ANNUAL SURVEY OF DEVELOPMENTS IN INTERNATIONAL TRADE LAW: 1983

As the volume of world trade burgeons, the demands on private international law associated with the trend towards a world economy will escalate accordingly. In recognition of this private legal trend, the *Georgia Journal of International and Comparative Law* in conjunction with the Dean Rusk Center for International Law now introduces a new feature intended to become a yearly supplement to the Journal's existing body of international legal criticism. This annual survey provides a catalogue of the recent changes and developments in international trade law which will serve both academicians and practitioners. The survey highlights developments from a United States perspective, focusing on areas such as the regulation, litigation, and multilateral or bilateral negotiation of trade issues in 1983.

— the 1984-85 Managing Board —
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I. UNFAIR TRADE PRACTICES

A. Antitrust

1. Trademark Enforcement

The Ninth Circuit Court of Appeals reiterated the heavy burden of proof imposed upon one who uses antitrust law to oppose trademark enforcement in *Model Rectifier Corp. v. Takachiho International, Inc.* A preliminary injunction had been issued in the case barring the sale of automobile kits imported into the United States, with the exception of such imports by the exclusive United States distributor. According to the defendant, the plaintiff was unfairly exempted from the Sherman Act by the injunction. Nevertheless, the court upheld the injunction due to the defendant's failure to prove a relevant market.

2. Stating a Cause of Action

The Fifth Circuit Court of Appeals held in *Industrial Investment Development Corp. v. Mitsui and Co.* that the United States corporation had a cause of action for an alleged conspiracy against its subsidiary. The plaintiff alleged conspiracy to restrain competition, restriction of freedom of commerce, and direct injury resulting from a conspiracy to deprive the corporation of business profits. The court explained that it might dismiss a case in the pleading stage where recovery could lead to "duplicative awards against the defendants" or to an "excessively complex apportionment of damages." There was, however, neither a danger of dual recovery, nor a need for complex damage apportionment; therefore, the complaint sufficiently stated an antitrust cause of action.

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1 See *infra* notes 280-284 and accompanying text for a discussion of Laker Airways Ltd. v. Pan American World Airways, 568 F. Supp. 811 (D.D.C. 1983), in which the plaintiff charged eight other airlines with violation of the Sherman Act sections 1 and 2. Laker claimed that the defendants conspired to force the plaintiff into liquidation to avoid the competition caused by Laker's low-fare rates between the United States and Great Britain. *Id.*

2 No. 82-5695, slip op. (9th Cir. May 18, 1983).

3 "The natural monopoly that a trademark owner has over its product does not violate antitrust laws unless it is used to gain control of the relevant market." In this case, the defendants offered no proof on the issue, therefore, they "failed to make even a colorable showing of an antitrust violation." *Id.* See *Failure to Prove Relevant Market Bars Trademark Enforcement Opposition*, 8 U.S. IMPORT WEEKLY (BNA) No. 10, at 383 (June 8, 1983).

4 594 F.2d 48 (5th Cir. 1979), rev'd, 671 F.2d 876 (5th Cir. 1982), vacated and remanded, 460 U.S. 1007 (1983), rev'd and remanded, 704 F.2d 785 (5th Cir. 1983), denial of rehearing en banc, 709 F.2d 712 (5th Cir. 1983).

5 *Indus. Inv. Dev. Corp.*, 704 F.2d at 786. See *Associated Gen. Contractors of Cal., Inc. v.*
3. Distribution Levels

In September 1983, a federal district court in Martin Process Co. v. Lee Co. granted summary judgment to a clothing manufacturer on claims against the manufacturer made by a retailer who had violated the export policy of the manufacturer. Since there was no showing of a conspiracy by the manufacturer to eliminate foreign competition, no indication that the manufacturer and retailer competed on the same level of distribution, and no proof of any effect upon interbrand competition, the court, in Martin Process, granted the defendant's motion for summary judgment.7

4. Joint Ventures

In December 1983, General Motors Corporation and Toyota Motor Corporation entered into an agreement to work jointly in the production of a compact car.8 The Federal Trade Commission approved the venture on December 22.9 This joint venture threatens to produce extensive antitrust litigation, initially evidenced by Chrysler Corporation's recent filing of a complaint for injunctive relief.10

7 "The court found as [a] matter of law that H.D. Lee as a manufacturer and V.F. International as a distributor cannot engage in unlawful horizontal activity." Manufacturer Defeats Suit, supra note 6.
8 Chrysler Sues to Block GM-Toyota Deal, Venture Partners Vow to Proceed as Planned, 9 U.S. IMPORT WEEKLY (BNA) No. 15, at 542 (Jan. 18, 1984) [hereinafter cited as Chrysler Sues]. General Motors is the largest auto manufacturer in the world, with Toyota following close behind as the third largest manufacturer. Id.
9 "The controversy over the antitrust issues was attested to not only by the 3-2 commission vote, but by the strong objections of competitors, and the newly disclosed division within the FTC staff." FTC Provisionally Okays GM-Toyota Joint Venture, But Court Challenge Threatened, 9 U.S. IMPORT WEEKLY (BNA) No. 13, at 488 (Jan. 4, 1984). See also, FTC Staff Recommends Against Bringing Antitrust Challenge to GM-Toyota Deal, 9 U.S. IMPORT WEEKLY No. 11, at 433 (Dec. 14, 1983).

Ford Motor Co. and American Motors Corp., however, are still considering alternatives to legal action. Id. For more background information on the joint venture see Chrysler Asks FTC Chairman to Recuse Himself in GM-Toyota Joint Venture, 9 U.S. IMPORT WEEKLY (BNA) No. 4, at 136 (Oct. 26, 1983); FTC, Toyota Resume Talks on Sensitive Price Data Related to GM Joint Venture, 9 U.S. IMPORT WEEKLY (BNA) No. 6, at 241 (Nov. 9, 1983); FTC and Toyota Resume Negotiations on Submission of Sensitive Data, 9 U.S. IMPORT WEEKLY (BNA) No. 8, at 323 (Nov. 23, 1983).

The Federal Trade Commission accepted a consent order which seeks to reduce the an-
B. Dumping and Countervailing Duties

1. Regulation

   a) Applicability of Countervailing Duties to Non-Market Economy Nations

   On October 4, 1983, the United States Department of Commerce announced its acceptance of a countervailing duty petition filed against the People's Republic of China (P.R.C.) by several United States textile industry associations. The Department has never considered whether United States countervailing duty laws apply to non-market economies. The textile associations charge the P.R.C. with allowing its exporters preferential exchange rates and favored access to raw materials. According to the petition, an "internal settlement rate" allows P.R.C. exporters to exchange each dollar earned for 2.8 yuan, whereas the official rate is approximately 1.9 yuan to the dollar.

   In respect to the dual exchange rate, Senator Heinz stated that the subsidy is more clear-cut than usual for a non-market economy nation and can be measured as the difference between the preferential rate and the normal rate. He also introduced legislation...
specifically designed for the artificial pricing of articles produced by non-market economy countries.\textsuperscript{18}

b) \textit{Bill to Revise Trade Remedy Laws}

The House Ways and Means Subcommittee is currently reviewing possible changes in United States antidumping and countervailing duty laws.\textsuperscript{16} The Subcommittee first met to discuss potential changes in current trade remedy laws in March of 1983\textsuperscript{17} and recently drafted a bill on the matter.\textsuperscript{18} The proposed bill includes a Trade Remedy Assistance office and a targeting subsidy monitoring program, government export targeting schemes within the scope of countervailing duty law, revision of existing standards for assessing non-market economies under trade remedy laws,\textsuperscript{19} improvement of injury standards and threat of injury standards for both types of cases, and streamlined procedures to reduce costs and delay to ensure United States industries and labor quick access to trade remedies.\textsuperscript{20} At the end of 1983, the measure still remained in the House Ways and Means Subcommittee due to disagreement on provisions regarding natural resource transactions and nonmarket economy country investigations.\textsuperscript{21}

\textsuperscript{15} See supra text accompanying notes 16-17.
\textsuperscript{16} Trade Description, supra note 16, at 116.
\textsuperscript{17} Options to Improve the Trade Remedy Laws: Hearings Before the Subcomm. on Trade of the House Comm. on Ways and Means, 98th Cong., 1st Sess. 1, pt. 1 (Mar. 16, 17, 1983) [hereinafter cited as \textit{Hearings}].
\textsuperscript{18} Senator Sam H. Gibbons, the Subcommittee Chairman, set forth the concerns of the Subcommittee prior to the initial hearing. The concerns included countering foreign unfair trade practices, facilitating adjustment of dislocated industries and workers to increase fair import competition, strengthening the United States Government's ability to identify and address trade distorting policies pursued by foreign governments, and improving the international dispute settlement procedures in order that they may operate more effectively to remove unfair trade practices. \textit{Id.}
\textsuperscript{19} See supra text accompanying notes 16-17.
\textsuperscript{20} \textit{Hearings}, supra note 17, at 1.
\textsuperscript{21} Gibbons Plans to Finish Action on Bill Revising U.S. Trade Laws Early Next Year, 9...
Passage of a trade reform bill in 1984 is not assured even though the subcommittee is close to agreement on these outstanding issues due to criticism from various sources. European Community officials have centered their opposition on provisions concerning upstream subsidies, downstream dumping, and foreign export targeting practices. United States industries have argued that the reform proposal should impose more restrictive measures and have introduced a competing bill. The Reagan Administration expressed concern over provisions for settlement agreements and shortened investigation timetables.

2. Litigation

a) Dumping

In 1981, Zenith filed a complaint, captioned Zenith Radio Corp. v. United States, which challenged a Department of Commerce determination reducing the dumping margins so that low dumping duties would be assessed on entries during 1979-1989. Zenith then moved for a preliminary injunction to prevent those goods with the new low dumping duties from being liquidated during 1979-1980. The Court of International Trade denied the motion, however, because the plaintiff had not shown that irreparable harm would result but for the injunction. On appeal in 1983, the court of appeals held that liquidation would eliminate the plaintiff's only remedy; thus, the plaintiff did show irreparable injury. The case was reversed and remanded to the Court of International


This measure, H.R. 4124, 98th Cong., 1st Sess. (1983), is backed by a group of industries known as the Trade Reform Action Coalition. The bill, introduced on October 6, 1983, is not expected to receive much support due to its highly restrictive import measures. It does serve, however, to keep pressure on the subcommittee to address the coalition's concerns. Gibbons Plans, supra note 21.

Ways and Means Panel Nears Completion of Trade Law Changes, Bill Expected Soon, 9 U.S. IMPORT WEEKLY (BNA) No. 3, at 93 (Oct. 19, 1983). European Community Officials objected to similar provisions. Id.


Zenith, 553 F. Supp. at 1055.

Zenith, 710 F.2d at 810.
In Armco Inc. v. United States, the Court of International Trade again found no showing of irreparable harm. Armco, a domestic industry, challenged an antidumping determination. The plaintiffs showed neither that fraud influenced the determination, nor that irreparable harm would be suffered without an injunction; therefore, the motion for a preliminary injunction was denied. In another unsuccessful challenge before the Court of International Trade, Goldsmith & Eggleton, Inc. v. United States, the plaintiff's claim against an antidumping determination was denied, because the Treasury Department had not yet assessed duties on the merchandise in question. The court held that the plaintiff's right of judicial review does not begin until an assessment of duty is made. Thus, the plaintiff's action was dismissed without prejudice.

A successful challenge to the International Trade Commission's determination, that imported sugar sold at less than fair market value materially injured United States industry, was accomplished in Atlantic Sugar, Ltd. v. United States. In 1982, the court determined that the International Trade Commission's finding was unlawful under the Tariff Act, section 516 A(b)(1)(B), because the Commission used data from plants geographically outside of the investigation's boundaries. In 1983, the Court of International Trade vacated the International Trade Commission's final determination of injury. Use of improper data left the investigation without "requisite substantial legal support"; therefore, the injury determination could not be sustained. Another International Trade Commission ruling was reversed and remanded by the Court of International Trade in Matsushita

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32 Atlantic Sugar, 553 F. Supp. at 1058.
**Electric Industrial Co. v. United States.** The court found a lack of substantial evidence to support the International Trade Commission's decision not to modify or revoke an antidumping order issued against Japanese television sets. When reviewing an antidumping order, the International Trade Commission must determine whether a United States industry would be materially threatened by the imports if the order were revoked. The review should, thus, establish the continuing need for the order. The International Trade Commission's ruling showed no substantial evidence that import levels without the antidumping order would injure United States industry; therefore, the Court of International Trade reversed and remanded the case.

b) **Countervailing Duties and the Disclosure of Confidential Information**

The Court of International Trade, in American Spring Wire Corp. v. United States, required that a number of confidential documents be provided to the plaintiff, and rejected the assertion that plaintiffs had not sufficiently particularized their discovery requests. On the issue of release of confidential documents, the court explained that it considered the need of the parties to obtain government data, the need of the Government to obtain business data, and the need for protection from disclosure of confidential information to competitors.

c) **Judicial Review of Countervailing Duty Orders**

The scope of judicial review in the Court of International Trade

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55 Id. at 40. 19 C.F.R. § 207.45 (1983).
56 17 CUSTOMS BULL. & DEC., supra note 34, at 43. "Here, the unavoidable conclusion from the lack of substantial evidence of a threat of injury is that, in the light of changed circumstances, there is no threat of injury." Id. at 49.
57 The International Trade Commission's finding "took the form of a prediction that import levels from Japan would increase significantly." "Such a presumption is not permitted by law. . . ." Id. at 41.
59 "At this preparatory stage, to require plaintiffs to make an exact demonstration of how the contents of this document will support their attack on the administrative determination would, in effect, require the court to make an advance judgment of the existence of substantial evidence for those determinations." American Spring Wire Corp., slip op.
60 Id.
was further defined in *United States Coalition for Fair Canadian Lumber Imports v. United States.* The plaintiff in *United States Coalition* challenged two of the grounds upon which the International Trade Administration had based its determination that the stampage programs in question were not "countervailable domestic subsidies." The court ruled that the determination would stand despite the Court of International Trade's decision, because the plaintiff challenged only two of the four grounds of the determination. In addition, the court refused to guide the International Trade Administration in making its determination. To do so would be to "unjustifiably interfere" with the administrative function of the International Trade Administration.

In *Bethlehem Steel Corp. v. United States*, the Court of International Trade dismissed an action challenging an International Trade Administration determination, because the action had not been filed within the statutory time limit. A party wishing to contest a countervailing duty order based upon an *affirmative* ruling must file his action within thirty days of the publication of the order. When the ruling is *negative*, however, the interested party has thirty days from the publication of notice in the Federal Register. This decision was confirmed in *British Steel Corp. v. United States*. In *British Steel*, a challenge to an affirmative investigation filed before the duty order was issued was adjudged premature, but the plaintiff preserved its cause of action by filing a second suit within thirty days of that order.

In a different Bethlehem Steel case, also captioned *Bethlehem Steel Corp. v. United States*, the Court of International Trade re-

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43 *Id.* at 840. See also *Cover v. Schwartz*, 133 F.2d 541 (2d Cir. 1942), cert. den., 319 U.S. 748 (1943).


stricted judicial review of data submitted by the plaintiff. There, Bethlehem Steel sought to force the United States Government to include information from investigations of products from Europe and Brazil in the record of its countervailing duty determination regarding steel products from South Africa. The court ruled that "[t]he record for judicial review should ordinarily not contain material from separate investigations."

d) In-House Counsel and Confidential Information

Corporate counsel for U.S. Steel was denied access to confidential information from competitors of the company during a countervailing duty investigation in U.S. Steel Corp. v. United States. The distinction between in-house and retained counsel was made in light of the close employer-employee relationship between corporations and their in-house counsel. The court justified its decision by noting that corporations can still obtain necessary information by retaining outside counsel. This decision simply confirmed the court's continued reluctance to disclose confidential evidence to in-house counsel.

e) Use of Experts

In Fairchild Aircraft Corp. v. United States, the defendant moved to release certain confidential documents for expert evaluation. Both the Government and the corporation opposed the motion. The Court of International Trade responded with an "unusually detailed protective order." The defendant's motion was granted, but the order requires the defendant to consult with the plaintiffs before employing experts to evaluate the documents. Once chosen, the experts are to agree to disclose the information to no one but counsel and to submit themselves to the court's juris-

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49 Bethlehem Steel, 566 F. Supp. at 347.
51 No Access, supra note 50, at 690.
52 Id. at 689. See 19 U.S.C. § 1516 a(b) (1982).
53 No Access, supra note 50, at 689.
54 No. 83-34, slip op. (Ct. Int'l Trade, Apr. 15, 1983).
55 Id.; Protective Order Establishes Guidelines for Outside Experts, 8 U.S. IMPORT WEEKLY (BNA) No. 4, at 134 (Apr. 27, 1983) [hereinafter cited as Protective Order].
diction including any sanctions the court might impose in the case of a breach of confidentiality. 64

II. TRADE CONTROLS

A. Export Administration Act

The principal source of legislative authority to control exports is the Export Administration Act of 1979 (EAA). 57 Congress has considered extending the EAA. Several bills have been introduced to accomplish this extension; some would amend and extend the Act, others would provide alternatives or would supplement the Act. 58 The bill which has received the most attention is H.R. 3231, the Export Administration Amendments Act of 1983, introduced by Representative Bonker. This bill amends major portions of the Act, including the national security, foreign policy, administration, and enforcement provisions of the Act. 59 The House passed the bill on October 27, 1983, and the Senate placed it on the Senate calendar on October 31. 60

The Administration has introduced its own bill in the House and the Senate. 61 The European Community, however, filed a formal protest to the provisions in the Administration's bill that would enable the President to prohibit imports from countries that violate certain United States export controls related to national security. 62

As of January 1, 1984, Congress had taken no final action on the EAA. The expiration date of the EAA was extended while Congress considered changes. 63 In conjunction, President Reagan ex-

58 Id. at 135.
54 For a discussion of particular bills, see U.S. Foreign Policy Export Controls, 98th Cong., Major Legis. of the Cong. (CRS) at MLC-037 (Sept. 1983).
60 98 Cong. Index (CCH) 35,044 (Jan. 26, 1984).

1. Boycotts

A landmark decision, Abrams v. Baylor College of Medicine, held that there is a private right of action under the antiboycott section of the Export Administration Act (EAA). This decision means that the Department of Commerce will no longer be the only authority to enforce antiboycott provisions. Instead, private parties injured by violations of the Act also have a remedy.\footnote{Nos. H-81-1433 & H-82-3253 (D.S. Tex. Aug. 5, 1983) (available on LEXIS, Genfed library, Dist file). Court Rules Private Right of Action Exists in Antiboycott Cases Under EAA, 19 U.S. Export Weekly (BNA) No. 19, at 726 (Aug. 16, 1983). U.S. Antiboycott Update, V INT'L LAW. NEWSLETTER 1 (Nov./Dec. 1983). Foreign firms may intentionally insert boycott terms in their proposals in order to discourage United States competition. Id. at 2.}

Only a few days later, however, Bulk Oil (Zug) A.G. v. Sun Co. held that there is no private right of action under the EAA. The court found that the legislative history of the Act provided no indication that Congress intended a private right of action.\footnote{83 Civ. 741 (D.S.N.Y. Aug. 11, 1983). No Private Right of Action Under EAA, District Court Rules in Bulk Oil Case, 19 U.S. Export Weekly (BNA) No. 21, at 791 (Aug. 30, 1983). For a discussion of United States antiboycott laws which identifies issues under the EAA and Internal Revenue Code Section 99, see Primer on U.S. Antiboycott Laws, V INT'L LAW. NEWSLETTER 5 (Nov./Dec. 1983), which also analyzes specific contract clauses under the antiboycott laws.}

2. Commodity-Control List

In United States v. Moller-Butcher, defendants moved to dismiss the indictment in which they were charged with exporting to restricted countries without a validated license and with making false statements about the exports.\footnote{United States v. Moller-Butcher, 560 F. Supp. 550, 551 (D.C. Mass. 1983). Indictment Charging Export of CCL Items Withstands Motion to Dismiss, 19 U.S. Export Weekly (BNA) No. 4, at 123 (Apr. 26, 1983).} The defendants argued that the Government was required to prove not only that the exported goods were on the commodity control list, but also that the goods would make a significant contribution to the receiving country's military strength.\footnote{Moller-Butcher, 560 F. Supp. at 552. 50 U.S.C.A. app. §§ 2405(a)- 2410(a), (b)(1) (West 1983). In addition, the court held that the Act does not improperly delegate authority to the executive branch, because the
statute is within the realm of foreign affairs.70

3. Effect of Executive Orders

The Supreme Court refused to grant certiorari in *Spawr Optical Research, Inc. v. United States* to review convictions under the EAA for violations which occurred after the Act expired, but before it was reenacted.71 The Court ruled that an executive order issued by President Ford perpetuated the regulations. Thus, the Government had sufficient authority to prosecute violations during the lapse period.

4. Application to People's Republic of China

The Administration has adopted a more expansive export policy toward the People's Republic of China. In June 1983 President Reagan announced that the Administration would elevate the level of high technology goods licensed for export to the P.R.C.72 The Department of Commerce also liberalized export policies toward the P.R.C. Changes in applications and licensing requirements were made, especially in technical data.73

B. Trade Reciprocity Bill

Legislation is currently pending which would amend the Trade Act of 197474 by requiring an annual study of foreign trade barriers to United States goods, services, and investments.75 The bill would allow the President to negotiate reductions in trade barriers against United States investments and to enter into agreements concerning high technology industries. The President would also have the discretionary authority to retaliate against foreign unfair

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70 "The power to classify goods on the CCL ... can (and should) be turned over to the executive branch, as it has the dominant role in conducting foreign policy." *Id.* at 553.
72 *China Welcomes Administration Decision to Loosen Technology Export Controls*, 19 U.S. EXPORT WEEKLY (BNA) No. 14, at 503 (July 12, 1983).
trade practices and to enforce United States rights under trade agreements. These bills arose out of a growing concern among Congress that other countries are taking advantage of the United States in the international market. Supporters of the legislation believe that United States exports are not receiving the same treatment which the United States gives to the exports of other nations.

C. Domestic Content Bill

The House of Representatives passed the Fair Practices and Procedures in Automotive Products Act of 1983 by a slim margin. The bill would impose a domestic content level for motor vehicles sold in the United States beginning in 1985. Supporters of the legislation believe that requiring each vehicle to contain a certain percentage of parts made in the United States will preserve and strengthen the automotive industry which supports, directly or indirectly, more than two million jobs in the United States. They also feel that the recent actions of the United States automakers have caused layoffs in both the automobile manufacturer and supplier industries. The three largest Japanese manufacturers, Toyota, Nissan, and Honda, would be immediately affected by the

76 Trade Reciprocity Legislation, 98th Cong., MAJOR LEGIS. OF THE CONG. (CRS) at MLC-105 (Nov. 1983). The senate bill (S. 144) would allow the United States Trade Representative to initiate investigations under § 301 of the 1974 Trade Act (19 U.S.C. 2411). Currently, only the President can take appropriate steps to obtain limitations on restrictions or subsidies. Id.

77 Id.


79 “Motor vehicles” include automobiles and light pickup trucks. “The required percentage of domestic content—parts or labor input—would range from 10% for companies selling at least 100,000 cars here to 30% for those selling 900,000 or more in 1985. In 1986 the requirement would increase to a range of 10% to 60%, and in 1987 and thereafter, it would rise to a 10 to 90% range.” House Approves, supra note 78, at 219. See also Automobile Domestic Content Requirements, 98th Cong., MAJOR LEGIS. OF THE CONG. (CRS) at MLC-097 (Jan. 1984) [hereinafter cited as Automobile Domestic Content].

80 Supporters include the United Auto Workers, various other labor organizations and automotive suppliers. Direct employment in the auto industry numbered 688,000 in January 1983. Larger supplier industries include steel, primary aluminum, malleable iron, and synthetic rubber. H. R. REP. No. 287, Pt. 1, 98th Cong., 1st Sess. 9 (June 30, 1983).

81 These actions involve the purchase of more parts and equipment from abroad to cut production costs, increase quality, and incorporate new technology. The automakers are also joining with foreign manufacturers for production, marketing, and research. Automobile Domestic Content, supra note 79.
Act. The three largest United States automakers, General Motors, Ford and Chrysler, probably would be forced to limit foreign parts purchases and subcontracts with foreign manufacturers for assembly work.\textsuperscript{88}

Neither the Senate nor the President, however, appear prepared to accept the bill.\textsuperscript{88} A Senate bill\textsuperscript{84} establishing domestic content requirements was introduced on March 8, 1983 and has not yet moved beyond the committee to which it was referred.\textsuperscript{85} Representative Richard Ottinger, a leading proponent of the House Bill, admits that the possibility for passage in the Senate is "very small."\textsuperscript{86} Nevertheless, other comments indicate that, regardless of Senate action, legislators are concerned about the health of the United States automotive industry and the barriers imposed on United States automotive exports.\textsuperscript{87}

D. Patent Law; Section 337, Tariff Act\textsuperscript{88}

In Aktiebolaget Karlstad Mekaniska Werkstad v. United States International Trade Commission, the court considered whether the International Trade Commission could limit the scope of its second investigation to the record from the first investigation and deny the plaintiff's motion to introduce additional evidence under section 337.\textsuperscript{89} The court of appeals approved this action by the In-

\textsuperscript{88} Id. See also House Approves, supra note 78, at 219.
\textsuperscript{84} House Approves, supra note 78, at 219.
\textsuperscript{87} Senator Riegle has stated that because the bill has not been supported in the committees which have jurisdiction, he and other supporters of the bill may attempt to bring it to the Senate floor in the form of an amendment to other legislation. Sponsor of Domestic Content Bill Envisions Senate Floor Debate This Spring, 9 U.S. IMPORT WEEKLY (BNA) No. 16, at 577 (Jan. 25, 1984).
\textsuperscript{88} Another Michigan congressman, Representative John Dingell, introduced a bill (H.R. 4499) designed to restrict imports of certain motor vehicles to no more than 15% of the aggregate number of vehicles sold in the United States. He believes that the bill is consistent with article XIX of the GATT because its purpose is to prevent or remedy the injury to the domestic market caused by foreign imports. Dingell Introduces Bill Imposing Global Quotas on Vehicles, Action Seen in 1984, 9 U.S IMPORT WEEKLY (BNA) No. 9, at 349 (Nov. 30, 1983).
\textsuperscript{89} See statements of Rep. Ottinger and Chrysler Corp. Chairman Lee Iacocca. Id. Representative Ottinger argues that the bill will provide some leverage for talks with the Japanese and the Europeans concerning the lowering of trade barriers. Id.
ternational Trade Commission, because the plaintiff failed to show that the information it sought to add was not available during the previous investigation.

The court of appeals was less deferential to the International Trade Commission in *SSIH Equipment S.A. v. United States International Trade Commission.* In *SSIH Equipment,* the court held that it could review an exclusion order modified by the International Trade Commission during the presidential review period. The factual findings of the International Trade Commission were held reviewable under a "substantial evidence standard," while the legal conclusions of the International Trade Commission were not binding.91

E. United States Customs

1. The International Convention on the Simplification and Harmonization of Customs Procedures

The United States has ratified the International Convention on the Simplification and Harmonization of Customs Procedures92 as of August 16, 1983.93 The aim of the treaty is to promote international trade by standardizing and simplifying customs procedures of member countries.94 The Convention is divided into two parts: a body containing nineteen articles which discuss the general provisions of the Covenant and thirty annexes which contain the substantive obligations of the Covenant. Countries may accept any number of the annexes and enter reservations on any of the annexes' provisions except their definition.95

During the process of consideration in the United States, President Reagan proposed that the Senate give its advice and consent to allow the United States to become a party to the Covenant's

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94 *SENATE COMM. ON FOREIGN RELATIONS, KYOTO CONVENTION ON CUSTOMS AND PROCEDURES, EXECUTIVE REPT. No. 9, 98th Cong., 1st Sess. 1 (1983) [hereinafter cited as REPORT]. This report presents a clear, concise history of the convention and the previous work toward simplifying customs procedures.
95 *Id.* at 2.
articles and twenty of the annexes. The Senate Foreign Relations Committee agreed with the President's recommendations, noting that ratifying the articles and twenty of the annexes would not require any implementing legislation since the United States had been an influential member of the Customs Cooperation Council which drafted the Convention. Consequently, most of the Convention's provisions reflected United States Customs views.

2. Customs Service Centralization Plan

The United States Customs Service (Customs) proposed a centralization plan to carry out duty assessment functions. The plan would reduce the number of cities with offices having duty assessment functions from eighty-three to approximately thirty-five or forty. The plan is anticipated to save $10 million a year. Cities targeted for reduction in the number of their offices or elimination of their offices claim that the plan will cause delays and losses of trade.

3. Proposed Copyright Recordation Regulations

Broad revisions in rules regulating copyright recordation were also proposed in 1983. These revisions would bring the customs and importation regulations in line with the 1976 Copyright Act.


Effective October 24, 1983, Customs requires disclosure of the country of origin of certain articles imported into the United States. The goal is to insure that the United States purchaser knows the country of origin of the article.

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98 Customs Procedures, supra note 92, at v.
97 Report, supra note 94, at Appendix 1.
99 Customs Backs Off From Centralization Plan in 20 Cities Due to Protest, 8 U.S. Import Weekly (BNA) No. 15, at 592 (July 13, 1983). The Customs Service has delayed putting the plan into action due to the protests of the targeted cities.
90 Extensive Revision in Copyright Regulations Proposed, 8 U.S. Import Weekly (BNA) No. 17, at 663 (July 27, 1983). The present 28-year term of recordation would be reduced to 20 years, which is the term for trademarks. The proposed regulations would also amend 19 C.F.R. § 13345 (1983) to correspond with the manufacture clause's extension to July 1, 1986.
5. Sureties on Customs Bonds

Customs published a proposal on October 14, 1983 that would eliminate sureties on customs bonds in certain instances. The change in surety requirements for importers is being considered because a surety often provides unnecessary security which raises costs of shipping and handling goods. Customs has also proposed to amend the Customs Regulations in order to provide greater control over merchandise that is imported and transported in bond "from port of entry to port of exportation."101

F. International Trade Commission's Rules

The International Trade Commission's Rules of Practice and Procedure were amended during 1983.102 Under the new rules for section 337 cases involving unfair practices in import trade, the complainant must file a temporary relief motion, including supporting allegations, with the complaint. Those parties who are opposed to the requested relief may file a formal response to the complainant's motion. The action to be taken will then be determined by the presiding officer. These rules became effective on August 4, 1983.103

III. TRADE ADMINISTRATION

A. Export Trading Companies

President Reagan signed the Export Trading Company Act
The Bank Export Services Act (Title II of the ETCA) altered section 4 of the Bank Holding Company Act of 1956 by allowing bank holding companies to invest in ETCs. On January 25, 1983 the Board of Governors of the Federal Reserve System proposed regulations by which it would administer the ETCA. Final rules were adopted July 8, 1983.

1. Certificates of Review

The International Trade Administration (ITA) issued guidelines on April 13, 1983 which authorize applications for export trade certificates of review. These certificates protect holders "from civil and criminal liability under Federal and state antitrust laws for conduct specified in the certificate."
The certificates, however, grant only limited immunity. Even if a certificate is granted, one who is injured by the Export Trading Company (ETC) may bring a civil action for conduct which violates the four antitrust standards embodied in Title III of the law. In addition, persons or conduct which are beyond the scope of the certificate are not protected, and certificates which are obtained by fraud are void. The certificates, furthermore, grant no immunity from claims under foreign competition laws.

The plaintiff in an antitrust action against the ETC must show either that the certificate was improperly issued or that circumstances have changed since the certificate was issued. There are, however, some limitations on such litigation. There is a presumption in favor of the certificate holder that his conduct complies with antitrust standards. The statute of limitations runs for two years from the date of notice as to failure of compliance, and for four years from the date of the act of non-compliance. If the defendant who was granted a certificate prevails, he recovers the cost of his defense.116 Certificates of review, therefore, are still beneficial despite the limitations placed on their antitrust immunity.117

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117 Donald Zarin, a former official of the Commerce Department, explained that the value of a certificate of review depends upon "what the bank-related export trading company wants to do. If what they want to do raises some antitrust concerns, then, in my view, the Title III certificate of review can be very valuable." Where an export trade company is putting together a consortium of suppliers to bid on foreign products, certification might be warranted, particularly if combinations of horizontal competitors are involved. If the bank is to aid in the exportation of products for the competitors, both the competitors and the bank should consider certification. In addition, "restrictive overseas distributorship arrangements, territorial limitations, pricing arrangements, and exchanges of information among competitors forming ETCs" are situations which "might warrant certification." No bank holding company has yet received a certificate of review; however, at least one bank is expected to apply. Former Commerce Dep't Official Foresees Rising Interest in ETCs, 46 ANTITRUST & TRADE REG. REP. (BNA) No. 1150, at 204 (Feb. 2, 1984).
2. Investment Applications

A portion of the responsibility for reviewing proposed investments in export trading companies was delegated to the Federal Reserve System on December 20, 1983. This change amended the federal regulations by authorizing the Federal Reserve Banks to assist in the processing of export trading company investment applications. The banks can issue notices of "intention not to disapprove."  

3. Travel Agency Services

The regulation by which the Board of Governors administers the ETCA was amended on December 20, 1983 by adding travel agency services to the list of activities authorized to act as export trading companies and by changing the notice requirements for changes in the activities of an export trading company.

4. Banking Reserves

The Board also proposed a requirement that banking institutions involved in export trading companies hold special reserves against risks involved in certain international investments.

B. Export-Import Bank

The Export-Import Bank of the United States (EximBank) had a busy year in 1983. It lowered its interest rate schedules in January 1983 to the levels contained in the International Arrangement on Export Credits. The Bank was aggressive in seeking financing of overseas sales and continued to provide credit to debtor countries.

The reauthorization of the bank drew much attention from Congress. After several reauthorization bills were proposed, a bill sponsored by Senator Heinz was incorporated into a House sup-
lementary appropriations bill for fiscal year 1984 introduced by Representative Whitten. This bill was passed by both the House and Senate.128

Title VI of the reauthorization law contains the EximBank Act passed by Congress in 1983. Section 611 extends the Bank's authorization to September 30, 1986. Section 618(a)(2) authorizes the Bank to aid small businesses in exporting through guarantees of small business exports of goods and services. Further, the Eximbank's Board of Directors is to appoint an officer who will be responsible for matters concerning small businesses and for maintaining relations with the Small Business Administration. Part C of Title VI authorizes the establishment of tied aid export credit subsidies handled by the Bank and the Agency for International Development.130

The reauthorization law also increased the United States participation in the International Monetary Fund (IMF) quota by $5.8 billion and in the General Arrangements to Borrow (GAB) by $2.6 billion. The law strengthens the supervision of international lending and financing.132

C. Trade Adjustment Assistance Program Extended

On October 12, 1983, President Reagan approved legislation extending the Trade Adjustment Assistance program (TAA) for workers and firms. The program provides cash and training ben-

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128 1 CONG. INDEX (CCH) 21,023 (Feb. 2, 1984). S. 869 was incorporated into H.R. 3959 on November 17, 1983.
129 1 CONG. INDEX (CCH) 28,373 (Sept. 29, 1983).
128 The bill was signed into law as Public Law 98-181 on November 30, 1983. 2 CONG. INDEX (CCH) 35,057 (Jan. 26, 1984).
131 Id.
132 The IMF proposed a quota increase from $67 billion to $99 billion. The GAB was increased from $7 billion to $19 billion. The International Monetary Fund (IMF) Quota Increase and the Banking Practices of U.S. Banks, 98th Cong., MAJOR LEGIS. OF THE CONG. (CRS) at MLC-102 (Jan. 1984).
133 Id.
benefits to groups of workers within a firm if the Secretary of Labor determines that a significant number of workers in the firm have been, or may be, totally or partially laid off. The Secretary must also determine whether increased imports of articles directly competitive with articles produced by the firm, or a subdivision, "contributed importantly" to the layoffs and declines in sales or production.

The new law amends the Trade Act of 1974 in two ways. First, it permanently restores the "contribute importantly" standard which had been subject to change since October 1983 according to the Omnibus Reconciliation Act of 1981. Second, the Act provides a preference to those firms which utilize employee stock ownership as a financing mechanism in their plans for repayment of twenty-five per cent of the federal adjustment loan.

D. Appropriation Bill for Trade Adjustment Assistance

A second measure regarding TAA was enacted on November 28, 1982 as an amendment to a larger appropriation bill. The "Bumpers Amendment" essentially maintains the present level of funding for the TAA program. In advocating the $14.6 million appropriation, Senator Bumpers stated that United States industries and jobs are threatened by the growth of imports and that the TAA is the only government program designed to assist small firms

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134 Id. at S13,321. Individual workers in approved groups are eligible for weekly cash payments equal to the worker's most recent unemployment insurance benefit, but only after exhausting other benefits and entitlements. They are also entitled to receive approved training, job search and relocation allowances. 19 U.S.C. §§ 2292-93 (1975).


138 Section 404 would have made applicable a "substantial cause" standard. 129 Cong. Rec., supra note 133, at S13,321.


141 Senator Dale Bumpers offered the funding provision. Senate Approves Funding for Continuation of Trade Adjustment Program for Firms, 9 U.S. Import Weekly (BNA) No. 5, at 190 (Nov. 2, 1983).

142 Id.
in modernizing their businesses.\textsuperscript{148} Senator Donald Riegle of Michigan echoed the sentiments of Senator Bumpers, stating that the TAA "has proven to be an effective and efficient way to help our nation maintain its competitiveness" in the face of the great challenge created by the increasing flow of imports.\textsuperscript{144} The legislation reflects Congress' response to strong protectionist pressures in the United States.\textsuperscript{145}

E. Trade Reorganization Bill

A bill\textsuperscript{146} introduced in the Senate would establish a Department of International Trade and Industry as an executive department of the Government. The legislation would also create an International Trade Assistant to the President and a White House staff to coordinate trade policy.\textsuperscript{147} At present, twenty-five different agencies within the executive branch are responsible for formulating and implementing United States foreign policy concerning trade and investment. Critics of the present system hope that a single agency would eliminate duplication of effort and promote coordination.\textsuperscript{148} The Administration strongly favors a single Department of International Trade and Industry, as evidenced by the President's comments in his January 1983 State of the Union message and other announcements.\textsuperscript{149}

\textsuperscript{148} Id. Senator Bumpers also noted that of the 2,240 firms which have received TAA assistance, 1,877 are still in business after having suffered the serious problems which prompted the request for assistance from the program. \textit{Id.}

\textsuperscript{144} Id. at 191. He also stated that the $14 million will keep the technical assistance portion of the program operating at last year's level.

\textsuperscript{145} Id. at 190.

\textsuperscript{146} S.121, 98th Cong., 1st Sess., reprinted in 1 CONG. INDEX (CCH) 14,157 (1983) (introduced by Senator William Roth on Jan. 26, 1983). The bill was reported out favorably with amendments on October 4, 1983 by the Senate Governmental Affairs Committee. \textit{Trade Reorganization: A Cabinet Level Department?}, 98th Cong. MAJOR LEGIS. OF THE CONG. (CRS) at MLC-106 (Nov. 1983) [hereinafter cited as \textit{Trade Reorganization}].

\textsuperscript{147} \textit{Trade Reorganization, supra} note 146. A similar bill was introduced in the House by Representative Bonker in an attempt to pique the interest of the House of Representatives in the plan to create a new agency. This bill would establish a Special Assistant to the President as well as a Department of Commerce and Trade. \textit{Bonker Launches Trade Reorganization Bill with Industrial Policy Provisions}, 9 U.S. IMPORT WEEKLY (BNA) No. 8, at 306-07 (Nov. 23, 1983).

\textsuperscript{148} \textit{Trade Reorganization, supra} note 146. The Senate bill, introduced on January 26, 1983, lists the offices and functions which would be transferred to the new Department. Some of these are the Office of the United States Trade Representative, Under Secretary of Commerce for International Affairs, the Export-Import Bank and Assistant Secretary of Commerce for International Economic Policy. \textit{Id.}

\textsuperscript{149} President's State of the Union Message of January 25, 1983, 1983 U.S CODE CONG. & AD. NEWS D8 (Apr. 1983). The President stated: "We must strengthen the organization of
F. Generalized System of Preferences

The Generalized System of Preferences (GSP) provides duty-free access to the United States market for approximately 140 countries. The present program began on January 1, 1976 and should continue through January 3, 1985. Modifications of the GSP are being considered; the Administration wants an extension of the program to 1996, but with an increased emphasis on reciprocity. New legislation has not yet been adopted. Section 503 of the Trade Act of 1974 requires that articles eligible under the GSP be imported directly from the beneficiary country. "Imported directly" is defined as being shipped directly to the United States from the exporting country or through another country or free trade zone without entering the commerce of the other country. Proposed regulations which would expand this definition were published in April and adopted in June. These new regulations eased restrictions on the route of the articles in question.

IV. Taxation

A. Tax Treaties

1. Netherlands Antilles Tax Treaty

Representatives from the United States and the Netherlands Antilles are currently renegotiating the Tax Treaty of 1948 between our trade agencies and make changes in our domestic laws and international trade policy to promote free trade and the increased flow of American goods, services and investments. Id.

On April 25, 1983 the President formally announced his decision to ask Congress to consolidate international trade functions into a single Cabinet Department. Trade Reorganization, supra note 146.


Administration Wants Renewed Program with Added Emphasis on Reciprocity, 8 U.S. IMPORT WEEKLY (BNA) No. 9, at 325, 326 (June 1, 1983).

The Netherlands Antilles are two island groups in the Caribbean Sea. The principal group is comprised of Curacaus, Bonaire and Aruba. They became an autonomous part of the Kingdom of the Netherlands in 1954.
tween the Kingdom of the Netherlands and the United States. Nearly $32 billion in Eurobond obligations issued by United States companies through offshore financing arrangements in the Nether-
land Antilles since 1974 is at stake in the negotiations. The current treaty exempts non-United States purchasers from the thirty percent United States withholding tax on interest payments. Aggressive marketing of the Treaty to third-nation investors has created a thriving offshore finance industry based on income generated by United States business.

A proposed bill, however, calls for a repeal of the thirty percent tax on loans made by foreign firms to United States companies. The Securities Industry Association projects that the proposal will increase United States revenues by making it unnecessary to use Netherlands Antilles finance subsidiaries to avoid the tax. Therefore, it would be unnecessary to claim foreign tax credits for income taxes paid by the finance subsidiaries in the Antilles. The net effect would be increased revenues because of fewer foreign tax credit claims.

Nevertheless, members of the accounting community fear that termination of the tax benefits under the current treaty would result in similar reciprocal restrictions on the use of other nations' treaty networks by foreign-based United States multinational corporations.
2. Australia-New Zealand Tax Treaties

The recently ratified treaties with Australia and New Zealand\(^\text{168}\) are comprehensive tax treaties, based on the United States Model Income Tax Treaty,\(^\text{169}\) which replace existing treaties with both nations.\(^\text{170}\) For United States investors, the most important provision of the new Australian treaty limits the Australian tax on royalties paid to United States residents to ten percent of the gross amount of royalties.\(^\text{171}\) Previously, this tax was set at fifty-one percent of the net amount.\(^\text{172}\) The new treaty with New Zealand lowers the tax rate for dividend payments to United States investors to fifteen percent from a previous rate of thirty percent.\(^\text{173}\)

by the argument that foreign investors may be deterred from investing capital in the United States by changes in the current treaty. The Foreign Investment in Real Property Tax Act (FIRPTA), designed to eliminate the worst abuses of the United States-Netherlands Antilles treaty, did not stop capital from entering the United States real estate market. \textit{Id.}


\(^{169}\) OECD Model Income Tax Convention, \textit{TAX TREATIES (CCH) \#207} (Jan. 1977).


\(^{171}\) \textit{Australia, New Zealand Treaties, 19 TAX NOTES 843 (May 30, 1983)} (opinion of the Treasury Department). \textit{See also Convention with Australia, supra note 168, art. XII (defines royalties and limits tax on royalties). Royalties are defined as payments or credits for the use of, or the right to use: copyrights, patents, designs, models, plans, secret processes or formulae, trademarks, or other similar property or rights. Id. The 10% rate limitation in the Australian Treaty applies only if the royalty is beneficially owned by a resident of the other country; it does not apply if the recipient is a nominee for a non-resident. S. Exec. Rep. No. 16, supra note 168, at 25.}


\(^{173}\) Convention with New Zealand, supra note 168, art. X.
The two treaties depart from the Model Treaty by allowing the two nations to tax income of container leasing companies which do not engage in shipping. The Australian and New Zealand treaties also allow the two nations to tax income derived from mineral exploration activities sooner than allowed in the Model Treaty. The new treaties extend "permanent establishment" status to drilling rigs present in the contracting nation for six months, while the Model Treaty would require twelve months before the rigs had such status.

3. People’s Republic of China Limited Tax Treaty

The United States and the People’s Republic of China (P.R.C.) have agreed to a limited tax treaty which provides for mutual tax exemption of transportation income from shipping and air transport enterprises. Exempted income includes that which is derived from the rental of ships and aircraft if such rental is incidental to the operation of the ships or aircrafts in international traffic; if it is earned from the operation of passenger, cargo, and mail services by the owner or charterer of a ship or aircraft; or from the rental or use of containers. The treaty applies retroactively to taxable years beginning on or after January 1, 1981.

The P.R.C. Treaty contains standard Model Treaty provisions

174 Senate Committee Approves Treaties with China, Australia, New Zealand, 20 Tax Notes 106 (July 4, 1983). The Model Treaty would exempt income derived from leasing if the lessee operated the ships or aircraft in international traffic or if the profits were incidental to other shipping or transport profits. It would not condition the exemption of container leasing income on any other activity of the lessor. S. ExeC. Rep. No. 16, supra note 168, at 19. The Australian and New Zealand treaties permit the source country to tax income from container rentals as royalty income at a rate of 10% of gross. Treasury Announces, supra note 168, at 281.

175 Convention with Australia, supra note 168, art. V. Convention with New Zealand, supra note 168, art. V.

176 129 Cong. Rec. S10,949-50 (daily ed. July 27, 1983). Senator Cranston is concerned that other developing nations will view container leasing income as royalties and insist on imposing withholding taxes on such royalties. Members of the Senate Foreign Relations Committee also warned that they would not approve future treaties which contain similar provisions. Treasury Announces, supra note 168, at 281.


178 Id., art. II.

179 Id. art. VIII. See also, Agreement Reached with Chinese on Shipping, Aircraft Income Tax, 9 U.S. Import Weekly (BNA) No. 4, at 153-54 (October 26, 1983)(hereinafter cited as Income Tax).
concerning the taxation of these international operations. The Treaty, however, is unusual because the Treasury does not normally negotiate limited agreements of this type. Nevertheless, an official from the Treasury stated that the importance of transportation activities to the expansion of economic relations between the two nations justifies the limited interim agreement.

B. Domestic International Sales Corporations (DISC) and its Alternatives

The domestic international sales corporations (DISC) program was severely criticized in 1983. The European Community (EC) filed a $2 billion claim against DISC with the GATT Council in January, claiming that DISC was an illegal export subsidy because it provided for an indefinite deferral of taxes from exports. The majority of the GATT Council agreed, stating that the DISC program was an export subsidy which violated the GATT. A number of critics in the United States have questioned the effectiveness of the DISC program.

Consequently, several alternatives to DISC have been introduced into Congress. The goal of these alternatives is to give exporters similar tax incentives which accord with the GATT. The Administration has proposed a plan to establish Foreign Sales Corpora-

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181 Id. A more complete agreement between the two nations to avoid double taxation of income is presently under negotiation. Income Tax, supra note 179, at 154.


183 The term "illegal export subsidy" in this context means an export subsidy that violates the GATT.

184 See supra note 182.


186 Id. One bill that was introduced in the House, but not here discussed, is H.R. 981, sponsored by Representative Frengel. This bill would establish International Sales and Services Corporations (ISSCs), which would replace DISCs. H.R. 981, 98th Cong., 1st Sess., 129 CONG. REC. H176 (1983).

tions (FSCs) in lieu of DISCs. Under the new plan, the FSCs must incorporate and maintain an office in a jurisdiction outside the United States customs territory.\textsuperscript{188} They must elect FSC treatment and must keep tax records at the foreign offices and in the United States.\textsuperscript{189} The FSCs must be managed and the economic processes of their export transactions must take place outside the United States.\textsuperscript{190}

The proposal mandates that either seventeen percent of an FSC, and its related party's taxable income derived from an export transaction, or up to 1.35 percent of the gross receipts from the export transaction is tax exempt.\textsuperscript{191} Further, some export transactions between FSCs and United States taxpayers can obtain FSC tax benefits under special administrative transfer pricing rules.\textsuperscript{192} If these rules apply, seventeen twenty-thirds of the FSC's income from the export transaction is tax exempt. If the rules do not apply, thirty-four percent of the income is exempt.\textsuperscript{193}

This FSC plan has been designed to satisfy the GATT concerns over DISC.\textsuperscript{194} Nevertheless, questions about the plan remain. The most critical question is whether the FSC plan is legal under the GATT.\textsuperscript{195} The U.S. Trade Representative's Office asserts that the plan is legal,\textsuperscript{196} but as of January 1, 1984, the GATT Council had not issued a statement as to whether the FSC plan is in accord with the GATT. Members of Congress and of the business commu-

\textsuperscript{188} DISC, supra note 185.
\textsuperscript{189} Administration's DISC Substitute Bill Introduced in Both House, Senate, 19 U.S. Export Weekly (BNA) No. 18, at 685 (Aug. 9, 1983) [hereinafter cited as FSC].
\textsuperscript{190} Id. The proposal defines "managed" as having shareholders' meetings and maintaining principal bank accounts outside the United States. The economic processes test requires either half of the costs of transportation, handling, advertising, collection and assumption of credit risk to be incurred outside the United States or eighty-five percent of the cost of any two of these five activities to be incurred outside the United States. Also, the solicitation, negotiation and consummation of the contract must take place outside the United States. Id. at 685-86.
\textsuperscript{191} Id. at 685.
\textsuperscript{192} Id. at 686. The administrative rules require the FSC to perform all of the economic processes activities. Further, 1.83 percent of the gross receipts cannot be greater than twenty-three percent of the taxable income of the FSC and its related party attributed to the export transaction. Proposed "Foreign Sales Corporation Act of 1983" (H.R. 3810) Introduced Aug. 4, 1983, 19 Export Weekly (BNA) No. 18, at 712 (Aug. 9, 1983).
\textsuperscript{193} FSC, supra note 189, at 685.
\textsuperscript{194} Administration, Finance Panel Ready to Act on FSC Bill as Part of Omnibus Tax Package, 20 U.S. Export Weekly (BNA) No. 18, at 601 (Feb. 7, 1984) [hereinafter cited as Tax Package].
\textsuperscript{195} FSC, supra note 189, at 685.
\textsuperscript{196} Tax Package, supra note 194, at 601.
nity have expressed concerns over the export of jobs associated with managing FSCs, the ability of small businesses to take advantage of the FSC tax advantages and the inclusion of services as well as goods in the FSC plan. The Senate Finance Committee began hearings on this plan on November 18, 1983.

Senator Boren introduced another alternative to DISC which would provide for Export Sales Corporations (ESC). ESCs would also incorporate abroad, and their tax treatment would be set up to avoid double taxation of export income from foreign sources. As of January 1, 1984, no new DISC legislation had passed.

C. Unitary Tax

California's unitary taxation system was upheld in June 1983 in Container Corporation of America v. Franchise Tax Board. The Container case involved a domestic corporation with foreign subsidiaries. In a similar case, Shell Petroleum & Graves, a foreign company with United States subsidiaries challenged the same law. Shell Petroleum is of interest from a litigation standpoint because it involved the procedural issue of whether a foreign parent corporation has standing to challenge the tax law of a state in which its subsidiaries operate. The federal district court ruled that the subsidiary could seek a remedy in state court; thus, it did not have standing in federal court. Furthermore, shareholders ordinarily are denied standing to redress injuries to corporations. One exception to this rule is generally granted, however, where a statutory right of action is created in the shareholders. The court found no such statutory right in favor of the plaintiffs in Shell Pe-

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197 FSC, supra note 189, at 685.
198 Tax Package, supra note 194, at 601.
199 Id.
200 1 CONG. INDEX (CCH) 21,042 (Feb. 2, 1984).
201 DISC, supra note 185.
202 1 CONG. INDEX (CCH) 14,152 (June 29, 1983).
206 Id. at 62. See Sherman v. British Leyland Motors, Ltd., 601 F.2d 429, 439-40 (9th Cir. 1979); Von Brimer v. Whirlpool Corp., 536 F.2d 838, 846 (9th Cir. 1976); Erlich v. Glasner, 418 F.2d 226 (9th Cir. 1969).
207 Shell Petroleum, 570 F. Supp. at 63.
troleum. The court of appeals affirmed the district court, and explained that under the tax treaty between the United States and the Netherlands, the corporation was placed in the same position as a domestic corporation. A domestic corporation with a majority interest in Shell would have been denied standing, so the foreign company was likewise denied standing. In December, the United States Supreme Court denied the plaintiff's petition for writ of certiorari.

V. INTERNATIONAL AGREEMENTS

A. Convention on Contracts for the International Sale of Goods


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208 The court denied that "general principles of international law" would vest rights in the shareholders. Id.

The court likewise denied that the Convention between the United States and the Netherlands regarding double taxation rights granted any right to the shareholder. Rather, the Convention was intended to confer rights on the corporations themselves. Id. at 63-65. Treaty of Friendship, Commerce and Navigation, Mar. 27, 1956, United States-Netherlands, 8 U.S.T. 2043, T.I.A.S. No. 3942. See, Sumitismo Shoji Am., Inc. v. Avagliano, 457 U.S. 176 (1982).

209 Shell Petroleum, 709 F.2d at 595-6.

210 Shell Petroleum, 104 S.Ct. at 537.


after it is ratified by ten nations. Thus, regardless of the action of the United States Senate, the CISG will probably become effective in 1984. The Convention will, therefore, be of concern to United States practitioners.

The scope of the CISG is of primary importance to those involved in international trade. The CISG applies to the sale of goods between persons, individual or legal, who have places of business in different countries, when both the country of the seller and that of the buyer have ratified the CISG; it also applies when private international law leads to the application of a contracting country’s law. Parties who are drafting international sales con-


Prompt Action, supra note 212.


It is possible that the CISG will apply to contracts to which United States traders are parties even if the United States never ratifies. In addition, language from the CISG is to be used to revise national sales law in the Nordic countries. Winship, The 1980 Vienna Convention, supra at 215 n.3.

United States lawyers should particularly note the Convention’s adoption of the receipt theory of acceptance, the reduction of price remedy for defective goods, the absence of law concerning documentary transactions, and the deletion of consideration as an essential element for contract formation. Lansing, supra at 278.

For hypothetical illustrations of the operation of the CISG, see Winship, supra note 213, at 1232-34.


The provision in article I (1)(b) providing for application of the Convention according to the rules of private international law may lead to the Convention’s application regardless of the intent of the contracting parties.

If the choice of law rules of a forum lead to the application of the law of a contracting state, the substantive provisions of the Convention, rather than the domestic law of that state, will apply. Thus, two parties from different non-contracting states who form a contract with some relation to a contracting state might find their contract unexpectedly governed by the Convention.

Dore & Defranco, A Comparison of the Non-Substantive Provisions of the UNCITRAL
tracts may incorporate the CISG by reference, even if their respective countries have not ratified the Convention. Several contract clauses, such as those which provide for arbitration, warranties and disclaimers, liquidated damage, and integration, remain unaffected by the CISG. The Convention will, however, govern the formation of international sales contracts and the obligations and remedies of the parties to such contracts.

In contrast to the Uniform Commercial Code (U.C.C.), the CISG imposes no restriction upon the freedom to contract. This broad contractual liberty is illustrated by article 6 of the Convention which allows parties to "exclude the application" of the convention or, "derogate from or vary the effect of any of its provisions" subject to the limitations of article 12. Further, the CISG does not govern sales to consumers. Rather, the convention impacts pri-

Convention on the International Sale of Goods and the Uniform Commercial Code, 23 Harv. Int'l L.J. 49, 55 (1982). To correct this problem, George P. Shultz, on behalf of the Department of State, recommended that the United States ratification include a declaration under article 96 of the CISG so that the United States would not be bound by article I (1)(b). If such a reservation were made, the Convention would only apply to United States traders when the seller and buyer had places of business in different countries. Letter of Submittal, S. Treaty Doc. No. 9, 98th Cong., 1st Sess., at VI (1983). CISG, S. Treaty Doc., supra note 211, art. 95. President Ronald Reagan concurred in this recommendation in his letter of transmittal recommending ratification to the Senate. CISG, S. Treaty Doc. art. III.


Id.

Winship, supra note 213, at 1231.

CISG, S. Treaty Doc., supra note 211, art. 6. Under article 12, the provisions of the Convention which allow a contract or any revision of the contract to be made by a method other than writing, do not apply to those parties whose place of business is in a country which has made a declaration pursuant to article 96 of the CISG. Id. art. 12. The article 96 declaration provides for countries which have legislative requirements that contracts be formed or evidenced in writing. The declaration allows a country to exempt itself from sections of the convention which would conflict with its own statute of frauds. CISG, S. Treaty Doc., supra note 211, art. 96. See Vienna Convention for Sale of Goods Gets Strong Backing at ABA Session, 19 U.S. EXPORT WEEKLY (BNA) No. 19, at 728, 729 (Aug. 16, 1983).


marily upon commercial sales between businesses.\textsuperscript{223} Also, the Convention does not apply to personal injury claims against sellers.\textsuperscript{223} Thus, the Convention should not interfere with the product liability law of individual countries.\textsuperscript{224} In addition, questions of contract validity are not covered by the CISG. Instead, the Convention is only concerned with contract formation and with the buyer's and seller's obligations and rights under the contract.\textsuperscript{225} 

In spite of certain differences, the Convention is similar to the U.C.C. in many respects. For example, both the Convention and the U.C.C. allow the cure of minor breaches in order to preserve a contract. The buyer is protected under the CISG, as under the U.C.C., in that he may not be caused "unreasonable inconvenience or unreasonable expense," and he may still claim damages for breach.\textsuperscript{226} 

Although at least one critic has claimed that the CISG may lead to the enforcement of fewer contracts than under domestic law,\textsuperscript{227} the Convention is still an improvement over the present state of international contract law.\textsuperscript{228} Currently a United States trader may have to bear the financial burden and inconvenience of arguing foreign law in domestic or foreign courts in disputes over contract for-

\textsuperscript{223} Legal Analysis, supra note 221, at 2. 
\textsuperscript{224} CISG, S. Treaty Doc., supra note 211, art. 5. 
\textsuperscript{226} CISG, S. Treaty Doc., supra note 211, art. 4. Thus, for example, the Convention would not affect a national law providing that contracts for the sale of illegal goods are void. Legal Analysis, supra note 221, at 3. 
\textsuperscript{227} CISG, S. Treaty Doc., supra note 211, art. 37. These provisions are similar to the sections of the U.C.C. on cure. See U.C.C. § 508(1) & (2); Legal Analysis, supra note 221, at 13. 
\textsuperscript{228} Id. The United States delegation to the Vienna Conference, the Secretary of State's Advisory Committee on Private International Law, and the American Bar Association have endorsed the CISG. Id. at 15. See also, Dore & Defranco, supra note 216, at 52. 

The CISG has been given less enthusiastic support by the British. J.D. Feltham concludes that the Convention may not be favorable for the United Kingdom, particularly in regard to f.o.b. and c.i.f. contracts. Nevertheless, "[t]he attitude of the United Kingdom will presumably . . . be affected by that of its main trading partners and, if a substantial number become parties to the Convention. . . , it may be felt that there is good reason for the United Kingdom to adopt it." Feltham, The United Nations Conventions on Contracts for the International Sale of Goods, 1981 J. Bus. L. 346, 360-61.
mation. The Convention should reduce the cost of such conflict-of-
law problems. Thus, the CISG is compatible with the interests of
United States business.

B. Tropical Timber Agreement

Representatives from eighty-eight countries agreed on the text
of a Tropical Timber Agreement on November 28, 1983 in Geneva,
Switzerland. The United States, the world’s third largest
importer of tropical timber, is expected to participate in the
Agreement.

The Agreement seeks to promote the expansion and diversifica-
tion of trade in tropical timber and to improve structural condi-
tions in the market. Further goals are to encourage reforestation
and forest management activities, to promote research and devel-
opment aimed at management and utilization, to improve distribution
of exports of producing members and to encourage policies
aimed at maintaining the ecological balance in the timber
regions.

The Agreement also provides that producer and consumer repre-
sentatives on the new Tropical Timber Council will share equal
voting power and that votes within each group will be based upon
each nation’s interest in the timber. No site has been selected
for the Council Headquarters although the Agreement is scheduled

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329 Dore & Defranco, supra note 216, at 67. According to the section of International Law
of the A.B.A. House of Delegates, the CISG will: 1) make agreements as to choice of forum
easier when dealing with foreign buyers; 2) allow parties to draft contracts which will
achieve on an international scale the same results which might be accomplished through the
U.C.C. in domestic cases; 3) decrease the cost of researching foreign law; and 4) reduce the
difficulty of proving foreign law in international litigation. Winship, supra note 213, at 1234.
330 Tropical timber is defined by the United Nations Conference on Trade and Develop-
ment (UNCTAD), under whose auspices the Agreement was negotiated, as “nonconiferous
tropical wood for industrial uses, which grows or is produced in countries situated between
the Tropic of Cancer and the Tropic of Capricorn.” The term includes logs, sawnwood, ve-
neer sheets, and plywood. See Producers, Consumers Resolve Voting Dispute, Reach Tropi-
cal Timber Agreement, 9 U.S. IMPORT WEEKLY (BNA) No. 9, at 359-60 (Nov. 30, 1983)
[hereinafter cited as Agreement].
331 The United States does not usually agree to commodity accords which contain such
clauses. The United States imports approximately $8 billion of tropical timber a year, trail-
ing only Japan and the European Community. Id. at 359.
332 The Agreement also aims to provide a forum for cooperation and consultation between
producers and consumers. Id.
333 Id.
334 Id.
335 This organization is based in Morges, Switzerland. Id.
to enter into force on October 1, 1984. Despite numerous clauses concerning ecological protection, the International Union for the Conservation of Nature has criticized the Agreement for not including additional safeguards to ensure that the forests of producing nations are not diminished as consumer demands increase.

C. Patent Agreement: United States, European Community, Japan

Representatives of the United States Patent and Trademark Office, the European Patent Office, and the Japanese Patent Office have reached a "landmark agreement" concerning cooperation in the field of industrial property on October 19, 1983. Parties involved believe that the Agreement marks "a new, important start for the world industrial property system" and initiates "the third patent revolution." The three offices have entered the pact recognizing that "industrial property plays an important role as a basic system supporting the progress of industry, technology, and economy" in each of the fostering nations.

The Agreement provides for cooperation in the introduction of automation and the exchange of technical personnel, documents and electronic patent data. The Memorandum of Understanding to the Pact also proposes that the parties meet annually to discuss matters of mutual interest, share patent search results, cooperate in document classification, promote dissemination of patent information to the public and private sectors and implement coopera-

236 The Agreement was opened for signature on January 2, 1984. It will only enter into force if 12 producing countries holding at least 55% of the total votes and 16 governments of consumer nations holding at least 75% of the total votes have ratified, signed, or acceded to the Agreement. Id.

237 Id.


239 Officers Agree to Share Data, supra note 238, at 557 (comment of Mr. Wahasugi).

240 Id. (comment of Mr. Benthem).

241 Memorandum of Understanding on Trilateral Cooperation in the Field of Industrial Property, 26 PAT., TRADEMARK & COPYRIGHT J. (BNA) No. 652, at 574-75 (Oct. 27, 1983) [hereinafter cited as Memorandum].

242 Offices Agree to Share Data, supra note 238, at 557.
tive research efforts. One limitation placed on the Agreement, on the other hand, is that electronic data exchanged between offices cannot be copied for distribution or sale to other entities unless authorized.

D. *International Coffee Agreement*

On October 12, 1983, President Reagan signed a bill extending United States participation in the International Coffee Agreement of 1976 until October 1, 1986. The purpose of the Agreement was to assure continued cooperation between coffee consuming nations, including the United States and coffee producing nations in stabilizing the price of coffee within an agreed range. The agreement developed a system of country export quotas which are regulated according to current price trends in order to keep coffee prices within the given range.

United States negotiators were successful in incorporating into the Agreement several amendments which are considered favorable to the United States. The changes clarified the producer's obligation to refrain from multilateral marketing arrangements outside the scope of the Agreement, allowed for increased input from consumer nations into the allocation of export quotas, and pro-

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243 Memorandum, supra note 241, at 574-75.
244 Id.
248 The United States imports approximately $3 billion of coffee every year amounting to about 30% of the world's coffee market. President to Sign Legislation Extending U.S. Participation in Coffee Agreement, 9 U.S. IMPORT WEEKLY (BNA) No. 2, at 64 (Oct. 12, 1983) [hereinafter cited as Participation in ICA].
250 At times of exceptionally high prices, quotas are suspended completely in order to encourage maximum exports. The importing nations enforce the quota system. Letter of Transmittal, supra note 249, at 1.
251 Participation in ICA, supra note 248, at 64. Members of the Congress were concerned that increased shipments of coffee at prices below those of the member nations are going to non-market nations who are not participants to the coffee pact. Id.
vided for the declaration of quota shortfalls. Extension of the Agreement was necessary to solidify business arrangements made by United States coffee roasters, importers, and brokers which were concluded in reliance upon continued participation of the United States.

VI. INTERNATIONAL CONTRACTS

A. Letters of Credit; Fraud

The Second Circuit Court of Appeals held that the "fraud in the transaction" defense may be used against a claim under a letter of credit. In Rockwell International Systems, Inc. v. Citibank the court upheld a preliminary injunction which stopped payment by a United States bank to an Iranian bank on demand under standby letters of credit. The court borrowed the "fraud in the transaction" defense from state law in order to supplement the

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254 Letter from Brock, supra note 247.
255 For a discussion of the convention on Contracts for the International Sale of Goods, see text at notes 211-30.
257 Rockwell, 719 F.2d at 583; Citibank is Enjoined From Paying Iranian Bank Under Letter of Credit, 20 U.S. Export Weekly (BNA) No. 5, at 169 (Nov. 1, 1983); 6 West's Fed. Case News 2 (Nov. 11, 1983).

It is important to note that the documentary credit in this case was in the form of standby letters of credit, as opposed to commercial letters of credit. Such standby credit has been frequently used in the Middle East, particularly for construction contracts. See, Effros, Current Legal Matters Affecting Central Banks, 13 GA. J. INT'L & COMP. L. 621, 623 (1984). A standby letter of credit is:

any letter of credit, or similar arrangement however named or described, which represents an obligation to the beneficiary on the part of the issuer 1) to repay money borrowed by or advanced to or for the account of the account party or 2) to make payment on account of any indebtedness undertaken by the account party, or 3) to make payment on account of any default by the account party in the performance of an obligation.


In commercial letters of credit "the issuing bank expects the beneficiary to draw upon the issuer." Id. at § 7.1160(a) n.1. There is no "guaranty" payment of a monetary obligation and no provision for "payment in the event of default by the account party." Id. In contrast, the parties to a standby letter of credit only expect the beneficiary to draw upon it in the case of non-performance. Documents of title serve as security to the bank under commercial credit, while there is no such security for standby credit. The most significant distinction for the purposes of the Rockwell case, however, is that while the law and practice governing commercial credit are well-developed, standby credit presently has no set body of rules. See Effros, supra, at 624-25.
Uniform Customs and Practice for Documentary Credits (U.C.P.) under which the letters of credit were issued.\footnote{287}

The alleged act of fraud was the demand of the Iranian bank for payment on letters of credit securing performance of contract terms which was made while the Iranian Government prevented performance.\footnote{288} In short, the Iranian Government first caused the default and then attempted to "reap the benefit of the guarantee."\footnote{289} Letters of credit as a matter of policy were not to be used to protect a party who prevents performances.\footnote{290} Following that theory the court concluded that there was evidence of fraud in the transaction and that there was a sufficient likelihood of success on the merits; therefore, the injunction was issued.\footnote{291}

\footnote{287} The U.C.P. does not explicitly provide for a "fraud in the transaction" defense. "Fraud in the transaction" is recognized, however, by New York law as an available defense under the U.C.P. \textit{Rockwell}, 719 F.2d at 588. The \textit{Rockwell} court also relied upon the U.C.C. in regard to the fraud defense. Because the Iranian bank was not a "holder in due course" of the letters of credit, it could not avoid the fraud in the transaction defense under U.C.C. § 5-114(2)(a) (1977). \textit{Rockwell}, 719 F.2d at 589. See N.Y.U.C.C. § 5-102(4) (McKinney 1964).

\footnote{288} \textit{Rockwell} was prevented by Iran's new government from completing performance of its contract because of the Iranian revolution. \textit{Rockwell}, 719 F.2d at 584. In such a case, the court will look at the surrounding circumstances to determine whether the alleged act amounted to fraud. \textit{Id.} at 589. \textit{See also}, Sztejn v. J. Henry Schroder Banking Corp., 177 Misc. 719, 31 N.Y.S.2d 631 (Sup. Ct. 1941).

For a case similar to \textit{Rockwell}, see \textit{American Bell Int'l, Inc. v. Islamic Republic of Iran}, 474 F. Supp. 420 (S.D.N.Y. 1979), involving a United States corporation's contract with the Iranian Government, under which performance ceased during the wake of the revolution. In that case the court denied the plaintiff's request for a preliminary injunction to stop payment under a standby letter of credit. Bell's "fraud in the transaction" claim was unsuccessful because the court found no real evidence of fraud. \textit{Id.} at 245.

In a more recent case, \textit{Itek Corp. v. First Nat'l Bank of Boston}, 511 F. Supp. 1341 (D. Mass. 1981), \textit{aff'd and modified}, Civil Action No. 80-58-MA, Slip Op. (May 25, 1982), \textit{vacated}, 704 F.2d 1 (1st Cir. 1983), the plaintiff was successful in obtaining a preliminary injunction. The Treasury Department, however, amended its regulations to make it clear that United States courts could not permanently enjoin any Iranian interest in a standby letter of credit. 31 C.F.R. § 535.504(b) (1983). Following this amendment, the court of appeals vacated the district court's grant of a permanent injunction. \textit{Itek Corp.}, 704 F.2d at 11.


\footnote{290} The court also held that a showing of deceit or malice was unnecessary to the fraud claim. \textit{Rockwell}, 719 F.2d at 589.

\footnote{291} \textit{Id.} By discussing the plaintiff's probability of success as to the fraud issue, the court implies that a permanent injunction might later be in order. \textit{But see Itek Corp.}, 704 F.2d at 11.

This case is unique because there was a \textit{force majeure} clause in the contract which \textit{Rockwell} invoked prior to the demand for payment on letters of credit. \textit{Rockwell}, 719 F.2d at 585.
B. Agency-Distributorship Contracts: Saudi Arabia

In May of 1983, Saudi Arabia adopted the Model Commercial Agency/Distributorship Contract. This model contract includes arbitration as a dispute settlement tool. It also broadens protection of the agent in the areas of maintenance and spare parts, and termination compensation.263

VII. JURISDICTION

1. Personal Jurisdiction in Product Liability

Under World-Wide Volkswagen Corp. v. Woodson, international plaintiffs must show that the defendant could reasonably anticipate being haled into court in the forum in question before jurisdiction is granted over a non-resident defendant. Two 1983 cases applied World-Wide Volkswagen Corp. v. Woodson to determine jurisdiction. A comparison of these two cases reveals that the World-Wide Volkswagen rule is more strictly applied to the manufacturer of a product which causes injury than to the manufacturer of a component of a defective product.

Nelson v. Park Industries, Inc.264 illustrates the application of World-Wide Volkswagen to a case involving the manufacturer of the injury-causing product. In Nelson, both the purchasing agent and the manufacturer of the product claimed lack of personal jurisdiction. The court explained that the defendants' awareness of the distribution system for the product was critical. After considering affidavits submitted on the issue, the court held that the

263 New Saudi Standard Commercial Agency/Distributorship Contract, 5 INT'L LAW. NEWSLETTER 8 (Nov./Dec. 1983). Under article 6 of the contract, the principal must "guarantee the quality of the product" and provide spare parts so that the agent can fulfill its legal obligations to the consumer. The termination compensation provisions provide that the agent/distributor "may claim reasonable compensation for any activity which has resulted in an apparent success of the business of the terminated Agent/Distributor. The terminated Agent/Distributor shall be entitled to compensation for his promotional activities and the development of clients resulting in a benefit to the Principal or to a newly appointed Agent." Any failure of the principal to renew the agent's contract qualifies as "termination" under the standard contract. Id.


265 Nelson v. Park Indus., Inc., 717 F.2d 1120 (7th Cir. 1983). Hong Kong Shirt Manufacturer Found Within Wisconsin Court's Jurisdiction, 9 U.S. IMPORT WEEKLY (BNA) No. 1, at 26 (Oct. 5, 1983). In Nelson, the plaintiff, a minor, sought to recover for personal injuries sustained when a cigarette lighter ignited the shirt she was wearing. Nelson, 717 F.2d at 1122.

266 Id. See Fed. R. Civ. P. 12 (b)(2).

267 Nelson, 717 F.2d at 1126.
defendants were aware of the sellers' distribution scheme so that they could "reasonably anticipate being haled into court" in Wisconsin.\footnote{Id. at 1127.} Thus, both defendants were held subject to suit under Wisconsin's long arm statute.\footnote{Id. at 1124; Wis. Stat. § 801.05 (1982).} This case is particularly relevant to international litigation because it shows that a manufacturer or an exporting firm does not have to manage its own distribution system in order to be subject to personal jurisdiction in a United States court.\footnote{This rule of law applies so long as the defendant "should reasonably anticipate being haled into court in that forum." Id. at 1126, n.6; \textit{World-Wide Volkswagen}, 444 U.S. at 297-98.}

The result was different, however, when the product liability action was against a foreign manufacturer who made only a component part of the injuring product. In \textit{Asahi Metal Industries Co. v. Superior Ct. of Solano County}, the defendant, in an action arising from injuries received when a motorcycle tire blew out, cross-claimed against the Japanese manufacturer of the tire valve. The Japanese manufacturer sought to quash service and claimed it was not subject to the California court's jurisdiction.\footnote{Asahi Metal Indus. Co. v. Super. Ct. of Solano County, 147 Cal. App. 3d Supp. 1146, 194 Cal. Rptr. 741, 742 (1983). \textit{California Court Says Jurisdiction Does Not Extend to Japanese Firm}, 8 U.S. IMPORT WEEKLY (BNA) No. 25, at 998 (Sept. 28, 1983).} The court in \textit{Asahi} determined that the crucial factual issue was whether Asahi's contacts with the state would make it reasonable to require the manufacturer to come to the state in response to a cross-complaint.\footnote{Asahi Metal, 194 Cal. Rptr. at 742. \textit{See}, Secrest Mach. Corp. v. Super. Ct., 33 Cal. 3d 664, 668-70, 660 P.2d 399, 190 Cal. Rptr. 175 (1983). Asahi was made a defendant on a cross-complaint, whereas the foreign corporations in \textit{Nelson} were original defendants, which further distinguishes the two cases. \textit{See Nelson}, 717 F.2d at 1122.} The court held that it was not reasonable "to require a component manufacturer, a small part of whose trade is with a Taiwanese fabricator, to come to California to respond to a [cross-complaint]."\footnote{Asahi Metal, 194 Cal. Rptr. at 744. In order to reconcile the opinion in \textit{Asahi} as to foreseeability with the stream-of-commerce rule of \textit{World-Wide Volkswagen}, the court held that the "'expectation' that the product will be purchased in the forum state means something more than mere foreseeability that the product will be so purchased." \textit{Id.}} Thus, the \textit{World-Wide Volkswagen} rule seems to work more favorably for manufacturers of components than for manufacturers of an entire product.

\textbf{B. Effect of Bilateral Agreements on Jurisdiction}

The Iran-United States Claim Tribunal was established in
The agreement creating the tribunal prevents United States courts from issuing final judgments which permanently enjoin, terminate, or otherwise dispose of an Iranian interest in a standby letter of credit. In *Rockwell International Systems, Inc. v. Citibank*, an Iranian bank appealed from an order which preliminarily enjoined payments under letters of credit for a contract between a United States company and the Iranian Government. The Iranian bank claimed that the district court lacked jurisdiction under the rules establishing the claim tribunal. The court of appeals held, however, that United States parties were still allowed to obtain temporary relief in United States courts. The United States courts could exercise jurisdiction because there was neither certainty that the Claims Tribunal would exercise jurisdiction over the controversy nor that the present Iranian courts would provide an adequate remedy for Rockwell International.

C. *Forum Non Conveniens*

Two unfair competition cases in 1983 perpetuated defendants’ lack of success with the use of *forum non conveniens* as an affirmative defense. In *Laker Airways Ltd. v. Pan American World Airways*, the court explained that the plaintiff’s choice of forum

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275 *Rockwell Int’l, 719 F.2d at 584.* For a general discussion of the Rockwell case see supra notes 21-27 and accompanying text.

276 *Rockwell Int’l, 719 F.2d at 584.*

277 *Id.; See 31 C.F.R. § 535 (1983).*

278 *Rockwell Int’l, 719 F.2d at 587.* The contract contained a forum selection clause requiring settlement of disputes in the Iranian court system. *Id. at 587 n.5.* The absence of evidence that the Iranian judiciary was capable of remedying the plaintiff’s complaints, however, led the court to refuse to enforce the clause. *Id. at 587.*


For further discussion of the background of the Laker case, see *Court Bars Six Airlines*
should be given preference. Parties who desire a forum other than that chosen by the plaintiff therefore have the burden of showing that another forum would be more convenient. 281 The court reasoned that it was more logical to try the Laker case in the forum chosen by the plaintiff since the United States was the "hub" of the alleged conspiracy. 282 The deciding factor, however, was that the forum which the defendants advocated was one in which they expected to be exonerated. 283 Thus, the plaintiff's motion for summary judgment on the forum non conveniens defense was granted. 284

The defendant in American Rice, Inc. was equally unsuccessful with the forum non conveniens defense. 285 The court recognized that the United States forum would be expensive for the defendant, because both evidence and witnesses would have to be transported from Saudi Arabia. Nevertheless, since the complaint al-

*Sued by Laker From Seeking Relief From Foreign Forums, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1106 at 606 (Mar. 17, 1983); 44 Antitrust & Trade Reg. Rep. (BNA) No. 1111 at 848 (Apr. 21, 1983). The district court most recently appointed an amicus curiae "to undertake the necessary investigations of fact and law . . . in determining what action by the [court] is required as appropriate in light of the decisions of the English authorities and the resulting incapacity of the plaintiff." Amicus Curiae Appointed to Advise District Court in Laker Litigation, 45 Antitrust & Trade Reg. Rep. (BNA) No. 1142 at 902 (Dec. 1, 1983).


283 The court explained that British courts would not provide enforcement of United States antitrust law. They were persuaded by the reasoning in Piper Aircraft Co.: " . . . if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight; the district court may conclude that dismissal would not be in the interests of justice." Piper Aircraft Co., 454 U.S. at 254; Laker, 568 F. Supp. at 817.

284 Laker, 568 F. Supp. at 818. Disputes over the antitrust action were discussed by the United Kingdom and the United States in May. In addition to the jurisdiction issue, there is controversy over application of the 1977 Bermuda Two Anglo-American civil aviation treaty. Article 17(7) of that treaty provides that "[e]ach contracting party shall, consistent with its national law, give full effect to any decision or award of the arbitral tribunal . . . ." Air Transport Services Treaty, July 23, 1977, United States-United Kingdom and Northern Ireland, 28 U.S.T. 5367, T.I.A.S. No. 8641. Unless the conflict is resolved by the diplomatic talks, the matter will probably go to arbitration. U.K.-U.S. Governments Hold New Talks on Laker Dispute, 44 Antitrust & Trade Reg. Rep. (BNA) No. 1116 at 1056 (May 26, 1983).

leged violation of United States law, not of foreign law, the court refused to send the plaintiff to a foreign forum.6

An exception to defendant's unsuccessful use of forum non conveniens as an affirmative defense in 1983, however, was the case of Timberlane Lumber Co. v. Bank of America National Trust and Savings Association.7 The most recent Timberlane decision is merely another ruling in a twelve-year long dispute between Timberlane, a United States company which attempted to buy out a failing Honduran lumber business, and the Bank of America, the primary creditor of the Honduran firm.8 While suits were pending in the Honduran courts concerning the rights of the failing lumber company's creditors, Timberlane brought an antitrust action against the Bank of America, along with several individual tort claims.9 This action is best noted for the tests applied by the court to determine the issue of United States jurisdiction.

Under Timberlane I, a prior case, the plaintiff must allege that he has been injured by acts which have an effect on the domestic or foreign commerce of the United States and that he has standing to challenge those acts.10 This standard has been modified by the Ninth Circuit to require balancing the impact of the defendant's conduct on United States commerce against the potential conse-

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That this case involved a United States corporation seeking to stop unlawful competition committed abroad by another United States corporation was sufficient to convince the court that the motion for dismissal on forum non conveniens grounds should be denied. American Rice, 701 F.2d at 417.

On the issue of extraterritorial jurisdiction, the court held that "the citizenship of the defendant, the effect on United States commerce and the existence of a conflict with foreign law were all relevant." Id. at 414.


In 1972, a subsidiary of the Timberlane Lumber Co. attempted to buy out Lima, a failing Honduran lumber firm. Timberlane II, 574 F. Supp. at 1456 n.7. At that time Lima was indebted to the Bank of America for approximately $250,000. In 1971, Lima had already disposed of some of its assets to Timberlane, although the bank had filed a foreclosure action against it. Id. at 1457. The Timberlane subsidiary protested the bank's claims by filing suit in Honduras. Id. at 1458. Both the bank and Timberlane employed "extra-judicial means" in order to obtain control over Lima's assets during the Honduran litigation. Id. at 1459.

Timberlane alleged that the Bank of America harassed the lumber company and that the bank frustrated its attempts to export Honduran lumber. In addition, employees of the lumber business brought tort claims for personal injuries suffered as a result of the "Timberlane incident." Id. at 1460.

Timberlane Lumber Co. v. Bank of America, 549 F.2d 597 (9th Cir. 1976).
quences of a grant of jurisdiction. As a part of the balancing test the court will consider: 1) whether the alleged restraint affected or was intended to affect United States commerce; 2) whether a violation of the Sherman Act could be shown; and 3) whether “international comity and fairness” would be jeopardized by an exercise of extraterritorial jurisdiction.

Using this balancing test, the court determined that Honduran law was the best standard by which to judge the defendant’s conduct. The court acknowledged that there is an exception to the forum non conveniens rule in antitrust claims which show a substantial effect upon United States interests. In this case, however, any effect that the demise of the Honduran lumber company had upon the state of competition in the United States was de minimis. The tort actions were dismissed on forum non conveniens grounds because the acts, witnesses, parties, and applicable law were all Honduran. The court also held that the plaintiffs did not have standing to bring the antitrust claim in United States courts; therefore, the defendant’s motion to dismiss for lack of jurisdiction and for forum non conveniens was granted.

Factors which the court will consider in determining the interest of the United States include: whether the anticompetitive actions occurred in the United States or abroad; whether the markets allegedly affected were in the United States or abroad; whether the effects were intentional or foreseeable; and whether the plaintiff had an opportunity for adequate remedies in a foreign court. The court explained that “[t]he central inquiry” was “whether the plaintiffs even were potential competitors in the markets that they allege were actually . . . rendered anticompetitive.” The court doubted that the defendant’s actions could possibly have affected United States foreign commerce.

There were four problems with Timberlane’s standing: 1) Lima, the Honduran company, not Timberlane, was the target of the bank’s action; 2) Timberlane’s interest was at most only an interest derived from the Honduran company; 3) antitrust laws were not intended to prevent the injury caused by the assertion of valid interests by secured creditors; and 4) there was no evidence that the defendant bank sought a monopoly interest in the lumber industry.

The forum non conveniens defense was probably successful because the plaintiffs had an adequate opportunity to assert their grievances in the Honduran courts. As for the antitrust action, the court believed that Timberlane simply took a foreign lawsuit and “repackaged” it as a United States antitrust case. “We commend plaintiffs for their perseverance and indefatigable enthusiasm, as well as their building the quintessential Trojan horse from the ashes of their aborted investment in Honduras.” “However clever the draftsmanship,” though, “no edifice of antitrust claims could withstand the inherently rickety foundations upon which this suit rests.”

The court did not intend to contradict the Laker Airways approach or limit it to the forum non conveniens defense. See supra text at notes 280-84. In fact, the court cites Laker as an example of the modern approach to the defense. Timberlane II. The Laker and
The *forum non conveniens* defense was also considered in conjunction with the Foreign Sovereign Immunities Act (FSIA) in the case of *Verlinden B.V. v. Central Bank of Nigeria*. The Court stated that the FSIA "does not appear to affect the traditional doctrine of forum non conveniens." 

D. **Foreign Sovereign Immunities Act**

*Verlinden B.V. v. Central Bank of Nigeria* is more significantly noted for the Supreme Court's consideration of whether the 1976 FSIA violates article III of the Constitution by allowing foreign plaintiffs to sue foreign states on non-federal grounds. The Court held that although the diversity clause of article III is not sufficient to support such subject-matter jurisdiction, the "arising under" clause is sufficient. In addition to satisfying article III, however, actions must also be based upon a statutory grant of subject-matter jurisdiction.

E. **Court of International Trade**

The Court of International Trade was compelled numerous times during 1983 to discuss the limits of its jurisdiction. Most of the issues focused upon the court's interpretation of 28 U.S.C. § 1581, which governs civil actions in the Court of International Trade against the United States and its agents and officers, and 19 U.S.C. § 1592, which sets forth the penalties for fraud and negligence in regard to customs duties.

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*Timberlane* decisions are factually distinguishable; thus, *Laker* is still a "recent touchstone of an appropriate extraterritorial application of U.S. antitrust laws." *Id.* at 1463 n.28.


Id. at 1970. "The judicial power shall extend to all cases... arising under this Constitution, the Laws of the United States, and Treaties made... under their authority." U.S. CONSTR., art. III, § 2, cl. 1.

*Verlinden B.V.*, 103 S.Ct. at 1973. The case therefore was remanded so that the court of appeals could determine whether the Foreign Sovereign Immunities Act itself granted jurisdiction over the plaintiff's claims. *Id.* at 1974.

In *Bally/Midway Manufacturing Co. v. Regan,*303 the plaintiff attempted to bring suit in the Court of International Trade on grounds of copyright infringement.304 Jurisdiction was based upon 28 U.S.C. § 1581(i).305 The plaintiff argued that section 1581(i) applied because the merchandise involved was "subject to an embargo." The court found, however, that the goods were not subject to an embargo nor to any other "quantitative restriction."306 The plaintiff also attempted to rely on 28 U.S.C. § 1581(h) which grants jurisdiction over reviews of preimportation rulings. Since the merchandise in question had already been imported before commencement of the action, however, the court held that 28 U.S.C. § 1581(h) was also inapplicable.307 The court, therefore, transferred the action to the district court.308

The *Bally/Midway* case was distinguished by the court in *Schaper Manufacturing Co. v. Regan.*309 *Schaper* dealt with the administration of customs regulations, an issue clearly absent in *Bally/Midway.*310 In *Schaper,* the Government filed a motion to

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305 "[T]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for 1) revenue from imports or tonnage; 2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; 3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or 4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section." 28 U.S.C. § 1581(i) (1982).
306 *Bally/Midway,* 565 F. Supp. at 1046.
307 Id. "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation." 28 U.S.C. § 1581(h) (1982).
310 *Schaper,* 566 F. Supp. at 899. *See also* Kidco, Inc. v. United States, No. 82-71, slip. op. (Ct. of Int'l Trade Sept. 8, 1982).
dismiss a cause of action against the United States for misadministration of customs regulations because the case involved a possible cause of action for copyright infringement. The plaintiff’s complaint, however, focused solely upon the admission of the merchandise and the application of customs regulations affecting the merchandise. Thus, although some of the importation was in violation of copyright regulations, the plaintiff’s action was not prevented because no claim had been filed for copyright infringement.

Two other cases in 1983 considered jurisdiction under section 1581. In Maple Leaf Fish Co. v. United States, the plaintiff sought to restrict the application of a presidential proclamation which grants relief to the importers of canned mushrooms. The defendant moved to dismiss the action for lack of jurisdiction. The plaintiff asserted jurisdiction under 28 U.S.C. §§ 1581(a) and (i)(2). The court ruled that because the plaintiff had filed a protest against additional duties on the mushrooms, subject matter jurisdiction was conferred by 28 U.S.C. § 1581(a). The issue was then framed as whether the court should review the authority exercised by the International Trade Commission and the President. The court found no statute which expressly prohibited such review. Thus the court held that it could review the presidential proclamation, but only to determine whether the action conformed with applicable statutory law.

In American Air Parcel Forwarding Co. v. United States, as in Bally/Midway, the plaintiff based jurisdiction in the Court of International Trade on 28 U.S.C. §§ 1581 (i) and (h). The defendants argued that the court lacked jurisdiction because the plain-

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311 Schaper, 566 F. Supp. at 896.
312 Schaper, 566 F. Supp. at 899. "The cause of action set forth in plaintiff's complaint . . . relates principally to the admission of the subject merchandise . . . ." Id. Trade Court Has Jurisdiction of Case on Regulations Despite Copyright Element, 8 U.S. IMPORT WEEKLY (BNA) No. 12, at 457 (June 22, 1983).
313 Schaper, 566 F. Supp. at 899.
317 Maple Leaf, 566 F. Supp. at 902.
318 Id.
319 Id.
320 Id. at 903.
322 See supra notes 306-08 and accompanying text.
tiffs had not exhausted their statutory remedies. The Court of International Trade held that the plaintiffs could not circumvent the requirements of section 1581(a) by asserting jurisdiction under section 1581(i). The court's decision as to the application of section 1581(i) was affirmed. Thus section 1581 (i) was unavailable to the plaintiffs. Defendants also contended that jurisdiction under 1581(h) was unavailable because that section does not encompass internal advice rulings, such as the ruling in the present case. The Court of International Trade agreed that section 1581(h) was not applicable absent a showing of irreparable harm. The decision as to section 1581(h) also was affirmed by the court of appeals.

Other decisions in 1983 interpreted 19 U.S.C. § 1592. The United States Government sought to recover the value of goods which allegedly entered the United States in violation of customs laws in *United States v. Murray.* The defendants moved to dismiss, arguing that section 1592 gives the court jurisdiction only over *in rem* actions. The court ruled, however, that it could “exercise jurisdiction over all section 1592 actions - *in rem* as well as *in personam* - regardless of whether such actions are brought under the pre- or post-1978 version of that statute.”

The defendant in *United States v. Appendagez, Inc.*, also claimed lack of subject matter jurisdiction. The United States Government sought to recover civil penalties for fraud and negli-

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324 “[W]here a litigant has access to this court under traditional means, such as 28 U.S.C. § 1581(a), it must avail itself of this avenue of approach . . . . It cannot circumvent the prerequisites of 1581(a) by invoking jurisdiction under 1581(i) as the latter section was not intended to create any new causes of action not founded on other provisions of law.” *Id.* at 607. See H.R. REP. No. 96-1235, 96th Cong. 2d Sess. 47, *reprinted in 1980 U.S. Code Cong. & Ad. News* 3729, 3759.

325 *American Air*, 718 F.2d at 1551.


327 “As a final matter, a § 1581 case would not provide relief for past transactions which are the principal subject matter of this complaint. Declaratory relief only is available.” *American Air*, 718 F.2d 1552.


329 The defendant charged that *in personam* claims could be brought only under 28 U.S.C. § 1582. The present action was *in rem*; therefore, the court lacked jurisdiction according to the defendant. *Murray*, 561 F. Supp. at 451.

gence under 19 U.S.C. § 1592. The Court of International Trade ruled that it was given "exclusive jurisdiction of civil actions to recover penalties" by section 1582 of the Custom Courts Act of 1980.

The Government's motion to dismiss for lack of jurisdiction was granted in another penalties case. In ITT Semiconductors v. United States, the court held that voluntary payment of customs in order to settle penalties is not a "'charge or exaction' that will confer jurisdiction on the Court of International Trade." Because there was no cause of action under 19 U.S.C. § 1514, the court could not exercise jurisdiction under 18 U.S.C. § 1581(a).

VIII. AGRICULTURE

The agriculture economy traditionally has been sensitive to the status of international trade because the production of forty percent of the harvested acreage in the United States is exported to foreign buyers. The value of United States agricultural sales overseas, however, declined in 1982, the first decline in thirteen years. Consequently, Congress gave serious attention to agricultural trade legislation in 1983.

The Senate focused principally on the Agricultural Export Equity and Market Expansion Act, which was introduced on March

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832 "Although there can be little doubt that the language of this provision is unambiguous, the legislative history of the Act clearly shows that a transfer in jurisdiction from the district courts to the Court of International Trade was desired to be effectuated with no gap in jurisdiction between the courts..." Appendagez, 560 F. Supp. at 51. 28 U.S.C. § 1582 (Supp. V 1981). H. R. REP. No. 96-1235, 96th Cong. 2d Sess., reprinted in 1980 U.S. CODE CONG. & AD. NEWS 3729, 3733.
834 Id.
835 Agriculture and Exports, MAJOR LEGIS. OF THE CONG. (CRS) MLC-001 (Nov. 1983). The United States has been involved in a continuing dispute with the European Community (EC) over the EC's agricultural export subsidies. The United States claims that the EC's export subsidies and import restrictions have caused the United States share of the world agriculture market to decrease while obtaining for the EC a disproportionate share of the market. Consequently, both the House and the Senate passed resolutions—H.R. Res. 322 and S.Res. 233—expressing the concern of each Chamber over the EC measures that restrict United States agriculture exports to the EC market. Agriculture and Exports, 98th Cong., MAJOR LEGIS. OF THE CONG. (CRS) at MLC-001 (Jan. 1984).
This bill has three main features:

1. the mandate of the sale of at least 150,000 metric tons of dairy products during the next three years, with at least one half of the proceeds to be used in export assistance programs,
2. establishment of a payment-in-kind program to further develop foreign markets for United States commodities,
3. exemption of the Department of Agriculture's "blended credit" program and the payment-in-kind program from cargo preference stipulations.

The bill was reported to the Senate with amendments from the Senate Foreign Relations Committee on March 24. Senator Helms subsequently introduced a more "streamlined" agriculture export bill.

The House worked on a few of its own agricultural trade bills, namely the Fair Trade for Agriculture Act and the Agriculture Export Equity Act of 1983. Several bills were introduced in the House to modify cargo requirements in order to reduce the costs of shipping the agricultural goods.

New agricultural agreements were established with the Soviet Union and with China. The Soviet Agreement was signed on July 28, 1983 in Vienna. According to the terms of the Agreement, the Soviet Union will buy between nine and twelve million metric tons of grain, in equal amounts of corn and wheat annually over the next five years, beginning October 1, 1983. The Soviets can
substitute up to 500,000 metric tons of soybean or soybean meal for up to 1 million tons of grain.346 The Chinese Agreement, signed on July 30, 1983, stated that United States imports of Chinese textiles will increase two to three percent annually over the next five years and that the United States will resume its grain sales to China.348

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348 Agriculture and Exports, 98th Cong., MAJOR LEGIS. OF THE CONG. (CRS) at MLC-001 (Sept. 1983). The United States has been negotiating with Japan about Japanese restrictions on United States agricultural imports, especially beef and citrus. The United States has filed a complaint with the GATT over what the United States claims are excessive import quotas.