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Section 301: Access to Foreign Markets From an Agricultural Perspective

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SECTION 301: ACCESS TO FOREIGN MARKETS FROM AN AGRICULTURAL PERSPECTIVE*

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INTRODUCTION

With the recent enactment of Title IX of the Trade Agreements Act of 1979 [hereinafter "section 301"],[1] it is timely to consider how section 301, as amended thereby, can be implemented to resolve certain international trade problems currently faced by U.S. exporters of agricultural products. This article attempts to answer that question by briefly discussing the major trade barriers faced by exporters of agricultural products and the legislative history of section 301 to determine how that statute can be used to protect certain interests of U.S. exporters of farm products.

The Carter Administration said the United States will take the lead in implementing recently concluded Tokyo Round "codes": international guidelines governing the use of certain nontariff barriers to the free flow of international trade.[2] For agriculture, the use of the codes to obtain market

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* The views expressed in this article are those of the author and not necessarily the views of the United States Department of Agriculture or the United States International Trade Commission.

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1. 19 U.S.C. § 2411 (1979), 45 Fed. Reg. 34870 (May 23, 1980). This title amends Title III of the Trade Act of 1974.

2. The Tokyo Round of multilateral trade negotiations was noteworthy for the attempts of the participants to define the disciplines on the use of some of the more flagrant nontariff barriers to trade. The resulting codes, as they are called, have been accepted by most of the developed countries but by few developing countries. Those codes accepted by the President and approved by the Congress are set forth at 19 U.S.C. § 2503(c). From an agricultural perspective, the most important of those codes are the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (relating to subsidies and countervailing measures) [hereinafter the "Subsidies Code"] and the Agreement on Technical Barriers to Trade (relating to product standards) [hereinafter the "Standards Code"]. Another code of interest to the agricultural exporting community is the Agreement on Import Licensing Procedures [hereinafter the "Licensing Code"]. The participants in the Tokyo Round also concluded bilateral and multilateral trade agreements specifically applicable to trade in agricultural products, as set forth at 19 U.S.C. § 2503 and Title VII of the Trade Agreements Act of 1979. The codes are reproduced in the Message from the President of the United States Transmitting the Texts of the Trade Agreements Negotiated in the Tokyo Round of the Multilateral Trade Negotiations, Pursuant to Section 102 of the Trade Act of 1974, H.R. DOC. NO. 96–153, Pt. I, 96th Cong. 1st Sess. (1979) [hereinafter "TOKYO ROUND TEXTS"].

access is a key issue. Given seemingly ideal conditions, such as continued world population growth, price and quality competitiveness, export promotion and favorable weather conditions, U.S. farm products should be able to enter foreign markets and be competitive. However, conditions are not ideal, because, among other factors, many countries impose unfair impediments to U.S. exports and unfairly compete in third country markets. With the U.S. government's encouragement of a vigorous implementation of the Tokyo Round codes, agricultural producers should face improved trading conditions in international markets. The elaboration through inter-national precedent of the new discipline on the use of export subsidies and of limitations on the use of product standards and import licensing procedures as artificial barriers to trade are concerns of U.S. exporters of agricultural products which should be addressed without delay. The international precedent may be established under the procedures of section 301.

By focusing attention on the unfair practices of other countries, the United States will certainly attract criticism of certain of its policies.[3] Nevertheless, if the net result of the effort is a reduction in nontariff barriers worldwide, a clarification of the rules governing international trade in agricultural products and a more widespread adherence to those rules, the system of international trade will be enhanced.

CHANGING NATURE OF AGRICULTURAL TRADE BARRIERS

Many agricultural economists view the period from the late 1890s to the beginning of World War I as a time of prosperity for U.S. agriculture. There was a balance between worldwide consumption and domestic production. International interdependence grew.

World War I led to a greatly expanded production of cereals, meats and meat products to meet foreign demand. The resulting overproduction,

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3. Among the American laws most often cited as trade restrictive are section 22 of the Agricultural Adjustment Act of 1933 (7 U.S.C. § 624) (relating to quantitative restrictions and duties), the meat import law (7 U.S.C. § 1202) (relating to quantitative restrictions) and section 204 of the Agricultural Act of 1956 (7 U.S.C. § 1854) (relating to bilateral export restraint agreements). Tariffs, not quantitative restrictions on quotas, are the preferred method of restricting imports under international trade law. During the Tokyo Round discussions concerning a possible safeguard or escape clause code, the compatability of each of the above laws with the substantive and procedural requirements of Article XIX of the General Agreement on Tariffs and Trade [hereinafter "GATT"] was questioned. (Only 7 U.S.C. § 624 has been granted a formal waiver of the requirements of the GATT at 3 BISD 32 (1955)). The United States has refused to negotiate these and many other laws, unless other countries will dismantle their protectionist legislation. However, neither side can withstand the domestic political opposition to such a negotiation. For Congress's position on the inviolability of section 22, *see* 7 U.S.C. § 624(f).

combined with a weakening international economy, led to price fluctuations. Counties imposed barriers to imports in an attempt to make domestic agricultural policies effective,[4] to maintain or gain a competitive position in domestic and foreign markets and to reduce the foreign exchange flow caused by imports.[5] Initially those barriers were fairly straightforward measures taken to impede market access: tariffs and other charges on imports. Gradually the import barriers became complex, obscure, numerous and nontariff in form. Nontariff barriers to the free flow of international trade replaced tariffs and charges as the primary means of restraining free international trade and denying market access. Currently, domestic agricultural policies and export promotion efforts are used, directly or indirectly, to obtain and maintain a competitive position in export markets. Consequently, nontariff barriers now impede market access and restrict competitive opportunities in third country markets.

There is agreement among governments that certain practices, when they have adverse effects on trade. constitute nontariff barriers to international trade.[6] There is disagreement about other practices, which on their

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4. FEDERAL RESERVE BANK OF KANSAS CITY, INTERNATIONAL TRADE AND AMERICAN AGRICULTURE 12–14 (1970) [hereinafter "FEDERAL RESERVE"]. The concept of a "parity price," or the ideal price to be achieved by farmers, is measured by reference to the prices for a particular agricultural product in the World War I period, i.e., 1910-1914. That period is considered more satisfactory than others in terms of price relationships. Hence many farmers today seek government payments to achieve "parity", i.e., a price which achieves a constant real price relative to the pre-World War I period. *See* D. GALE JOHNSON, WORLD AGRICULTURE IN DISARRAY 30–31 (1973) [hereinafter "JOHNSON"].

5. "Protection for domestic agriculture received some support as part of a program of economic preparedness against possible future loss of foreign supplies, as well as part of a search for an internal political balance in which a stable peasantry would help offset the growing strength of newly emerging radical parties. Furthermore, agricultural products were tending to fall on world markets as lower cost producing areas outside Europe maintained the high levels of production induced by the war, in spite of lower European demand for agricultural imports. Because of these factors, agricultural protectionism in Europe became increasingly evident after 1925. Government intervention affecting foreign trade in farm commodities was often the initial form taken by Government programs seeking to relieve the difficulties under which their agricultural sectors were suffering." FEDERAL RESERVE, *supra* note 4, at 17. *See also* JOHNSON, *supra* note 4, at 28–43 and COUNCIL ON INTERNATIONAL ECONOMIC POLICY, 93rd CONG. 1st Sess., AGRICULTURALTRADE AND THE PROPOSED ROUND OF MULTILATERAL NEGOTIATIONS 2–6 (Comm. Print 1973).

6. *See* the preambles to the Subsidies Code and Standards Code for expressions of governments' current emphasis on the effects, rather than the existence, of a nontariff barrier. *See also* Articles 8, 10–11 of the Subsidies Code and Article 2.1 of the Standards Code.

face are domestic policies but which, in reality, can have a distorting effect on the volume of goods available for export or for sale on the domestic market.

David Gale Johnson, the renowned economist, wrote of the impediments to the free flow of international trade caused by the protection of domestic agriculture:

> The interference, however, includes measures other than tariffs, quotas or export subsidies. A reduction in imports is no less real or significant if it occurs as a result of a production expansion engendered by deficiency payments rather than from a tariff or quota. Similarly, exports can be encouraged by input subsidies or deficiency payments related to output as well as by the direct use of export subsidies. Thus protection is here defined to include techniques that may be used to increase domestic production above the level that would prevail if farmers received the world market prices and nothing more.[7]

Perhaps without great exaggeration, it has been said that: "After World War II the agricultural problems grew slowly larger. Gradually it might be said that from the 1950s [agrigultural problems] came to be recognized as the nastiest and most intractable problems confronting the world trading community."[8]

After World War II, the negotiators of the General Agreements on Tariffs and Trade[9] [hereinafter the "GATT"] made little progress in establishing international rules to govern the use of nontariff barriers to the flow of agricultural trade. One reason was that the applicability of the GATT to agriculture was, and is, a topic of much discussion. Governments have been reluctant or unwilling to apply to agricultural trade the basic rules of the GATT to the extent they are applied to industrial trade. Thus there are few references in the GATT to agriculture,[10] and the GATT itself did not

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7. JOHNSON, *supra* note 4, at 227.

8. GERARD AND VICTORIA CURZON, HIDDEN BARRIERS TO INTERNATIONAL TRADE 1 (1970) [hereinafter "CURZON"]. Gerard Curzon is Professor of International Economics at the Graduate Institute of International Studies at the University of Geneva. Victoria Curzon is *chargé de cours* at the Institut Universitaire d Etudes Europeénes and a research associate at the University of Geneva.

9. October 30, 1947. T.I.A.S. No. 1700, 55 U.N.T.S. 194 (1948). There are, in fact, two references: Article XI (relating to quantitative restrictions) and Article XVI:3 (relating to export subsidies).

10. Article XVI:3 admonishes the governments which formally apply the GATT, officially referred to as the contracting parties, to "seek to avoid" the use of export subsidies. There is no prohibition on their use. *Cf.* Article XVI:4 (relating to subsidies

effectively restrain the use of nontariff barriers to international trade in agricultural products.

By 1962, the GATT was the centerpiece of international trade law. The Kennedy Round of multilateral trade negotiations was about to begin, with hopes for concluding agreements further liberalizing trade in agricultural, as well as industrial, products.[11] However, also in 1962, the member states of the European Economic Community [hereinafter "EEC" or the "Community"][12] enacted a systematic agricultural policy. The policy encouraged domestic production through the use of price supports; facilitated low-priced, subsidized exports through the use of export subsidies; and, restricted access to the internal Community market through the use of import levies.

Because a significant portion of U.S. commercial exports of agricultural products were exported to the EEC, many U.S. farmers were deeply concerned by the common agricultural policy [hereinafter the "CAP"]. As the first common policy of the EEC, the CAP was seen as evidence of European unity; therefore, the United States did not argue that the CAP was unjustifiable or inconsistent with the GATT. Instead it agreed that the common agricultural policy should be treated as the "unbinding of concessions"[13] permitted upon the formation of a customs union under Article

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on the export of non-primary products). If a contracting party "grants directly or indirectly any form of subsidy which operates to increase the export of any [agricultural] product from its territory, such subsidy shall not be applied in a manner which results in that contracting party having *more than an equitable share of world export trade in that product,* account being taken of the shares of the contracting parties in such trade in the product during a previous representative period, and any special factors which may have affected or may be affecting such trade in the product." (Emphasis added.) The vagueness of the rule and its reference to a share of "world" export trade made it virtually useless against subsidized competition in general but, particularly, against subsidized competition in an individual third country market.

11. For a summary of the results of the Kennedy Round agricultural negotiations, *see* FOREIGN AGRICULTURAL SERVICE, U. S. DEPARTMENT OF AGRICULTURE, REPORT ON THE AGRICULTURAL TRADE NEGOTIATIONS OF THE KENNEDY ROUND (1967). The results, largely tariff reductions, did not match the hopes expressed in the United States. *See also* JOHNSON, *supra* note 4, at 25–26.

12. The European Economic Community had six member states in 1962: France, West Germany, Italy, the Netherlands, Belgium and Luxembourg. The United Kingdom, Denmark, Greece and Ireland have since become member states.

13. "The central obligation of GATT is the tariff "concession," which is a commitment by a GATT contracting party to levy no more than a stated tariff on a particular item. This commitment is contained in a "Schedule" for that party. The items in the Schedule are termed "bound" items and the individual commitment is sometimes termed a "binding." J. JACKSON, WORLD TRADE AND THE LAW OF GATT 201 (1969). The decision to renege on the commitment may be referred to as an "unbinding."

XXIV[14] of the GATT. Controversy still exists regarding the wisdom of the original U.S. position.

The CAP was implemented under Articles 9, 38–47 and 110 of the Treaty of Rome.[15] It is a harmonized or common policy to permit free intra-Community trade in certain agricultural products and to establish a common pricing policy. The common agricultural policy has two major aspects: a market policy (consisting of provisions for the free internal movement of agricultural products and price supports) and a structural policy (relating to the size and number of farms and related businesses). It is the market policy which is usually called into question by U.S. exporters of agricultural products. The CAP, through its use of price supports and market prices set at the same level, maintains artificially high market prices for the products of EEC farmers. The high support prices encourage production, which often exceeds internal EEC consumption. The Community products remain salable on the Community markets because competing imports are charged a variable import levy, which raises the EEC price for the import to the level of the competing EEC product. Thus, low world prices for agricultural products have no adverse repercussions on EEC production and prices; market access is restricted because imports are no longer price competitive. Surplus EEC products, which were produced at above-world prices, are made price competitive on world markets through the use of export subsidies called export restitution payments. Thus the CAP has an effect on U.S. products entering the EEC market and on U.S. exports competing with EEC products for sales in third country markets.

The Kennedy Round of multilateral trade negotiations did not address the CAP or a multitude of other nontariff barriers. In 1970, the Curzons wrote:

> Export subsidies for agriculture are much in vogue. The purpose of those subsidies is not to improve the balance of payments, but to foster a weak sector for which the domestic market is too small for survival. In the case of agriculture, high support prices lead to over-production and hence the need to subsidize the export of the surplus . . . An essentially domestic problem has repercussions because the way in which it is handled threatens the trading interest of other countries.[16]

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14. Art. XXIV has been amended by the Special Protocol relating to Article XXIV of the GATT, signed at Havana, on March 24, 1948. *See* 62 U.N.T.S. 56 [1950].

15. March 25, 1957. 298 U.N.T.S. 11.

16. CURZON, *supra* note 8, at 8.

By 1974, when the Tokyo Round of multilateral trade negotiations began, the rules of the GATT were observed almost as much in the breach as in the observance. The growing number of nontariff barriers of developed and, increasingly, developing countries and their instrumentalities were of increasing concern. The participants in those negotiations hesitantly began to address some of the obvious nontariff barriers to trade in agricultural and industrial products. However, no participating developed country was willing to discuss an international discipline on or scrutiny of the effects of its domestic agricultural programs and policies. Thus the proposed Multilateral Agricultural Framework,[17] or "Cathedral," was reduced to a framework for discussions.

Former Ambassador Robert Strauss, during testimony on the bill to implement the Tokyo Round Agreements, illustrated the impasse:

> We have gotten some major concessions in these negotiations. This country had spent 2½ years with no progress. One of the reasons was that we sat over there [in Geneva] saying, "We want you to give up the common agricultural policy." The Europeans said, "We will not give up the common agricultural policy." It was baying at the moon. I talked to the farm leaders in this country, for example, and our other leaders. They agreed this was not doing them any good, so I went back to the Europeans and said, "As much as we want you to, we know you are not going to tear up your common agricultural policy, so let's get into negotiation. With that understood, relax. We do not want to take that away from you, but we want you to liberalize it a little bit. Let us get our nose out of the tent a little further." We could have looked nice and strong and screamed at them for two more years and moved nothing additional into Europe. We took a policy of getting something. That is the reason all of these agricultural groups are behind us. Instead of pedantic postures, we pragmatically traded and improved our market access. My judgment is the Europeans do not like the common agricultural policy themselves; they know it is costly and wasteful. But they cannot politically do anything about that and do not intend to at the moment. So we might as well resolve ourselves to that and try to live with it and liberalize it as much as we can until they get rid of it themselves in their own due time.[18]

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17. The Cathedral, which developed into a short framework of an agreement, was not submitted to the Congress for its approval with the other Tokyo Round trade agreements.

18. A bill to approve and implement the Trade Agreements negotiated under the Trade Act of 1974, and for other purposes, Pt. 1. Hearings on S. 1376 before the Sub-

Several codes and other agreements applicable to agricultural trade were concluded during the Tokyo Round. However, the effect of the negotiations on the liberalization of the international trade in agricultural products will be judged largely by the implementation of the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the GATT [hereinafter the "Subsidies Code"] and the Agreement on Technical Barriers to Trade [hereinafter the "Standards Code"].

LEGISLATIVE HISTORY OF SECTION 301

Recently, in 1962, 1974 and 1979, the Congress authorized the President to retaliate at his discretion when the access of U.S. commerce to foreign markets is adversely affected by certain trade practices of other countries and instrumentalities. The authority could be used when a trade dispute could not be resolved by consultation and negotiation.

(a) Section 252 of the Trade Expansion Act of 1962

To authorize the President to participate for the United States in the Kennedy Round of multilateral trade negotiations, the Congress enacted the Trade Expansion Act of 1962.[19] Section 252 of that Act[20] [hereinafter "section 252"] authorized the President to respond to certain foreign practices which restricted U.S. trade or hindered access to foreign markets. The checklist of questionable practices was broadly worded and included unjustifiable foreign import restrictions, nontariff trade restrictions, discriminatory acts, policies unjustifiably restrictive of U.S. commerce and unreasonable import restrictions. The Act contained no definitions of those terms. In general, the adverse effect of those practices on U.S. commerce was measured by determining whether the value of a tariff commitment made to the United States had been impaired, trade expansion prevented, or a substantial burden placed on U.S. commerce in contravention of the terms of a trade agreement. The presidential responses authorized by section 252 varied with the nature of the foreign trade practice. The possible responses were designed to equalize

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committee on International Trade of the Committee on Finance, 96th Cong., 1st Sess. 418 (1979) (Testimony of Ambassador Robert Strauss). For a summary of the results of the Tokyo Round with regard to agriculture, *see* MTN STUDIES: 1 (results for U.S. agriculture), 2 (Tokyo-Geneva Round: Its Relation to U.S. Agriculture), 6:4 (Analysis of Nontariff Agreements) and 6:5 (Industry/Agriculture Sector Analysis) AGREEMENTS BEING NEGOTIATED AT THE MULTILATERAL TRADE NEGOTIATIONS IN GENEVA—U.S. INTERNATIONAL TRADE COMMISSION INVESTIGATION NO. 332–101, A Report Prepared at the Request of the Committee on Finance, 96th Cong. 1st Sess., August 1979.

the trade distortion created by the foreign practice. They included taking "all appropriate and feasible steps within his power to eliminate such restriction"[21]; imposing duties or other import restrictions on the offending country's or instrumentality's imports into the United States[22]; suspending, withdrawing or preventing the application of benefits of trade agreement concessions to products of the country or instrumentality[23]; and refraining from proclaiming the benefits of trade agreement concessions, among other remedies.[24] The response, or retaliatory measure, could be aimed at an individual offending country, a contravention of the GATT's principle of most-favored-nation treatment.

Since the Community recently had instituted its common agricultural policy, the concerns of the Congress and agricultural producers focused on the

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19. 19 U.S.C. § 1801 (repealed in part 1974 and 1979). The Trade Expansion Act of 1962 authorized the President to enter into bilateral and multilateral trade agreements and, as he determined required or appropriate, to implement those agreements, to proclaim certain tariff modifications, to continue existing duties or duty-free treatment and to impose certain import restrictions. The Act also provided for advice from the Tariff Commission (now the United States International Trade Commission) and some Executive Branch agencies (the agencies participating in the trade policy mechanism were Agriculture, Commerce, Defense, Interior, Labor, State and Treasury) concerning proposed trade agreements and import restrictions, most-favored-nation clauses which eliminated certain import restrictions, and for assistance to firms or workers injured by competition from imports.

20. 19 U.S.C. § 1882 (repealed 1974).

21. 19 U.S.C. § 1882(a)(1).

22. 19 U.S.C. § 1882(a)(3).

23. 19 U.S.C. § 1882(b)(2)(a).

24. 19 U.S.C. § 1882(c)(2). *Cf.* Arts. XXIII:2 (relating to nullification or impairment) and XXVIII:4(d) (relating to modification of schedules) of the GATT. Article XXIII contains the international procedure for settling disputes which arise under the GATT. Disputes arise when a contracting party considers that a benefit accruing to it under the GATT is being nullified or impaired or that the attainment of an objective of the GATT is being impeded as the result of either (1) "the failure of another contracting party to carry out its obligations under this Agreement," (2) "the application by another contracting party of any measure, whether or not it conflicts with the provisions of this agreement," or (3) "the existence of any other situation." When a dispute remains unresolved after the completion of the dispute resolution process, the contracting parties, acting jointly, may authorize a member government to suspend the application of "such concessions or other obligations under this Agreement as they determine to be appropriate under the circumstances." Many issues are the subject of consultations under Article XXII before becoming the subject of an Article XXIII proceeding. Under Article XXVIII contracting parties negotiate the modification or withdrawal of a concession. When no settlement can be reached on the terms for the withdrawal or the modification by the government wishing to do so, the withdrawal or modification may occur. However, certain affected governments may modify or withdraw substantially equivalent concessions.

CAP as a systematic tariff and nontariff barrier to trade in agricultural products. Congressional intent to counteract the effects of these tariff and nontariff barriers to trade is clear from the legislative history of section 252.[25]

It is interesting to note that what is probably the most publicized use by the President of section 252 authority concerned exports of agricultural products to the EEC, the so-called "chicken war."[26] United States exporters of certain poultry products to the Federal Republic of Germany complained that, by instituting a CAP on poultry, the EEC formulated a common external tariff higher than the previous bond concession of a member state. The result, according to the exporters, was a more restrictive treatment of poultry imports into Germany and the loss of $46 million in trade. An informal advisory panel was formed by the Secretary-General of the GATT to consider the dispute under Article XXVIII of the GATT. The panel recommended the equivalent of $26 million in compensation for the "unbindings of bound concessions." In response to the panel's findings, the President temporarily increased the duties on potato starch, brandy, dextrine and trucks. Although the duty increases were applied to imports from all countries, as required by the GATT's most-favored-nation principle, the EEC supplied most of the imports of the named products. The duty increases remained in place until the Tokyo Round of multilateral trade negotiations. More importantly, the Community never rescinded the CAP on poultry products.[27]

(b) Section 301 of the Trade Act of 1974

Several years later, to authorize the President to participate for the United States in the Tokyo Round of multilateral trade negotiations, the Congress enacted the Trade Act of 1974.[28] Section 301 of that Act[29] authorized the President to respond to certain trade practices of foreign governments,

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25. *See* [1962] U.S. CODE CONG. & AD. NEWS 3126–27.

26. For a discussion of the chicken or poultry war, *see* R. B. TALBOT, THE CHICKEN WAR (1978).

27. *See id.* For a discussion of the CAP, *see* JOHNSON, *supra* note 4, at 38–39; OECD, AGRICULTURAL POLICY OF THE EUROPEAN ECONOMIC COMMUNITY (1974); JOHN MARSH AND CHRISTOPHER RITSON, AGRICULTURAL POLICY AND THE COMMON MARKET (1971); MTN STUDIES: 1 (RESULTS FOR U.S. AGRICULTURE), a Report Prepared at the Request of the Committee on Finance, 96th CONG. 1st Sess., Aug. 1979 at CRS 227–234.

28. 19 U.S.C. § 2101 (repealed and amended in part, 1979). The Trade Act of 1974 authorized the President, *inter alia*, to enter into bilateral and multilateral trade agreements for the purpose of establishing fairness and equity in international trading relations, including (a) the reform of the rules governing international trade, (b) the harmonization, reduction, and elimination of tariff and nontariff barriers to, and other

when the practice had a described, adverse economic effect on U.S. commerce. The new authority reflected the increase in Congress's concern with nontariff barriers to international trade.[30] Section 301, as originally enacted, authorized the President to respond unilaterally to unreasonable[31] and unjustifiable[32] tariff or other import restrictions; discriminatory or other acts or policies which were unjustifiable or unreasonable and burdened or restricted U.S. commerce[33]; export subsidies which affected U.S. commerce; and, restrictions on access to food, raw materials and other basic products. The possible responses included the suspension, withdrawal, nonapplication of or refusal to proclaim the benefits of trade agreement concessions and the imposition of duties, fees and other import restrictions.

A much publicized section 301 proceeding involved the Community's CAP on wheat. The petition was filed under the 1974 Act and became a transition case under the 1979 amendments.[34] Great Plains Wheat, Inc.

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distortions of, international trade and (c) securing for the commerce of the United States, on a basis of reciprocity. equal competitive opportunities in foreign markets. S. REP. NO. 93–1298, 93rd Cong. 2d Sess. (1974) [hereinafter "S. REP. 93–1298"]. The Act also authorized the President to modify tariffs, grant preferential tariff treatment to imports from developing countries, and enter into international agreements concerning supply access; provided for Congressional oversight of trade negotiations and their implementation and for private sector advisory participation in the negotiating process; and, established "improved procedures for responding to unfair trade practices in the United States and abroad." *Id.* at 4.

29. 19 U.S.C. § 2411 (amended 1979).

30. "Section 301 revises and expands existing section 252 of the Trade Expansion Act of 1962 regarding responses to unjustified or unreasonable import restrictions of other countries or instrumentalities including variable levies, export subsidies by them to third markets which displace competitive U.S. exports, and export subsidies to the U.S. market which substantially reduce sales of competitive domestice products." "H.R. REP. NO. 93–571, 93d CONG. 1st Sess. (1974), at 64.

31. A restriction which is not necessarily illegal but which nullifies or impairs benefits to the United States under trade agreements or which otherwise discriminates against or burdens United States commerce. S. REP. NO. 93–1298, *supra* note 28, at 163.

32. A restriction which is illegal under international law or inconsistent with international obligations. *Id.*

33. The report of the Committee on Finance described several foreign practices as "foreign discrimination against U.S. commerce," including discriminatory rules of origin, government procurement, licensing systems, quotas, exchange controls, restrictive business practices, discriminatory bilateral agreements, variable levies, border tax adjustments, discriminatory road taxes and horsepower taxes. The Committee made particular reference to the distorting effects of subsidies and the discriminatory effects of standards. *Id.* at 163–164.

34. For a discussion on the Great Plains Wheat, Inc. petition, *see* PATTERSON, KEEPING THEM HAPPY DOWN ON THE FARM, 36 FOREIGN POLICY 63 (Fall 1979).

[hereinafter "GPW"], a nonprofit market development organization, filed a petition alleging that the EEC's restitutions on wheat shipped to Brazil lowered the high (domestic) price of EEC wheat to make it attractive in sales competition in Brazil with the lower priced U.S. wheat exports. GPW's petition alleged that subsidized Community exports of wheat displaced sales by U.S. exporters in a third country market, Brazil, and depressed market prices.[35] It asked that the U.S. government immediately implement counteractive measures in retaliation for the trade disruption suffered by U.S. farmers.[36] The measures suggested by GPW were duties on EEC imports into the United States, an export subsidy on U.S. exports of wheat or a complaint under Article XVI:3 of the GATT.[37] The petition was pending during the delicate, closing phases of the Tokyo Round as the United States and EEC tried to agree upon language to define the discipline on the use of export subsidies on agricultural products. Both the U.S. government and the Community wanted to prevent the section 301 complaint from becoming an explosive issue while the negotiations continued. Consequently, the only step taken concerning the petition was to conduct bilateral discussions. The petition, which raised basic issues concerning the permissible limits of subsidized competition in third country markets, was considered under the transition rule of section 301 and terminated.

Just as the CAP was a targeted trade barrier at the beginning of the Kennedy and Tokyo Rounds of multilateral trade negotiations, the Japanese systems of tariff and nontariff barriers to trade were targeted for negotiation during the Tokyo Round. Japan, another potentially major market for increased U.S. exports of agricultural products, maintains various policies such as quotas, licensing requirements and product standards, which operate to restrict the access of imports to the Japanese market. That country, like many others, supports the price of certain basic crops, but at an extremely high level. The high prices are intended to maintain or increase the level of domestic production. In addition, Japan makes incentive payments and payments to encourage double cropping of land. As an example of the protection offered, the Japanese livestock industry is insulated from the effect of imports through the use of support measures, domestic prices above the market level, nontariff barriers to imports and a significant tariff.

Section 252 and the original section 301 were considered by U.S. exporters of agricultural products to be means either to obtain the market access and competitive opportunities which are associated with liberal international trade or to retaliate against unfair trade restrictions. In fact,

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35. *Id.* at 65.
36. *Id.*
37. *Id.*

section 301 was originally drafted by agricultural interests concerned by the common agricultural policy of the Community. However, neither section, as implemented, resulted in a satisfactory resolution of the majority of the trade problems raised under them. Perhaps the foremost reason for the resulting dissatisfaction was the failure of successive administrations to act under the provisions. The Executive Branch was aware that the unilateral response by the President was considered by most countries to be illegal under international trade law, since the response did not emanate from a proceeding under Article XXIII or XXVIII of the GATT. Such a proceeding could thus have an adverse effect on foreign relations. Moreover, the country or countries against which the President acted might retaliate against U.S. exports. Consequently, successive presidents were reluctant to use their authority and permitted cases to drag on.

Several petitions were filed under section 301 concerning agricultural products. Many are still pending. Six of the thirteen section 301 transition cases involved agricultural products. Practices complained of included the preferential duties of citrus fruits and other products the EEC imports from Mediterranean countries; the EEC variable import levy on the sugar additives in canned fruits; the EEC export subsidy on wheat flour; the EEC export subsidy on barley malt; various EEC levies on imports of egg albumen and the EEC's export subsidy on wheat shipped to Brazil.

(c) Section 301 as amended in 1979

The 1979 amendments to section 301 adopt several procedures designed to encourage the use of the Presidential authority. First, section 301 now imposes time limits on the determinations of the United States Trade Representative [hereinafter "USTR"][38] and the President.[39] Second, the domestic proceeding will develop contemporaneously with the dispute resolution procedure applicable under a trade agreement.[40] Third, the President's retaliatory measure may be the same as that authorized under an internationally approved dispute resolution procedure.[41]

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38. Section 141 of the Trade Act of 1974 (19 U.S.C. § 2171) established the Office of the Special Representative for Trade Negotiations within the Executive Office of the President to conduct trade negotiations and to advise the President on matters related to the trade agreements program, among other duties. That Office has been renamed the Office of the United States Trade Representative and its authority expanded to include trade, investment and energy negotiations and policy. 1979 Reorg. Plan No. 3, eff. Jan. 2, 1980, 44 Fed. Reg. 69–273, 93 Stat. 1831 and Exec. Order No. 12188, 45 Fed. Reg. 989, Jan. 4, 1980.

39. 19 U.S.C. § 2411(c)(2).

40. 19 U.S.C. § 2413.

41. 19 U.S.C. § 2414.

Under the new law the USTR must determine within 45 days whether to initiate an investigation based on a petition[42] and, generally, must hold any public hearing within 30 days of that determination.[43] The time limits within which the USTR must recommend to the President what action, if any, to take range from 7 to 12 months after the date of the initiation of the investigation.[44] In the case of a petition alleging only an export subsidy the time limit is 7 months.[45] The President must determine, within 21 days after receiving the recommendation of the USTR, what action he will take, if any.[46]

The President's action under section 301 can be identical to and timed to correspond with the countermeasures proposed under the dispute resolution procedure of the GATT or a code, thereby eliminating the unilateral nature of the U.S. response to a foreign trade practice and the attendant criticisms. Section 301 now provides for a domestic procedure which parallels the international dispute resolution process. On the day the USTR decides to initiate an investigation under section 301, the USTR must request consultations with the foreign country or instrumentality concerned. If the case involves a dispute under a code (or other trade agreement) and a bilaterally acceptable resolution is not reached during the code's consultation period, the USTR "shall promptly request proceedings on the matter under the formal dispute settlement procedures provided under such agreement."[47]

Each code negotiated during the Tokyo Round contains a dispute resolution procedure.[48] Although the procedures under each code differ in technical details,[49] the basic framework under each includes consultations, conciliation, review by a panel of experts, written reports from the panel to a committee of the whole and, possibly, recommendations by that committee within a specified period of time. These procedures are patterned after those in the Draft Understanding Regarding Notification, Consultation, Dispute Settlement and Surveillance,[50] another agreement negotiated during the Tokyo Round of multilateral trade negotiations.

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42. 19 U.S.C. § 2412(a).
43. 19 U.S.C. § 2412(b)(2).
44. 19 U.S.C. § 2414(a)(1).
45. 19 U.S.C. § 2414(a)(1)(A).
46. 19 U.S.C. § 2411(c)(2).
47. 19 U.S.C. § 2413.
48. *See* Subsidies Code, *supra* note 2, at Articles 12–13, 16–18.
49. *See* Standards Code, *supra* note 2, at Articles 14.9–14.11 (relating to the referral of questions of a technical nature to a group of technical experts). It is expected that this special procedure will be used often for disputes involving agricultural issues, such as veterinary standards.
50. Tokyo Round Texts, *supra* note 2, at 634–648.

A means of illustrating the announced commitment to the implementation of the codes would be for the USTR, acting through the trade policy organization[51] and in consultation with the private sector,[52] to establish priority issues for resolution under the codes. Those issues, if not raised in a petition by an interested person, can be raised by the President.[53] For agriculture, the primary issues for resolution would involve the use of section 301 to interpret and implement the codes on subsidies, product standards and, possibly, licensing.

THE SUBSIDIES CODE

Of primary concern to U.S. exporters of agricultural products as a trade problem for resolution under the codes is the clarification and enforcement of the new discipline on the use of export subsidies. Article 10[54] of the Subsidies

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51. 19 U.S.C. § 1872. The Trade Expansion Act of 1962 established an interagency procedure for establishing a unified government position on trade matters. The position is established through the consultations of the Trade Policy Committee, which acts through subcommittees unless there is a major interagency disagreement to be resolved at the Secretarial level. The Trade Policy Committee includes the highest level representatives of the Departments of State, Treasury, Defense, Justice, Interior, Agriculture, Labor, Transportation and Energy; the Office of Management and Budget, the Council of Economic Advisors, the National Security Office and the International Development Cooperation Agency. The Chair and Vice-Chair are filled by the USTR and the Secretary of Commerce, respectively. The Trade Negotiating Committee, a subcommittee, is limited to the Departments of State, Treasury, Agriculture, Commerce, Labor and to the USTR, which is the Chair. Exec. Order No. 12188, 45 Fed. Reg. 989, Jan. 4, 1980.

52. 19 U.S.C. § 2155 (relating to general policy and technical advice from the private sector on trade agreements and trade policy). The private sector, formed into committees, meets to discuss issues and provide advice to the President.

53. 19 U.S.C. § 2411(c)(1).

54. Art. 10 of the Subsidies Code reads in full:

"(1) In accordance with the provisions of Article XVI:3 of the GATT, signatories agree not to grant directly or indirectly any export subsidy on certain primary products in a manner which results in the signatory granting such subsidy having more than an equitable share of world export trade in such product, account being taken of shares of the signatories in trade in the product concerned during a previous representative period, and any special factors which may have affected or may be affecting trade in such product.

(2) For purposes of Article XVI:3 of the GATT and paragraph 1 above:

(a) 'more than an equitable share of world export trade' shall include any case in which the effect of an export subsidy granted by a signatory is to displace the exports of another signatory bearing in mind the developments on world markets;

(b) with regard to new markets traditional patterns of supply of the product concerned to the world market, region or country in which the new market is

Code contains the refinement of the GATT's rule concerning the use of export subsidies on agricultural products. Article 10:2(a) defines "more than an equitable share of world export trade" to exist when the effect of an export subsidy is "to displace the exports of another signatory bearing in mind the developments on world markets." With regard to new markets, traditional patterns of supply to the world market, region, or country in which the new market is situated shall be taken into account in determining what is an equitable share of world export trade.[55] Perhaps most importantly, under Article 10:3, "Signatories further agree not to grant export subsidies on exports of [agricultural] products to a particular market in a manner which results in prices materially below those of other suppliers to the same market."

Several major issues remain unresolved by the language of Article 10. The threshold issue is which governmentally bestowed benefits are subject to the new discipline. Is a reduced interest rate production credit an export subsidy? Are concessional credit terms export subsidies when the exports are part of an aid transaction? Is a deficiency payment an export subsidy?

Equally important as an issue is how to determine when the effect of an export subsidy contravenes the discipline of a third country market. Is more than an equitable share of a third country market to be measured by an increase in the exporter's market share, in the absolute volume it exported, in the historic rate of its increase in exports to the third country market, by another measure or by one or more of the above?

A third issue will revolve around the development of the meaning of the price discipline under Article 10:3, perhaps the most concrete development under the Article.

THE STANDARDS CODE

The Standards Code is another code whose implementation through section 301 would benefit U.S. exporters of agricultural products. A body of international precedent would be helpful if it developed guidelines concerning when a product standard is intended to be, or is *per se*, a barrier to international trade.

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situated shall be taken into account in determining 'equitable share of world export trade';

(c) a previous representative period shall normally be the three most recent calendar years in which normal market conditions existed.

(3) Signatories further agree not to grant export subsidies on exports of certain primary products to a particular market in a manner which results in prices materially below those of other suppliers to the same market."

55. Art. 10(2)(b).

Under the Standards Code countries agree not to use technical regulations and standards (including packaging, marking and labelling requirements and methods for certifying conformity with technical regulations and standards) to create unnecessary obstacles to international trade.[56] However, a country may enforce a nondiscriminatory measure which is necessary to ensure the quality of its exports; to protect human, animal or plant life or health or the environment; or to prevent deceptive practices, even if it impedes market access.[57]

Standards form one of the most often used barriers to international trade in agricultural products. For example, countries have differing standards concerning how a plant or animal must be grown, how an animal may be slaughtered or further processed, which diseases and pests in a foreign country threaten the health of citizens and when the quarantine of imports is necessary. The Standards Code should result in the harmonization of some and the removal of other trade standards when they impede trade.

There is some disagreement among certain signatories of the Standards Code whether the code's provisions cover process and production methods as nontariff barriers. The language of Article 14.25 is unclear: "The dispute settlement procedures set out above can be invoked in cases where a Party considers that obligations under this Agreement are being circumvented by the drafting of requirements in terms of processes and production methods rather than in terms of characteristics of products."

Whether standards drafted in terms of processes (the form in which many agricultural standards are drafted) are covered by the code became a major issue soon after the code became effective. Great Britain required that imported poultry be treated according to a process called spin-chilling, a process not prevalent in the United States. American exporters of poultry products considered the UK's spin-chilling requirement an unnecessary nontariff barrier. The requirement will become even more restrictive in 1982, when it will be made applicable to imports into any EEC member state.

Consultations under the Standards Code led to no resolution of the issue. The U.S. government probably will raise the question of the spin-chilling requirement in an Article XXII proceeding so as not to cause a major dispute

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56. Standards Code, *supra* note 2, Article 2.1.

57. *Id.*, Article 2. This provision may be used as a loophole. It and many others in the Standards Code refer either specifically or by implication to agricultural products. *See* Articles 1.1 (relating to coverage), 2.4 (relating to performance standards), 12.4 (relating to special and differential treatment for developing countries), 13.3 (relating to Codex Alimentarius), 14.6 (relating to disputes concerning perishable products), 14.7 (relating to disputes concerning crops with a 12 month crop cycle), 14.9 (relating to technical issues), and 14.25 (relating to processes and production methods).

under the Standards Code. The exporters of poultry products might, however, file a petition under section 301, which will squarely focus attention on spin-chilling as a process which is contrary to the Standards Code and thus create a major dispute despite the caution adopted by the government in its choice of proceeding.

THE LICENSING CODE

The elimination of discriminatory and arbitrary import licensing systems through the implementation of the Licensing Code[58] could be a third category of priority. Procedurally a licensing system may lead to burdensome administrative delays which can have a variety of adverse effects on imports and on trade, e.g., unfavorable market price variation during the delay, loss of goodwill and the cost of legal advice or litigation. With perishable agricultural products, a last minute delay can result in the deterioration or spoilage of the product and its consequent rejection by the importer. The enforcement of the Licensing Code and the encouragement of broader ratification would ease the administrative burdens faced by U.S. exporters of agricultural products.

CONCLUSION

The Congress has repeatedly expressed through legislation its desire that the President act, when appropriate, to protect the access of U.S. exports of agricultural products to foreign markets. The Congressional concern with the effects of nontariff barriers to trade on market access became more accentuated as the variety and complexity of those barriers increased. However, the President rarely used his statutory authority to retaliate against practices deemed unfair. The use of that authority raised major issue concerning the U.S. government's compliance with international rules regarding acceptable procedures for dispute settlement and most-favored-nation treatment. Thus, the use of the domestic legislation had significant, adverse foreign policy implications. This situation has been changed by the 1979 amendment to section 301, which links the domestic procedure to an international dispute settlement process and internationally authorized retaliation.[59] Thus, two of the previous reasons for Presidents' hesitation to

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58. *See supra* note 2. The Licensing Code applies to automatic and non-automatic import licenses. The Code attempts to establish transparency, fairness and some certainty in the import licensing process.

59. *See* text at pp. 16–18 and accompanying footnotes, *infra*.

use section 301, when valid assertions of denial of market access were raised, no longer exist.[60]

Section 301 proceedings will result in bilateral consultations on important market access issues and simultaneously can serve to establish a body of precedent interpreting the new codes of conduct on nontariff barriers to international trade. Naturally some restraint on the use of the section will persist. It is still considered a less desirable tool than friendly consultations and negotiations for the removal of nontariff trade barriers.

As in 1962 and 1974, present U.S. exporters of agricultural products have reason to anticipate that their access to foreign markets and fair conditions of competition will be enhanced through the implementation of a new law. It remains to be seen whether they will be more satisfied with Title IX of the Trade Agreements Act of 1979 than with the previous statutes.

Clearly the delays in action which characterized the previous laws no longer exist. Several bilateral consultations have occurred in relation to the transition cases.[61] Moreover some major issues are now being considered in proceedings under the auspices of the GATT.[62] Those developments represent significant accomplishments.

On the other hand, there is as yet no indication that the President will use his authority to initiate section 301 proceedings *sua sponte* as a means of implementing and developing precedent under the codes. Rather the emphasis might be directed towards friendly negotiations and a more active

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60. *See* the prior section 2411, Pub. L. 92–618, Title III, § 301, Jan. 3, 1975, 88 Stat. 2041 and the present section, 19 U.S.C. § 2411 for a comparison of Presidential responses to foreign import restrictions and export subsidies.

61. The proceeding concerning barley malt was terminated because the EEC reduced the level of the subsidy and the Community's practice was addressed by the Subsidies Code (45 Fed. Reg. 41558, June 19, 1980). The proceeding concerning wheat was terminated on the basis of a US-EEC cooperative framework on problems in world wheat trade (45 Fed. Reg. 49428, July 24, 1980). The proceeding concerning canned fruits was terminated because the Community fixed the amount of the levy during the Tokyo Round (45 Fed. Reg. 41254, June 18, 1980). The proceeding concerning egg albumen was terminated because the supplemental levies have not been applied since 1976 (45 Fed. Reg. 48758, July 21, 1980). Informal bilateral discussions have been held concerning wheat flour and citrus fruits and products.

62. The USTR determined that the EEC's preferential duties on citrus fruits and products affect bindings made by the Community. He also determined that the EEC's subsidy on exports of wheat flour is inconsistent with the Community's obligations under the Subsidies Code. Article XXII bilateral consultations were requested on both issues. They will be followed by an Article XXIII proceeding, if necessary.

role for the Secretariat of the GATT.[63] Eventually, however, the President and others may find that carefully selected, self-initiated cases which lead to the development of clear guidelines on the use of nontariff barriers to trade in agricultural products would be of benefit to all exporters of agricultural products.

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63. An unclassified cable from the U.S. Mission in Geneva suggests: "post MTN implementation will probably continue to dominate 1981, especially with the procurement and valuation codes coming into force January 1. However, 1980 has already shown areas where much more work must be done in the future if the GATT is to be forward looking. The agricultural sector comes immediately to mind as the Cathedral concept is fleshed out. Clarification if not renegotiation of critical parts of the Standard [sic] Code appears called for in light of the spin-chill case. Further trade liberalization must also be examined, especially in view of the global negotiations." Geneva 11953, Sept. 8, 1980.