirements for foreign persons holding direct investments in United States real property interests.\textsuperscript{105} Unlike the old reporting requirements, only those foreign persons holding direct property interest valued at $50,000 or more may be required to file a return.\textsuperscript{106}

II. TRADE CONTROLS

A. Export Administration Act

After six months of negotiations, the House and Senate failed to reach an agreement on the expansion and amendment of the Export Administration Act of 1979 (EAA).\textsuperscript{107} Failure to renew the

\textsuperscript{102} Deficit Reduction Act, § 129(a), 98 Stat. 655 (to be codified at 26 U.S.C. § 1445(a)).

\textsuperscript{103} Id. § 129(a), 98 Stat. 655-59 (to be codified at 26 U.S.C. §§ 1445(b)(2)-(6)). For a detailed discussion of the new section 1445 and its five exceptions, see Hudson, Karp, Longer, and Warner, Analysis of the New FIRPTA Withholding Requirements, 24 Tax Notes 573 (Aug. 6, 1984). The temporary regulations, however, increase the number of ways a taxpayer can exempt or modify his tax payments.

\textsuperscript{104} IRS Issues Series of FIRPTA Rules for Taxing Investments in U.S. Real Property Interests, 2 Int'l Trade Rep. 28 (Jan. 2, 1985) [hereinafter cited as FIRPTA Rules].

\textsuperscript{105} Deficit Reduction Act, § 129(b), 98 Stat. 659 (to be codified at 26 U.S.C. § 6039C). The reporting requirements were initially designed to prevent foreigners from leaving the United States without paying taxes on capital gains from real estate transactions. See also FIRPTA Rules, supra note 104, at 28.

\textsuperscript{106} Deficit Reduction Act, § 129(b), 98 Stat. 659 (to be codified at 26 U.S.C. § 6039C(b)(2)). The return must set forth the name and address of the foreign person, a description of the United States real property interests held by the person, and any other information prescribed by the Secretary of Treasury. Id. § 129(b), 98 Stat. 659 (to be codified at 26 U.S.C. § 6039C(a)). Due to the controversial nature of the reporting requirements, it is unlikely that the requirements will become effective in the near future. See Fogarasi & Renfrose, An Analysis of New Section 1445 (FIRPTA Withholding) - Problem Areas and Strategies, 13 Tax Mgmt. Int'l J. 371 (1984).


The House passed its original renewal bill, H.R. 3231, on October 27, 1983. For a detailed
EAA will force the Administration to rely on its emergency powers under the International Emergency Economic Powers Act (IEEPA)\(^{108}\) to regulate trade. Some trade experts, however, fear that the use of export controls under the IEEPA purely for foreign policy reasons will leave the President open to challenges of abuse of power.\(^{109}\) The five major issues contained in the bill (HR 3231, S 979) involved foreign availability in the national security controls area,\(^{110}\) national security and foreign policy import controls,\(^{111}\) en-

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\(^{109}\) Conferees Deadlock on Export Bill, 42 CONG. Q. 2472 (Oct. 6, 1984) [hereinafter cited as Deadlock].

\(^{110}\) The compromise reached by the House and Senate on foreign availability of goods or technology in the national security controls area would shift the burden of proof on foreign availability questions to the government. The conferees agreed that the President should place strong emphasis on negotiations aimed at eliminating problems and suggested that the Secretaries of Commerce and Defense assist the President in gathering foreign availability information. 130 CONG. REC. 12,152 (1984). Furthermore, the conferees agreed that a new 18-month time limit should be placed on foreign availability negotiations. At the end of this period, items would be decontrolled barring an agreement. 130 CONG. REC. 12,152 (1984). The compromise package would establish a new Office of Foreign Availability and would require a “comparable quality” and “sufficient quantity” standard in defining foreign availability. 130 CONG. REC. 12,152-53 (1984). The conferees also agreed to adopt a Senate proposal for a list of relevant factors to be considered when determining foreign availability. 130 CONG. REC. 12,153 (1984). See generally Compromise Package on National Security Issues Ready for Next EAA Bill Conference, 20 U.S. EXPORT WEEKLY (BNA) 1068 (June 19, 1984) [hereinafter cited as Compromise]; EAA Conferees Make Progress But Reach No Agreement on Controversial Issues, 20 U.S. EXPORT WEEKLY (BNA) 929-30 (May 8, 1984).

\(^{111}\) The compromise reached on foreign policy and national security import controls would retain the Senate proposal for national security import controls, but would eliminate the proposed foreign policy import controls. See Compromise, supra note 110, at 1068. The bill, as it came to the Senate floor, contained provisions which would have authorized the use of import controls in tandem with foreign policy export controls. The bill also authorized the use of import sanctions against firms which violated regulations issued under multilateral agreements for national security export controls. 130 CONG. REC. 12,153 (1984). Under the compromise plan, the President could authorize the use of import controls if he determined that the use of the controls was consistent with United States international obligations and

112 According to the compromise reached on enforcement responsibilities, the Customs Service and Commerce Department would share investigatory authority and would coordinate in exchanging licensing and enforcement information. The Customs Service would have priority in enforcement at ports, borders, and overseas, while the Commerce Department would retain primary enforcement authority elsewhere. Both agencies would be required to have reasonable cause before inspection of goods and probable cause before detention and seizure of goods. 130 Cong. Rec. 12,157 (1984). See generally Compromise, supra note 110, at 1068.

113 The compromise on COCOM licensing would generally remove the licensing requirement for exports to other COCOM countries. Three exceptions, however, would exist for cases involving specific end users, certain high technology items, and items which the Secretary of Commerce has deemed to be unavailable on the foreign market. Compromise, supra note 110, at 1068. The compromise would also provide that low technology items which require only COCOM notification, not approval, would not require a license. 130 Cong. Rec. 12,153 (1984). An unresolved portion of the compromise involved individual exports of items eligible for multiple licenses to COCOM countries. See EAA Conference Stalls over COCOM Licensing Language, Raising Possibility Bill is Dead, 1 Int’l Trade Rep. 5 (July 4, 1984); see also Compromise, supra note 110, at 1068.

114 The Commerce Department’s handling of the attempted diversion of a VAX 11/782 computer system to the Soviet Union was greeted with a great deal of criticism from the Congress, the DOD, and the Customs Service. As a result, the Senate proposed a bill which would authorize the Pentagon to review applications for exports to any country where there is a possibility of diversion to hostile countries. Under the Senate proposal, the Secretaries of Defense and Commerce would agree on a list of categories of licenses to be reviewed by the DOD in advance; all disagreements would be settled by the President. 130 Cong. Rec. 12,156 (1984). House conferees, however, were unwilling to allow the DOD so much control without the Commerce Department’s concurrence with the DOD’s proposed list. EAA Conferences Meet Again, Seek Compromise on Defense Review in West-West Licensing, 1 Int’l Trade Rep. 391 (Oct. 10, 1984) [hereinafter cited as Defense Review]. For an overview of the differing attitudes of the Commerce Department, Customs Service, and DOD towards the enforcement jurisdiction of the EAA, see Enforcement of the Export Control Enforcement Act: Hearing Before the Senate Committee on Banking, Housing, and Urban Affairs, 98th Cong., 2d Sess. (1984).

The compromise reached between the House and Senate provided no DOD review of: (a) exports of low technology items unless they were unavailable to the controlled countries; (b) exports to COCOM countries unless agreed to by the Secretaries of Commerce and State; and (c) reliable end-users unless such a review is performed in conjunction with the Commerce Department in consultation with the Customs Service. Compromise, supra note 110, at 1068.

On September 12, 1984, however, the House conferees unanimously rejected a motion by Senate Banking Subcommittee on International Finance and Monetary Policy Chairman John Heinz (R-Pa.) to accept the entire compromise package. Rather, the House conferees
ferees resolved virtually all of their major differences on these key issues, they could not reach an agreement on whether the DOD should be allowed greater control over exports to prevent technology with potential military capabilities from being diverted to hostile nations.\textsuperscript{116} The House conferees objected strongly to any increased DOD monitoring because of its potential debilitating effect on high-technology industries.\textsuperscript{116} Senate conferees, on the other hand, urged that greater Pentagon control is necessary to prevent the diversion of sensitive technology to Eastern bloc countries.\textsuperscript{117} It is predicted that efforts to renew the EAA, which expired on March 30, 1984, will resume when Congress reconvenes in 1985.\textsuperscript{116}

1. Technology Transfers Under the EAA

In what has been called one of the most serious incidents of illegal transfer of United States technology to the Soviet Union since export controls were instituted in 1949,\textsuperscript{118} the Swedish firm of Datasaab was fined $3.12 million by a federal district judge\textsuperscript{120} and denied export privileges from the United States by the Commerce Department.\textsuperscript{121} The fine and restrictions arose from Datasaab's vi-

backed a motion by House Foreign Affairs Subcommittee Chairman Don Bonker (D-Wash.) to accept the compromise without the DOD review provision. House Conferees Reject DOD Review, Contract Sanction Language at Sept. 12 EAA Conference, 1 INT'L TRADE REP. 298 (Sept. 19, 1984) [hereinafter cited as Sept. 12 Conference]. On October 9, 1984, the conferees made one final attempt to resolve their differences on the issue, but no compromise could be reached. Defense Review, supra, at 391.

\textsuperscript{110} Deadlock, supra note 109.
\textsuperscript{116} Sept. 12 Conference, supra note 114, at 298.
\textsuperscript{117} Deadlock, supra note 109, at 2472.

\textsuperscript{119} Statement by Commerce Secretary Malcolm Baldridge, Record $3.12 Million Fine for Violation Imposed on Sweden's Datasaab Contracting, 20 U.S. EXPORT WEEKLY (BNA) No. 30, at 905 (May 1, 1984) [hereinafter referred as Record $3.12 Million Fine].
\textsuperscript{120} United States v. Datasaab Contracting A.B., DC Crim. No. 84-00130 4/27/84.
lations of restrictions placed on its license to export air traffic control technology to the Soviet Union issued by Commerce in 1977. These violations, which Judge Gerald Gessell found to be knowing, deliberate and premeditated, allowed the Soviets to develop a sophisticated military air traffic control system using United States technology. Though arguments for even stiffer penalties were rejected, the investigation leading up to this action nonetheless resulted in the largest fine ever imposed for a violation of the Export Administration Act.

A United States firm was fined $10,000 and sentenced to three years probation for aiding the export of high-speed film used in nuclear research to the People's Republic of China in violation of the Export Administration Act. The fine, which followed a guilty plea was reduced, however, in light of the firm's agreement to help in the prosecution of an alleged middleman to the transaction. This development came in a year in which the United States and the People's Republic sought to expand their trade relations. A May meeting of the United States-China Joint

(May 8, 1984).

Justice Files Charges Against Swedish Firm for Export Administration Act Violations, 20 U.S. EXPORT WEEKLY (BNA), No. 27, at 838 (Apr. 10, 1984) [hereinafter referred to as Justice Files Charges]. Datasaab's original license application was rejected. Commerce advised Datasaab of the necessary conditions for approval and accepted a revised application in October 1977. By this time, however, Datasaab had already made shipments to the Soviets contrary to the conditions. Id.

Record $3.12 Million Fine, supra note 119, at 905.


The investigation was conducted in Sweden and, thus, was restricted due to Swedish neutrality. Investigators attribute much of their success to the procedural guideline which directs the Department of Commerce to handle both licensing and enforcement actions. Justice Files Charges, supra note 122, at 888.

The current version of the EAA provides for fines in these cases up to $15 million. 50 U.S.C. app. § 2410 (1983). The trial judge, citing mitigating circumstances having to do with the revelation of the incident, held the fine to $3.12 million, the value of the parts shipped to the Soviet Union. See Record $3.12 Million Fine, supra note 119, at 906.


Beverly Hills Firm, supra note 128 at 939.

Astrobar Fined, supra note 128, at 1081. The middleman, Man Chung Tong, allegedly made the exports via Canada and Hong Kong. Id.
Commission of Commerce and Trade resulted in an agreement under which the parties would conduct work programs designed to increase cooperation in industrial technology. Bilateral investment negotiations were also scheduled, and the parties agreed to exchange information regarding their import and export control policies.

2. Personal Cause of Action Under the EAA

In Abrams v. Baylor College of Medicine, decided March 5, 1984, the United States District Court for the Southern District of Texas upheld the right of a plaintiff to bring a private cause of action under the Export Administration Act of 1979 (EAA). The court concluded that Plaintiffs, two Jewish anesthesiologists and Baylor faculty members who were excluded from participating in Baylor's cardiovascular surgical exchange program with King Faisal Hospital in Saudi Arabia, held an implied cause of action under the EAA. Based on this conclusion, the court applied the facts to the policies underlying the EAA and the regulations promulgated under it, concluding that Baylor had violated the EAA. The court limited Plaintiffs' compensation to actual economic damages for two reasons. The court determined that the evidence did not justify an award for humiliation and anguish and that Baylor's actions were not so egregious or malicious to support the imposition of punitive damages.

B. Buy American Provisions

A United States District Court in Acme of Precision Surgical v. Weinberger, handed down an interpretation of the "Buy American" provisions of the Department of Defense Appropriations Act

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133 U.S.-China Announce Trade Developments Following Second Joint Commission Meeting, 9 U.S. IMPORT WEEKLY (BNA), No. 32, at 1000 (May 16, 1984).
134 Id.
138 Abrams, supra note 136, at 1581.
139 Id. at 1582.
140 Id.
141 Id.
142 Id.
relating to the purchase of specialty metal products. Plaintiff, a United States manufacturer of surgical instruments, had hoped to prohibit the Defense Department from purchasing specialty metal end products not manufactured entirely in the United States or its possessions. The court disagreed, finding that the Department of Defense may contract to buy specialty metal products manufactured overseas so long as these products are formed from specialty metals melted in the United States.

C. Travel to Cuba/Trading with the Enemy Act

In Regan v. Wald, the Supreme Court in a 5-4 decision reversed a First Circuit decision which had directed the Massachusetts District Court to issue an injunction barring the enforcement of Treasury Department regulation 560. Regulation 560 was amended in 1982 to permit only certain types of travel, such as official visits, news gathering, and visits to relatives, and to exclude general tourist and business travel. Justice Rehnquist, speaking for the majority, held that the grandfathering of national emergency provisions taken against Cuba in 1963 in accordance with the Trading with the Enemy Act preserved the President's authority in these areas. Justice Blackmun, in his dissent, stressed that the restrictions under regulation 560 were not promulgated in compliance with the International Emergency Economic Powers Act of 1977, and that Congress had not intended for this Act to be bypassed by the use of grandfathered provisions from an act designed to be used in case of war.


145 Id. at 506.


147 Wald v. Regan, 708 F.2d 794 (1st Cir. 1983).


150 Regan, 104 S.Ct. at 3035.


152 Regan, 104 S. Ct. at 3047.
D. Proposed Changes in Commerce Department Distribution Licenses

On September 10, 1984, the United States Department of Commerce announced a revised set of proposed distribution license regulations designed to tighten controls over United States exports.\(^{153}\) The revised regulations are a modification of an earlier set of proposals\(^{154}\) announced in January 1984 which were heavily criticized by business firms, trade groups, and foreign governments.\(^{155}\)

The proposed regulations place greater emphasis on the distribution license holder's self-control and require that all license holders present a description of their internal controls to the Commerce Department as a precondition to receiving or renewing a license.\(^{156}\) These internal controls must prove that the exporter has (1) an effective system for training and educating all consignees on the license and communicating export control information to all consignees, (2) a precise identification of positions in the United States firm and at all consignee firms responsible for compliance with the license procedure requirements, and (3) an internal audit program.\(^{157}\) The regulations require that companies applying for their first license receive counseling from the Commerce

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\(^{155}\) European Community Hits Extraterritoriality of Proposed Distribution License Regulations, 1 INT'L TRADE REP. (BNA) 614 (Nov. 21, 1984). The January proposal was the result of a year-long examination of the existing licensing system. The examination was part of an overall review by the Reagan administration of export administration procedures, especially those affecting high technology exports.

Under the January proposal, a more complete description of the commodities to be exported under the licenses would be submitted to the Commerce Department. In addition, exporters would be required to obtain a minimum of 50 validated licenses in the year preceding the application in order to qualify for a distribution license. Furthermore, no commodity received by a foreign consignee under a distribution license could be re-exported to a customer outside NATO except in Spain, New Zealand, Australia, or Japan unless the consignee obtained a certificate from the customer stating that the commodity would not be re-exported without Commerce Department's approval. 49 Fed. Reg. 2265 (1984). See also Changes in Distribution License Procedure Are Proposed by Commerce, Comments Invited, 20 U.S. EXPORT WEEKLY (BNA) 562 (Jan. 24, 1984) [hereinafter cited as Changes].


Department. The January proposal required a minimum of fifty validated licenses in the preceding year and a minimum one year documented relationship with consignees for distribution license eligibility. The current proposal requires only that there be a "reasonable expectation" that the distribution license will replace twenty-five validated licenses. In addition, an exception to the one-year relationship rule may be obtained if there is suitable evidence of consignee reliability. The new rules also require that distributors notify customers, other than approved consignees on the distribution license and agencies of foreign governments, that the goods were imported from the United States under a special license which prohibits unauthorized re-exporting. Furthermore, the new proposal deletes the January proposal's requirement that distribution license-holders submit a complete customer and potential customer list to the Commerce Department on a quarterly basis. The Commerce Department estimates that there are currently about 700 distribution license holders, many of whom are among the United States' major exporters. According to Acting Assistant Secretary of Commerce for Trade Administration, William Archey, United States companies in the high technology field could not compete in the world market effectively without the distribution license program.

E. Non-Complying Goods

On July 6, 1983, the Consumer Product Safety Commission (CPSC) ruled in In re Imperial Carpet Mills that items failing to comply with applicable flammability standards under the Flammable Fabrics Act (FFA) could still be exported even though

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160 Id.
161 Id. at 35,793.
162 Changes, supra note 155, at 562-63.
163 Revised Regulations, supra note 153, at 254. The distribution license program accounts for approximately $20 billion per year in business.
they could not be introduced into domestic commerce. In February 1984, the CPSC met\textsuperscript{166} to discuss the possibility of extending the policy applicable to goods under the FFA to goods under the Consumer Product Safety Act (CPSA)\textsuperscript{167} and the Federal Hazardous Substances Act (FHSA).\textsuperscript{168} The current policy generally prohibits the exportation of noncomplying goods but does allow noncomplying goods made explicitly for export to be shipped overseas.\textsuperscript{169}

On May 16, 1984, the CPSC voted three-to-one to retain its current policies regarding exports of noncomplying goods under the CPSA and the FHSA.\textsuperscript{170} Commissioner Stuart M. Statler explained that the decision was based on the "explicit language" of the export exemptions of the two acts which specifically exclude the exportation of noncomplying goods sold or distributed for sale in domestic commerce.\textsuperscript{171}

The CPSC issued a formal policy statement concerning its interpretation of the CPSA and FHSA provisions on October 9, 1984.\textsuperscript{172} The statement also listed policy factors supporting its position\textsuperscript{173} and named products which would not be affected by the policy.

\textsuperscript{166} 49 Fed. Reg. 39,669 (1984)(to be codified at 16 C.F.R. § 160). The export policy under the FFA allows manufacturers who have recalled noncomplying goods from domestic commerce to export those goods to foreign countries so long as the CPSC is given 30 days notice, the goods are properly labeled, and the goods present no unreasonable risk to consumers in the United States. 15 U.S.C. §§ 1202a-1202c.


Advocates of the extension of the FFA policy to CPSA and FHSA goods argue that changes should be made so that all the policies for the major acts administered by the Commerce Department would be consistent. CPSC Releases General Counsel Memorandum on Export of Products Not Subject To Rule, 20 U.S. EXPORT WEEKLY (BNA) 884 (Apr. 24, 1984). The CPSC office of general counsel recommended the adoption of a uniform policy, claiming that the language and history of the two Acts were ambiguous, thereby leaving the CPSC free to change its policy. Consumer Safety Panel Votes to Maintain Current Policy on Exports of Banned Goods, 20 U.S. EXPORT WEEKLY (BNA) 970 (May 22, 1984) [hereinafter cited as Panel Votes].

\textsuperscript{170} Id. at 970.

\textsuperscript{171} Id. at 971.


F. COCOM Guidelines on Computer Sales

On July 12, 1984, members of the Coordinating Committee for Multilateral Exports (COCOM) agreed on common guidelines limiting the sale of computers and software to the Soviet Union and its Eastern Bloc allies. The guidelines, designed to tighten existing COCOM controls on exports, went into effect immediately. The accord expands the existing NATO embargo on the sale of large computers to include smaller models adaptable for military use. The accord also places new restrictions on industrial robots, printed circuits, space craft equipment and several other goods considered potentially useful to Soviet military efforts. At the same time, however, the accord loosened restrictions on personal computers and established new export thresholds for minicomputers.

The accord is the result of over a decade of negotiations among major Western allies to develop a common understanding on the sale of items with potential military capacities to the Soviet Union. The accord is the first major updating of restrictions on

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174 Id. at 39,667.
175 COCOM is a voluntary organization consisting of the major NATO Allies (less Iceland and Spain) and Japan. The goal of the committee is to establish mutually acceptable standards for the control of exports, strategic goods, and technology with potential military application to the communist world. To accomplish this goal, COCOM has focused on four major areas: (a) the creation of agreements concerning strategic criteria for control; (b) the formation of detailed lists of embargoed goods; (c) the evaluation of possible exceptions from the lists of embargoed goods; and (d) the coordination of efforts to insure enforcement of the embargoes. Hunt, Multilateral Cooperation in Export Controls - The Role of COCOM, 14 U. TOL. L. REV. 1285, 1285-87 (1982-1983) [hereinafter cited as Cooperation].
177 Id.
179 U.S. Allies to Restrict Computer Technology Exports to Soviet Bloc, Wall St. J., July 23, 1984, at 24, col. 4. The accord now allows the exportation of computers with a greater memory capacity and data processing rate to the Eastern Bloc countries. The new ceiling is a data processing rate of 48 million bits of information a second, 50% more computing power than was allowed previously.
180 Root, Trade Controls That Work, 52 FOREIGN POL'Y 61, 68-69 (1984). In general, the United States has encouraged strict guidelines for all exports regardless of the remoteness of their military application. The European nations, on the other hand, tend to be equally concerned with economic and trade considerations when formulating export guidelines. COCOM Feuds Over Trade to East Bloc, Wall St. J., July 17, 1984, at 35, col. 1 [hereinafter cited as COCOM Feuds]. For a discussion of the policy differences between the United
the sale of computers to Eastern Europe and the Soviet Union since the most recent computer embargo list was announced in 1976.\footnote{Ban Widened, supra note 178, at 7, col. 1.} Although the exact details of the new embargo list remain secret,\footnote{Id. All COCOM lists of embargoed goods and guidelines are classified and reviewed every three years. Any changes in the lists are generally based on technological advances and the availability of certain goods from sources outside the COCOM countries. Cooperation, supra note 175, at 1288-90.} the contents should become more apparent as member countries begin to announce new export control orders.\footnote{Cooperation, supra note 175, at 1289. In response to the COCOM accord, the Commerce Department's Office of Export Administration issued new regulations on December 31, 1984, tightening restrictions on the export of computers. For the complete text of the new regulations, see 49 Fed. Reg. 50,608 (1984) (to be codified at 15 C.F.R. §§ 379, 386, 399).}

G. Foreign Policy Controls on Exports to Iran

On March 16, 1984, the Commerce Department issued interim rules imposing restrictions on exports to Iran\footnote{49 Fed. Reg. 10,247 (1984) (to be codified at 15 C.F.R. § 385.4).} due to its repeated support of acts of international terrorism.\footnote{On January 20, 1984, the Secretary of State declared that Iran is a country which has repeatedly supported acts of international terrorism. 49 Fed. Reg. 2836 (1984). According to the Export Administration Act of 1979, 50 U.S.C.A. app. § 2405(a) (West Supp. 1984), the President has the authority to prohibit or curtail the exportation of any goods or technology to the extent necessary to fulfill the foreign policy of the United States. Furthermore, the Act states that the United States may use foreign policy export controls to encourage other countries to take whatever steps are necessary to prevent their territories or resources from being used to assist, encourage, or give sanctuary to persons involved in the direction, support, or participation in acts of international terrorism. Id. § 2402(8). The functions conferred upon the President under this section were delegated to the Secretary of Commerce by Exec. Order No. 12,214, reprinted in 45 Fed. Reg. 29,783 (1980). When imposing, expanding, or extending export controls, the President must consider: (a) whether the controls will achieve the foreign policy purpose; (b) whether the controls are compatible with United States foreign policy objectives; (c) the possible reactions of other countries to the controls; (d) the effect of the controls on the competitive position of the United States in the international economy; (e) the ability of the United States to enforce the controls; and (f) the foreign policy consequences of not imposing the controls. 50 U.S.C.A. app. § 2405(b) (West Supp. 1984).} The restrictions are identical to previous restrictions applicable to other countries which have repeatedly provided support for acts of international terrorism.\footnote{47 Fed. Reg. 10,248 (amending 15 C.F.R. § 385.4 (1984)). Countries currently under restrictions include the Republic of South Africa, Namibia, the People's Republic of China, the People's Democratic Republic of Yemen, Syria, and Afghanistan. 15 C.F.R. § 385.4. The interim regulations place Iran under identical restrictions as those placed on the People's} Accordingly, the restrictions impose the requirement
of a validated license\textsuperscript{187} for the export of crime control and detection equipment,\textsuperscript{188} military vehicles and materials for producing military equipment,\textsuperscript{189} certain specified aircraft and helicopters,\textsuperscript{190} and goods or technology subject to national security controls.\textsuperscript{191} When the licensing requirement involves the use of parts, components, or materials originating in the United States, decisions on granting a license will take into account whether the United States content is twenty percent or less by value.\textsuperscript{192} In addition, licensing decisions concerning exports to Iran will take into account two additional factors: (a) whether the transaction involved a contract in effect before January 23, 1984, requiring exportation or re-exportation of the goods in question, and (b) whether the goods had been exported from the United States before that date.\textsuperscript{193} On September 26, 1984, the Commerce Department issued modifications of these anti-terrorism controls on certain exports to Iran.\textsuperscript{194} In particular, the rule modifies the controls on aircraft and helicopters,\textsuperscript{195} and on goods and technology subject to national security controls if the export is destined for military use.\textsuperscript{196} The licensing policy is one of

Democratic Republic of Yemen and Syria. 49 Fed. Reg. 10,248 (amending 15 C.F.R. § 385.4(d)).

\textsuperscript{187} 15 C.F.R. § 385.4(d). The EAA gives the Secretary of Commerce the authority to require the imposition of export licenses to further the foreign policy objectives of the Act. 50 U.S.C.A. app. § 2403 (West Supp. 1984).


\textsuperscript{190} Each aircraft requiring a validated license must be valued at $3 million or more and the helicopters must weigh over 10,000 pounds when empty. 15 C.F.R. 385.4(d). An exception exists for aircraft and helicopters used by regularly scheduled airlines for which assurances against military use have been submitted to the Office of Export Administration. \textit{Id.}

\textsuperscript{191} 15 C.F.R. § 385.4(d). The validated licenses are only required on goods and technologies subject to national security controls if the export is destined to military end-users or for military end-uses and is valued at $7 million or more.

\textsuperscript{192} The new rules remove the last sentence of 15 C.F.R. § 385.4(d) and insert the new 20% content requirement. 49 Fed. Reg. 10,248 (to be codified at 15 C.F.R. § 385.4(d)).

\textsuperscript{193} \textit{Id.}

\textsuperscript{194} 49 Fed. Reg. 38,243 (1984). Further restrictions on exports to Iran were deemed necessary in light of the Iranian government's continuing policies of support for international terrorism. \textit{Id.}

\textsuperscript{195} Under the previous regulations, certain value and weight restrictions were applied to controls on helicopters and airplanes, \textit{supra} note 190. The September regulations remove these weight and value restrictions, thereby applying the controls to any helicopters, airplanes, or their components and parts. 49 Fed. Reg. 38,243 (1984).

\textsuperscript{196} The new regulations remove the $7 million value limit on national security controls on goods and technical data. \textit{See supra} note 191. Instead, the controls apply to all goods and technology regardless of their value. In addition, the rules impose new controls on marine
general denial, but limited exceptions are allowed.\footnote{197}  

H. Domestic Content

The Fair Trade Practices in Automotive Products Act,\footnote{188} a bill which would impose required percentages of domestic content for companies selling automobiles in the United States, failed to pass the Senate in 1984.\footnote{199} Although the bill is expected to be reintro-


\footnote{197} 49 Fed. Reg. 38,243 (1984). The exceptions will be considered on a case-by-case basis. Among the possible exceptions are transactions involving the export or re-export of goods or technology under a contract which was in effect before January 23, 1984, for aircraft and helicopters subject to the previous value and weight limits or national security controlled items valued at $7 million or more. Similar exceptions may apply to transactions involving the export or re-export of goods or technology under a contract which was in effect before September 28, 1984, in the case of all other commodities or technical data. Other possible exceptions would include commodities or technical data which had been exported from the United States before January 23, 1984, or September 28, 1984, as applicable, and foreign produced commodities in which the United States content is 20% or less by value. Id. at 38,244.


\footnote{199} Domestic content legislation, H.R. 1234, passed the House on November 3, 1983, but failed to pass the Senate by the time Congress adjourned in October 1984. *Content Legislation, supra* note 198, at MLC-111.

In general, domestic content legislation imposes local content requirements for parts and labor involved in the production of vehicles sold in the United States. The content requirements, however, would only be imposed on manufacturers which produce over 100,000 vehicles for ultimate retail sale in the United States. The required minimum domestic content ratios would be determined by the amount of total corporate sales divided by 10,000. The penalty for violating the required ratio would be the imposition of import quotas reducing the amount of allowable vehicle imports by the percentage by which the auto manufacturer fell short of the prescribed ratio. The content requirements would have been phased in during 1985 and 1986 with the maximum requirement of 90%. United States parts and labor would have been reached by 1987. Id. See also *Battle Over Domestic Content Bill Resumes with Hearing By Senate Commerce Committee*, 9 U.S. IMPORT WEEKLY (BNA) 1035 (May 23, 1984) [hereinafter cited as *Battle*].

Recent changes in the structure of the United States automobile industry along with the short-term effects of the 1980-82 recession prompted the proposal of domestic content legislation. In particular, the attractiveness and affordability of imported automobiles and light pick up trucks have resulted in large increases in the number of automobiles imported into the United States. In 1983, 26% of all new cars, and 40% of all cars in certain western states, were imported. In addition, United States automobile manufacturers have recently been purchasing more parts and equipment from abroad to reduce production costs, increase quality, and incorporate new technology. Finally, recent joint ventures between
duced it is expected to face continued opposition from congres-
sional leaders who view the bill as too protectionist. 200

In general, proponents of domestic content legislation argue that
a protectionist United States policy is necessary to preserve the
United States automobile industry. 201 Such legislation, they argue,
would prevent further erosion of auto-related jobs and curb the
rise of foreign-sourcing 202 by United States companies while induc-
ing foreign companies to invest in the United States. 203 Opponents
to domestic content legislation argue that the enactment of such
legislation would result in increased automobile prices, 204 lost jobs, 205 reduced incentives for foreign manufacturers to invest in
the United States, 206 and retaliation against American exports by

United States automakers and foreign manufacturers have also affected United States autoworkers and suppliers. The result has been that larger numbers of workers and suppli-
ers in the auto industry have been laid off. Content Legislation, supra note 198, at MLC-111.

1234 Before the House Ways and Means Committee, 98th Cong., 2d Sess. 15, 32, 176 (1983)
[hereinafter cited as House Hearings]; House Ways and Means Committee, Adverse Re-
1st Sess. 5 (1983) [hereinafter cited as ADVERSE REPORT]. See also Domestic Content Bill
Could Pass This U.S. Election Year, 31 Bus. INT'L 179 (June 8, 1984) [hereinafter cited as
Bill Could Pass].

201 House Hearings, supra note 200, at 60-65 (statement of Dick Warden, Legislative Di-
rector of the United Automobile, Aerospace and Agricultural Implement Workers of
America).

202 Foreign-sourcing is the practice of bringing foreign parts and components into the
United States, assembling them here, and labeling them as United States produced. Oppo-
nents to the practice argue it threatens to domestic jobs. Id. at 61.

203 Id. at 64.

204 Under existing voluntary restraint agreements with Japan, approximately $400 is
added to the price of cars sold in the United States. It is estimated that if domestic content
legislation is passed, additional increases from $300 to $1,000 would be imposed. Battle,
supra note 199, at 1036. In addition, the Congressional Budget Office (CBO) has estimated
that domestic content legislation would cause consumers to buy fewer cars at higher prices.
This reduction in car sales, in turn, would result in a welfare loss to consumers of $4.9
billion by 1990. Federal Trade Commission Opposes Auto Domestic-Content Legislation,
Commissioner Douglas Testifies, 20-8 FTC News Notes 1 (May 28, 1984). See generally,
ADVERSE REPORTS, supra note 200, at 5-6.

205 The CBO has estimated that if domestic content legislation were adopted, 104,000 jobs
would be lost in the United States export sector by 1990, while only 38,000 jobs in the
automobile field would be gained. U.S. Private Sector Coalition Appeals to Senate to Re-
ject Domestic Content Bill, 9 U.S. IMPORT WEEKLY (BNA) 895 (Apr. 18, 1984). Similarly, a
Wharton Econometric Forecasting Associates study which was submitted to the House
Ways and Means Committee concluded that the actual gains in the United States auto in-
dustry would total only 2,000 workers in 1986, and 58,000 workers by 1991. In contrast, the
study indicated that the net loss of jobs in other sectors would be approximately 365,000 by

206 The CBO found that the content legislation would serve as a disincentive to invest-
United States foreign trading partners. Opponents also argue that the impact on Japanese imports would be particularly strong and would in all likelihood lead to retaliation.

I. United States Customs

1. New Country-of-Origin Textile Regulations

On August 3, 1984, the United States Customs Service issued interim country-of-origin regulations designed to tighten con-

ment because the companies at which the legislation is directed would be discouraged from continuing their investments in United States facilities. Since 1981, Honda, Nissan, and Volkswagon have invested millions of dollars in constructing manufacturing facilities in the United States. The CBO concluded that if the domestic content legislation were enacted, the content requirements would act as the equivalent of an import quota. Accordingly, the CBO estimated that by 1990, Toyota and Nissan would be forced to limit their exports to approximately 250,000 units each. This, in turn, would discourage future investment in the United States. ADVERSE REPORT, supra note 200, at 6-7.

Opponents of the legislation argued that the domestic content requirements clearly violate the General Agreement on Tariffs and Trade (GATT). Articles III and XI of the GATT prohibit member countries from adopting local content requirements and quantitative restrictions. Although article XIX provides an "escape clause" from these prohibitions, opponents of the legislation argue that it does not meet the qualifying requirements of article XIX. Specifically, article XIX allows for the imposition of domestic content legislation if a country can show that increased imports cause, or threaten to cause, serious injury to domestic industry. Such relief, however, is meant to be temporary and no more severe than the injury itself. Id. at 7-8. See also Opposing Views on Auto Content Bill Mark Second Hearing of Senate Panel, 9 U.S. IMPORT WEEKLY (BNA) 1065, 1067 (May 30, 1984).

Opponents to the bill also argued that the legislation would be inconsistent with provisions similar to those of the GATT in commercial treaties between the United States and its trading partners. Id. at 8. Similarly, opponents feared that the legislation could endanger 12 separate joint ventures recently negotiated between the United States and foreign automobile manufacturers. Bill Could Pass, supra note 200, at 179-80.

Retaliation could take the form of increased tariffs, quotas, similar local content requirements, or similar restrictive measures. In addition, retaliation would not necessarily be limited to the auto industry, but could also be directed towards other export sectors such as agriculture, computers, or aircraft. Advocates, Critics of Local Content Bill Debate Measure's Efficacy on House Floor, 9 U.S. IMPORT WEEKLY (BNA) 186, 187 (Nov. 2, 1983).

Section 204 of the Agriculture Act of 1956, 7 U.S.C. § 1854 (1982), authorizes the President to negotiate textile restraint agreements and to enforce such agreements through appropriate import regulations covering the designated textile products.

In December 1973, 50 members of the General Agreement on Tariffs and Trade (GATT)
The regulations, which became effective on September 7, 1984, were enacted to "prevent circumvention or frustration of multilateral and bilateral agreements to which the United States is a party and to facilitate efficient and equitable administration of the United States Textile Import Program."

In general, the new regulations provide more rigid guidelines for determining whether a "substantial transformation" in the nature of a textile product has taken place in a country to qualify it as the country-of-origin. Under the interim regulations, a "substantial transformation" occurs when an article has been "substantially transformed by means of a substantial manufacturing or processing operation into a new and different article of commerce with a name, character, or use distinct from the article or material from which it was so transformed." The new regulations list a set of

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Prior to the May ninth executive order, various importers made numerous attempts to circumvent the textile import program. These events, coupled with the U.S. Court of International Trade's (CIT) decision in Cardinal Glove Co. v. United States, 4 Ct. Int'l Trade 41 (1982), declaring that textile agreements were only applicable to products of the country of exportation, led to the promulgation of the interim regulations. 49 Fed. Reg. 31,248 (1984).

After repeated threats of trade retaliation from United States trading partners, however, the Customs Service announced on August 29 that implementation of the regulations would be delayed until October 31 in certain cases. The exceptions cover situations where a purchaser had an agreement in effect prior to August 3, 1984 and the textiles were shipped from the country-of-origin. T.D. 84-190, 49 Fed. Reg. 34,199 (1984) (to be codified in various sections of 19 C.F.R.). See also Customs Service Announces Partial Delay in Implementing Country-Of-Origin Rules, 1 INT'L TRADE REP. (BNA) 228 (Aug. 29, 1984).

Under previous guidelines, a product was considered an export of the country where it was cut, sewn, or assembled. Thus, overseas producers under tight quota restrictions could avoid United States import rules by shipping partially completed goods to other countries with more lenient quota restrictions where they would be re-exported to the United States as finished goods. See Third World Textile Producers Protest U.S. Origin Rules, Countervailing Duty Petitions, 1 INT'L TRADE REP. (BNA) 180 (Aug. 15, 1984).

Under the interim regulations, simple combining or packaging operations, or the mere joining together of parts of apparel in a particular country is no longer a sufficient manufacturing or processing operation to qualify that country as the country-of-origin. 49 Fed. Reg. 31,249 (1984). For a definition of the substantial transformation test, see infra note 214.
criteria for determining whether a substantial manufacturing or processing operation has taken place\textsuperscript{215} and whether a new and different product has been created.\textsuperscript{216}

To ensure that appropriate information is available to the Customs Service for identifying the country-of-origin, the interim regulations require that importers declare a product as processed in a particular country or provide certification that complete information on the product's origin is unavailable.\textsuperscript{217} The declaration must describe the manufacturing and processing operations involved, the materials used, and the costs incurred, and must identify the country, territory, or possession involved in the production of the item.\textsuperscript{218}

The general effect of the regulations will be to curb the flow of textiles illegally imported into the United States and to increase the number of job opportunities available to domestic textile workers.\textsuperscript{219} For the ultimate purchaser of the textile products, however, the regulations will result in higher average prices for retail goods due to reduced availability and quota charges in the Far East.\textsuperscript{220}

Reaction to the new regulations has been extremely negative.\textsuperscript{221}

\footnotesize
\textsuperscript{215} The criteria for determining whether a substantial manufacturing or processing operation has taken place include: (a) material costs; (b) direct labor costs; (c) other direct processing or manufacturing costs; (d) time involved in the manufacturing or processing operation; (e) complexity of the manufacturing or processing operation; (f) level or degree of skill or technology required in the manufacturing or processing operation; and (g) physical change of the material or article at each stage in the manufacturing or processing operation. 49 Fed. Reg. 31,249 (1984).
\textsuperscript{216} The criteria for determining whether a new and different article has been produced include changes in: (a) the commercial designation or identity; (b) the essential character; and (c) the commercial uses of the item. Id.
\textsuperscript{217} If the information in the declaration is incomplete or insufficient, the Customs Service may deny release of the goods until a determination of the country-of-origin is made based on the information available. Id.
\textsuperscript{218} Id.
\textsuperscript{220} Id. at 307. It is estimated that the new regulations will add approximately 20% to the cost of affected goods. Apparel Imports Blast Country of Origin Rule, Say Will Lose Millions If Implemented, 1 INT'L TRADE REP. (BNA) 206 (Aug. 22, 1984).
\textsuperscript{221} On September 6, 1984, the Textile Committee of the GATT condemned the interim regulations and called for their withdrawal. Canada, Japan, and the European Community have joined with the GATT member nations in condemning the regulations. See GATT Textile Committee Condemns New U.S. Regulations, Calls for Their Withdrawal, 1 INT'L TRADE REP. (BNA) 256 (Sept. 12, 1984).
In mid-August, China cancelled private purchase contracts amounting to approximately $300,000 in wheat. Similarly, Hong Kong instigated a voluntary boycott of United States tobacco products in August that could affect as much as $47 million in cigarettes exported from the United States. At home, various textile manufacturers and retailers have challenged the new regulations before the Court of International Trade. In October, however, the regulations were upheld as a valid delegation of Presidential authority in *Mast Industries Inc. v. Regan*.

2. Amended Regulations Relating to the Examination of Imported Merchandise

Effective August 20, 1984, the Customs regulations relating to the location of examinations of imported merchandise were changed. Under the previous regulations, almost all imported merchandise entering the United States was examined at "public stores" at the expense of the Customs Service. The new regulations, however, require that all imported merchandise be ex-

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222 *Textile Regulations Protests Interfering With Strategy To Get President Reelected*, 1 INT'L TRADE REP. (BNA) 204 (Aug. 22, 1984).


224 Among the challenges to the new regulations are Mast Industries, Inc., the Retail International Trade Action Coalition, Laura Ashley, Inc., Liz Claiborne, Inc., Marisa Christina Holdings, Inc., and the U.S. Shoe Corp. See *Laura Ashley, Liz Claiborne File Briefs Against Interim Textile Regulations*, 1 INT'L TRADE REP. (BNA) 307 (Sept. 19, 1984).


227 "Public Stores" are defined as "[a]ny premises owned or leased by the government and used for the storage of merchandise for the final release of which from customs custody a permit has not been issued. . . ." 19 U.S.C. § 1561 (1982). The entire concept of "public stores" has waned in recent years because the Customs facilities, personnel, equipment, and logistical backing necessary to support the public stores are very limited in many locations. 49 Fed. Reg. 29,373 (1984).

228 Inflammable, explosive, or dangerous goods, or goods that could not easily be examined at public stores were allowed to be examined elsewhere. 19 C.F.R. § 151.6 (1984). The Regulators allowed importers to request that the examination take place at a location other than the public stores. 19 C.F.R. § 151.7 (1984). The Customs Service would then decide how, when, and where the shipment would be examined. If the Customs Service decided to do the examination at the public stores, it would bear the cost of loading and hauling the merchandise there. If, on the other hand, the Customs Service approved an alternative location, all examination costs would be charged to the importer. See 49 Fed. Reg. 29,373 (1984).
amined at the place of arrival at the importer’s expense. Importers may request examination at a place other than the arrival location, but if such a location is authorized by Customs, certain conditions apply. The new requirements are expected to decrease Customs costs and liability while providing for more expeditious examination and release of cargo shipments.

3. New Reporting Requirements for Certain Commercial Aircraft

Effective December 31, 1984, the Customs regulations regarding reporting requirements for aircraft arrivals into the United States were amended. Under previous regulations, reporting and landing requirements applied only to private aircraft. The new regulations, however, expanded the definition of “private aircraft” to include certain commercial aircraft arriving from regions south of the United States.

The purpose of the new regulations is to improve the effectiveness of United States drug smuggling prevention by expanding the number of aircraft subject to reporting requirements. In particular...
lar, the new regulations will prevent the avoidance of reporting and landing requirements by certain aircraft operators previously claiming the commercial aircraft loophole. By eliminating this loophole, Customs hopes to facilitate the elimination of the current drug abuse situation in the United States.236

4. Mutual Assistance Agreement Between United States and Canadian Custom

On June 20, 1984, representatives from the United States and Canadian Customs Administrations signed a Mutual Assistance and Cooperation Agreement.237 The agreement formalizes the existing cooperation between the two customs services in administering and enforcing customs laws affecting the transportation of goods across national boundaries.238 In particular, United States and Canadian Customs Administrations will assist one another in: (a) the prevention, investigation, and repression of offenses; (b) the exchange of information for use in administering and enforcing customs laws; (c) researching, developing, and testing new systems and procedures; (d) harmonizing documentation; (e) exchanging personnel; and (f) coordinating border facilities.239

flights per year are involved in drug smuggling. Id. at 46,885. Moreover, countries to the south of the United States are thought to be the major source of these smuggled drugs. Id.

In 1975, the Customs regulations were amended by adding a new section, 19 C.F.R. § 6.14, which provides for the giving of notice of intended arrivals by private aircraft entering the United States via the Mexican border. Id. In 1983, these notice requirements were extended to private aircraft arrivals via the Gulf of Mexico, the Pacific Coast, and the Atlantic Coast. T.D. 83-192, 48 Fed. Reg. 41,381 (1983) (codified at 19 C.F.R. § 6.14). Section 6.14 also requires that private aircraft land at fourteen specified airports along the United States-Mexican border. 19 C.F.R. § 6.14 (1984).

Despite these drug enforcement efforts, major increases in the volume of illegally imported drugs have continued. The Customs Service believed this was because the previous regulations applied only to private aircraft. The new regulations were introduced to prevent aircraft operators from avoiding landing and reporting requirements, and from possibly engaging in drug smuggling, by claiming to be on exempted commercial flights. See 49 Fed. Reg. 46,885 (1984).

236 See id.


Informal meetings between United States and Canadian Customs officials began in January 1983. Agreement on a text was reached in October 1983. Minor misunderstandings between the United States Department of State Treaty Affairs Division and the Canadian Department of External Affairs Treaty Registrar’s Office, however, delayed the signing until June 1984. Id. at 26-27.

238 Id. at 26.

239 1 INT’L TRADE REP. (BNA) 25 (July 4, 1984).
5. Revised Regulations Relating to Penalties and Penalty Procedures

Effective February 13, 1984, the Customs regulations relating to fines, penalties, and forfeiture programs were revised. The amended regulations alter penalty guidelines to the Customs regulations, clarify the requirements and criteria applicable to disclosures of Customs violations, and place a limit on the number of supplemental petitions for relief from fines, penalties, forfeitures and liquidated damages claims. According to the Customs Service, the new penalty guidelines are solely for instruction and guidance to Customs field officers and are not considered formal regulations.

6. Customs Litigation

a. Country-of-Origin Regulations Are Valid Delegation of Presidential Authority

The United States Court of International Trade decided on October 4, 1984 that the recently promulgated country-of-origin rules are a valid delegation of legislative power to the Presi-

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242 For a discussion of remedies for Customs violations, see supra note 240. Section 162-75(a) of the new regulations requires that a prior disclosure of violations be made in writing so that the date, time, and contents of the disclosure is established in the record. For the text of the revised part 162 dealing with prior disclosures, see 49 Fed. Reg. 1678-80 (1984).
243 The new regulations impose a limit of two supplemental petitions for relief from a previous decision. For the text of the revised parts 171-72, see 49 Fed. Reg. 1680-81 (1984).
244 Final Regulations Amending Procedures Issued by Customs Service, 9 U.S. IMPORT WEEKLY (BNA) 796 (Mar. 21, 1984).
dent. In *Mast Industries, Inc. v. Regan*, the court held that the authority delegated to the President under section 204 of the Agricultural Act of 1956 confers upon the President the right to limit textile imports via regulations such as the country-of-origin rules. In addition, the court held that the regulations are exempt from the prior notice and comment provisions of section 553 of the Administrative Procedure Act by virtue of the "foreign affairs function" or the "general statement of policy" exceptions of section 553.

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249 Section 204 delegates to the President the authority "to issue regulations governing the entry or withdrawal from warehouse[s] of any . . . textiles, or textile products" to "carry out" any agreements limiting the importation of such products into the United States. 7 U.S.C. § 1854 (1982).

250 See id. In *Mast Industries, Inc. v. Regan*, the court rejected the plaintiffs' contention that the authority delegated to the President under § 204 was an unconstitutional violation of the separation of powers doctrine. 596 F. Supp. at 1574. The court stated that congressional authorizations of presidential power should be afforded a broad construction and not be "hemmed in" by "anxious judicial blinders." Id. at 1575. The court concluded that where Congress had decided to give the President discretion in delegating authority in international trade, any actions taken by the President pursuant to this discretion would not fall to claims that the executive branch had exceeded its delegated authority. Id. at 1576.

251 Administrative Procedure Act, 5 U.S.C. § 553 (1982). Section 553 requires that general notice of proposed rule-making be published in the Federal Register unless certain exceptions apply. Id. § 553(a)-(b). In addition, § 553 requires that interested persons be given an opportunity to participate in the rule-making through submission of written data, views, or arguments unless one of the exemptions apply. Id. § 553(c)-(d).

252 Section 553(a) exempts from the notice and comment provisions any military or foreign affairs function of the United States. Id. § 553(a)(1). The court held that the foreign affairs function is not limited to diplomatic activities, but rather includes any matter which is "clearly and directly" involved in a foreign affairs function. 596 F. Supp. at 1582. The court concluded that to the extent that the regulations define or alter limitations in bilateral trade agreements or restrictions imposed on textile imports, the regulations "clearly and directly" involve a foreign affairs function and, therefore, are exempt from the notice and comment provisions of § 553. Id. at 1583.

253 Section 553(b) states that notice and hearings requirements do not apply to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. 5 U.S.C. § 553(b) (1982). The court held that a rule is a general statement of policy when it "does not establish a ‘binding norm’" and "is not finally determinative of the issues or rights to which it is addressed." 596 F. Supp. at 1579. The court concluded that since the administrator of the regulations was free to exercise his informed discretion in any situations arising under the regulations, the regulations fell within the general statements of policy exceptions of 5 U.S.C. § 553(b) (1982). 596 F. Supp. at 1579-80.
b. Dual Burden Test Overturned

On May 2, 1984, the Fifth Circuit Court of Appeals overturned the "dual burden of proof" test that was previously applied in Customs classification cases in Jarvis Clark Co. v. United States. Under the traditional dual burden test, an importer must prove not only that his classification is correct, but also that the government's classification is incorrect. In Jarvis, however, the court changed the operation of the dual burden test by requiring that the Court of International Trade (CIT) "consider whether the government's classification is correct, both independently and in comparison with the importer's alternative." The court relied on the language and the legislative history of the Customs Courts Act of 1980, 28 U.S.C. § 2643(b), in finding that the CIT has a duty to reach a correct result in every case. By granting the CIT the power to remand or retry any action, the court concluded that the dual burden test's potential for unfairness could be eliminated.
without affecting the government's opportunity to develop evidence concerning classifications not previously considered.\footnote{\textit{Id.} at 877.}

\textit{c. Negligence of Customs Officials}

The Supreme Court ruled in \textit{Kosak v. United States}\footnote{\textit{Id.} at 1528.} that the United States government cannot be held responsible for damages done to property in the possession of the Customs Service, even if the damages were negligently inflicted by Customs agents.\footnote{28 U.S.C. §§ 2671-80 (1982). In general, the Federal Tort Claims Act abrogates the federal government's immunity from tort liability in most situations. \textit{Id.} § 2674. The Act, however, preserves governmental immunity in 13 situations specifically enumerated in § 2680.} The Court held that the exceptions to coverage by the Federal Tort Claims Act\footnote{In particular, § 2680(c) exempts from the Act's coverage "[a]ny claim arising in respect of . . . the detention of any goods or merchandise by any officer of customs. . . ." 28 U.S.C. § 2680(c).} listed in section 2680\footnote{\textit{Id.} at 1520.} includes claims "arising out of" the detention of goods, including a claim resulting from the negligent handling or storage of detained property.\footnote{The plaintiff had argued that the exemptions under 2680 only applied to "harms attributable to an illegal detention, such as a decline in the economic value of detained goods. . . , injury resulting from deprivation of the ability to make use of the goods during the period of detention, or consequential damages resulting from lack of access to the goods." \textit{Id.} at 1523. The Court, however, agreed with the government's interpretation that the exception covered "all injuries to the property sustained during its detention by customs officials." \textit{Id. See also Tort Claims Act Does Not Allow Recovery Based on Negligence of Customs Officials, 9 U.S. IMPORT WEEKLY (BNA) 816 (Mar. 28, 1984) [hereinafter cited as Negligence].}} The Court stated that based on the language of the statute, the exceptions are not limited to claims caused by the detention itself.\footnote{\textit{Id. at 1526.}} Thus, the Court concluded that the exemption precluded recovery against the United States for damages caused during a temporary detention of the property by the Customs Service. In reaching its conclusion, the Court relied on Congress' intent in creating the exceptions, especially the need to protect the government from fraudulent claims.\footnote{\textit{Kosak v. United States,} \textit{\textbf{- U.S. -},} 104 S. Ct. at 1524-28. Two other commonly stated objectives of the exceptions to the Federal Tort Claims Act are the need to ensure that certain governmental activities be free of threats of damage suits and the need to prevent the Act from being extended to suits for which adequate remedies are readily available. \textit{Id.} at 1526. \textit{See also Negligence, supra note 266, at 816.}}
The Court of Appeals for the Federal Circuit held in *Rohm & Haas Co. v. United States*\(^{268}\) that the meaning of a tariff term is presumably the same as its dictionary or common meaning unless evidence exists to the contrary. Any evidence contrary to the ordinary meaning must show a commercial meaning which is definite, uniform, and general throughout the trade.\(^{269}\) According to the *Rohm* court, the Court of International Trade clearly did not err by finding that Plaintiff failed to prove that the term “flexible” has a “commercial designation based on a trade definition of the term ‘flexible’ which differs from its common meaning.”\(^{270}\)

e. Status of Goods Under the MFA and the GSP

The Multifiber Arrangement\(^{271}\) is a “textile agreement” within the meaning of a United States Generalized System of Preferences (GSP) provision excluding textile products subject to textile agreements from duty-free treatment.\(^{272}\) In *Luggage and Leather Goods Manufacturers of America, Inc. v. United States*,\(^{273}\) the court stated that “[t]he plain meaning of the statute\(^{274}\) and the plain

\(^{268}\) 727 F.2d 1095, 1097 (Fed. Cir. 1984). Plaintiff, a domestic manufacturer of acrylic resin sheets, challenged a United States Customs classification of a similar product from Taiwan under item 771.41 of the Tariff Schedules of the United States (19 U.S.C. §§ 202 et. seq.) as “flexible” and thus eligible for GSP treatment. Plaintiff contended the Taiwanese product should have been classified under item 771.45 TSUS as “other” rather than “flexible.” Items classified as “other” are ineligible for GSP treatment. *Id.* at 1096.

\(^{269}\) Id. at 1097.

\(^{270}\) Id.


\(^{272}\) The GSP states that “The President may not designate any article as an eligible article under subsection (a) of this section if such article is within one of the following categories of import-sensitive articles. . . (A) textile and apparel articles which are subject to textile agreements.” 19 U.S.C. § 2463(c)(1)(A) (1982).


Custom’s response to the challenge was that it interpreted 19 U.S.C. § 2463(c)(1)(A) (1982) to apply only to bilateral agreements imposing current restrictions on imports. This interpretation does not include the MFA, which is granted authority to impose future restraints. *Id.* at 1416-17.

\(^{274}\) The Court agreed with the plaintiffs that “the term ‘textile agreement’ as used in 19 U.S.C. § 2463(c)(1)(A) means exactly what it says. Because the MFA is an agreement cover-
congressional intent, establish that section 2463(c)(1)(A) of the GSP precludes the granting of duty-free treatment to textile products subject to the Multifiber Arrangement."

f. Preferential Duty Treatment Under the GSP

The court in Florsheim Shoe Co. v. United States upheld presidential authority to limit preferential duty treatment accorded a particular product under the provisions of the United States Generalized System of Preferences. The Court stated that in international trade matters presidential acts are reviewable only to determine whether they are within the President's delegated authority and whether they properly construe the statutory language and conform to relevant procedural requirements. The President, therefore, acted within his authority under the GSP. The court went on to state that the President's findings of fact and the motivations for those findings are not subject to judicial review. Thus the Court of International Trade was correct in refusing to review the United States International Trade Commission's fact-finding on the issue.

g. Use of Equitable Estoppel in Customs Service Rulings

The Court of International Trade, in dismissing Wally Packaging Inc. v. United States, held that Plaintiff could not use the
equitable estoppel doctrine to avoid the 180-day limit on filing civil actions against a United States Customs Service ruling.\textsuperscript{282} In cases where equitable estoppel has been applied the government was estopped only when acting in its proprietary capacity, not in its sovereign capacity.\textsuperscript{283} The government is acting within its sovereign capacity when collecting or refunding duties on imports, and thus is not subject to estoppel in such cases.\textsuperscript{284}

7. Duty Status of Imports Fixed at the Date of Entry

On May 10, 1984, the Court of International Trade in \textit{Teters Floral Products Co., Inc. v. United States}\textsuperscript{285} ruled that the duty status of imported merchandise is fixed at the date of entry rather than at the date the goods enter the geographical territory of the United States.\textsuperscript{286} The President's withdrawal of duty-free status of Plaintiff's merchandise was within his discretionary power under the United States Generalized System of Preferences. Plaintiff was not entitled to a judicial-type hearing prior to the presidential action.\textsuperscript{287} Finally, the Court found that Plaintiff could not claim a lack of adequate notice of the changed duty status for its merchandise when it simply failed to file for entry before the amendment took effect.\textsuperscript{288}

International Trade on May 27, 1982. The court dismissed the action for lack of subject-matter jurisdiction because the plaintiff did not commence the action within 180 days after the mailing of the notice of denial, as required by 28 U.S.C. § 2626(a) (Supp. V (1981)).

\textsuperscript{282} Plaintiff contended that equitable estoppel should apply because a Customs examiner advised it to seek reliquidation of the shipment. In relying upon that advice, the plaintiff withheld court action pending outcome of the administrative proceeding. \textit{Id.} at 1410.

\textsuperscript{284} \textit{Id.} at 1410-11.

\textsuperscript{284} \textit{Id.} at 1411.

\textsuperscript{285} 586 F. Supp. 960 (Ct. Intl’l Trade 1984). Plaintiff brought certain artificial flowers from Hong Kong into Seattle, Washington on February 17, 1978. Customs officials released the goods to the plaintiff on February 25, 1978. On February 24, 1978, the President withdrew the duty-free status accorded those goods under the United States GSP. This amendment (Exec. Order No. 1204(a)) would become effective on March 1, 1978. Although the plaintiff's customs house brokers learned of the amendment on February 28, 1978, they did not file a consumption entry covering the merchandise until April 6, 1978. Plaintiffs challenged the withdrawal of duty-free status for their merchandise on the grounds that the clause defining the effective date of the executive order conflicted with statutory law as well as retroactively deprived the plaintiffs of property rights. Plaintiff also contended its goods should have been afforded duty-free status because of a lack of due process or because of equitable considerations arising from the short term of notice from the order's issuance to its effective date. \textit{Id.} at 961. The court granted summary judgment for the plaintiff. \textit{Id.} at 963.

\textsuperscript{286} \textit{Id.} at 961-63.

\textsuperscript{287} \textit{Id.} at 963.

\textsuperscript{288} \textit{Id.}
J. Intellectual Property Rights

As a flood of fake merchandise surged across the country and into United States markets abroad, Congress and the Administration sought to strengthen protection for United States intellectual property rights against trademark counterfeiting and other unfair trade practices.

The United States International Trade Commission (USITC) defines counterfeit products as "any goods bearing an unauthorized representation of a legally registered trademark if those goods are similar or identical to the product for which the trademark is registered." Traditionally, counterfeiters have concentrated on consumer goods such as wearing apparel, jewelry, watches, records, and tapes for their operations because of their strong brand-name identification and high markups based upon the trademark reputation. Recently, according to the USITC, counterfeiting has been reported in such products as drugs, cosmetics, auto parts, sporting equipment, luggage, hand tools, integrated circuits, and toasters. Sales lost to counterfeits in seven industrial sectors increased from a minimum of $37.5 million in 1980 to $49.2 million in 1982. The USITC estimated that in 1982, United States industry lost between $6 billion and $8 billion to foreign product counterfeiting and other unfair trade practices regarding intellectual property rights combined. The lost sales

\( \text{\textsuperscript{299}} \) See also Staff of Subcomm. on Oversight and Investigations of the House Comm. on Energy and Trade, 98th Cong., 2d Sess., Unfair Foreign Trade Practices Stealing American Intellectual Property: Imitation is Not Flattery, (Comm. Print 1984) [hereinafter cited as Not Flattery]. Other forms of intellectual property rights violations include: unregistered trademarks; copyright infringements; patent infringements; "passing off," which is the use of a similar though not identical trademark on a substantially similar product or the use of similar or identical packaging without the trademark; trademark dilution, which is the unauthorized use of a trademark on a substantially nonsimilar product; and "gray market" sales, or the sale of products bearing an unauthorized trademark in contravention of a marketing agreement. U.S. International Trade Commission, Pub. No. 1535, Operation of the Trade Agreements Program 15 (1984) [hereinafter cited as Trade Reporter].

\( \text{\textsuperscript{300}} \) Id.

\( \text{\textsuperscript{301}} \) Id. at ix-x.

\( \text{\textsuperscript{302}} \) The sectors included: wearing apparel and footwear; chemicals and related products; transportation equipment parts and accessories; miscellaneous metal products, machinery and electrical products; records and tapes; sporting goods; and miscellaneous manufactures. Id.

\( \text{\textsuperscript{303}} \) Id. at xiii-xiv. "It should be noted that a number of respondents known to be suffering significant losses due to counterfeiting could not quantify these losses and figures therefore represent minimum losses." Id.

\( \text{\textsuperscript{304}} \) Id. at xiv. See supra note 289 regarding unfair practices.
and damage to trademark owners' domestic goodwill\textsuperscript{296} resulted in an estimated loss of some 131,000 jobs in 1982 in the five industrial sectors most susceptible to counterfeiting.\textsuperscript{296} Counterfeiting of United States products and other unfair practices was most prevalent in the Far East, with Taiwan leading in many categories.\textsuperscript{297}

Congress responded in several areas: (a) it established criminal penalties and enhanced civil remedies against trademark counterfeiting; (b) it passed the Semiconductor Chip Protection Act to combat piracy and infringement of copyrighted computer programs; (c) it conditioned developing countries' participation in the United States Generalized System of Preferences upon their enforcement of intellectual property rights; and (d) it ratified the Brussels Satellite Convention protecting copyrighted program-sending signals. The Administration sought the development of a worldwide code against counterfeiting, increased international cooperation in patent procedures and increased United States participation in the Patent Cooperation Treaty, and began a review of United States Customs Service regulations permitting the entry of "gray market" imports.

1. 1984 Trademark Counterfeiting Act

The 98th Congress in its waning hours enacted the Trademark Counterfeiting Act of 1984\textsuperscript{298} to counter the growing problem of counterfeit goods flooding United States markets.\textsuperscript{299} The measure made three primary changes in the law by providing for: (1) criminal penalties for those who intentionally deal in goods they know to be counterfeit;\textsuperscript{300} (2) virtually mandatory awards of treble damages and attorneys fees in civil counterfeiting cases;\textsuperscript{301} and (3) ex

\textsuperscript{296} Id. at xvi.
\textsuperscript{297} Id. at xii. Of the 151 product items reported as subject to counterfeiting, Taiwan was cited as the source for 91. The report also said Taiwan was the source of unfair trade practices for another 65 items. Id.
\textsuperscript{299} See supra notes 289-97 and accompanying text.
\textsuperscript{300} Counterfeiting Act, supra note 298 at 2178. The new 18 U.S.C. § 2320(a) provides that whoever "intentionally traffics or attempts to traffic in goods or services and knowingly uses a counterfeit mark on or in connection with such goods or services shall, if an individual, be fined not more than $250,000 or imprisoned not more than five years, or both, and if a person other than an individual, be fined not more than $1,000,000." Id.
parte seizure of counterfeit goods upon a showing that the defendant might attempt to hide or destroy them. The law defines "counterfeit mark" as a "spurious mark that is used in connection with trafficking in goods or services, that is identical with or substantially indistinguishable from a mark registered for those goods or services on the principal register in the United States Patent and Trademark Office and in use, whether or not the defendant knew such mark was so registered." The law provides for enhanced criminal penalties against repeat offenders who have previous convictions under the Act. The Act also provided that persons subject to a wrongful seizure have a cause of action against an applicant who sought the seizure in bad faith. Finally, the bill specifically omitted "gray market" and "parallel import" goods from its definition of "counterfeit mark."

2. Trade and Tariff Act of 1984

The Trade and Tariff Act of 1984 established protection of United States intellectual property rights as a condition for benefits and a factor in trade relations in several areas. The Generalized System of Preferences Renewal Act of 1984 provides that when the President considers a country's eligibility for tariff pref-

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using a counterfeit mark, "the court shall, unless the court finds extenuating circumstances, enter judgment for three times such profits or damages, whichever is greater, together with a reasonable attorney's fee . . . ." Id.

Id. at 2180-82. The Act amended § 34 of the Lanham Act, 15 U.S.C. § 1116, to provide for ex parte seizures when, inter alia, (1) an order other than an ex parte seizure would be inadequate to achieve the purposes of § 32 of the Lanham Act, 15 U.S.C. § 1114; (2) the applicant has not publicized the seizure; (3) the applicant is likely to succeed in showing the defendant used counterfeit goods; (4) denial of a seizure order would result in immediate and irreparable injury; (5) the harm to the applicant in denial of a seizure outweighs the legitimate interests of the person whose goods would be seized; and (6) if the defendant got notice of the proceedings, he would "destroy, move, hide, or otherwise make such [counterfeit] matter inaccessible to the court." Id. at 2181. See Explanatory Statement Concerning Compromise Draft of Trademark Counterfeiting Legislation, 130 Cong. Rec. S13,066 (daily ed. Oct. 4, 1984) [hereinafter cited as Counterfeit Explanation].

Counterfeiting Act, supra note 298 at 2179.

Id. at 2178. 18 U.S.C. § 2320(a) (1982) provides that for an offense under the statute "that occurs after that person is convicted of another offense under this section, the person convicted, if an individual, shall be fined not more than $1,000,000 nor imprisoned not more than fifteen years, or both, and if other than an individual, shall be fined not more than $5,000,000." Id.

Id. at 2182.

Id. at 2179. See Counterfeit Explanation, supra note 302, at S13,068.


Id. at 3018.
ferences, he determines the "extent to which such country is providing adequate and effective means under its laws for foreign nationals to secure, to exercise, and to enforce exclusive rights in intellectual property, including patents, trademarks, and copyrights." The Amendment to the Trade Act of 1974 requires the United States Trade Representative preparing National Trade Estimates to "identify and analyze acts, policies, or practices which constitute significant barriers to, or distortions of . . . property protected by trademarks, patents, and copyrights exported or licensed by United States persons." The Act also amends the definition of an "unreasonable" trade policy, act or practice as one which "denies fair and equitable . . . provision of adequate and effective protection of intellectual property rights." Finally, the legislation made intellectual property protection a key objective in negotiations to eliminate barriers to trade in high technology products.

3. Semiconductor Chip Protection Act

The Semiconductor Chip Protection Act added Chapter 9 to the Copyright Act, 17 U.S.C. § 101 et. seq., to provide ten years of protection and exclusive rights for semiconductor chips, i.e., "mask works." The protection is neither available for mask work that is not original or consists of "staple, commonplace, or familiar" designs, nor does it extend to any "idea . . . embodied in such work." The law allows a person other than the owner to reproduce the mask work "solely for the purpose of teaching, analyzing, or evaluating the concepts or techniques embodied in the

509 Id. at 3019. The GSP Renewal Act, enacted as Title V of the Trade and Tariff Act, also requires the President to consider respect for intellectual property rights when considering whether to waive the competitive-need limitations with respect to a particular article imported from that country. Id. at 3021.
510 Id. at 3000.
511 Id. at 3001.
512 Id. at 3005.
513 Id. at 3008.
515 Id. at 3349-50.
516 Id. at 3349. The bill's legislative history, however, "includes repeated assurances that mask work protection in no way erodes copyright protection for subject matter such as computer programs, even if that subject matter is embodied in a semiconductor chip." Congress Gives OK to Bill Containing Host of Intellectual Property Reforms, 28 PAT. TRADEMARK & COPYRIGHT J. (BNA) 663 (1984).
mask work." Further, the reproducer may use the results of the analysis in an original mask work made to be distributed. Passage of a semiconductor chip protection act was recommended in a report by the House Energy and Commerce Committee, Subcommittee on Oversight and Investigations, as a means to combat counterfeiting.

4. Brussels Satellite Convention

Among its final acts before adjournment, the Senate ratified the Convention relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, also known as the Brussels Satellite Convention. The agreement prohibits the piracy of program-carrying satellite signals. It also obligates contracting parties "to take adequate measures to prevent the distribution on or from its territory of any program-carrying signal by any distributor for whom the signal emitted to or passing through the satellite is not intended." The United States initially declined to ratify the Convention when it was signed in 1974 because it contains numerous exemptions from the general principle of protecting works and because at the time the United States was revamping its own copyright law. Failure to ratify the Convention, the Administration stated, had placed it in a weak bargaining position in its attempts to encourage foreign protection of United States satellite broadcasts.

5. Patent Cooperation Treaty

President Reagan asked the Senate for its advice and consent to withdraw the United States reservation to Chapter II of the Patent Cooperation Treaty. The treaty, to which the United States and thirty-five other countries are parties, provides a centralized filing procedure and a standardized application format that simplifies the process of patenting the same invention in different member nations.

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317 Chip Act, supra note 314 at 3350.
318 Id.
319 Not Flattery, supra note 289, at 8.
321 Treaty Document, supra note 320, at art. 2.
323 Id.
Chapter II gives applicants thirty months (as of January 1, 1985) from the earliest filing date to which their international applications are entitled before they must elect whether to undertake national patent processing. Chapter II also provides applicants with an international preliminary examination evaluating their inventions in the light of articles cited in international search reports provided by Chapter I. The United States declared its reservation to Chapter II because it believed the preliminary examination reports produced abroad would be of questionable value in the United States examination process. Those concerns were alleviated, however, and the Secretary of State said in a report that adherence to Chapter II "would 'enhance the obtaining of foreign patent protection by U.S. nationals' and 'would be in the interests of industry and independent inventors alike.'" The request for withdrawal was referred to the Senate Foreign Relations Committee. Legislation amending the patent laws to implement the treaty was introduced October 10 and referred to the Senate Judiciary Committee.

6. GATT Counterfeit Trade Study

The General Agreement on Tariffs and Trade (GATT) passed a resolution at its annual meeting calling for a study on counterfeit trade. Third World countries had opposed the trade negotiating body's consideration of the issue but agreed to the study in return for a United States withdrawal of a proposal to include services in GATT. The resolution directed the GATT Secretariat to assemble a group of trade party experts to analyze documentation compiled by the United States and other governments on the counterfeiting problem. In 1985, the group then would advise the GATT

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325 President Reagan Asks Senate to Withdraw Reservation to Chapter II of PCI, 28 PAT., TRADEMARK & COPYRIGHT J. (BNA) 349 (1984) [hereinafter cited as Reagan Asks].
327 Reagan Asks, supra note 325, at 349.
328 Id.
331 U.S. Push to Bring Services in GATT Meets With Only Limited Success as Meeting Ends, 1 INT'L TRADE REP. (BNA) 670, 671 (1984) [hereinafter cited as Meeting Ends].
332 Id.
333 Id.
Council on how to address counterfeiting. Property Organization, which worked on a draft code to protect computer programs from infringement, also was to participate in the counterfeit study. The United States, Canada, Japan and the European Communities made draft proposals for a counterfeiting code at the GATT Ministerial Meeting in 1982, but virtually no movement had occurred on the issue before the annual GATT meeting in November 1984. Third World countries opposed such a code because they wanted GATT to complete its 1982 work program before launching new initiatives. They also opposed a code because they wanted the issue in a forum where they had a built-in majority, such as the United Nations General Assembly, and because for some of those countries, product counterfeiting comprises a substantial portion of their total trade.

7. Trilateral Patent Cooperation

The directors of the Japanese, European and United States patent offices signed a memorandum in Munich extending and enlarging a patent cooperation agreement reached in 1983. Many of the understandings in the memorandum pertain to the adaptation of electronic processing techniques to handle an ever-growing mass of technical information. For example, the three offices share the work of converting the technical documentation of more than twenty million publications into electronic media. Another goal was to make automated patent information available to the public in the countries represented by the offices to the fullest extent possible.

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334 Id.
336 Meeting Ends, supra note 331, at 671.
338 Meeting Ends, supra note 331, at 671.
340 Id.
341 Id.
342 Id. The 1983 and 1984 agreements further envisioned cooperation in classifying and indexing patent documentation, exchange of patent search results and techniques, harmonization of patent grant procedures, and exchange of experts. Id.
8. EC Adopts Rules Change on Patent License Agreements

The Commission of the European Communities adopted a rules change, effective January 1, 1985, which grants certain patent licensing agreements automatic exemptions under the Treaty of Rome's Article 85(3). Articles 85(1) and 85(2) render void any concerted activity tending to have an unnatural effect on competition in the European Economic Community. Licensing of intellectual property constitutes such concerted activity. Under Article 85(3), however, such activity which benefits consumers can be exempted from Articles 85(1) and (2) by application to the Commission. The new rule, No. 2349/84, extends automatic exemptions to licensing agreements containing certain obligations. Those obligations "generally contribute to improving the production of goods and to promoting technical progress by making patentees more willing to grant licenses and licensees more inclined to undertake the investment required to make, use, and sell a new product or to use a new process," the Commission said.

9. China Adopts Patent Law

On March 12, the Standing Committee of the National People's Congress approved the Patent Law of the People's Republic of China, effective April 1, 1985. Ren Jianxin, the Director of the Legal Affairs Department of the China Council for the Promotion of International Trade, in 1980 offered this rationale for a Chinese patent system: "Our government is getting ready to institute a patent system in order to protect and encourage invention, to expand international exchange of technology, and to import advanced technology for acceleration of the four modernizations." The ba-
sic requirements for inventions and utility model patents are novelty, \textsuperscript{351} inventiveness, \textsuperscript{352} and applicability. \textsuperscript{353} Design patents simply are required to be novel. \textsuperscript{354} The law does not allow patents for any invention or creation "contrary to the laws of the the State or social morality or that is detrimental to public interest" and also excludes certain specific categories of items. \textsuperscript{355} Invention patent rights last fifteen years from the application filing date in China, regardless of whether the applicant enjoyed priority rights. \textsuperscript{356} Utility model and design patents are valid for five years from the filing date and may be extended three years. \textsuperscript{357} Only things an individual develops on his own time and with his own materials may be patented by that individual, and in many cases the right of application belongs to the inventor's work unit rather than to the inventor. \textsuperscript{358} Foreign individuals and corporations may apply for patent rights. \textsuperscript{359} The law gives priority rights to invention or utility model applications received within twelve months after the inventor applies for patent rights in a foreign country and within six months for a design patent. \textsuperscript{360}

10. Taiwanese Counterfeiting Control

A Taiwanese official reported that his government had set up anti-counterfeiting committees within the Department of Trade and the Chamber of Commerce to investigate counterfeiting cases and to discourage Taiwanese manufacturers from infringing on

\begin{itemize}
  \item People's Court. \textit{Id.} at 34. See Vice President of China's Supreme People's Court Explains New Patent Law, 29 PAT., TRADEMARK & COPYRIGHT J. (BNA) 207 (1984).
  \item \textsuperscript{351} Patent Report, supra note 349, at 26.
  \item \textsuperscript{352} \textit{Id.} at 27.
  \item \textsuperscript{353} \textit{Id.}
  \item \textsuperscript{354} \textit{Id.} at 26.
  \item \textsuperscript{355} \textit{Id.} at 28. Items not patentable are (1) scientific discoveries, (2) rules and methods of mental activity, (3) methods of diagnosis and treatment of diseases, (4) foods, beverages, and flavorings, (5) pharmaceuticals and substances produced by chemical processes, (6) animal and plant species, and (7) substances produced by means of nuclear transformation. China will grant patents, however, for production methods of materials under items 4-6. \textit{Id.}
  \item \textsuperscript{356} \textit{Id.} at 31.
  \item \textsuperscript{357} \textit{Id.}
  \item \textsuperscript{358} \textit{Id.} at 29. "This provision is one of the ways in which the Chinese patent system is said to conform with the socialist economy and to balance the interests of the state, the collective and the individual." \textit{Id.}
  \item \textsuperscript{359} \textit{Id.}
  \item \textsuperscript{360} \textit{Id.} For the United States reaction to the patent law, see \textit{New Chinese Patent Law Examined by House Panel}, 28 PAT., TRADEMARK & COPYRIGHT J. (BNA) 563, 564 (1984); \textit{P.R.C. Patent Law Discussed as House Panel Opens Hearings on Trade and Commerce Laws}, 1 INT'L TRADE REP. (BNA) 276, 277 (1984).
\end{itemize}
The deputy director-general of the Board of Foreign Trade, Pan Chia-sheng, said Customs officers also had been instructed to inspect goods leaving the country, but the practice was ineffective because of the volume of exported goods. The United States International Trade Commission, in its 1984 investigation on counterfeiting, identified Taiwan as the greatest manufacturer of counterfeit United States products and other types of unfair trade practices involving intellectual property. "Sometimes we think our businessmen have no idea of intellectual property," Pan said. "The people are very new in the business and do not understand the idea of copyrights. They don't have any idea."

The Judicial Yuan announced in September that it would establish a special court for handling lawsuits involving violations of trademark and patent rights.

11. Intellectual Property Litigation

a. ITC's "Single Dispositive Issue" Decisions in 337 Cases

The Court of Appeals for the Federal Circuit ruled in Beloit Corp. v. Valmet Oy that once the United States International Trade Commission (ITC) has decided a single dispositive issue in a § 337 case, it need not decide every issue in that case. The ITC's presiding officer had determined in a patent infringement case that the patent was valid and that the defendant had injured a domestic industry, but the defendant had not infringed the

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561 Taiwan Counterfeiting Is Under Control, According to Senior Government Official, 1 Int'l Trade Rep. (BNA) 626 (1984) [hereinafter cited as Taiwan Counterfeiting].
562 Id.
563 Trade Report, supra note 289, at xii.
564 Taiwan Counterfeiting, supra note 361, at 626.
   (a) Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry, or to restrain and monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provisions of law, as provided in this section.
   Id.
568 742 F.2d at 1423.
plaintiff's patent. The ITC adopted the portion of the initial determination pertaining to noninfringement without taking a position on the other issues. The Court endorsed the ITC's adoption of a single dispositive issue as a time-saving device and said that, given time constraints, a requirement that the ITC do otherwise would be "intolerable."

b. Patent Priority Dates Under the Paris Convention

Foreign patents do not lose their priority dates under the Paris Convention if their corresponding United States patent proves invalid, the Court of Appeals for the Federal Circuit ruled in Stein Associates, Inc. v. Heat and Control, Inc. Under the Paris Con-

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569 Id. at 1422.
570 Id. Beloit appealed "solely on the issue of noninfringement," and Valmet moved for dismissal on the ground the plaintiff should be required to refile a new notice of appeal based on the overall "no violation" of the § 337 ruling. Such an appeal would have enabled Valmet to argue error in those parts of the initial determination that were unfavorable to Valmet. In denying the defendants' motion, the Court said it does not sit to review issues not determined by the Commission and would not act as a "Surrogate Commission." Id. at 1422-24.
571 Id. at 1423.

On September 12, 1983, Stein moved for a summary judgment in its United States District Court action on the validity of Heat and Control's United States patents. Stein contended the patents were invalid under 35 U.S.C. § 102(b) (1982) because of an alleged offer to sell more than one year before Heat and Control filed its patent application. Stein also sought an order enjoining the defendant from enforcing its British patents against Stein. Id. at 655. Stein contended that once the court found Heat and Control's United States patents invalid, the British patents would lose their priority dates under the Paris Convention. Without the priority dates, the plaintiff argued, the British patents would be invalid under British law. Id. at 656. The United States District Court denied both the motion for summary judgment and for a preliminary injunction against the British lawsuit. Plaintiff then filed the instant appeal. Id.
vention, patents obtained in separate countries for the same invention stand or fall independently of one another. The Court further held that "[i]t would defeat the purpose of the Paris Convention if inventors filing applications in the PTO [United States Patents and Trademark Office] were required to prove that their original claims were patentable before establishing a filing date entitling them to claim a right of priority for their corresponding foreign applications."  

c. Computers

The United States International Trade Commission (USITC) issued a broad exclusion order against personal computers and computer components that infringe Apple Computer patents and copyrights in In re Certain Personal Computers and Components Thereof. The USITC found that the respondents' programs were virtually identical to the complainant's, surpassing the standard of substantial similarity necessary to establish direct copyright infringement. The USITC noted that one respondent's computer,

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374 Id. at 657. Stein's attempts to convince this Court that once a United States patent falls, all corresponding foreign patents lose their priority dates is totally without merit and is expressly refuted by the Paris Convention itself. Article 4 of the Paris Convention provides:

(1) Patents applied for in the various countries of the Union by nationals of countries of the Union shall be independent of patents obtained for the same invention in other countries, whether members of the Union or not.

(2) The foregoing provision is to be understood in an unrestricted sense, in particular, in the sense that patents applied for in the period of priority are independent, both as regards the grounds for nullity and forfeiture, and as regards their normal duration.

Id.

375 Id. Whether the claims of a United States application as originally filed meet all patentability requirements is determined during prosecution. That determination is the 'outcome' of the application and is not a prerequisite to the establishment of a filing date under § 111 [35 U.S.C. § 111 (1982)], nor is that determination a condition precedent to the creation of a 'regular national filing' under the Paris Convention.

Id.


377 Id. at 22. The ITC Presiding Officer found a § 337 violation in that Apple's patents
the Orange & Two, did not contain an infringing program when it entered the United States and that the infringing chip was installed only after importation. The USITC rejected the claim that it therefore lacked jurisdiction, however, and said, "The importation of the Orange & Two is a step in the direct infringement of both the reproduction rights and the distribution rights of Apple in its Autostart ROM program copyrights."

d. Treble Damages Under the 1984 Trademark Counterfeiting Act

An Eastern District of New York court ruled in Louis Vuitton, S.A. v. Spencer Handbags Corp. that the treble damages provision in the Trademark Counterfeiting Act of 1984 would not be retroactive. The court said congressional intent in providing for treble damages was to offer an incentive for industry to bring suits and a deterrent to companies contemplating trademark counterfeiting. The award of treble damages in the instant case would serve neither purpose, the court said, because Vuitton had already filed suit and won a judgment and because the defendant had already ceased its counterfeiting.

e. Standard Used for Determining Counterfeit Goods

The United States Supreme Court denied certiorari to a Second Circuit case holding that whether certain imported articles bear a counterfeit mark must be determined from the standpoint of the average purchaser rather than that of an expert.

and copyrights were valid and infringed, that the portion of Apple Computers, Inc. which manufacturers Apple II and Apple III computers constitutes an "industry, efficiently and economically operated, in the United States," and that the importation of the items at issue tended to cause substantial harm to that industry. Id. at 3.

578 Id. at 27.
579 Id. at 36. By comparison with the U.S.I.T.C. ruling, the United States Customs Service found that the Copyright Act does not bar the importation of "ROM-less" computers. Importation of "ROM-less" Computers Not Barred Under § 602(b) of Copyright Act, 9 U.S. IMPORT WEEKLY (BNA) 1062 (1984).
581 Id.
582 Id.
583 Id.
584 Montres Rolex, S.A. v. Snyder, 718 F.2d 524 (2d Cir. 1983), cert. denied, Grand Jew-
The action ensued after customs officials detained approximately 100 eighteen-karat gold watch bracelets at John F. Kennedy Airport in New York City. A customs expert, using a jeweler's loupe, determined that while the mark on the bracelets infringed the Rolex registered "crown design" trademark, it was sufficiently different not to constitute a counterfeit. The Customs Service thus ruled the goods were not subject to forfeiture under 19 U.S.C. § 1526(e) and could be entered and distributed if the infringing marks were obliterated or removed.

The Second Circuit affirmed the United States District Court ruling that the bracelets were counterfeit. It also upheld the lower court ruling interpreting § 1526(e) to require accused marks to be compared with the protected mark on the genuine merchandise rather than with the facsimile filed with the Customs Service. Further, the Second Circuit agreed that comparison of the two marks must be from the standpoint of the average purchaser, as opposed to an expert trained to detect minute differences.

f. Imports

The United States Customs Service in May of 1984 began soliciting data from the public regarding the economic impact of so-called "gray market" imports for a study by the Cabinet Council on Commerce and Trade's (CCCT) Working Group on Intellectual Property (WGIP). "The WGIP may make a recommendation to the CCCT with respect to parallel imports of trade-mark products when it concludes its study." The WGIP had not announced its findings by year's end.

The solicitation notice defined "parallel imports" and "gray market" imports as "those goods manufactured abroad bearing an authentic United States trademark that are imported and sold in the United States without authorization from the owner of the

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385 718 F.2d at 526.
386 Id.
387 Id.
388 Id. at 533. "We examined the actual bracelets at oral argument and found the Grand Jewels samples to be the spitting image of the Rolex merchandise. An average purchaser would surely find the real and fake bracelets to be substantially indistinguishable." Id.
389 Id. at 532.
390 Id. at 531.
392 Id. at 21,454.
U.S. trademark.\footnote{Id.}{393} The statutes affecting such imports are § 526 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1526, also known as the Genuine Goods Exclusion Act, and § 42 of the Lanham Act, 15 U.S.C. § 1124.\footnote{19 U.S.C. § 1526(a) (1982) states:}{394} The Customs Service implements those statutes through its regulations under 19 C.F.R. § 133.21.\footnote{Id.}{395} The regu-

\footnote{Id.} Id.


\begin{quote}
(\textit{a}) Importation prohibited:

It shall be unlawful to import into the United States any merchandise of foreign manufacture if such merchandise, or the label, sign, print, package, wrapper, or receptacle, bears a trademark owned by a citizen of, or by a corporation or association created or organized within, the United States, and registered in the Patent and Trademark Office by a person domiciled in the United States, under the provisions of sections 81 to 109 of title 15, and if a copy of the certificate of registration of such trademark is filed with the Secretary of the Treasury, in the manner provided in section 106 of said title 15, unless written consent of the owner of such trademark is produced at the time of making entry.
\end{quote}

\begin{quote}
(\textit{b}) Importation of goods bearing infringing marks or names forbidden.

\ldots no article of imported merchandise which shall copy or simulate the name of the ["so" in the original] any domestic manufacture, or manufacturer, or trader, or of any manufacturer or trader located in any foreign country, which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with the provisions of this chapter or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any customhouse of the United States; and, in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer or trader, and any foreign manufacturer or trader, who is entitled under the provisions of a treaty, convention, declaration, or agreement between the United States and any foreign country to the advantages afforded by law to citizens of the United States in respect to trade-marks and commercial names, may require his name and residence, and the name of the locality in which his goods are manufactured, and a copy of the certificate of registration of his trade-mark issued in accordance with the provisions of this chapter, to be recorded in books which shall be kept for this purpose in the Department of the Treasury, under such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the Department facsimiles of his name, the name of the locality in which his goods are manufactured, or of his registered trade-mark, and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of customs.
\end{quote}

\begin{quote}
19 C.F.R. § 133.21 reads in pertinent part:

\textit{§ 133.21 Restrictions on importation of articles bearing recorded trademarks and trade names.}

\textit{(a) Copying or simulating marks or names.} Articles of foreign or domestic manufacture bearing a mark or name copying or simulating a recorded trademark or trade name shall be denied entry and are subject to forfeiture as prohibited im-
lations, while providing for seizure of genuine goods imported without authorization, allow anyone to import foreign-made goods bearing genuine trademarks if: (1) both the foreign and United States trademark rights are owned by the same person or business; (2) the owners of the foreign and United States trademarks are parent and subsidiary companies or otherwise are subject to common ownership or control; or (3) the articles bear a trademark applied under authorization of the United States trademark owners.\footnote{Id.}

Customs earlier had drafted a change in the regulations that would have eliminated the distinction between affiliated and non-affiliated companies.\footnote{Id.} The proposal was deemed so controversial, however, that it was never published for public comment, and the administration referred the matter to the CCCT for the instant study.\footnote{Id.}

While the WGIP considered whether to change Custom's gray marketing regulations, United States trademark owners were challenging the regulations in various courts and the United States International Trade Commission with little success. In Vivitar Corp.
v. United States, the Court of International Trade (CIT) ruled the Customs regulations a reasonable interpretation of congressional intent and said the CIT holds exclusive jurisdiction. The United States District Court for the District of Columbia also found the Customs regulations "sufficiently reasonable" in Coalition to Preserve the Integrity of American Trademarks v. United States. That court held, however, that Vivitar notwithstanding,

Vivitar Corp. v. United States, 585 F. Supp. 1419 (Ct. Int'l Trade 1984) (CIT has exclusive jurisdiction over gray marketing cases), 593 F. Supp. 420 (Ct. Int'l Trade 1984) (owner of U.S. trademark did not have right to demand that Customs Service exclude unauthorized imports of genuine goods). Plaintiff Vivitar Corp. owned U.S. trademark rights and licensed foreign manufacturers to apply its mark to photographic equipment. Third parties unrelated to the plaintiff bought the products abroad, imported them without the plaintiff's permission and sold them outside the plaintiff's chain of distribution. Plaintiff sought a declaratory judgment that 19 U.S.C. § 1526(a) required Customs to exclude genuine goods imported without the domestic mark-holder's consent. 593 F. Supp. at 420-23.

Congress enacted § 526(a) as an amendment to the Tariff Act of 1922, Pub. L. No. 67-318, § 526, 42 Stat. 975 (1922). "The sponsors made clear that the purpose of the amendment was to protect an American trademark owner who had purchased the right to use a trademark in America from an independent foreign company." 593 F. Supp. at 427. During the debate, Senator Lenroot expressed concern that the amendment might allow an international company to "designate an American agent to register its trademark in the United States and then use that registration to ban unauthorized imports." Id. The sponsors, however, "apparently did not believe that the section granted these rights." Id. at 428.

A predecessor to 19 C.F.R. 133.12(c) issued in 1936, T.D. 48537 (1936), responded to Senator Lenroot's concerns by not extending 526 protection when the same entity owns both the foreign and domestic trademarks. That policy has survived to the present. Id. at 429.

The Court said it would give deference to the long-standing Customs policy on the matter, especially in light of Congress' apparent acquiescence to the Customs policy by not amending the law during a revamping of 526 in 1978. "This court is convinced that Customs' interpretation is a reasonable construction reflecting Congress' intent, and in fact is a necessary construction of the statute to avoid results Congress clearly did not intend." Id. at 434.

585 F. Supp. at 1423-27. The CIT found it had jurisdiction both under 28 U.S.C. 1581(3) and (4), which grant the CIT jurisdiction under certain circumstances, id., and under broad policy considerations:

It is sensible for this court to hear the present action because the dispute involves a statute and a Customs Service regulation in need of a uniform national interpretation. This court's basic purpose is to provide "a comprehensive system of judicial review of civil actions arising from import transactions, utilizing the specialized expertise of the Court.

598 F. Supp. 844 (D.D.C. 1984). Plaintiff represents certain United States companies which manufacture or distribute trademarked products and which have registered their United States marks with the Customs Service. They alleged injury by the unauthorized importation of genuine goods manufactured abroad by their licensees or subsidiaries. Id. at 846. The Court said the pivotal question in the case was not whether 19 C.F.R. § 133.21 was the only reasonable interpretation of 19 U.S.C. § 1526(a) (1982), but whether it was a "sufficiently reasonable" interpretation. 598 F. Supp. at 851. The Court then found the regulations in fact sufficiently reasonable. Id. at 852.
it also had jurisdiction over gray market cases. An Eastern District of New York court upheld the Customs regulations in *El Greco Leather Products Co. v. Shoe World, Inc.* but dictum in a New York Southern District court decision indicated that Customs may have overstepped its authority by promulgating the gray market regulations. The International Trade Commission said in *In re Certain Alkaline Batteries* that gray marketing can constitute a violation of § 337 of the Tariff Act of 1930 and it ruled that imported Duracell batteries violated § 42 of the Lanham Act. Early in 1985, however, President Reagan disapproved the

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403 Id. at 847


404 599 F. Supp. 1380 (E.D.N.Y. 1984) Plaintiff owns U.S. trademark "Candies" for shoes which are manufactured for the plaintiff by Brazilian companies. The shoes at issue were produced under the plaintiff's authorization but rejected upon delivery. Plaintiff sought a permanent injunction to prevent Shoe World, a discount chain, from using the "Candies" mark on the rejected shoes which Shoe World had purchased. *Id.* at 1383-88.

Citing Vivitar v. United States, 595 F. Supp. 1419 (Ct. Int'l Trade 1984), the court rejected the plaintiff's 19 U.S.C. § 1526(a) (1982) claim because the plaintiff did not obtain the trademark rights from a foreign entity and was in fact the sole source of the genuine trademarked goods. *Id.* at 401. The court also held the plaintiff did not prove, under 19 C.F.R. § 133.21(c)(3), that the foreign manufacture of the trademarked goods was unauthorized. *Id.*

405 Osawa & Co. v. B & H Photo, 589 F. Supp. 1163 (S.D.N.Y. 1984) (granted preliminary injunction but modified to withhold the relief upon Defendant's pledge to cease importation voluntarily pending decision on the merits). Plaintiff owns United States rights to Mamiya trademarks for photographic equipment manufactured in Japan. Defendants imported and sold genuine Mamiya equipment in discount camera stores. *Id.* at 1164-69. The court found the Plaintiff suffered irreparable harm from the gray marketing and held plaintiff entitled to a preliminary injunction pending the outcome on the merits. *Id.* at 1168, 1171.

406 In dictum, the Court characterized 19 C.F.R. § 133.21(c)(1)-(c) as based upon Customs' "perception" of antitrust policy and said Congress had not authorized Customs to condition benefits upon any such analysis of an antitrust policy. *Id.* at 1177-78. Again in dictum, the Court said it found "no basis in fact or logic" to believe 19 U.S.C. § 1526(a) (1982) applies only when the United States mark-holder purchased outright the trademark rights from their foreign owner and was not related to that foreign entity. *Id.* at 1174-75.


408 See supra note 367 and accompanying text.

409 No. 337-TA-165 at 22-32. Under Bourjois v. Aldridge, 263 U.S. 675 (1923), the majority ruled that Duracell batteries made by the owner of the Belgian Duracell trademark and imported to the United States copy the United States Duracell mark on domestically produced batteries. *Id.*
USITC ruling because it contravened the longstanding Customs regulation embodied in 19 C.F.R. § 133.21. The President also said that allowing the USITC decision to stand would signal a change in administration policy before the WGIP had announced the results of its gray market study.

III. EXPORT FINANCING

A. Federal Guidelines on United States Mixed Credit Program

On November 30, 1983, President Reagan signed into law the Supplemental Appropriations Act of 1984. Title VI of the Act contains the Export-Import Bank Amendments of 1983. Part C, entitled the Trade and Development Enhancement Act of 1983, authorizes the Export-Import Bank (Eximbank) and the Agency for International Development (AID) to establish mixed credit programs. According to Eximbank President William Draper, the purpose behind the creation of the mixed credit program was to facilitate the phasing out of discriminatory mixed credit programs of other nations by “stealing business back” from foreign

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411 Id.
413 Id. Title VI, 97 Stat. 1254 (to be codified at 12 U.S.C. § 635).
414 Id. §§ 641-647, 97 Stat. 1263-66 (to be codified at 12 U.S.C. § 635(o)-(t)).
415 Id. §§ 644-645, 97 Stat. 1264-65 (to be codified at 12 U.S.C. § 635(q)-(r)). A mixed credit program involves financial credit which is provided for development aid purposes and is tied to the purchase of exports from the country granting the credit. Id. § 647(1), 97 Stat. 1265 (to be codified at 12 U.S.C. § 635(t)). The United States mixed credit program combines the use of credits, loans, and guarantees offered by Eximbank with concessional financing or grants offered by AID. The purpose of the program is to allow the United States to compete with foreign financiers by offering funding for the export of United States goods and services which is at least as concessional as foreign financing. Id. §§ 644(a)(3), 644(b), 97 Stat. 1264 (to be codified at 12 U.S.C. § 635(a)). The United States mixed credit program is limited to financing only those United States exports which can reasonably be expected to contribute to the advancement of the development goals of the importing country. Furthermore, the program must be consistent with the economic, social, and political criteria used to establish allocations of Economic Support Funds. See infra note 419 and accompanying text. Id. § 645(b), 97 Stat. 1264-65 (to be codified at 12 U.S.C. § 635(r)).

All United States mixed credit programs are subject to approval by the National Advisory Council on International Monetary and Fiscal Policies (NAC). Id. § 646, 97 Stat. 1265 (to be codified at 12 U.S.C. § 635(s)). The NAC is chaired by the Secretary of the Treasury and its members include the Secretaries of Commerce and State, and representatives from AID, Eximbank, the Federal Reserve, and the United States Trade Representative’s Office. Congress Extends Eximbank Authority As Part of IMF, Housing Legislation, 20 U.S. Export Weekly (BNA) 301, 302 (Nov. 22, 1983).
financing programs which undercut United States bids.\textsuperscript{416}

The United States mixed credit program allows the combination of AID foreign assistance grants and commercial export financing from Eximbank to produce lower interest rates, extended terms, or both, for projects involving less developed countries (LDCs).\textsuperscript{417} Under the United States program, AID financing may only be "defensive,"\textsuperscript{418} the United States exports financed must contribute to the development of the LDC's economy, and the credits are available only for exports to countries eligible for Economic Support Funds.\textsuperscript{419} As of December 31, 1984, Eximbank has offered mixed credits on five separate occasions, once in association with AID.\textsuperscript{420}

The United States is currently attempting to encourage the Organization for Economic Cooperation and Development (OECD) to revise its mixed credit procedures.\textsuperscript{421} Under the current procedures, mixed credits with a grant element of less than twenty percent of the total value of export financing are illegal. Grant elements between twenty and twenty-five percent of the total financing packages require ten days prior notice to the OECD to provide time for counteroffers by other countries. No notification is necessary if the grant element exceeds twenty-five percent of the package.\textsuperscript{422} The United States is attempting to have the permissible minimum grant threshold increased from twenty to fifty per-

\textsuperscript{416} AID Not Likely to Join in 'Mixed Credit' Scheme, Draper Tells Senate Funding Panel, 20 U.S. EXPORT WEEKLY (BNA) 767, 768 (Mar. 20, 1984).


\textsuperscript{418} Supplemental Appropriations Act of 1984 § 645(b)-(c)(1), 97 Stat. 1265 (to be codified at 12 U.S.C. § 635(r)). To satisfy the "defensiveness" test, the United States exporter must be the lowest bidder on the project and prove that "but for" the financing offered by its competitor, the United States bidder would have been awarded the project. Foot-Dragging, supra note 417, at 186.

\textsuperscript{419} AID is allowed to reallocate any unused Commodity Import Program (CIP) funds to mixed credits in any country eligible to receive United States Economic Support Funds (ESFs), 22 U.S.C. § 2413 (1982). These recipient countries include: Botswana, Chad, Djibouti, Kenya, Liberia, Niger, Senegal, Somalia, Sudan, Zaire, Sambia, Zimbabwe, Pakistan, Thailand, Jordan, Lebanon, Morocco, Tunisia, Turkey, Costa Rica, Dominican Republic, El Salvador, Grenada, Haiti, Honduras, and Jamaica. Panama and Belize were scheduled to be added to the eligible list in 1985. Under current allocations for the fiscal year ending September 31, 1984, the United States could have theoretically mobilized $223.5 billion in CIP funds in eight countries for mixed credits in the 26 ESF-recipient countries. Foot-Dragging, supra note 417, at 186.

\textsuperscript{420} OECD's Wallen Endorses U.S. Position on Eliminating Use of Mixed Credits, 1 INT’L TRADE REP. (BNA) 563, 564 (Nov. 7, 1984) [hereinafter cited as U.S. Position].

\textsuperscript{421} Foot-Dragging, supra note 417, at 185-86.

\textsuperscript{422} U.S. Position, supra note 420, at 564.
cent in an effort to make the use of mixed credits prohibitively expensive, thereby discouraging their use.\textsuperscript{423}

B. \textit{New Eximbank Marketing Plan to Aid Small Businesses}

In May 1984, United States Export-Import Bank (Eximbank) Director William Draper announced a new four-state pilot program designed to aid small businesses.\textsuperscript{424} The program will offer certain banks in Minnesota, Wisconsin, Illinois, and Michigan\textsuperscript{425} up to $300,000 per contract in export credit guarantees to certain small business exporters, without the need for specific Eximbank approval.\textsuperscript{426} The plan was designed to improve Eximbank's ties with banks in the four states and to encourage attempts by small businesses to expand their export operations.\textsuperscript{427}

The pilot program will be used to initiate two new Eximbank programs:\textsuperscript{428} the Foreign Credit Insurance Association (FCIA) "umbrella program"\textsuperscript{429} and the working capital guarantee program.\textsuperscript{430}

\textsuperscript{423} \textit{French Veto Prevents EC Finance Ministers From Approving Plan to Curb Mixed Credit}, 1 INT'L TRADE REP. (BNA) 615 (Nov. 21, 1984).

\textsuperscript{424} \textit{Senate Small Business Committee Hears Details of New Eximbank Marketing Plan}, 20 U.S. EXPORT WEEKLY (BNA) 951 (May 15, 1984) [hereinafter cited as \textit{Eximbank Marketing Plan}]. The purpose of the program is to increase the use of Eximbank programs by: (a) increasing awareness and understanding of Eximbank Programs; (b) increasing the number of distributors for the program; (c) establishing a system of field support for exporters using the programs; and (d) evaluating the effectiveness of the programs. \textit{Export Opportunities: An Untapped Resource for Small Business: Hearing Before the Subcomm. on Export Opportunities and Special Small Business Problems of the House Comm. on Small Business, 98th Cong., 2d. Sess. 138 (1984) (statement of W. Garrett Boyd, Special Assistant to the Vice Chairman for Small Business, Export-Import Bank of the United States) [hereinafter cited as \textit{Small Business Hearing}].

\textsuperscript{425} Id. at 138-39. These four states were chosen for the pilot program because of (1) their activities in financing small business exports, (2) the fully-developed commercial bank structure in the area, and (3) the high volume of industrial and agricultural exports from the area. \textit{Eximbank Marketing Plan, supra} note 424, at 952. Collectively, the four states produce approximately one-fourth of all United States exports. \textit{Eximbank's Draper Launches Midwest Pilot Program to Assist Small Business Exporters}, 1 INT'L TRADE REP. (BNA) 393 (Oct. 10, 1984) [hereinafter cited as \textit{Pilot Program}].

\textsuperscript{426} Barovick, \textit{Eximbank Marketing Plan, supra} note 424, at 951.

\textsuperscript{427} Barovick, \textit{New Export Credit Tools Will Help Smaller Exporters}, 7 BUS. AM., (June 11, 1984), at 3, 4 [hereinafter cited as \textit{Smaller Exporters}].

\textsuperscript{428} \textit{Small Business Hearing, supra} note 424, at 138.

\textsuperscript{429} For a discussion of the umbrella program, see infra notes 431, 432 and accompanying text.

\textsuperscript{430} For a discussion of the working capital guarantee program, see infra notes 433-39 and accompanying text.
1. FCIA Umbrella Program

The FCIA Umbrella program provides short-term credit insurance to businesses which are new to overseas marketing. Under the program, new exporters will be insured up to ninety percent against commercial risks abroad and up to one hundred percent for political risks of nonpayment by foreign buyers for approved transactions. While the umbrella program was initiated in the four state area, it is not restricted to banks in this area.

2. Working Capital Guarantee Program

On August 30, 1984, the Small Business Administration and the Eximbank signed an agreement to initiate a new working capital guarantee program. Under the new program, the two agencies will jointly guarantee loans of up to one million dollars made by financial institutions to small businesses for certain export projects. Loans exceeding one million dollars, however, will be guaranteed exclusively by Eximbank.

To qualify for a loan under the new plan, a firm must be classified as a small business and have been in operation for over one year. Interest rates on the loans will be no higher than the prime lending rate plus 2.25 percentage points. The guarantees will cover approximately ninety percent of the principal and interest.

Under the new program, the loans must be used for the purchase of goods and services to be used for export sale or for foreign business development. Loans may also be used for marketing, travel...

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431 Pilot Program, supra note 425, at 394. Under the umbrella policy program, state agencies, export management and trading companies, trade associations, banks, and any other organization serving exporters can qualify as an umbrella policyholder and can administer FCIA insurance on behalf of a group of exporters. Small Business Hearing, supra note 424, at 137. Any exporter with a volume under $2 million annually on open account is eligible to participate in the program. Pilot Program, supra note 425, at 394. See also Eximbank Marketing Plan, supra note 424, at 951.

432 Smaller Exporters, supra note 427, at 4.

433 Small Business Administration, Eximbank Announce Program to Aid Small Exporters, 1 Int'l Trade Rep. (BNA) 263 (Sept. 12, 1984) [hereinafter cited as SBA-Eximbank Program]. See also Small Business Hearing, supra note 424, at 135-36.

434 SBA-Eximbank Program, supra note 433, at 263.

435 Id.

436 Export-Aid Loans Set, N.Y. Times, Aug. 31, 1984, at D9, col. 5. At the time the agreement was signed, the prime lending rate was set at 13%. Id.

437 SBA-Eximbank Program, supra note 433, at 263. The guarantee covers 90% of the loan or the line of credit. Interest will be guaranteed up to the lesser of the rate on the note or the Treasury borrowing rate for similar maturities plus 1%. Maturities may be extended on a case-by-case basis. Pilot Program, supra note 425, at 394.
expenses, trade show expenses, and other promotional activities in connection with export sale. The loans must be secured by inventory, accounts receivable, or other similar collateral, and the outstanding loan balance cannot exceed ninety percent of the collateral balance.

C. Foreign Aid Assistance Bill

In March 1984, the International Security and Development Cooperation Act of 1984 was introduced in the House of Representatives. The foreign assistance bill authorized bilateral economic and military aid programs, contributions to international organizations for fiscal year 1985, and supplemental authorizations for fiscal year 1984. As passed by the House on May 10, 1984, the bill authorized a total of eleven billion dollars in new budget authority for 1985 foreign aid programs and thirteen billion dollars in overall program size, including "off-budget" foreign military sales credits.

Among the bill's major provisions were increases in the level of economic support funds, slight decreases in military aid funds, and sufficient authorization to fund a special Central America aid

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438 SBA-Eximbank Program, supra note 433, at 263.
439 Pilot Program, supra note 425, at 393.
442 Id.
443 The bill authorized $3.2 billion to provide economic assistance to countries of particular economic, political, or security interest to the United States. In particular, Israel and Egypt were to receive major assistance in support of peace efforts in the Middle East. House ISDCA Report, supra note 440, at 2.
444 The bill authorized $3,735,059,000 for foreign military sales credits, military assistance grants, and training and peacekeeping programs. In its entirety, H.R. 5119 authorized appropriations of approximately $10 billion, roughly $1.6 billion less than the amount requested by the executive branch for fiscal year 1985. The main reductions resulted from leaving foreign military sales market-rate financing off of the budget and from reducing funding for foreign military sales guarantee reserves and military grant assistance. Id.
program. The bill also increased spending for bilateral development programs.

The Senate Foreign Relations Committee met in April 1984 to consider its own version of the foreign aid authorization bill. The Senate bill, however, excluded funding for Central America.

In August 1984, the Senate reportedly decided to table further consideration of the authorization measure. A final effort to revive the bill failed in October 1984. Thus, any future foreign aid appropriations will be governed by the Continuing Appropriations Act of 1985.

D. Revisions of Regulation K

In June 1984, the Federal Reserve Board issued proposed revisions to Regulation K governing the operation of Edge corpora-

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445 Congressional Action, supra note 441, at MLC-032. The bill provides funding based on the recommendations of the National Bipartisan Commission on Central America, the so-called Kissinger Commission. The Commission found that although much of the trouble in the region was due to such indigenous problems as poverty, injustice, and closed political systems, the current crisis in the area was significantly influenced by the worldwide economic recession and Cuban/Soviet/Nicaraguan intervention in the area. The Commission urged that the crisis be dealt with through a comprehensive aid program which would support democratic development, improve human rights, and bring peace to the area. Transmittal Letter from George P. Shultz, Secretary of State, to the Congress Regarding the International Security and Development Cooperation Program, reprinted in 84 DEPT. ST. BULL. 22, 25 (May 1984). See also President's Message to Congress Regarding Central America Initiative Legislation, reprinted in 84 DEPT. ST. BULL. 75 (April 1984) [hereinafter cited as President's Message]. The funds will be used to support agricultural development, export promotion, aid for small businesses, education, health services, humanitarian relief, and other activities. Special attention will also be given to leadership training, scholarship, educational exchanges, and support for the growth of democratic institutions. President's Message, supra at 75.

446 The bill authorized $1.6 billion to support economic development in approximately 70 third world countries. The bill also authorized $125.5 million for the Peace Corps in fiscal year 1985. House ISDCA Report, supra note 440, at 3.


448 Congressional Action, supra note 441, at MLC-032.

449 Id. See also Administration's New Foreign Aid Programs Not Assured of Congressional Approval, 1 INT'L TRADE REP. (BNA) 76, 77 (July 18, 1984).


The proposed revisions would: (a) liberalize the types of activities in which Edge corporations may engage in the United States; (b) revise the limitations on the operations of Edge corporations; (c) alter the process by which investment in Edge cor-

3101 (1982). The IBA requires that the Federal Reserve Board review and revise its rules governing the operation of Edge corporations every five years. This review ensures that the purposes of the Edge Act, infra note 452, are being properly served in light of current economic conditions and banking practices. 49 Fed. Reg. 26,002 (1984).


Edge corporations are federally chartered banking and financing institutions through which United States banking organizations offer international banking services. Edge corporations are limited by statute to engaging in only those activities in the United States which are incidental to international or foreign business. In general, all deposits of domestic residents must be related to the carrying out of international transactions and all credit transactions with domestic residents must be related to international transactions. This relationship is determined on a transaction-by-transaction basis. Id. See also Federal Reserve Board Proposes Liberalizing Edge Corporations' International Activities, 20 U.S. Export Weekly (BNA) 1014 (June 5, 1984).

The current transaction-by-transaction approach towards determining which United States activities are incidental to international business has served as a constraint on the operation of Edge corporations. The proposed revisions consider three alternatives to this approach.

Under the "qualified business entity" approach, the requisite international business connection is linked to the overall business activities of its customers. Qualifying companies would be those which are restricted to an international business by their charter or license. In addition, businesses which are principally, but not exclusively, engaged in international business would be allowed to receive a full range of credit services so long as 75% of the credit extensions of the Edge corporation meet the current transaction standards in Regulation K. 49 Fed. Reg. 26,002-03 (1984).

The "transactional leeway" approach would allow Edge corporations to provide credit to any customer for domestic purposes provided that 75% of the credits were for international purposes and met the transaction test. Under this approach, Edge corporations would have to maintain records sufficient to verify that 75% of the loans meet the transactions test. Id. at 26,003 (1984).

Finally, the "limited branch" approach would allow an Edge corporation to extend credit for domestic purposes to the extent that it was funded from international and foreign source deposits from corporations, individuals, and partnerships. Credit transactions with domestic residents in excess of the amount of this funding would be justified on a transaction-by-transaction basis. Id.

Section 211-6 of Regulation K contains the limitations which have been established on the operation of Edge corporations. These limitations cover bankers' acceptances, lending limits, and capital requirements. The proposed revisions offer two clarifying changes for the provisions dealing with bankers' acceptances. The revisions also increase the lending limit for Edge corporations to 15% of capital and surplus and conform the capitalization requirements to those established for national and state banks. For a complete discussion of these revisions, see id. at 26,003-04 (1984).
porations is approved;\textsuperscript{465} and (d) provide a procedure to govern changes in control of Edge corporations.\textsuperscript{466} The proposed revisions were open for written comment until October 12, 1984.\textsuperscript{457} As of December 31, 1984, no further formal action had been taken.

IV. \textsc{Trade Administration}

A. \textit{Tariff and Trade Act of 1984}

On October 30, 1984, the Trade and Tariff Act of 1984,\textsuperscript{458} an amalgam of over two hundred changes and additions to United States trade laws, was signed into law. The Act contains three of the Reagan administration's top trade priorities: the extension of the Generalized System of Preferences (GSP),\textsuperscript{469} the establishment of a free trade area (FTA) with Israel,\textsuperscript{470} and the expansion of the Administration's trade reciprocity provisions.\textsuperscript{471} The new Act also includes measures designed to aid domestic steel producers\textsuperscript{472} and import relief procedures for domestic winemakers.\textsuperscript{473}

1. Generalized System of Preferences

Title V of the Trade and Tariff Act renews the Generalized System of Preferences (GSP)\textsuperscript{484} for 8.5 years until July 4, 1993.\textsuperscript{465} The

\textsuperscript{465} The proposed revisions retain the general consent procedures contained in Regulation K but seek to raise the dollar limitation on initial investments. For other specific changes in the consent procedure, see id. at 26,004.

\textsuperscript{466} Currently, there is no procedure to review changes in the ownership of Edge corporations. The proposed revisions require that a person provide the Federal Reserve Board with prior notice before acquiring 25\% or more of the shares of an Edge corporation. The revisions also reserve to the Board the authority to impose whatever conditions are necessary to prevent any negative repercussions resulting from a change in ownership. Id. at 26,004-05.


\textsuperscript{469} Trade and Tariff Act of 1984, Title V, 98 Stat. 2948, 3018-24. For a complete discussion of the provisions, see infra notes 464-74 and accompanying text.

\textsuperscript{470} Trade and Tariff Act of 1984, Title IV, 98 Stat. 2948, 3013-18. For a complete discussion of the provisions, see infra notes 475-85 and accompanying text.

\textsuperscript{471} Trade and Tariff Act of 1984, Title III, 98 Stat. 2948, 3000-13. For a full discussion of the provisions, see infra notes 486-503 and accompanying text.

\textsuperscript{472} Trade and Tariff Act of 1984, Title VIII, 98 Stat. 2948, 3043-47. For a full discussion of the provisions, see infra notes 504-12 and accompanying text.

\textsuperscript{473} Trade and Tariff Act of 1984, Title IX, 98 Stat. 2948, 3047-50. For a complete discussion of the provisions, see infra notes 689-704 and accompanying text.

\textsuperscript{484} The Generalized System of Preferences (GSP) is a program designed to provide duty-
new legislation amends the current GSP provisions under Title V of the Trade Act of 1974.\textsuperscript{466} The new provisions include an executive waiver authority allowing the President to disregard the use of competitive need limits on a product-specific basis.\textsuperscript{467} Under the 1974 Trade Act competitive need provisions, a country lost its GSP eligibility if United States imports of a particular product from that country exceeded 50% of the value of all United States imports of that product or if

\textsuperscript{466} Trade and Tariff Act of 1984, \textsection 505(a), 98 Stat. 2948, 3023. Currently, the GSP grants duty-free treatment to approximately 140 countries and territories. See \textit{Tariﬀ Preferences for Developing Countries: The Generalized System of Preferences, [98th Cong.] MAJOR LEGIS. OF THE CONG. (CRS), MLC-114 (Dec. 1984).}

imports from the country exceeded a certain amount determined by a formula based on the United States gross national product (GNP). The new provisions reduce the product percentages necessary to disqualify a country from GSP eligibility from 50% to 25% of the total value of United States imports of the product in issue. The GNP ratio limits, however, remain the same.

Under the new provisions, the President will base any decision to waive competitive need limits on an evaluation of the exporting country's trade policies, the country's steps to open its markets to United States exports, and its policies regarding the protection of intellectual property rights. Other factors influencing the President's decision include the beneficiary country's level of economic development, its competitiveness in production of the product, and the expected impact of the decision on the particular industry or producer. The new waiver authority will go into effect on January 4, 1987. The Act also contains a new provision denying GSP benefits to any beneficiary developing country with a per capita GNP in excess of the "applicable limit" for the determination year.

2. U.S.-Israel Free Trade Area

Title IV of the Trade and Tariff Act authorizes the President to negotiate a free trade area (FTA) with Israel to reduce many

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470 See id. (amending 19 U.S.C. § 2464(c)(1)(A)). The year to which the GNP ratio is compared, however, is changed from 1974 to 1984. See supra note 468.

471 Id. (amending 19 U.S.C. § 2464(c)(1) (1982)). For a fuller discussion of these relevant factors, see supra note 467.


474 Id. § 505(c), 98 Stat. 2948, 3022-23 (adding section f(1) to 19 U.S.C. § 2464 (1982)).


476 A free trade area is one in which any barriers to, or other distortions of, international trade have been removed through the negotiation of a bilateral trade agreement between the affected countries. 19 U.S.C. § 2112 (1982). The objective of these trade agreements is "to obtain more open and equitable market access" and to achieve "the harmonization, reduction, or elimination of devices which distort trade or commerce." 19 U.S.C. § 2113 (1982).
of the current trade barriers currently existing between the two countries.\textsuperscript{477} In particular, the new Act amends section 102 of the Trade Act of 1974 to authorize the President to enter into trade agreements to reduce or eliminate duties on imports from Israel.\textsuperscript{478} Title IV also authorizes the President to negotiate specific agreements with other countries to reduce or eliminate duties, provided certain conditions are met.\textsuperscript{479}

Section 402 of the new Act sets out the rules of origin for articles eligible for duty-free treatment under the FTA.\textsuperscript{480} In general, the article must be either entirely of Israeli origin, or, if produced from a combination of materials, the Israeli-origin materials and processing costs must exceed 35\% of the article's import value.\textsuperscript{481} If any portion of the cost or value of materials originates in the United States, such portion may be applied to the minimum Israeli-origin percentage up to 15\% of the article's import value.\textsuperscript{482} These restrictions will retain duties on products that are merely shipped through Israel for the purpose of taking advantage of the FTA.\textsuperscript{483}

Section 403 of the new Act authorizes the President to suspend any reduction or elimination of duty under the FTA if such sus-
pension is made under import relief or national security safeguard statutes.484 Similarly, section 406 states that no provision of a free trade agreement may affect the application of any United States law providing relief from import competition or from unfair trade practices from Israeli articles.485

3. Reciprocity

The International Trade and Investment Act,486 Title III of the Trade and Tariff Act, provides for changes in those portions of the Trade Act of 1974 addressing United States negotiating authority, the enforcement of United States rights under trade agreements, and responses to foreign trade practices.487 The goals of Title III are to foster the economic growth and employment of the United States by expanding United States exports through the attainment of commercial opportunities in foreign markets equivalent to those accorded by the United States.488 The new Act seeks to achieve these goals by improving the President's ability to identify and analyze barriers to trade and by authorizing the President to seek new international agreements that will reduce or remove barriers to trade in services, high technology products, and direct investment abroad.489

Title III amends the negotiating authority provisions of the Trade Act of 1974490 by adding a new section dedicated to actions concerning barriers to market access.491 In general, the new Act authorizes the United States Trade Representative (USTR) to iden-
tify and analyze any foreign acts, policies, or practices that may constitute barriers to United States foreign investments and trade in services. The USTR is also authorized to make an estimate of the trade-distorting impact of these barriers on United States commerce. Both the analysis and estimate, as well as any information regarding actions taken by the USTR to eliminate the barriers, are to be reported to the Congress annually.

Title III also amends the provisions in the Trade Act of 1974 dealing with enforcement of United States rights under trade agreements and responses to certain foreign trade practices. Under § 301 of the Trade Act of 1974, the President was allowed to take whatever steps he deemed necessary to eliminate any unfair trade practices that either violated a United States trade agreement or were determined to be an unreasonable, unjustified, or discriminatory burden on United States trade. The new Act expands the President's authority to authorize retaliation against any unfair trade practice regardless of its consistency with international trade agreements and without the requirement that the act, policy, or practice be unjustifiable, unreasonable, or discriminatory. Thus, any exercise of authority is solely within the President's discretion so long as it is exercised on a nondiscriminatory basis and is directed only against the foreign country or instrumentality involved.

Section 306 of the new Title III mandates that the Commerce Department establish a service industry development program (SIDP). The goal of the SIDP is to develop policies regarding services that will increase the competitiveness of United States service industries in foreign commerce. This goal will be achieved through an assessment of domestic and foreign laws, regulations, policies, and conditions that may affect the international competitiveness of the United States. In addition, the SIDP will develop

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492 Id. at 3001.
493 Id.
494 Id. at 3002.
496 Id. § 301, 88 Stat. 1978, 2041-43.
498 Id. See also Omnibus Trade Bill Includes Powerful New Authority to Offset Foreign Unfair Actions, 1 INT'L TRADE REP. (BNA) 472 (Oct. 17, 1984).
499 Id. at 3006, 98 Stat. 2948, 3008-12.
500 Id. at 3008.
501 Id. at 3009.
improved data collection processes for assessing the adequacy of government policies and actions pertaining to services\textsuperscript{502} and will conduct a program of research and analysis of service-related issues and problems, including forecasts and industrial strategies.\textsuperscript{503}


The Steel Import Stabilization Act,\textsuperscript{504} Title VIII of the Trade and Tariff Act, supplements the President’s new steel industry policy announced on September 18, 1984.\textsuperscript{505} Title VIII provides the enforcement authority for that portion of the President’s program

\textsuperscript{502} Id. at 3008-09.
\textsuperscript{503} Id. at 3009.
\textsuperscript{504} Id., Title VII, 98 Stat. 2948, 3043-47.
\textsuperscript{505} On September 18, 1984, the President issued a formal policy statement regarding steel import relief. 49 Fed. Reg. 36,813 (1984). The President rejected a proposed relief package of tariffs and quotas on imported steel that would have limited steel imports to 15\% of the United States market for a five year period. See President Rejects Import Relief Plan for Steel Industry, Sets “New” Policy, 1 INT’L TRADE REP. (BNA) 296 (Sept. 19, 1984). Rather, the President recommended that the United States negotiate voluntary restraint agreements with foreign steel producers in order to keep their exports at approximately 20\% of the domestic market. Green, Steel’s Hill Allies Ponder Import Bars, 42 CONG. Q. 2296 (Sept. 22, 1984). Currently, steel imports account for approximately 25\% of the domestic market. Pressman, Pressure Mounts on Protectionist Trade Bills, 42 CONG. Q. 1896, 1897 (Aug. 4, 1984).

President Reagan’s policy decision was provoked by a July International Trade Commission (ITC) recommendation that the President impose quotas and tariffs to aid domestic steel producers. \textit{U.S. Industry Sharply Criticizes ITC Remedy Finding, Vows to Continue Push for Quota Bill}, 1 INT’L TRADE REP. (BNA) 98 (July 25, 1984). Under Title II of the Trade Act of 1974, the ITC, an independent fact finding agency, is empowered to declare that foreign competitors are injuring domestic industries and to suggest remedies that can be taken by the President. 19 U.S.C. § 2251 (1982). After receiving these recommendations, the President may choose to follow any, all, or none of the recommendations in deciding whether to impose import relief. 19 U.S.C. § 2252 (1982).

In rejecting the recommendation to impose tariffs and quotas, the President emphasized the need to avoid protectionism, to keep the United States market open to fair competition, and to provide certain access to the United States market for major trading partners. See 49 Fed. Reg. 36,813 (1984).

Specific elements of the new steel import relief policy include:

a) the negotiation of “surge control” arrangements by the United States Trade Representative with countries whose exports to the United States have greatly increased in recent years;

b) reaffirmation of existing measures with countries having voluntarily restrained their exports to the United States;

c) consultation with United States trading partners over the elimination of trade restraining practices to contribute to the liberalization of world steel trade; and

d) rigorous enforcement of United States unfair trade laws by the Commerce Department and the U.S. Trade Representative. Id. at 36,813-14. See also Congress Overwhelmingly Approves Trade Bill After Conferes Resolve Differences, 1 INT’L TRADE REP. (BNA) 388, 389 (Oct. 10, 1984) [hereinafter cited Differences].
directing the USTR to negotiate bilateral agreements with countries whose steel exports to the United States have damaged the United States economy.\textsuperscript{506} Section 805 authorizes the President to take whatever steps he deems necessary or appropriate to enforce the limitations, restrictions, or other terms of the bilateral agreements. Such steps may include the requirement that valid export licenses or other documents issued by the exporting government be required as a condition for the entry of steel products into the United States.\textsuperscript{507} Continuation of the enforcement powers, however, is contingent upon the United States steel industry's efforts to improve and restore its competitive position.\textsuperscript{508}

Title VIII also mandates that the Secretary of Labor establish a plan for the assistance of workers in communities that have been adversely affected by steel imports.\textsuperscript{509} In particular, the plan must include procedures for the retraining and relocation of former steel industry workers who may be unable to continue working in the steel industry.\textsuperscript{510}

The Act states that "the sense of Congress" is that the policy, once fully implemented, will result in a reduction of foreign steel imports to 17-20.2\% of the domestic market.\textsuperscript{511} Similarly, the Act states that if the policy for the steel industry does not result in such a reduction within a reasonable time period, Congress will take the legislative action necessary to stabilize conditions in the domestic market for steel products.\textsuperscript{512}

B. \textit{Industrial Competitiveness Act}

The Industrial Competitiveness Act,\textsuperscript{513} a major industrial policy

\textsuperscript{506} Trade and Tariff Act of 1984, § 802(b)(1), 98 Stat. 2948, 3044. See also ITA Analysis, supra note 458, at 23.


\textsuperscript{508} Trade and Tariff Act of 1984, § 802(b)(2), 98 Stat. 2948, 3044. These efforts include the requirement that a substantial portion of the industry's cash flow be devoted to reinvestment in, and modernization of, its plants and equipment. Differences, supra note 505, at 389. See also ITA Analysis, supra note 458, at 24.

\textsuperscript{509} Id. § 807, 98 Stat. 2948, 3047. The Secretary of Labor has until March 1, 1985 to submit the proposed plan. See id.

\textsuperscript{510} Id.

\textsuperscript{511} Id. § 803(1), 98 Stat. 2948, 3044.

\textsuperscript{512} Id. § 803(3), 98 Stat. 2948, 3044-45. See also Differences, supra note 505, at 389.

bill designed to improve the industrial competitiveness of the United States, failed to pass the Congress in 1984. Introduction of the bill was supposedly prompted by the "expensive, inarticulate, and badly-coordinated set of industrial policies which is inefficient in promoting the international competitiveness of our basic industries." Proponents of the legislation argued that this decline in competitiveness has endangered the economic stability of the United States and its ability to maintain a defense industrial base sufficient to ensure national security. Proponents also urged the creation of effective, high-level forums for the development and coordination of long-range strategies for ensuring the international competitiveness of the United States. In particular, the bill would have created a Council on Industrial Competitiveness, a Bank for Industrial Competitiveness, and a Federal Industrial


The committee report noted that virtually all of the United States' competitors have coordinated industrial policies. Id. at 26. The Committee also concluded that these policies have contributed to the strong trade performance of United States rivals and to the declining position of several domestic industries. Id.

Industrial Competitiveness Hearings, § 2(a)(9)-(10), supra note 515, at 5.

The Act notes that these strategies should be balanced by encouraging the development of new industries that can provide economic growth and employment and by devoting resources to the revitalization of mature and linkage industries. Id. § 2(a)(12), at 5.

Title I of the Act would create a Council of Industrial Competitiveness. The Council would consist of sixteen members, four each from government, labor, business, and public sectors. Members would be appointed by the President and confirmed by the Senate. Id., Title I, § 103(a), at 9-10.

The Council's duties would include, among other things: (a) the collection and analysis of information regarding the competitiveness of United States industries; (b) the evaluation of existing government policies and business practices in terms of their competitive impact; (c) the recommendation of industrial development priorities; and (d) the stimulation and promotion of employee ownership. Id. § 102, at 6-8. The Council would also set policy guidelines for the proposed Bank for Industrial Competitiveness, infra note 519, to ensure that the Bank's activities would be consistent with the developing industrial strategies. Id.

Title II of the Act would create the Bank for Industrial Competitiveness. The Board of Directors would consist of twelve members—one each from government, business, labor, and
Mortgage Association.\textsuperscript{520}

Opposition was strongest to the bill's proposal of a Bank for Industrial Competitiveness. Many democrats were hesitant to support a bill that would advance central planning or encourage complete free market trade.\textsuperscript{521} The Reagan administration also opposed the bill, stating that "existing agencies of the federal government . . . are sufficient to deal with the problems of trade and our international industrial competitiveness."\textsuperscript{522} The Administration also stated that the Council on Industrial Competitiveness would be a new bureaucracy ""inconsistent with the basic structure of our government' because it would be outside the executive branch and Congress."\textsuperscript{523} The President's Commission on Indus-

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\textsuperscript{520} Title III of the Act would create the Federal Industrial Mortgage Association. The Board of Directors would consist of the Secretaries of Treasury and Commerce and three other members with experience in the fields of business investment, industrial development, and finance. \textit{REPORT} 1, Title III, § 302(a), \textit{supra} note 514, at 17. The three additional members would be appointed by the President and approved by the Senate. \textit{Id}.

The Association would be authorized to purchase, and to make commitments to purchase, industrial mortgages from any qualified financial institution. \textit{Id}., § 303, at 17. The Association would be confined to purchasing industrial mortgages that meet five conditions: (a) the mortgage loan would be limited to financing the purchase of facilities and equipment for activities conducted in the United States; (b) the borrower would have to be a qualifying business; (c) the maximum term of the loans could not exceed ten years for equipment and twenty years for productive facilities; (d) the loans would have to be secured by a security interest in machinery, equipment, or real property; and (e) the mortgage would have to be fully amortized over the life of the loan. \textit{Id}., § 304, at 18.

\textsuperscript{521} See \textit{La Falce Indicates He Would Sever Bank Plan From Industrial Policy Bill to Gain Passage}, 20 U.S. EXPORT WEEKLY (BNA) 916 (May 1, 1984).

\textsuperscript{522} \textit{Industrial Policy}, \textit{supra} note 513, at 983 (quoting statement by H.P. Goldfield, Assistant Secretary of Commerce for Trade Development).

\textsuperscript{523} \textit{Id}.
trial Competitiveness also endorsed the Reagan administration's position and rejected the alternate proposals of the democrats, including industrial policy legislation.

C. Caribbean Basin Initiative

The Caribbean Basin Economic Recovery Act, also known as the Caribbean Basin Initiative (CBI), took effect on January 1, 1984, with twenty of the twenty-seven eligible countries designated as beneficiaries. The United States Trade Representative's Office

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524 The Commission on Industrial Competitiveness consists of thirty representatives from the business, labor, financial, and academic fields who were empanelled by the Reagan administration in June 1983 to find ways to improve United States competitiveness in the world market. See Presidential Competitiveness Commission Calls for Program to Tap Market Potential, 1 INT'L TRADE REP. (BNA) 146, (Aug. 8, 1984). Specifically, the Commission was charged to:

a) identify the problems and opportunities for the private sector in developing new commercial products, services, and manufacturing processes;

b) develop specific recommendations for federal technology policies to create a favorable climate for industrial progress; and

c) recommend changes in government policies to improve the private sector's ability to compete in the international marketplace.


525 In general, the Commission urged the President to call for greater cooperation between management and labor and to encourage collaborative efforts designed to maximize productivity through open communication and worker participation. See Presidential Panel, GOP Group Release Industrial Competitiveness Suggestions, 9 U.S. IMPORT WEEKLY (BNA) 978 (May 9, 1984).


Jan Rosenbaum, Assistant United States Trade Representative for the Americas, said important concessions gained from the countries seeking CBI benefits included commitments from several nations to resolve expropriation disputes and disagreements over the questionable use of intellectual property, such as broadcasting rights and copyrighted textbooks. Several Caribbean nations and all the Central American countries stated their intentions to seek GATT membership. Rosenbaum said several countries agreed to allow the national federation of local unions and to permit national unions to join international labor organizations. Several countries announced plans to eliminate barriers to their own markets and plans to aid foreign investment in their countries. President Designates Nine New Nations for Trade Benefits Under CBI Program, 9 U.S. IMPORT WEEKLY 491, 492 (1984) [hereinafter
fice also announced in January the establishment of two ad hoc subcommittees. One subcommittee would oversee the CBI's daily operations, while the other would consider policies to enhance the CBI program. At a February conference, United States officials suggested that electronic components manufacturing and agribusiness offered the greatest opportunities for taking advantage of the program. The United States Customs Service issued its final regulations on the CBI in December 1980. These regulations eliminated the necessity for importers to obtain the specific costs of production performed in the area and reduced the burden on United States importers of taking responsibility for the correctness of an import declaration. During the same year, Congress modified the CBI to allow inward processing in Puerto Rico to be counted as CBI content if necessary to reach the required thirty-five percent value-added minimum.

D. Foreign Trade Zones

In 1984, the General Accounting Office and the United States International Trade Commission issued reports on foreign trade zones (FTZs); each stated that evidence on the economic impact of such zones was inconclusive. The number of FTZs increased

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528 Id. at 491.
530 49 Fed. Reg. 47,986 (1984). See Customs Service Issues Final CBI Regulations with Some Changes to Ease Importers' Burdens, 1 INT'L TRADE REP. 713 (1984) [hereinafter cited as CBI Regulations]. Most producers are reluctant to disclose their costs of production to importers because such details could compromise a producer's bargaining position with the importers. Id. at 713.

The ITC report stated that the growing volume of trade conducted within the zones might well have occurred otherwise in the United States without the zones. Id. at 795. The GAO
from thirteen general purpose zones and five subzones in the
1970's to ninety-one general purpose zones and thirty subzones in
1983.\textsuperscript{533} Economic activity in the zones also increased during the
same period. The economic activity in general purpose zones in-
creased from $114 million to $1.5 billion while activity in subzones
increased from $47 million to $2.5 billion.\textsuperscript{534} The primary products
shipped into the zones were automobiles, motorcycles, microwave
ovens, televisions, and petroleum products.\textsuperscript{535}

V. UNFAIR TRADE PRACTICES

A. Dumping/Antidumping

1. Determination Duties

In 1979, Melamine Chemicals, Inc. filed a complaint with the
Treasury Department alleging that melamine from the Nether-
lands was being sold on the United States market at less than fair
value (LTFV). The Treasury disagreed, issuing a TentativeNegative
Determination on November 13, 1979 which effectively stated
that there had been no such sales.\textsuperscript{536}

When the International Trade Administration (ITA) Commerce
Department assumed LTFV determination duties in 1980, it deter-
mined that Treasury's calculations were in error and issued an Af-
firmative Preliminary Determination.\textsuperscript{537} Hearings and rehearings
followed, after which the ITA published a Final Negative Determi-
nation and concluded its investigation.\textsuperscript{538}

Malamine challenged this determination in the Court of Interna-
tional Trade (CIT) alleging, among other things, that the ITA
erred in applying a ninety-day lay rule in calculating the foreign
exchange value used to determine the price of foreign melamine
sold in the United States.\textsuperscript{539} The CIT agreed, finding the ITA's use
of such a rate outside the enabling statute,\textsuperscript{540} rescinding the deter-

\textsuperscript{533} Id.
\textsuperscript{534} Id.
\textsuperscript{535} Id.
\textsuperscript{537} Dumping/Calculation of Foreign Exchange Value, 45 Fed. Reg. 12,466 (1980).
\textsuperscript{539} In so alleging, Melamine charged that Commerce was acting in an \textit{ultra vires} manner
\textsuperscript{540} Melamine Chemicals, Inc. v. United States, 561 F. Supp. 458, 464 (Ct. Int'l Trade
mination, and remanding it to the ITA. ITA appealed this decision to the Court of Appeals for the Federal Circuit which, in a decision dated April 19, 1984, vacated the CIT’s order rescinding and remanding the determination and reversed the CIT’s judgment, holding that the ITA had acted unlawfully in applying the ninety-day lay rule. The Court of Appeals reasoned that, in passing on the validity of agency regulations issued under the authority of a statute, such agency’s construction of the statute is entitled to great weight, and that such regulations are to be sustained unless unreasonable and plainly inconsistent with the statute.

Following the reversal, the CIT reconsidered the case to dispose of remaining issues not previously addressed. It decided, first, that the Secretary of Commerce may amend a determination to correct a manifest error, and second, that Melamine was not denied due process by procedural irregularities that occurred in the antidumping proceeding. The CIT entered judgment for the United States and dismissed the action.

2. Price Adjustments

The Court of International Trade affirmed an ITA antidumping duty determination regarding sorbitol imported from France in Roquette Freres v. United States. Roquette had claimed an adjustment to its purchase price based on a law allowing an increase equivalent to “the amount of import duties imposed by the country of exportation which have been rebated, or which have not been rebated.”

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541 Id.
543 Id. at 928. Melamine has since been cited for this proposition. See In re Holland American Wafer Co., 737 F.2d 1015, 1018 (Fed. Cir. 1984).
544 Melamine, 732 F.2d at 928.
546 Melamine, 592 F. Supp. at 1340.
547 Melamine, 592 F. Supp. at 1342.
548 Id.
been collected, by reason of the exportation of the merchandise to the United States."\textsuperscript{550} The court disagreed, concluding that since payment of the export refund was not dependent on prior payment of import levels, the levies were not related by reason of the exportation of the merchandise to the United States, and thus fell outside the statute.\textsuperscript{551}

3. Perishable Produce

The Court of International Trade recently decided whether the International Trade Administration (ITA) may consider below cost sales, reflecting the perishable nature of produce, in determining whether foreign produce was sold at less than fair value (LTFV) on the United States market.\textsuperscript{552} The court ruled that these sales may be considered in determining the foreign market value of fresh winter vegetables.\textsuperscript{553} The court also ruled that the use of the Canadian market for means of price comparison was allowable, at least in this case, where there was no appreciable Mexican market for fresh winter vegetables\textsuperscript{554} and where Congress has shown a preference for third country sales comparisons over constructed value figures.\textsuperscript{555} The ITA's position was supported by substantial evidence and the CIT affirmed its determination.

\textsuperscript{550} 19 U.S.C. § 1677a(d)(1)(B) (1984). Corn is needed to produce sorbitol, and Roquette imported and paid import levies on large quantities of United States corn. Roquette was in turn entitled to a refund of these levies based upon the corn content of exported sorbitol. Roquette Freres v. United States, 583 F. Supp. at 601.

\textsuperscript{551} Roquette Freres v. United States, 583 F. Supp. at 602. Regarding Phizer's claim that the ITA should not have split the sorbitol industry into two sectors, the court pointed out that, although liquid and crystalline sorbitol both possessed the same chemical formula, they had distinct and dissimilar end uses which prevented their interchangeability. Id. at 604.

\textsuperscript{552} Southwest Florida Winter Vegetable Growers v. United States, 584 F. Supp. 10 (Ct. Int'l Trade 1984). The degree to which the supply of fresh produce such as squash, tomatoes, and cucumbers may be regulated is limited. Produce, once on the market, must be sold by a certain time or else it loses value. Sales of produce below cost may, therefore, sometimes be necessary to avoid greater losses.

\textsuperscript{553} Id. at 16. 19 U.S.C. § 1677b (1982) allows three methods for computing foreign market value for antidumping investigation purposes: (1) value on the market of the exporting country, id. § 1677b(a)(1)(A); (2) value on the market of a third country, id. § 1677b(a)(1)(B); or (3) "constructed value," id. § 1677b(a)(2).


\textsuperscript{555} Southwest Florida Winter Vegetable Growers v. United States, 584 F. Supp. at 18.
4. Representation

The representative nature of an antidumping petition was analyzed and explained by the CIT in *Gilmore Steel Corp. v. United States.* The statutory provision in question requires that a party filing an antidumping petition do so not only on its own behalf, but also on behalf of an industry in a representative capacity. The questions before the court concerned the nature and scope of this representative capacity. The court concluded that while a petitioner must represent an industry rather than the more general interests of an industry, it need not do so on a national level, but may represent a regional industry as well. To the extent that Gilmore's petition purported to represent national industry, the court allowed the government's rescission of notice commencing an antidumping investigation to remain in effect. Those portions of Gilmore's petition that alleged LTFV sales and injury to a regional industry were reinstated.

5. Revocation of ITA Finding

An ITA decision to revoke an antidumping finding against two Canadian sulfur producers was unsuccessfully challenged by an United States producer in *Freeport Minerals Co. v. United States.* The court ruled that in determining whether a foreign producer has refrained from less than fair value (LTFV) sales for two years as required for revocation, the ITA need not, for reason of administrative convenience, include all sales up to the date of the tentative revocation determination. The court also rejected

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588 *Gilmore Steel Corp. v. United States,* 585 F. Supp. at 671. Plaintiff, challenging the government's rescission of a notice commencing the antidumping investigation, contended that the phrase "on behalf of an industry" in 19 U.S.C. § 1673a(b)(1) (1982) required only that the sought-after relief inure to an industry. It also asserted that the term "industry" as used in that section need not be national in scope, but could apply as well to regional industries. In its brief, the government argued that the language requires the petitioner to be a representative of a national industrial interest. *Gilmore Steel Corp. v. United States,* 585 F. Supp. at 677-78.
589 *Gilmore* at 671.
590 Id. As the court explained, an administrative proceeding is not a judgment that can only be derailed by either negative injury or a negative LTFV sales determination. *Id.* at 673-74.
593 *Id.* at 1250. The court could find no statutory language supporting Freeport's position.
Freeport's charge that the producers would resume LTFV sales following the revocation, pointing out that their shipments since the antidumping finding had been consistently at or above fair value. In addition, the producers gave reliable assurances that they would avoid future LTFV sales.564

6. Standing to Challenge

In an action brought by a domestic mineral producer, Freeport Minerals challenged a notice of partial revocation by the ITA of an antidumping finding on Canadian sulfur.565 The CIT found that such notice is not reviewable under the applicable statute566 and dismissed the case.567 The court held that it is only with respect to an antidumping duty order, based on final affirmative determinations by the ITA and ITC, that the time for the commencement of an action by the CIT begins to run from the date of publication in the Federal Register568 (emphasis in original). In this case, where notice was issued pursuant to a reward from the CIT after issuance of the original order, the thirty-day period commenced the date of the publication of the original order.569 Plaintiff failed to intervene in the cause of action which led to the remand, and failed to institute a cause of action of its own.570

7. Export Sales Price Offset Cap

A flurry of litigation in the Court of International Trade over the validity of the export sales price (ESP) offset cap, used as an aid in determining dumping margins,571 has culminated in a recent decision by the Court of Appeals for the Federal Circuit.572 As a result

and felt that the complexities of the administrative review process and the large volume of data involved in the investigation justified the ITA's choice of time period. Id.

564 Id. at 1252.
569 Freeport Minerals Co. v. United States, 583 F. Supp. at 590.
570 Id.
571 Id.
573 Consumer Products Division, SCM Corp. v. Silver Reed America, Inc., 753 F.2d [hereinafter cited as SCM]. 103 (Fed. Cir. 1985) (reversing Silver Reed, supra note 571). In terms of clarity and economy, the following test describes the background of this
of this decision, which upholds the validity of the ESP offset cap,\textsuperscript{673} foreign manufacturers and related importers may no longer deduct indirect sales costs incurred in their home market from the foreign market value used by the ITA in computing dumping margins.\textsuperscript{574} This result will have the effect of increasing dumping margins and, consequently, antidumping duties assessed against imported goods.\textsuperscript{675} The court, citing a House Report\textsuperscript{676} expressing concern that improper foreign market value adjustments may unjustifiably reduce dumping margins, concluded that the ITA is not required under the applicable statutes\textsuperscript{677} to make an adjustment for indirect selling expenses.\textsuperscript{678} The court further found that the dispute.

Under the antidumping provision of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. §§ 1673, 1677, Rule 3.4(b), if foreign merchandise is sold or is likely to be sold in the United States at less than its fair value, subjecting United States industry to material injury or a threat of material injury, an antidumping duty shall be imposed on such merchandise. The amount of the duty is to equal "the amount by which the foreign market value exceeds the United States price for the merchandise" (i.e., "the dumping margin"). The statute provides for several alternative bases from which to calculate the foreign market value and the United States price. To these base figures, certain cost adjustments are made to derive values that can reasonably be compared to determine whether dumping has occurred and the amount of the duty to be imposed, if any.

The present case concerns an antidumping order, published May 7, 1980, against portable electric typewriters (PET's) from Japan. 45 Fed. Reg. 30,188 (1980). Silver Seiko, Inc. and its United States subsidiary, Silver-Reed America, Inc., (collectively "Silver") are subject to the order. In determining the foreign market value of Silver's goods, the price at which such goods were sold in Japan was used in accordance with 19 U.S.C. 1677(a)(1)(B). From this figure, Silver has been allowed to deduct all direct expenses of sale, such as expenses that vary with the quantity sold, such as commissions. The dispute concerns other deductions from that price. In particular, Silver successfully challenged a limitation established by regulation, 19 C.F.R. § 353.15(c), on the amount which may be deducted from its market price in Japan for indirect costs of sales in Japan, such as overhead. Any increase in deductions from the foreign market value, of course, reduces the dumping margin.

The United States price to which the foreign market value has been compared in this case is based on the "exporter's sales price" (ESP), that is, the price at which Silver Seiko's United States subsidiary, Silver-Reed, sells a product in the United States. 19 U.S.C. § 1677a(c). From ESP, pursuant to 19 U.S.C. § 1677a(e)(2), all expenses, both direct and indirect, of PET sales in the United States have been deducted to arrive at the United States price used for comparison. Obviously, deductions from ESP increase the dumping margin.

The regulation in issue, 19 C.F.R. § 353.15(c), limits the amount of indirect costs which may be deducted on the foreign side of the equation to the amount deducted from the U.S. price, when such price is based on the ESP. This limitation is denominated as the "ESP offset cap."

\textsuperscript{673} SCM, \textit{supra} note 572 at 1035.
\textsuperscript{674} Foreign market value is defined in 19 U.S.C. § 1677b(a) (1983).
\textsuperscript{675} SCM, \textit{supra} note 572 at 1035.
\textsuperscript{678} SCM, \textit{supra} note at 1038.
regulation establishing the ESP offset cap was a reasonable exercise of administrative power, pointing out the broad range of discretionary power given the Secretary of Commerce in these matters.\footnote{Id. at 1040.}

8. Injunction Against Liquidation of Entries

The CIT in \textit{Silver Reed America, Inc. v. United States}\footnote{590 F. Supp. 1254 (Ct. Int'l Trade 1984).} outlined the requirements that a plaintiff must meet to enjoin the Customs Service from liquidating entries pursuant to an Antidumping Duty Order. Silver Reed sought the injunction pending the outcome of the appeal of a CIT decision holding the export sales price (ESP) offset cap\footnote{19 C.F.R. § 353.15(c) (1980). See supra note 571 and accompanying text.} invalid.\footnote{See supra note 571.} The court held that if a plaintiff establishes: (1) that it will be immediately and irreparably injured; (2) that there is a likelihood of success on the merits on appeal; (3) that the public interest would be better served by the relief requested; and (4) that the balance of hardship on all parties favor the moving party, the relief sought will be granted.\footnote{Silver Reed, 590 F. Supp. at 1259.} Based on these criteria, the court granted the injunction,\footnote{Id.} although Silver Reed eventually lost on appeal.\footnote{Id. at 2.}

9. Refunds of Estimated Duty Overpayments

The Court of International Trade in \textit{Diversified Products Corp. v. United States}\footnote{No. 82-7-01065 (Ct. Int'l Trade Feb. 29, 1984).} conceded that the importer of Japanese bicycle speedometers would be entitled to a refund of overpaid estimated antidumping duties, but refused to grant the importer an immediate refund.\footnote{Id. at 2. The overpayment occurred as a result of an ITA error in computing the dumping margin, which it initially set at 25.98\% \textit{ad valorem} and later corrected to 20.04\% \textit{ad valorem}. Diversified sued for the return of the 5.94\% difference in its deposits of estimated duties. \textit{Id.} at 1-2.} The court instead held that Diversified must wait until liquidation of the entries for which estimated antidumping duties were deposited,\footnote{Id. at 2.} at which point it would receive a refund with interest.\footnote{Id. at 2.} The court, looking to the applicable section
of the Trade Agreements Act of 1979, found language directly supporting the government's position and concluded that neither the ITA nor Customs had the statutory authority to immediately satisfy Diversified's request.

B. Countervailing Duties

1. Timeliness of Actions

The court in Allegheny Lindlum Steel Corp. v. United States set forth the time constraints governing CIT jurisdiction over actions contesting ITA countervailing duty determinations. The actions before the court demonstrate the working of constraints. Plaintiff, a United States steel manufacturer, sought to impose heavier duties on foreign products. An action before the court filed twenty-one days after the publication of an ITA countervailing duty order on stainless steel plate contesting the amount of duty imposed by the order was found to be timely. The court also ruled that judicial review of an ITA investigation into stainless steel strips and sheets for which no countervailing duty order had been issued due to negative injury determinations was premature. Plaintiff's contest of these negative injury determinations filed more than thirty days after their publication were found to be too late and untimely.

2. Subsidies

The CIT outlined the circumstances under which a tax law may be considered a subsidy for the purposes of an ITA countervailing duty investigation in Bethlehem Steel Corp. v. United States.

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591 Diversified Products Corp. v. United States, No. 82-7-01065, at 3, 4.
592 Id. at 5.
593 No. 83-7-01036, slip. op. 84-16 (Ct. Int'l Trade Mar. 7, 1984).
595 Allegheny Lindlum Steel Corp. v. United States, No. 83-7-01035, slip. op. 84-16 at 7.
596 Id. at 8.
597 590 F. Supp. 1237 (Ct. Int'l Trade 1984). Plaintiff Bethlehem Steel contested an ITA determination on a South African tax law which allowed companies to deduct from their taxable income 200% of expenses incurred in operating a state-certified employee training program. The ITA ruled that the deductions did not constitute a subsidy and did not war-
The court upheld the ruling on very narrow grounds, however, holding that tax laws are not subsidies to the taxpayer unless selective in their terms or administration. Since the tax benefit in this case was generally available to all South African companies, it did not constitute a bounty or grant as called for in the applicable law. The court reasoned that since tax laws clearly are not subsidies when they exact payment from an industry, they should not be seen as subsidies when they present all industries an equal opportunity to reduce their payment.

3. Payment of Interest

The Court of International Trade decided in *Hide-Away Creations, Ltd. v. United States* whether the government is obligated under 19 U.S.C. § 1677g to pay interest on overpayments of estimated countervailing duties in cases arising under 19 U.S.C. § 1303, and to which entries, if any, these payments would apply. It held that interest is payable, but only on deposits made in connection with entries made on or after the date of the ITA’s final affirmative countervailing duty determination. The same court had previously held that since the exporting country was not a signatory to the GATT subsidies code, and since no affirmative injury determination was required to impose a countervailing duty on its products, it did not fall within the statutory language authorizing the imposition of countervailing duties. *Id.* at 1238-39, 47 Fed. Reg. 39,382 (1982).

Bethlehem Steel Corp. v. United States, 590 F. Supp. at 1241.

*Id.* at 1245. South Africa is not a "country under the Agreement" within the meaning of § 701(b) of the Trade Agreement Act of 1979, 10 U.S.C. § 1671(b) (1984). In this situation, ITA investigators need not find injury to a United States domestic industry to call for countervailing duties on a foreign product. Rather, they must only find a bounty or grant upon that product. 19 U.S.C. 1303 (1984). The language in this law reflects that of the original countervailing duty laws. Bethlehem Steel Corp. v. United States, 590 F. Supp. at 1239.

*Id.* at 1245.


19 U.S.C. § 1677g (1983). Section (a) of this statute provides that:

> Interest shall be payable on overpayments and underpayments of amounts deposited on merchandise entered, or withdrawn from warehouses, for consumption on and after the date on which notice of an affirmative determination by the Commission under section 1671d(b) or 1673d(b) of this title with respect to such merchandise is published.

*Id.*

19 U.S.C. § 1303 (1983). This section authorizes the levying of countervailing duties on countries not party to the Agreement of Subsidies and Countervailing Measures of the GATT.

thorizing payment of such interest.\textsuperscript{606} The court, after hearing arguments from both sides and amicus supporting the payment of interest, concluded that the interest provision applied to non-signatories of the GATT subsidies code as well as to signatories.\textsuperscript{607} It was amended\textsuperscript{608} to the extent that the previous decision was inconsistent with the later one.

4. Cumulative Effect of Imports

A CIT review of seven preliminary negative determinations\textsuperscript{609} resulting from ITC countervailing duty investigations of imported steel products found that the ITC failed to consider the cumulative effect of importations from more than one country or applied too stringent a standard in its deliberations.\textsuperscript{610} The court found that the proper criteria for determining if the imported products posed a threat of domestic injury should have been whether all subsidized or allegedly subsidized products of the same type from all nations in question could have a combined injurious effect.\textsuperscript{611} The court further found, in cases where cumulative effect was not in question, that the ITC did not properly weigh the information


\textsuperscript{607} Hide-Away Creations, Ltd. v. United States, No. 83-5-00644, slip op. 84-126 at 11.

\textsuperscript{608} Id. at 15.

\textsuperscript{609} The seven determinations were the following:


\textsuperscript{610} Republic Steel Corp. v. United States, No. 82-03-00372, slip op. 84-84 (Ct. Int'l Trade July 11, 1984).

\textsuperscript{611} Id. at 11. This effect was found to be possible in determinations one through four and seven. See supra note 608.
before it\textsuperscript{612} and applied too strict a standard in determining whether injury could result.\textsuperscript{613} The court also felt that, just as there is a legal threshold for finding actual injury in countervailing duty investigations, there should be similar standards for finding a reasonable indication of threat of injury.\textsuperscript{614}

5. Administrative Record/State Privilege/Deliberative Process Privilege

In an action contesting a final affirmative countervailing duty determination by the ITA covering canned tuna from the Philippines,\textsuperscript{615} the Court of International Trade ruled on motions relating to the content and accessibility of the administrative record in such cases.\textsuperscript{616} In regard to Plaintiff's motion to supplement the administrative record, the court found the scope of the record to be the "information . . . before the relevant decision-maker at the time the decision was rendered."\textsuperscript{617} Based on a sworn assertion by the agency responsible for the documentation offered by the defense, the court concluded that the material in question was outside the scope of the record and denied the motion.\textsuperscript{618} The defense also prevented disclosure of some portions of the record by asserting the state secret\textsuperscript{619} and deliberative process\textsuperscript{620} privileges. The court, weighing Plaintiff's need for pertinent material against the dangers to national security posed by disclosure, held for Defendants.\textsuperscript{621} The court also found documents compiled for an agency's internal use in the deliberative process subject to a protective order against disclosure on the ground of privilege.\textsuperscript{622}

\textsuperscript{612} Id. at 29. This conclusion applied to determinations five and six.
\textsuperscript{613} Id. at 30. This result also applies to determinations five and six.
\textsuperscript{614} Id. at 33.
\textsuperscript{615} Canned Tuna from the Philippines, 48 Fed. Reg. 50,133 (1982).
\textsuperscript{616} Star-Kist Foods, Inc. v. United States, No. 83-12-01711, slip op. 84-130 (Ct. Int'l Trade, Dec. 6, 1984).
\textsuperscript{617} Id. at 4 (citing Beker Industries Corp. v. United States, No. 84-62, slip op. (Ct. Int'l Trade, June 5, 1984)).
\textsuperscript{618} Id. at 5.
\textsuperscript{619} 28 U.S.C. § 2641(b) (1982). The court emphasized that this privilege is not absolute and is subject to the discretion of the court. Star-Kist Foods, Inc. v. United States, No. 84-130, slip op. at 6.
\textsuperscript{620} Id. at 9. Defendants claimed that the documents sought were vital to the decision-making process.
\textsuperscript{621} Id. at 8.
\textsuperscript{622} Id. at 10 (citing SMC Corp. v. United States, 473 F. Supp. 791 (Cust. Ct. 1979) and Sprague Electric Co. v. United States, 462 F. Supp. 966 (Cust. Ct. 1978)).
C. Countervailing Duties and Dumping Legislative Reform

Though the Trade Remedies bill failed to win approval in the Senate following its House passage,\textsuperscript{623} numerous provisions of the bill relating to countervailing duty and antidumping laws\textsuperscript{624} were incorporated in an omnibus trade act\textsuperscript{625} signed into law on October 30, 1984.\textsuperscript{626}

D. Section 301 Complaint

In 1984, Transpace Carriers, Inc., a Maryland expendible-vehicle launch services corporation, commenced action under § 301 of the Trade Act of 1974\textsuperscript{627} alleging unfair subsidization of Arianespace S.A., a French competitor, by the European and French space agencies.\textsuperscript{628} The complaint asked the President to prevent the Europeans from continuing these practices and to impose interim measures forbidding Arianespace from advertising in the United States. The complainant further sought economic sanctions against the European Space Agency member states.\textsuperscript{629} Following an evaluation of the complaint, the United States Trade Representative’s office began its investigation into the merits of the case.\textsuperscript{630}


\textsuperscript{624} Changes in the antidumping and countervailing duty law seek to improve administrative efficiency, address new unfair trade practices, and make these processes more available to potential petitioners. Ways and Means Trade Subcomm. Reports Trade Remedies Bill Introduced by Gibbons, 9 U.S. IMPORT WEEKLY (BNA) at 648 (February 15, 1984).

\textsuperscript{625} The Senate passed H.R. 3398 on September 20, 1984 by a vote of 96 to 0. 98th Cong., 2nd Sess., 130 CONG. REC. S11,581 (1984). A conference report incorporating the Trade Remedies Bill and other amendments was later approved. 98th Cong., 2nd Sess., 130 CONG. REC. H12,286 (1984).


\textsuperscript{627} 19 U.S.C. § 2411 (1984). This section, with its companion §§ 2412-2416, 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 (USTR) requesting the President to take appropriate action to counter the discriminatory practices of which the party has complained.

\textsuperscript{628} Transpace accused the Europeans of subsidizing this private undertaking by providing facilities and labor at below market value and by agreeing to pay a premium for Arianespace’s services, thereby enabling it to offer low-cost services to United States and third country customers. U.S. Space Launch Survives, Company Brings Unprecedented Complaint Against Europeans, 20 U.S. EXPORT WEEKLY (BNA) at 1056 (June 12, 1984).

\textsuperscript{629} Id.

\textsuperscript{630} USTR Initiates Investigation of U.S. Space Launch Company’s Unprecedented Complaint, 1 INT’L TRADE REP. (BNA) at 45 (July 11, 1984). The USTR made his evaluation pursuant to 19 U.S.C. § 2412(b) (1984). As of this writing, the results of the investigation have not been reported.
E. Antitrust

1. New Merger Guidelines

The Justice Department issued new merger guidelines on June 14, 1984 to clarify the treatment of foreign competition and world markets in defining markets and determining market share. The revisions were "intended to convey the message that the Guidelines are not a set of rigid mathematical formulas that ignore market realities and rely on a static view of the marketplace." The revisions clarify standards concerning the definition of markets and apply the calculation of market shares equally to foreign and domestic firms. Because a foreign firm is subject to United States import quotas, it is not excluded from the market. Moreover, the guidelines assign market shares to foreign firms in the same manner in which shares are assigned to domestic firms. In addition to the treatment of foreign companies, the revisions also address market definition and measurement. These factors affect

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634 Id.

This is due to the fact that it is difficult to assess the effectiveness and longevity of a particular quota and to measure the likely offsetting supply response from firms that are not subject to a quota. A quota applied selectively to some nations and not to others may have only a limited effect on the foreign competition that domestic firms face. This is because a country subject to a quota may divert its exports to a country that is not subject to the quota and that country in turn may divert an equivalent quantity of the product to the United States. Given the limitations on available data, the problems associated with trying to quantify the effects of such trade restraints often are insuperable.

Id.

635 Id.

When dollar sales of shipments are used to measure the shares of domestic firms, the market shares for foreign firms are measured using dollar sales or shipments to the relevant market. If physical capacity, reserves, or dollar production is used for domestic firms, the market shares of foreign firms will be measured in terms of the capacity, reserves, or production that is likely to be devoted to the relevant United States market in response to a 'small but significant and nontransitory' increase in price. In general, then, the Department will consider, where appropriate, qualitative evidence relating to the competitive significance of foreign firms in interpreting market share and concentration data.

Id.
the significance of concentration and market share data in evaluating horizontal mergers, treatment of efficiencies, and treatment of otherwise healthy firms' failing divisions.636

Although the new guidelines improve efficiency and foreign competition, Commerce Secretary Malcolm Baldridge stressed that the 1984 revision failed to address the fundamental question of whether any antimerger enforcement was needed for industries subject to intense foreign competition.637

2. Shipping Act of 1984

The Shipping Act of 1984 was designed to extend antitrust immunity to intermodal rate-fixing and to reduce antitrust uncertainty in international ocean shipping.638 Carriers are allowed to set intermodal through rates639 while individual members of shipping conferences may set independent rates and services upon ten days notice.640 The Act allows shippers to form nonprofit associations to consolidate cargo and negotiate volume discounts.641 The measure abolishes the presumption that carrier agreements are against the public interest and places the burden of proof on those opposing the particular agreements.642 If the Federal Maritime Commission determines that a carrier agreement to reduce competition is likely to produce an unreasonable reduction in transportation service or an unreasonable increase in transportation cost, the

636 Id. at 26,824-27.

A fundamental question remains as to the need for any anti-merger enforcement in industries subject to intense competition in world markets. Commerce Secretary Baldridge believes it is no longer appropriate policy to evaluate a merger primarily upon a prediction of whether the risk of collusion will be increased as a result of a change in concentration of the market.

Id. at 193-94.

639 Shipping Act, supra note 638, at 70. See Gorton Comments, supra note 638, at S1571; Shipping Act Compromise Designed to Reduce Antitrust Uncertainty, TRADE REG. REP. (CCH) No. 638, at 2 [hereinafter cited as Act Compromise].
640 Shipping Act, supra note 638, at 71.
641 Gorton Comments, supra note 638, at S1571; Act Compromise, supra note 639, at 2.
642 The Act requires the Federal Maritime Commission to approve or disapprove the agreement within 45 days of its filing. Shipping Act, supra note 638, at 72.
Commission may seek an injunction against the agreement. The Act also precludes per se antitrust condemnation of concerted conduct.

3. United States-Canada Antitrust Cooperation Agreement

Canada and the United States signed a memorandum of understanding on March 9, 1984 to promote cooperation between their antitrust agencies and to reduce potential antitrust enforcement conflicts. The agreement requires notice before one nation takes any action that might affect the other nation's interests. If requested, bilateral consultations are required. Either nation may request the other to participate in private antitrust actions in the other's courts. The agreement also provides voluntary methods for obtaining documents located in the other nation. Both nations agreed not to discourage its citizens or businesses from providing information to the other nation. The memorandum was the third such agreement between the two countries in the past twenty-five years.

4. European Community-IBM Antitrust Settlement

The Commission of the European Communities announced the settlement of its antitrust proceeding against IBM on August 2, 1984. In the settlement, IBM pledged to disclose more information about its new products. This information would presumably allow competitors to develop interface between their products. IBM may terminate the agreement any time after January 1, 1990, upon one year's notice; otherwise, the agreement has an indefinite lifespan. The settlement is the culmination of investigations into

643 Shipping Act, supra note 638, at 72-73. The Conference Committee developed the standard because of concerns that the current standard was too vague. Act Compromise, supra note 639, at 2.
644 Gorton Comments, supra note 638, at S1572.
646 Id.
647 Id.
648 Id.
649 Id.
650 Id.
651 EC, IBM Settle Antitrust Dispute; Computer Firm to Disclose New Product Data Sooner, 1 INT'L TRADE REP. (BNA) 156 (1984).
652 Id.
653 Id. at 156-57.
654 Id. at 157.
5. LTV-Republic Steel Merger

On August 2, 1984, the Department of Justice reversed an earlier announcement and agreed not to oppose a merger between the LTV Corporation and Republic Steel Corporation. The Justice Department's earlier announcement opposing the merger between the United States' third and fourth largest steelmakers drew sharp criticism from Commerce Secretary Malcolm Baldridge and United States Trade Representative William Brock. Negotiations between the Antitrust Division and the steel concerns produced an agreement whereby LTV could acquire Republic if the companies divested themselves of two steel mills. A United States district court approved the consent agreement. On December 4, 1984, the Justice Department announced it had approved the sale of one mill, and was seeking a trustee to handle the sale of the second mill.

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655 Id. Several United States companies complained that IBM was violating EC antitrust regulations by withholding detailed specifications of new products, which presumably prevented competitors from developing compatible equipment. Id.

Both sides had good reason to settle. IBM is the largest computer and data-processing company in Western Europe, with 1983 revenues of $10.6 billion. IBM employs 100,000 people in Europe, spends $2 billion a year on goods and services there and pays $1 billion in taxes, making it one of the ten largest taxpayers in Europe. Id.


658 Baldrige termed the decision a world class mistake. Smith, Baldridge Clash Over Opposition by Justice to LTV-Republic Merger Plan, 9 U.S. IMPORT WEEKLY (BNA) 756 (1984). In a statement released on February 16, 1984, Baldridge stated that when "the Clayton Act was passed in 1913, it was right to be concerned about the risks of collusion in more concentrated markets." However, Baldridge went on to state that in 1984 "when the American steel companies have less than 10 percent of the world market, the risk is not so much that of potential price-fixing—the far greater risk is that if we do not allow our companies to become competitive on a world basis, we will see their gradual decline." Justice Objects to LTV-Republic Merger in Face of Criticism from Brock, Baldrige, 9 U.S. IMPORT WEEKLY (BNA) 673 (1984) [hereinafter cited as Justice Objects]. Brock added that if "justice does not recognize that competition is no longer limited to the fifty states, then protectionism will have found a new crack in the door." Id.

659 United States v. LTV Corp., supra note 656, at 66,335-36. The mills scheduled for divestment were located in Massillon, Ohio and Gadsden, Alabama. Id.

660 Id. at 66,334.

661 Consent Decrees, TRADE REP. (CCH) No. 680, at 4.
6. Laker Airways

The District of Columbia Court of Appeals upheld antisuit injunctions preventing two European airlines from joining an action in British courts to prevent a defunct airline from pursuing an antitrust proceeding against them in the United States. Laker Airways originally filed two antitrust suits in United States district court alleging that Defendants' predatory competitive practices drove the airline out of business. The four foreign defendants then won injunctions in British courts ordering Laker not to pursue the antitrust action in the United States. Laker then sought an antitrust injunction to prevent defendant Sabena, KLM, and Royal Dutch Airlines from joining the British airlines and removing themselves as defendants in the United States action. In upholding the district court's ensuing order, the court of appeals stated that both the United States and Great Britain have concurrent prescriptive jurisdiction. The court also stated that the

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663 Laker Airways originally filed two antitrust actions. They were consolidated on March 9, 1983. Id. at 919. Laker Airways initiated its no-frills air service between New York and London in 1977. By offering fares at approximately one-third the cost of other carriers, Laker at its zenith carried one of every seven passengers flying between New York and London. Laker alleged that defendant airlines conspired to set their full-service fares at predatory levels, paid secret commissions to travel agents to direct potential customers away from Laker, and interfered with Laker's financing arrangements in an effort to drive Laker out of business. In 1982, Laker succumbed and closed. Id. at 917.


665 Laker Airways, Ltd. v. Sabena, Belgian World Airways, 731 F.2d at 918.


667 Laker Airways, Ltd. v. Sabena, Belgian World Airways, 731 F.2d at 926. The United States had territorial jurisdiction because the alleged conspiracy affected United States consumers. Similarly, Laker's principal creditors are United States citizens, who availed themselves of United States law. Great Britain has territorial jurisdiction because Laker did business in the United Kingdom and because some of the alleged conspiratorial acts occurred in the United Kingdom. The principal reason, however, is the nationality of the parties; Laker
juncture "does not transgress either the principles of international comity or nationalist-based prescriptive jurisdiction on which KLM and Sabena rely."\textsuperscript{668} The United States action could proceed.\textsuperscript{669} The court commented, however, that the antisuit injunctions were only the "flashpoint" of the controversy and that the primary problem of fundamentally opposed policies of the two governments\textsuperscript{670} should be resolved through diplomatic and executive channels.\textsuperscript{671}

7. Application of the Robinson-Patman Act to Middleman Sales

In a case of first impression, the District Court of New Jersey held that the Robinson-Patman Act,\textsuperscript{672} prohibiting discriminatory pricing, applies to sales of goods to domestic middlemen who then resell the goods, which are ultimately sold abroad.\textsuperscript{673} Plaintiffs in this case package and distribute automotive replacement parts for sale in the United States and abroad.\textsuperscript{674} They alleged that defendant part manufacturer committed antitrust violations as well as contract and tort violations.\textsuperscript{675} The court denied Defendants' motion for summary judgment in part because Defendants' sales to Plaintiffs were not exempt from the Robinson-Patman Act.\textsuperscript{676} The Act prohibits the discriminatory pricing of commodities sold for use, consumption, or resale within the United States or its possessions. However, export sales are excluded from the Act's provi-

\textsuperscript{668} Id. at 915. According to the court, "Limitations on the applicability of comity dating from the origins of the doctrine recognize that a domestic forum is not compelled to acquiesce in pre- or post-judgment conduct by litigants which frustrates the significant policies of the domestic forum." Id.

\textsuperscript{669} Id. at 955.

\textsuperscript{670} Id. at 916.

\textsuperscript{671} According to the court, "At the root of the conflict are the fundamentally opposed policies of the United States and Great Britain regarding the desirability, scope, and implementation of legislation controlling anticompetitive and restrictive business practices." Id. at 955.


\textsuperscript{674} Id. at ¶ 65,949.

\textsuperscript{675} Id. at ¶ 65,950. Plaintiffs alleged that the defendant engaged in price discrimination and other pricing practices to drive them out of business. The complaint also alleged that Defendant misrepresented its prices to Plaintiffs as the most favorable it was offering and, \textit{inter alia}, that Plaintiff's supplier competed with Plaintiffs for their own customers. Id. The specific parts in question were valve tappets. Id. ¶¶ 65,949-50.

\textsuperscript{676} Id. ¶ 65,951.
The court stated that the language of the statute, the legislative history, and public policy dictate that it should apply to sales to middlemen who then resell the goods. It matters not that the goods are eventually sold abroad. “Congress drew the line between export-oriented activity and domestic economic activity by exempting the export transaction and the sale to the exporter, but not additional domestic transactions.”

8. Relevant Market for Oilfield Services

The district court in Gearhart Industries, Inc. v. Smith International, Inc. held that the world is the relevant geographic market for the oilfield services industry for antitrust purposes. The United States District Court for the Northern District of Texas found that an oilfield services company was not entitled to a preliminary injunction against a tender offer because the company was not likely to succeed on the merits of an antitrust claim. Plaintiff Gearhart Industries contended that an acquisition by defendant Smith International would violate the Clayton Act by substantially lessening competition within the Measurement-While-Drilling (MWD) sector of oilfield services. After determining MWD to be the relevant product market, the court stated that the relevant geographical market for MWD is the world and not simply the United States because the oil services industry is a worldwide industry. The court further found that Smith was not a

677 Id. ¶ 65,950.
678 Id. ¶¶ 65,951-53.
679 Had Congress intended the Act to apply solely to goods ending up in the United States, it would have omitted the word ‘resale’ from that statute instead of providing only for domestic ‘use or consumption.’ It did not do so. Only by ignoring the word ‘resale’ can the defendants’ construction be rendered plausible.

Id. at ¶ 65,951.

It is clear from this example that, unless the next immediate resale is for export, a given domestic transaction is covered by the Act. The export exemption, therefore, does not apply to the instant situation where the defendants’ sales to Interparts and Plaintiffs were domestic transactions removed from export. Id. ¶ 65,952.

681 Id. ¶ 66,107.
682 Id. ¶ 66,190.
683 Id. ¶¶ 66,191-92. The court rejected a contention that foreign government regulations have significant effects on a company’s ability to offer MWD services abroad and that, thus, the relevant geographic market should be the United States. “[T]he oil services industry is clearly worldwide and no company’s scope is limited to just the United States market.” The court pointed out that Gearhart’s advertisements indicated it intended its MWD services to
viable competitor of Gearhart in the MWD. In terms of its potential as a competitor, Smith's independent entry into the market would have little impact in the foreseeable future. Therefore, the court affirmed that Gearhart was unlikely to be successful in its claim that the acquisition by Smith would violate antitrust laws.

9. Pilkington Brothers - FTC Case

The Federal Trade Commission (FTC) challenged on anticompetitive grounds the acquisition of thirty percent of the stock of a United States float-glass manufacturer by a British manufacturer of the same product. Pilkington Brothers, P.L.C., the world's largest manufacturer of float-glass, had acquired thirty percent of Libby-Owens-Ford Company of the United States, the fourth largest float-glass manufacturer in the world and the second largest in the United States. The FTC charged that the acquisition would increase already high levels of concentration in the industry, eliminate Libby as an innovator and competitor in the field, and eliminate substantial actual and potential competition between the two companies. Under its settlement with the FTC on June 22, Pilkington agreed to sell its forty-nine percent ownership of Ford Glass, Ltd., a Canadian float-glass producer, and surrender certain controls over Vitro Plan S.A., a Mexican producer of which Pilkington owns thirty-five percent.

10. National Cooperative Research Act

Congress enacted the National Cooperative Research Act as a means of maintaining the United States' competitiveness in the world market by clarifying the application of antitrust laws to joint research and development (R & D) ventures. Antitrust laws had
tended to discourage such joint ventures among United States
compaines while other industrialized countries had sanctioned col-

laborative efforts. Section three of the Act provides that in anti-

trust actions against R & D ventures, the court will not deem the
venture illegal per se but will instead apply a rule of reason consid-
ering all relevant factors affecting competition. Under section four, any claimant prevailing in an action against a joint R & D
venture would recover only single damages rather than treble dam-
ages. A prevailing claimant would receive attorney’s fees and a
prevailing defendant would receive attorney’s fees if the claim or
claimant’s conduct was “frivolous, unreasonable, without founda-
tion, or in bad faith.” Section six requires that the Attorney
General and Federal Trade Commission be notified of the partici-
pating parties and of the nature and objectives of the venture.
The Act further provides that notice of the participants and the
general area of activity be published in the Federal Register.

opment ventures, thus reducing the risk of such ventures and producing incentives
for companies to join together and undertake the complex research projects which
are necessary if the United States is to maintain its competitive edge in the world
marketplace. Currently, many pro-competitive joint research and development
ventures never come about because of the risk of antitrust challenge; society suf-
fers accordingly because of inefficiency and duplication of effort.

Id.

“Joint R & D venture” means any group of activities by two or more persons for the
purpose of: (1) theoretical analysis, experimentation, or systematic study of phenomena or
observable facts; (2) development or testing of basic engineering techniques; (3) the exten-
sion of investigative findings or theory of a scientific or technical nature into practical appli-
cation for experimental and demonstration purposes, including the experimental production
and testing of models, prototypes, equipment, materials, and processes; (4) the analysis, collec-
tion, and exchange of research information; or (5) any combination of the foregoing. R &
D Act, supra note 690, at 1815.

“If a joint R & D program has no anticompetitive effects, or if any such
effects are outweighed by its procompetitive effects, then it should not be deemed to violate
the antitrust laws.” Joint Explanatory Statement of the Comm. of Conference, 130 Cong.

The guiding principle is that R & D conduct within the scope of a joint research
and development venture is never subject to more than actual damage recovery
where there is compliance with the requirements of section 6 [regarding notifica-
tion]. This is so even if it is subsequently demonstrated that there has been a
violation of the antitrust laws. The recovery, however, should fully reimburse the
injured plaintiff.

Joint Statement, supra note 694, at H9942.

R & D Act, supra note 690, at 1817.

Id. at 1818.

Id.
VI. Agriculture

A. Wine Equity Act

Despite administration opposition and harsh criticism from the European Community, Congress enacted the Wine Equity and Export Expansion Act.699 The measure granted grape growers standing as part of the wine industry, enabling them to file antidumping and countervailing duty actions with the United States International Trade Commission against imported wines.700 According to the administration and the European Community, the provision violated General Agreement on Tariffs and Trade principles and would probably draw retaliation from countries affected by the measure.701 The Act directs the United States Trade Representative to identify major wine-trading countries which maintain tariff

700 Id. at 3047. See Congress Overwhelmingly Approves Trade Bill After Conferrees Resolve Differences, 1 Int'l Trade Rep. (BNA) 388 (1984).
701 Objections Remain to Wine Trade Reciprocity Provision Included in Omnibus Trade Measure, 1 Int'l Trade Rep. (BNA) 496, 497 (1984) [hereinafter cited as Objections Remain]:

Section 8 of the bill [H.R. 3795] changes countervailing and dumping duty laws so that the definition of industry is broadened to include grape producers when such producers of wine and grape products face import competition. In other words, grape producers can file a suit against foreign wine producers because this bill describes themselves as a component of a United States industry producing a like product. This provision clearly violates article VI of the GATT subsidies dumping codes which specifically require that complainants be producers of a like product. There is a long history of interpreting a like product to be identical or to have characteristics closely resembling those of the produce under consideration. Under GATT the United States has argued successfully that agriculture imports do not constitute a like product. By providing a departure from GATT principles, the bill will probably encourage retaliation.


Jacques Bourgeois provided the European Community's response to the Act: "The Community considers the possibility now given to the grape growers to start antidumping and countervailing duty proceedings against imports on wine an unprecedented and flagrant departure from established international rules." EC Seeks Subsidies Code Committee Meeting on Grape and Wine Provisions in Trade Act, 1 Int'l Trade Rep. (BNA) 598 [hereinafter cited as EC Seeks]. The European Community protested through official GATT channels. Id. at 598; EC Wins Support at GATT in its Complaint Against Wine Provision in New Trade Act, 1 Int'l Trade Rep. (BNA) 723 (1984).

The bill's proponents pointed out the United States subjects 77% of imported wine to a duty of 37.5 cents per gallon, the lowest of any major wine-producing country. 130 Cong. Rec. H10,982 (daily ed. Oct. 3, 1984) (remarks by Congressman Shumway). They also claimed that the grape-growing industry is part of the wine industry. "Grapes are as essential to wine as petroleum is to gasoline." 130 Cong. Rec. H10,985 (daily ed. Oct. 3, 1984) (remarks by Congressman Gibbons).
barriers, non-tariff barriers, or other measures distorting the United States wine trade.\textsuperscript{702} Moreover, the Act directs the Trade Representative to consult with wine-producing nations to reduce barriers to United States wine trade.\textsuperscript{703} The Act also calls for an export promotion program for United States wines.\textsuperscript{704}

B. Agricultural Trade Disputes

The European Community (EC) notified the General Agreement on Tariffs and Trade (GATT) members on April 6, 1984 of its intent to begin negotiations with the United States regarding limitations on United States cereal substitute imports.\textsuperscript{705} In June and October, the EC proposed a duty-free limitation of 3 million metric tons annually. As a concession, the EC increased the limit to 3.4 million tons.\textsuperscript{706} United States officials acknowledged the legality of the EC initiative,\textsuperscript{707} but called the move unjust and unfair.\textsuperscript{708}

\footnotesize

\textsuperscript{702} Wine Equity Act, supra note 699, at 3048-49.
\textsuperscript{703} Id. at 3049.
\textsuperscript{704} Id. at 3050.
\textsuperscript{705} EC Notifies GATT of Intention to Open Negotiations on Corn Gluten Imports, 20 U.S. EXPORTS WEEKLY (BNA) 839 (1984) [hereinafter cited as EC Notifies]. The EC stated that imports of cereal substitutes such as corn gluten, corn germ oilcakes, and brewing and distilling residues had more than doubled from 1981 to 1983. In 1983, the United States exported about 3.5 million metric tons of cereal by-products to Europe. Id. See also EC Maintains It Will Impose Corn Gluten Duty, U.S. Says It Would Retaliate as Talk Begins, 20 U.S. EXPORT WEEKLY (BNA) 1069 (1984) [hereinafter cited as EC Maintains].

The EC and the United States agreed to a tariff concession regarding cereal substitutes when the EC was organized in 1958. The value of the imports has grown from $17 million in 1958 to $600 million in 1983. Id. at 1069.

GATT permits nations to alter previously negotiated tariff levels so long as they compensate the affected supplier. The country must first open bilateral negotiations with its trading partners, and if they reach no agreement, the trading partners may retaliate. See General Agreement on Tariffs and Trade, done Oct. 30, 1947, 61 Stat. 73, T.I.A.S. No. 1700, 55 U.N.T.S. 187, art. XXVIII.

EC agricultural delegate Michel Jacquet stated that the change in the corn gluten importation policy was part of a scheme to streamline the EC's agricultural policy. According to Jacquet, stabilizing corn gluten was necessary because so much corn gluten was entering Europe that farmers were using European Community cereal surplus for animal feed. EC Maintains, supra, at 1069.

\textsuperscript{706} See EC Maintains, supra note 705, at 1069; EC Offers to Increase Corn Gluten Quotas But U.S. Rejects Offer as Insufficient, 1 INT'L TRADE REP. (BNA) 501 (1984) [hereinafter cited as U.S. Rejects].
\textsuperscript{707} U.S. Rejects, supra note 706, at 501. The United States position is reflected in the following statement by Donald Phillips, the commodity policy director for the United States Trade Representative: "Under Art. XXVIII [of GATT] we have got to maintain a balance in tariff compensation, and this calls for compensation in addition to making the restrictions a little less onerous. We recognize the EC has the right to do this [impose quotas] under GATT rules, but we believe there is no economic justification for this move. It's our belief we will not reach agreement on this issue." Id.
United States officials threatened retaliation if the EC implemented the restrictions.\footnote{Block Blasts EC for Blocking Subsidy Pact, Says Limits on Corn Gluten Would Be ‘Unjust,’ 1 INT’L TRADE REP. (BNA) 392 (1984) [hereinafter cited as Block Blasts].} The parties did not schedule further talks following the October meeting.\footnote{See U.S. Rejects, supra note 706, at 501.}

The United States and Japan agreed to new quotas for United States beef and citrus exports to Japan. The compromise quotas averted a United States complaint to GATT and a Section 301 complaint by the National Cattlemen’s Association.\footnote{Id.} The agreement allows Japanese imports of United States beef to reach 58,400 metric tons, while citrus imports may reach 126,000 metric tons annually over the four-year term.\footnote{Japan Agrees to Buy More U.S. Beef, Citrus; U.S., Industry Drops Plans to File Complaints, 20 U.S. EXPORT WEEKLY (BNA) 838 (1984) [hereinafter cited as Japan Agrees].} In 1984, the United States filed a complaint under GATT subsidies Code article XVIII charging that Brazil and the EC were illegally subsidizing poultry sales to the Middle East.\footnote{Subsidized Poultry, supra note 713, at 10.} At a June meeting, Brazilian officials responded to United States charges by claiming that article XIV (30 of the GATT subsidies Code) allows a developing country to use subsidies to protect its market.\footnote{Id. See Agreement on Interpretation and Application of Articles VI, XVI and XXVIII of the General Agreement on Tariffs and Trade, Art. 14(3), April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, reprinted in Contracting Parties to the General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents 56, 73 (Sept. 26, 1980).} Brazil refused to discuss the matter until the United States withdrew the complaint.\footnote{Subsidized Poultry, supra note 713, at 10.}

The previous Japanese-American bilateral trade plan expired a week before the compromise agreement. It provided for an increase of 3,300 metric tons of beef imports annually until the 1984 imports rise by 3,300 metric tons a year, to the 1984 quota of 30,800 tons annually. The citrus quota increased by 5,000 metric tons per year to 82,000 metric tons in 1984.\footnote{Japan had offered to allow the beef quota to increase by 5,500 metric tons a year, but the United States sought a 10,000 ton annual increase. The Japanese Ministry of Agriculture, Forestry, and Fisheries (MAFF) had predicted Japanese beef consumption would increase 21,000 metric tons per year over the next four years. The MAFF said Japanese producers would supply 13,000 metric tons of the increase annually, with the United States and Australia providing the remainder. Australia was exporting 110,000 metric tons of beef annually to Japan in 1984. Plan on Increased Capital, Financial Market Access Delayed, Proposal Set on Beef Quotas, 20 U.S. EXPORT WEEKLY (BNA) 746 (1984).} Japan had offered to allow the beef quota to increase by 5,500 metric tons a year, but the United States sought a 10,000 ton annual increase. The Japanese Ministry of Agriculture, Forestry, and Fisheries (MAFF) had predicted Japanese beef consumption would increase 21,000 metric tons per year over the next four years. The MAFF said Japanese producers would supply 13,000 metric tons of the increase annually, with the United States and Australia providing the remainder. Australia was exporting 110,000 metric tons of beef annually to Japan in 1984. Plan on Increased Capital, Financial Market Access Delayed, Proposal Set on Beef Quotas, 20 U.S. EXPORT WEEKLY (BNA) 746 (1984).

Japan Agrees, supra note 712, at 838.

\footnote{U.S., EC, Brazil Unable to Resolve Dispute Over Subsidized Poultry Sales to Middle East, 1 INT’L TRADE REP. (BNA) 10 (1984) [hereinafter cited as Subsidized Poultry].}

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\footnote{Id. The April 7 agreement provided that the United States beef quota would increase 6900 metric tons a year and that the citrus quota would increase 11,000 metric tons a year.}
C. GATT Agriculture Committee

In 1984, the General Agreement on Tariffs and Trade's Agriculture Committee reached a fragile agreement for negotiations to bring agricultural subsidies and quantitative restrictions under greater GATT discipline.\(^7\) As a compromise between the United States and the EC, the document provided for simultaneous negotiations on both a total subsidies ban and on a subsidies ban with certain exceptions.\(^7\) The negotiation agreement represents the result of a 1982 GATT objective to settle the aged subsidies dispute between the United States and the EC.\(^7\)

D. GATT Dairy Agreement

In December 1984 the United States announced plans to withdraw from the General Agreement on Tariffs and Trade's International Dairy Agreement because the arrangement reached in 1982 was no longer effective.\(^7\) The United States earlier told the GATT Dairy Council that it would re-evaluate its membership in light of the EC's sale of 100,000 metric tons of butter to the Soviet bloc and Middle East at subsidized prices well below the agreement minimum.\(^7\) Almost simultaneously with the EC butter sale,

\(^7\) GATT Committee Reaches Subsidy Compromise But Further Progress Linked to Other Issues, 1 Int'l Trade Rep. (BNA) 613 (1984) [hereinafter cited as GATT Committee].

Quantitative restrictions include restrictions maintained by the United States under its 1955 waiver to GATT, import and export activities of state trading, voluntary restraint agreements, variable levies and charges, unbound tariffs, and minimum import price arrangements. Id. See Waiver Granted to the United States in Connection with Import Restrictions Imposed Under Section 22 of the United States Agricultural Adjustment Act [of 1933] as Amended, Contracting Parties to the General Agreement on Tariffs and Trade, Basic Instruments and Selected Documents 32 (Sept. 3, 1955).

Before formulating the agreement, the committee sought to identify the agricultural trade policies and practices which did not conform to the GATT. GATT Agriculture Committee Completes First Job: Report on Barriers and Aid, 9 U.S. Import Weekly (BNA) 822 (1984) [hereinafter cited as Agriculture Report].

\(^7\) The committee reached an informal agreement calling for the phasing out of agricultural export subsidies as soon as possible. The United States strongly supported this position. On Sept. 27, 1984, however, the EC rejected the agreement, and called for a general ban with certain exceptions. The parties reached the compromise one week before the GATT membership meeting in November 1984. Id.

\(^7\) EC Block GATT Committee Effort to the Ban of Agricultural Export Subsidies, 1 Int'l Trade Rep. (BNA) 364 (1984); Agriculture Report, supra note 716, at 822.


\(^7\) Id.
the GATT reported record milk production in 1983 of some 500 million tons, a four percent increase over 1982 levels.\textsuperscript{721}

E. International Sugar Agreement

The International Sugar Agreement expired at the end of 1984 following unsuccessful negotiations for a new agreement in July.\textsuperscript{722} The talks ended when the EC refused to accept a proposal to reduce major sugar exporters' shares of the world market.\textsuperscript{723} The conference did adopt an administrative agreement allowing the world sugar trade to continue. The agreement, however, contained no economic clauses. Conference President Jorge Zorreguieta of Argentina stated that economic negotiations might not resume within the next year.\textsuperscript{724}

F. Ban on Ethylene Dibromide

The United States Environmental Protection Agency banned the use of the fumigant ethylene dibromide (EDB) on citrus and papayas beginning September 1984.\textsuperscript{725} Scientists recently confirmed a suspected link between the chemical and cancer.\textsuperscript{726} Agricultural officials of Caribbean Basin countries claim the ban on EDB will be disastrous for the region, particularly if it were extended to mangos. Caribbean nations use EDB to control fruit flies.\textsuperscript{727} A

\textsuperscript{721} World Dairy Market Situation Shows No Sign of Improvement, Annual GATT Survey Reports, 1 INT'L TRADE REP. (BNA) 661 (1984).

\textsuperscript{722} Producing, Consuming Nations Fail to Reach New Multi-Year Agreement on Sugar Trade, 1 INT'L TRADE REP. (BNA) 62 (1984) [hereinafter cited as Sugar Trade]. The International Sugar Agreement, 906 U.N.T.S. No. I-12951, seeks to maintain world sugar prices between 13 and 23 cents per pound by using export quotas when prices are low, and by releasing stocks when prices are high. GAO Says Decreased Demand, Higher Prices, Lower Imports Changing Sweetener Market, 1 INT'L TRADE REP. (BNA) 655 (1984) [hereinafter cited as GAO Says]. After Zorreguieta announced insufficient goodwill to negotiate prices on June 29, 1984, the price of sugar on the world market dropped to 4.87 cents per pound, the lowest in 20 years. See Sugar Trade, supra at 63. In November, the General Accounting Office issued a report calling the ISA a failure, and attributing much of the blame on EC surpluses. GAO Says, supra at 655.

\textsuperscript{723} Sugar Trade, supra note 722, at 63.

\textsuperscript{724} Id.


\textsuperscript{727} Id. Several Caribbean countries had planned to increase their mango acreage to take advantage of duty-free access to United States markets under the Caribbean Basin Initiative. A post-harvest technology expert for the Jamaican Ministry of Agriculture stated that the United States was "giving to us through the Caribbean Basin Initiative with one hand and taking from us by the ban on ethylene dibromide with the other." Id.
United States Department of Agriculture (USDA) official in Florida predicted the ban would cost Florida citrus growers $112 million in lost grapefruit exports to Japan.\(^{728}\) Japan requires either EDB or cold treatment of citrus to prevent the introduction of the fruit fly into the country.\(^{729}\) The Agency for International Development is helping Caribbean countries find alternatives to EDB, while the USDA is experimenting with alternatives for United States exporters.\(^{730}\)

G. **Crop Support Bill**

In 1984 Congress enacted a bill reducing domestic support levels for export crops such as wheat, corn, unplanted cotton, and rice.\(^{731}\) This bill reflects the Reagan administration's agreement to increase agricultural export assistance programs.\(^{732}\)

In a joint resolution, Congress established a thirty-five member commission to explore methods of improving United States agricultural export and trade programs.\(^{733}\) The group's initial task was to complete a report that could be considered with the 1985 farm bill.\(^{734}\)

H. **Agricultural Imports Litigation**

The Court of International Trade ruled that the United States government may negotiate voluntary restraining agreements to set beef import quotas at levels lower than the minimum access floor in the Meat Import Act of 1979.\(^{735}\) The Meat Import Act\(^{736}\) pro-

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\(^{730}\) *Id.*


\(^{733}\) *Agricultural Trade and Export Policy Commission Act*, Pub. L. No. 98-412, 1984 *U.S. CODE CONG. & AD. NEWS* (98 Stat.) 1576. The Commission included members of Congress, executive officials, and representatives of the farm industry. The resolution directed the Commission to study issues such as international trends affecting agriculture, food assistance, the effectiveness of existing agricultural assistance programs, potential new export programs, the practices of foreign countries, and the effectiveness of United States agricultural trade agreements. *Id.* at 1576-77.

\(^{734}\) *New Agricultural Export Study Commission Meets for First Time, Sets Agenda for Year*, 1 *INT'L TRADE REP.* (BNA) 675 (1984).

\(^{735}\) *Australian Meat and Live-stock Corp. v. Block*, No. 84-65, *U.S. IMPORT WEEKLY* (BNA)
vides that the United States Department of Agriculture may set ceilings on the beef imports in relation to domestic production. The ceiling, however, may not be lower than 1.25 billion pounds.\textsuperscript{737} The CIT held that the Act's floor applies only to imposed limits; the court did not mention or modify the government's power to negotiate such limits.\textsuperscript{738}

VII. JURISDICTION

A. In Personam Jurisdiction Over Foreign Manufacturers

The District Court for the Northern District of Iowa\textsuperscript{739} determined in 1984 when a foreign components manufacturer would be subject to in personam jurisdiction. The Eighth Circuit subsequently upheld the lower court's decision.\textsuperscript{740} Defendant, a Japanese manufacturer of car seats, was sued in the United States for money damages allegedly arising out of an accident involving an automobile containing its seats. The lower court dismissed the case for lack of in personam jurisdiction.\textsuperscript{741}

The district court held that the manufacturer must have sufficient minimum contacts with the forum so as to comply with traditional notions of fair play and substantial justice.\textsuperscript{742} Furthermore, the manufacturer must evidence such contacts by purposely availing itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of that state's law.\textsuperscript{743} The court analyzed the case, taking into account (1) the nature and quality of the contacts with the forum state, (2) the quantity of contacts, (3) the relation of the cause of action to the contacts, (4) the interest of the forum state, and (5) the convenience of the parties.\textsuperscript{744} The court found the contacts between Defendant and the forum state too fortuitous and tenuous to warrant the exercise of personal jurisdiction over Defendant.\textsuperscript{745} The court re-
marked that although Defendant could have foreseen that its product could have found its way into the United States, it could not have reasonably anticipated being haled into court in Iowa.\textsuperscript{746} On the basis of this opinion, the Eighth Circuit affirmed the dismissal of the case.\textsuperscript{747}

B. Court of International Trade

In \textit{Vivitar Corp. v. United States},\textsuperscript{748} the court settled the question of whether the Court of International Trade has subject matter jurisdiction over a trademark owner's claim challenging Customs Service decisions concerning exclusions under the customs law. Although district courts generally have jurisdiction over trademark cases, the court held that the CIT has general jurisdiction over cases arising out of international trade disputes.\textsuperscript{749} Citing a previous decision of the CIT, the court further remarked that its jurisdictional requirements are satisfied when a plaintiff's claim relates to regulations proclaimed by Customs, and to their administration and enforcement.\textsuperscript{750} In fact, Customs Service regulations are particularly within the CIT's expertise.\textsuperscript{751}

The Court of International Trade declined jurisdiction in an action brought by an importer of sugar blend seeking an injunction restraining the Customs Service from imposing requirements which would subject the sugar content of the blend to payments.\textsuperscript{752} Reviewing the applicable statute,\textsuperscript{753} the court could not find jurisdiction\textsuperscript{754} through traditional statutory avenues.\textsuperscript{755} Despite the fact that the CIT has on occasion asserted subject matter jurisdiction in matters arising from the administration of import regulations

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\textsuperscript{746} \textit{Id.} at 533, citing World-Wide Volkswagen v. Woodson, 444 U.S. 286, 297 (1980).

\textsuperscript{747} \textit{Humble v. Toyota Motor Co.}, 737 F.2d at 711.

\textsuperscript{748} \textit{Vivitar Corp. v. United States}, 585 F.Supp. 1419 (Ct. Int'l Trade 1984). Plaintiff, a trademark owner which had granted permission to licensed foreign manufacturers to use its trademark, challenged a Customs Service decision excluding products bearing identical trademarks from customs restrictions when both foreign and United States trademarks are owned under the control of the same entity or when that trademark was applied under authorization of the United States owner. 19 C.F.R. 133.21 (1984).


\textsuperscript{751} \textit{Vivitar v. United States}, 585 F. Supp. at 1423.

\textsuperscript{752} \textit{Arbor Foods, Inc. v. United States}, No. 84-12-01722, slip op. 84-140 (Dec. 11, 1984).


\textsuperscript{754} \textit{Arbor Foods, supra} note 752, at 6.

\textsuperscript{755} 28 U.S.C. § 1581(a) - (h) (1983).
where the plaintiff has not exhausted administrative remedies,\textsuperscript{756} the court found insufficient reason to do so in this case.\textsuperscript{757} The court recommended that Plaintiff seek recourse by way of administrative protest.\textsuperscript{758}

The Court of International Trade in \textit{American Association of Exporters and Importers v. United States}\textsuperscript{760} addressed the threshold issues of subject matter jurisdiction and standing and their role in governing access to the Court of International Trade. The court also examined the respective roles of the executive and legislative branches in regulating foreign trade, particularly regarding the delegation of powers between the branches.\textsuperscript{760} Plaintiff, a trade association representing textile importers and retailers in the United States, brought this action to obtain relief from government policies imposed by the executive branch which restrained imports of textiles into the United States.\textsuperscript{761} Addressing the issue of subject matter jurisdiction, the court stated that neither a denied protest\textsuperscript{762} nor exhaustion of administrative remedies\textsuperscript{763} was a prerequisite for asserting jurisdiction. The court also held that Plaintiff had standing to sue since its members had a direct interest in purchasing the regulated products.\textsuperscript{764} Finally, the court said that while the power to regulate commerce between the United States and foreign nations is vested in Congress,\textsuperscript{765} Congress may in its discretion delegate this power.\textsuperscript{766} Citing numerous instances where the executive branch had acted pursuant to such delega-

\textsuperscript{756} \textit{Arbor Foods, supra} note 752, at 5. The CIT may review administrative and enforcement actions under 28 U.S.C. § 1581(i) (1983). The court in its discretion may waive the requirement that Plaintiff exhaust all administrative remedies.

\textsuperscript{757} \textit{Arbor Foods, supra} note 752 at 6.

\textsuperscript{758} Id.

\textsuperscript{760} 583 F. Supp. 591 (Ct. Int'l Trade 1984). These issues were raised by government motions to dismiss for lack of subject matter jurisdiction, failure to exhaust administrative remedies, and lack of standing. \textit{Id.} at 592.

\textsuperscript{761} This issue stemmed from Plaintiff's allegations questioning the authority of the President to regulate foreign trade and Defendant's motion to dismiss for failure to state a claim upon which relief could be granted. \textit{Id.}

\textsuperscript{762} \textit{Id.}

\textsuperscript{763} \textit{Id.} (citing 28 U.S.C. 2637(d) (Supp. V 1981)).

\textsuperscript{764} American Assoc. of Exporters and Importers v. United States, 583 F. Supp. 592 (citing 28 U.S.C. § 2637(d) (Supp. V. 1981)). The court stated that exhaustion is a discretionary tool to be used by the court in prudence and equity. \textit{Id.} at 597.

\textsuperscript{765} American Assoc. of Exporters and Importers v. United States, 583 F. Supp. at 597-98.

\textsuperscript{766} U.S. Const. art. I, § 8, cls. 1, 3.

tion,\textsuperscript{767} the court concluded that the President had authority to impose restrictions on textile imports.\textsuperscript{768} The court also granted Defendant's motion to dismiss for failure to state a claim upon which relief could be granted.\textsuperscript{769}

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\textsuperscript{768} American Assoc. of Exporters and Importers v. United States, 583 F. Supp. at 598.

\textsuperscript{769} Id. at 599.