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Non-tariff Import Restrictions: Remedies Available in United States Law

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NON-TARIFF IMPORT RESTRICTIONS: REMEDIES AVAILABLE IN UNITED STATES LAW

*Craig Mathews**

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SINCE World War II, a fundamental objective of the foreign policy of the United States has been to strengthen political and economic relationships among free-world nations. An integral element of this policy has been the expansion of international trade on mutually beneficial terms. The legal and practical problems of reducing or eliminating restrictions on the international movement of commodities have therefore assumed a major importance.

International commodity transactions have traditionally been subject to a wide range of such restrictions. In the case of imports, the most familiar barriers are tariffs and formal quotas or embargoes imposed by national governments. In recent years, however, the major industrialized nations have tended toward a gradual reduction in tariff levels. Concurrently with this trend, and partially in consequence of it, there has developed an increasing awareness that other forms of import restrictions may constitute equal or even greater obstacles to trade.

It must be anticipated that nations will tend to rely increasingly upon non-tariff import restrictions if tariffs continue to be reduced. The present discussion describes the principal types of

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these restrictions which are prevalent today and analyzes the substantive and procedural authority of the President under United States law to persuade other nations to remove them.

In order to confine the discussion within manageable bounds, the following limitations have been adopted:

First, the extensive and complex field of import controls applicable to agricultural and comparable products is not considered. Restrictions in that area are conditioned by specialized economic and political factors, which are frequently reflected in the existence of domestic subsidy programs. National policies that have been evolved to deal with imports of these products are correspondingly specialized and are therefore not always representative of the more general problems presented by non-tariff trade barriers applicable to other types of commodities.¹

Second, no consideration is given to restrictions applicable to capital movements, the physical transfer of securities, or similar international transactions. Restrictions on the availability and cost of foreign exchange are included only insofar as they are relevant to the discussion of obstacles to commodity imports.

Third, although no consideration is given to tariffs per se, reference is made to certain specialized types of tariffs, such as tariff quotas and multi-column preferential tariffs, which have restrictive characteristics in addition to those inherent in tariff schedules of general applicability. Consideration is also given to additional forms of customs levies, such as surcharges, import taxes, supplementary taxes, and similar devices.

Fourth, although domestic economic measures as such are not discussed, mention is made of subsidy and similar programs within the importing country insofar as they may have the effect of placing imported commodities at a competitive disadvantage.

Fifth, commercial factors, including differences in specifica-

¹ The omission of non-tariff restrictions on agricultural imports is not intended to suggest that they are less widespread or less significant than restrictions applicable to non-agricultural imports. The reverse is frequently true. Restrictions in the agricultural field are often more extensive than those in other areas and are usually more difficult to eliminate. The recent "chicken war" between the United States and the European Economic Community is one of many examples of their potentially disruptive impact on world trade. A 1962 GATT report points out, "There has been extensive resort to the use of nontariff devices, whether or not in conformity with the General Agreement, which, in many cases, has impaired or nullified tariff concessions or other benefits which agricultural exporting countries expect to receive from the General Agreement These developments are of such a character that either they have weakened or threaten to weaken the operation of the General Agreement as an instrument for the promotion of mutually advantageous trade." GATT, *TRADE IN AGRICULTURAL PRODUCTS* 25 (1962).

tions or consumer preferences between national markets and such competitive considerations as cost disparities, are no more than mentioned, although they may often constitute substantial deterrents to international trade.²

I. THE BACKGROUND

With the passage of the Trade Expansion Act of 1962³ and the preparations thereafter initiated for further multilateral tariff negotiations pursuant to the General Agreement on Tariffs and Trade,⁴ the United States has continued its firm commitment to the belief that an expansion in the volume of international trade will promote its economic, political and social objectives, and will strengthen the alliance of free nations. President Kennedy characterized the Trade Expansion Act as "the most important international piece of legislation . . . affecting economics since the passage of the Marshall Plan," and asserted that it "marks a decisive point for the future of our economy, for our relations with our friends and allies, and for the prospects of free institutions and free societies everywhere."⁵

One of the principal premises underlying the Trade Expansion Act has been its anticipated role in promoting the commercial export trade of the United States and thereby alleviating the international payments deficits that this country has experienced in recent years. President Kennedy described the act as "the pri-

² The significance of these commercial factors is too self-evident to require documentation. For one typical summary, see statement by the Automobile Manufacturers Association, *Hearings on H.R. 9900 Before the House Committee on Ways and Means*, 87th Cong., 2d Sess. 4080-83, 4087-88 (1962). The hearings contain numerous comparable examples.

³ 76 Stat. 872, 19 U.S.C. §§ 1801-1991 (Supp. IV, 1963).

⁴ The United States became a party to the General Agreement pursuant to an executive agreement concluded by the president. Proclamation No. 2671A, 12 Fed. Reg. 8863 (1947). Presidential action was based on authority delegated by the trade agreements legislation.

⁵ 47 DEP'T STATE BULL. 655 (1962). More recently, Christian Herter, United States Special Representative for Trade Negotiations, summarized the principal purposes of the act as follows:

"To increase the security and well-being of the United States and the Free World through the expansion of trade, with the consequent benefits to industries and workers.

"To strengthen Atlantic ties and enlarge the area of interdependence within an Atlantic Community and with industrialized countries such as Britain, Japan, Australia and Canada.

"To stimulate the economic growth of the less developed nations by offering access to world markets for their products and encouraging commercial policies on their part which are conducive to their own development and to fruitful world trade." U.S. DEP'T OF COMMERCE, INT'L COMMERCE 10-11 (Sept. 23, 1963).

mary long-term means" of reversing the recent decline in the commercial trade surplus and stated that it should "open new markets and widen existing markets for American exports."⁶ Secretary of the Treasury Douglas Dillon, testifying in support of the bill, pointed out that an expansion in the export trade of the United States "has become an urgent national need."⁷ He reasoned:

"If tariffs on our exports and imports are reduced to a comparable extent, the neutral assumption would be that exports and imports would rise by the same percentage. As a result, the American trade surplus would become larger.

"Conditions now evident, and likely to persist for a number of years, make it more likely, however, that American exports to Western Europe would rise by a greater percentage than the exports of Western European countries to the United States."⁸

There can be no question, in view of the recurring deficits in the United States balance of payments, that the expansion of commercial exports must be an important and continuing objective of national policy. So long as our foreign dollar expenditures for programs of military and economic assistance remain at substantial levels, a countervailing increase in the commercial trade surplus would be clearly preferable to other, usually more restrictive, methods of reducing the payments deficit.

To assist in achieving this objective, the executive branch in recent years has instituted a variety of programs designed to promote the commercial export trade of the United States. The Department of Commerce has steadily expanded its activities in this field.⁹ In 1962, the President established within the Department the office of the National Export Expansion Coordinator for the purpose of correlating these activities with those of other departments and agencies as well as private organizations.¹⁰ These con-

⁶ President's Special Message on Balance of Payments, 109 CONG. REC. 12113 (daily ed. July 18, 1963).

⁷ *Hearings on H.R. 9900*, *supra* note 2, at 816.

⁸ *Id.* at 818.

⁹ There is a voluminous literature describing the Department's export promotion activities. One brief summary appears in *Commerce in 1961*, 49 SEC. OF COMMERCE ANN. REP. 61-73 (1961). The President's Special Message on Balance of Payments, 109 CONG. REC. 12113, 12114 (daily ed. July 18, 1963) notes that "the Department of Commerce has developed a broad program of education and assistance to present and potential American exporters."

¹⁰ Draper Daniels, the first National Export Expansion Coordinator, was appointed July

tinuing programs have been supplemented from time to time by additional means, such as the 1963 White House Conference on Export Expansion.¹¹ Proposals have recently been made in Congress for legislation to authorize a review of the entire export promotion program and to establish a national advisory council on export policy and operation which would examine progress and make recommendations to the President in this area.¹²

These efforts to expand the volume of commercial exports have undoubted value.¹³ But experience increasingly demonstrates that the effectiveness of export promotion programs and concomitant attempts to negotiate reciprocal tariff reductions can be substantially vitiated in many instances by the presence of non-tariff restrictions that discriminate against imported goods. The Commission of the European Economic Community has recently pointed out:

"The Community must give increased attention to other indirect obstacles to the free movement of goods, which are becoming all the more conspicuous and critical as further progress is made in the abolition of customs duties and quotas properly so called."¹⁴

Non-tariff trade barriers are not of recent origin. Their existence has long been recognized by businessmen, government officials, and commentators. They were discussed when the Trade Agreements Act was under consideration in 1934¹⁵ and were cited

20, 1962. For his description of the activities of his office, see *Hearings on Small Business and Foreign Trade Before the House Select Committee on Small Business*, 88th Cong., 1st Sess. 153-79 (1963). Government departments and agencies concerned with export promotion include, in addition to the Department of Commerce, the Department of State, the Treasury Department, the Department of Agriculture, the Small Business Administration, the Agency for International Development, the Export-Import Bank, and the United States Information Agency.

¹¹ Held in Washington, D.C., Sept. 17-18, 1963. The conference has been followed by a series of regional "little White House conferences" throughout the United States.

¹² See S. 1614, 88th Cong., 1st Sess. (1963).

¹³ It is probably impossible to arrive at any reliable quantitative measure of the extent to which exports have been increased by these promotion programs. Large firms which are already experienced in the export field are not likely to be significantly affected. Smaller firms, particularly those that are unfamiliar with the export market, have in many instances benefited substantially. A few illustrative figures appear in the statement of Draper Daniels, *Hearings*, *supra* note 10, at 153-79.

¹⁴ Memorandum of the Commission on the Action Programme of the Community for the Second Stage 11 (Oct. 24, 1962). To the same effect, see EUROPEAN FREE TRADE ASSOCIATION 3d ANN. REP. 6 (1963), stating that "the progressive elimination of tariffs and quantitative restrictions means that other obstacles to trade gain in relative importance."

¹⁵ See testimony of Secretary of State Cordell Hull with respect to non-tariff import barriers, quoted in *Organization for Trade Cooperation: Hearings on H.R. 5550 Before the House Committee on Ways and Means*, 84th Cong., 2d Sess. 67 (1956).

in the Randall Commission Report.¹⁶ More recently, they were extensively referred to during the hearings on the Trade Expansion bill¹⁷ and were the subject of a 1961 staff study by a subcommittee of the Joint Economic Committee.¹⁸ They have been discussed in the proceedings of many professional and business groups concerned with problems of international trade.¹⁹

Despite wide recognition of the existence of these barriers, until recently there seemed to exist a tendency on the part of some government officials to discount their significance. Administration statements regarding the Trade Expansion Act have occasionally appeared to assume that a continuing policy of multinational tariff reductions will of itself be sufficient to permit the desired expansion in the volume of international trade.²⁰ The comment is frequently made that restrictions other than tariffs have largely disappeared in the industrialized countries, at least insofar as non-agricultural commodities are concerned. A recent assertion to this effect appears in the 1963 report of the President on the trade agreements program, which recognizes the continued existence of non-tariff import controls in many countries but concludes that "on the whole, industrial countries have few remaining restrictions except in the agricultural sector."²¹

During hearings on the Trade Expansion bill, this attitude provoked considerable legislative criticism, which was by no means confined to opponents of the trade agreements program. A leader in the attempt to secure adequate recognition of the problems posed by non-tariff barriers was Representative Curtis of Missouri,

¹⁶ COMMISSION ON FOREIGN ECONOMIC POLICY, REPORT TO THE PRESIDENT AND THE CONGRESS 44 (1954).

¹⁷ *Hearings on H.R. 9900, supra* note 2; *Hearings on H.R. 11970 Before the Senate Committee on Finance*, 87th Cong., 2d Sess. (1962). Virtually every domestic industry testifying on the bill provided instances of non-tariff import barriers that it had encountered abroad. A number of importers' groups cited comparable restrictions existing in the United States. Characteristic of much of this testimony was the assertion by Paul Douglas, President of the Sulphur Export Corporation, that United States sulphur exports face "a veritable jungle of restrictions." *Hearings on H.R. 9900, supra* note 2, at 1841.

¹⁸ SUBCOMMITTEE ON FOREIGN ECONOMIC POLICY OF THE JOINT ECONOMIC COMMITTEE, 87TH CONG., 1ST SESS., TRADE RESTRAINTS IN THE WESTERN COMMUNITY (1961).

¹⁹ For one recent example, see PROCEEDINGS, CONFERENCE ON LEGAL PROBLEMS OF TRADE AND INVESTMENT IN LATIN AMERICA 255, 258 (1963).

²⁰ See, e.g., the statement of Secretary Dillon quoted in text accompanying note 8 *supra*. The hearings on the Trade Expansion Act contain numerous similar statements.

²¹ PRESIDENT'S 7TH ANN. REP. ON THE TRADE AGREEMENTS PROGRAM 10 (1963). The context suggests that the reference is to formal quantitative restrictions and licensing and exchange controls imposed primarily or entirely for balance of payment reasons. As thus limited, the statement is probably correct. It fails to mention, however, a wide range of other non-tariff restrictions, maintained by industrialized and less developed countries alike, that often substantially inhibit world trade. See part II *infra*.

who subsequently voted for the bill. To Representative Curtis and others, the bill appeared to be regarded by some administration officials primarily as a tariff measure rather than as a mechanism for dealing with all forms of trade restrictions. A characteristic statement of his position appears in his comment to Under Secretary of State George Ball:

"Tariffs probably are the most liberal of all the kinds of trade barriers. Yet, the President's message, your statement, and the statement yesterday [by Secretary of Commerce Hodges], are almost confined to this very narrow band of trade barriers which we call tariffs."²²

On a number of occasions during the hearings, administration spokesmen were asked to submit detailed information as to non-tariff barriers currently existing abroad, particularly in Europe.²³ A considerable volume of this material was furnished. It related primarily to import licensing and exchange controls and direct quantitative restrictions in the form of quotas and embargoes, although various instances of surcharges, deposit requirements, internal taxes, and certain other restrictive techniques were also cited.²⁴

It seems fair to conclude that although the executive branch has kept well advised regarding formal restrictions of this type, it has—at least until recently—possessed considerably less detailed information concerning the informal restrictions that often result from foreign administrative and private practices. Information of this nature is, of course, most readily available to United States businessmen who encounter such obstacles in seeking to sell abroad. Nevertheless, it would appear that the Department of Commerce, which has primary responsibility for the export promotion program, could perform a potentially valuable service by undertaking further efforts to collect such data from the business community and other sources. The information could be used both to assist prospective exporters and to advise our GATT representatives

²² *Hearings, supra* note 2, at 651. To the same effect see *id.* at 273-74. Earlier in the testimony, Secretary Hodges had suggested to Representative Byrnes that the problem of non-tariff barriers "is not as bad as you intimate" and had stated that "we are making tremendous progress in getting the nations of the world, particularly the important industrialized nations of the world, to cut down and cut out their restrictions." *Id.* at 161-62.

²³ See, e.g., *id.* at 650-51, where Representative Curtis asked for "an exhaustive list" of past and current restrictions. There are numerous additional instances.

²⁴ *Ibid.* See especially 162-231, 480-600. The Department of Commerce also supplied a "Sample List of Nontariff Barriers to Trade." *Id.* at 274-76.

as to restrictions which they should seek to persuade other nations to remove.²⁵

Despite the diversity of views expressed by business spokesmen concerning the merits of the Trade Expansion Act, they have generally agreed that it is not likely to be successful in expanding commercial exports unless adequate measures are taken to remove the non-tariff, and particularly the informal, import restrictions which domestic firms have frequently encountered abroad.²⁶ Various amendments for this purpose were included in the bill in the course of legislative review.²⁷ The conduct of the 1964 GATT negotiations will furnish an indication of the extent to which the United States is prepared to exercise these statutory mechanisms, and of the extent to which restrictions of this nature are capable of being dealt with by such means.

II. THE PRINCIPAL CATEGORIES OF NON-TARIFF IMPORT RESTRICTIONS

It is obviously impracticable to attempt to enumerate all of the various forms of non-tariff import barriers. Their possible number is subject only to the limitations of human ingenuity. They may, however, be conveniently classified into categories according to their nature, their purpose, or the source from which they arise. For present purposes, a further distinction exists between overt and "hidden" barriers as it affects both the ease with which they may be identified and the probable effectiveness of attempts to remove them.

The most readily identifiable types of non-tariff import restrictions are those which are formally imposed by national govern-

²⁵ It should be noted that in 1962 and 1963 the Department, primarily through the Business and Defense Services Administration, has held informal meetings with a number of industries largely for the purpose of obtaining this type of information. In addition, it has recently circulated a questionnaire to the business community seeking further data concerning such restrictions. It is to be hoped that these inquiries will prove sufficiently productive to warrant an expansion of the Department's efforts.

The Role of the Trade Information Committee should also be recognized in this regard. A primary objective of the Committee during its recent hearings in preparation for the 1964 tariff negotiations has been to collect evidence concerning foreign non-tariff import restrictions. See text accompanying notes 125-26 *infra*.

²⁶ See, e.g., the statement of Clarence Higbee, representing the Import Committee of the Wire and Cable Division of the National Electrical Manufacturers Association, *Hearings on H.R. 9900, supra* note 2, at 2414-16. Mr. Higbee urged that the bill should provide adequate assurance "that the executive branch will actively seek the elimination of foreign restrictions" other than tariffs, and stated that "the administration's trade proposals cannot be effective in promoting the export trade of the United States" unless such restrictions are removed.

²⁷ See part III *infra*.

ments to regulate the entry of goods. They include quantitative restrictions, mixing and tying restrictions, import licensing controls, foreign exchange controls, deposits required of importers, formal customs provisions, and customs levies other than tariffs. Inter-governmental commodity agreements, at least to the extent that their purpose is to protect competing industries within the importing country, may also be included in this category. In addition to these formal import controls, there also exist numerous informal types of restrictions which are considerably more difficult to identify. They result from customs administration and procedure and from the administration of the formal import controls. Finally, there exist certain other types of restrictions which are unrelated to the entry of goods as such; these include government procurement policies, internal tax policies, subsidy programs which accord an advantage to domestic industries, and various private practices.

These *methods* by which imports may be controlled should be distinguished from the *purposes* motivating the restrictions. The latter include protection of the national security, relief of injury caused by trade concessions, conservation of foreign exchange, encouragement of domestic industries, protection of public health, safety or morals, prevention of unfair competitive practices, and various other objectives which may be as numerous as the problems from which they arise. This distinction has considerable significance, since the availability and efficacy of legal and diplomatic procedures to remove such restrictions will depend both on their nature and on the reasons for their imposition.

A. *Formal Restrictions on the Entry of Goods*

1. *Formal Quantitative Restrictions*

In a sense, all government import controls other than tariffs, other customs levies, and deposit requirements can be considered quantitative restrictions, since they operate directly by limiting the volume of imports rather than indirectly by interposing the economic deterrent of increased cost. Nevertheless, because formal quantitative restrictions present distinguishable problems of identification and removal, it is convenient to consider them separately.

The principal types of formal quantitative restrictions are quotas and embargoes, the latter in effect being quotas which are set at a level of zero import units.²⁸ They may be imposed either

²⁸ It is apparent that a tariff can itself have the effect of an embargo if the rate is

on a single product or on a group of related products. Quotas may apply to all such imports collectively, regardless of origin, in which case they are generally termed "global," or they may allocate a specific quantity or proportion of the total quota to each country of origin. In the latter case, a common criterion of allocation is the amount supplied by each such country during a prior base period. The maximum number of units to be permitted entry under a quota may be absolute, in the sense that this figure may not be exceeded during the quota period. In some instances, however, such as the current German quota on coal, imports are permitted above the quota maximum but are subjected to a higher rate of duty which is frequently designed to render them noncompetitive in the importing market. This form of restriction is generally termed a "tariff quota."

Quota levels may be established by a variety of methods. The simplest procedure is to specify the maximum number of units that will be permitted entry under the quota during a fixed period. Some quotas utilize more complicated formulae based on the level of domestic demand, anticipated domestic production, or various other criteria.²⁹

Following World War II, most industrialized nations except the United States employed quotas in conjunction with import licensing controls, exchange restrictions, and other techniques, as a means of conserving scarce foreign exchange during the period of reconstruction. As their domestic economies developed, these controls have been gradually relaxed. They remain prevalent, however, in the less developed countries.

2. *Mixing and Tying Requirements*

Mixing requirements specify that not less than a designated proportion of the components of processed goods must be of

sufficiently high. See, e.g., data supplied by the Sulphur Export Corporation with respect to sulphur tariffs in Mexico and certain other foreign countries, which it characterized as "so high as to represent a complete embargo." *Hearings on H.R. 9900*, *supra* note 2, at 1841.

²⁹ The United States quota on petroleum imports illustrates the potential complexity of these formulae. The United States is divided for quota purposes into five districts (Puerto Rico constitutes an additional district) and petroleum imports are divided into three categories—crude and unfinished oils, finished petroleum products, and residual fuel oil for use as fuel. The maximum level of imports of each category of products in each district is determined by various interrelated formulae based on a composite of domestic demand, the level of imports during various prior base years, and the proportion of total imports supplied by various categories and subcategories of these products. The allocation of import licenses among importers is determined by a related set of formulae.

domestic origin. While such requirements characteristically apply to agricultural products (for example, the requirement that bread processed in the importing country must contain at least a specified proportion of domestic wheat flour), they are capable of being applied to certain types of non-agricultural commodities.

Tying requirements condition the importation of a commodity upon a commitment by the importer (or the foreign supplier or exporter) to provide a market for a specified quantity of another commodity which the importing country wishes to sell. In the typical case, the tied commodity is one that has not been moving successfully in ordinary trade. Usually, although not always, the commitment must be to sell in the export market. Tying requirements are characteristically found among the less developed nations, such as those of Latin America.

Both of these forms of restriction can seriously inhibit imports. Mixing requirements may be compared with quotas based on a proportion of domestic production. Tying requirements can be even more restrictive. Since the tied commodity is likely to be difficult to sell profitably, and since its market may not be familiar to the party required to give the commitment, the effect may be to discourage the transaction altogether.

3. *Import Licensing Controls*

One of the most flexible and effective methods of restricting international trade is to require that imports be licensed in advance by the government of the importing country. It is apparent that by making licenses easier or more difficult to obtain, the government can regulate the volume of imports of any commodity at will.³⁰ It is also apparent that the regulation can be accomplished either by establishing formal criteria governing the issuance of licenses or—often more simply and effectively—by causing issuance to depend on *ad hoc* administrative determinations.

Licensing requirements today are most prevalent in the less developed countries, where they are frequently coupled with exchange controls.³¹ Together, they often comprise a more serious

³⁰ Import licensing controls are thus effective substitutes for formal quotas or embargoes, and may be less readily identifiable. The Sulphur Export Corporation has asserted that "one of the most flagrant examples of nontariff discrimination is the current policy of the Japanese Government of absolutely prohibiting any imports of crude elemental sulphur by refusing to issue import licenses." *Hearings on H.R. 9900*, *supra* note 2, at 1842. The Japanese appear to have relaxed these restrictions somewhat in recent months.

³¹ See, e.g., *PROCEEDINGS*, *op. cit. supra* note 19, at 157.

deterrent to imports than any other restrictions imposed by those countries.³² Even among the industrialized nations, however, some licensing requirements still remain. The Commission of the European Economic Community has recently stated:

"The elimination of quantitative restrictions has not necessarily dispensed importers and exporters from the obligation of obtaining licenses. The administrative procedure for issuing these is often extremely cumbersome, involving prolonged delays or even genuine impediments especially in cases of economic hardship or sensitive products. Hence, even where licenses are issued automatically, the licensing system is not in practice always compatible with the free movement of goods in the Common Market and should therefore be abolished."³³

Licensing controls are frequently used, either in addition to or in lieu of exchange controls, as a method of alleviating international payments deficits. Another common purpose, at least in the less developed countries, is to encourage the growth of domestic industries. In Mexico, for example, the original objective of licensing controls was primarily to conserve foreign exchange for essential uses. The system now increasingly appears to be administered as a means of protecting local industries. Two of the principal criteria for evaluating a license application are whether domestic sources of supply are adequate and whether the proposed import transaction would adversely affect competition in the domestic market.³⁴

4. *Exchange Controls*

Since international trade depends upon the adequate availability of foreign exchange on reasonable terms, the manner in which exchange controls are applied can sharply affect the volume of imports. There are many forms of such controls, including general restrictions on current payments, multiple currency prac-

³² "[M]ost free trade advocates recognize that in many areas, such as Latin America, the chief barrier to increased trade is not high tariffs, but complex and discriminatory non-tariff import and exchange control regulations." *Id.* at 255.

³³ Memorandum of the Commission, *supra* note 14, at 14.

³⁴ Import licensing controls in many countries are even more directly designed to protect domestic industries. As an example, a license is required in Venezuela to import any commodity of a kind produced by a local industry which the government desires to encourage. Normally, licenses for such commodities will be issued only to the extent that the domestic demand may be expected to exceed domestic supply. It is indicative of the underlying purpose of the restrictions that license applications are typically made not to officials concerned with foreign trade but rather to the Ministry of Development.

tices, preferential regional treatment, and bilateral payments arrangements.

The improvement in the payments and reserves position of the industrialized countries of Western Europe has led to a general relaxation of their exchange controls. A similar trend has been evident in Japan, although that country incurred a marked payments deficit in 1961 which was not reversed until early in 1962. Controls remain common in the less developed nations, many of which have substantial and continuing payments deficits as well as serious internal economic problems.³⁵

Practices common throughout Latin America illustrate the exchange control difficulties faced by importers located in less developed regions who seek to do business with United States firms. Bilateral payments arrangements among Latin American countries, although less prevalent than in the past, are still encountered. Member countries of the Latin American Free Trade Association frequently accord reciprocal exchange control preferences which are not available to imports from other sources. Moreover, multiple exchange rates exist in many countries.³⁶

5. *Prior Deposits*

In a number of countries, importers are required to deposit with the government a specified sum in order to obtain the license or certificate of exchange cover which is a precondition of the import transaction. The deposit requirement may thus be viewed as one element either of the country's exchange controls or of its licensing controls. In its effect, however, it constitutes an additional and frequently substantial obstacle to the transaction.

The extent to which this requirement may inhibit trade depends upon both the amount and the period of the deposit. The amount is usually proportionate to the value of the proposed

³⁵ For a recent review of exchange restrictions by country, see INT'L MONETARY FUND 14TH ANN. REP. ON EXCHANGE RESTRICTIONS pt. 2 (1963).

³⁶ In Brazil, for example, two foreign exchange categories are used. Commodities considered essential, and virtually all commodities from the other members of the Latin American Free Trade Association, are included in the "general category." All other commodities appear in the "special category." Importers of articles in both categories must contract in advance for foreign exchange, but importers of special category items must also obtain an import license. For this purpose, it is first necessary to obtain a "promise of license." These promises are made available at public auction by the Superintendency of Money and Credit. Because the amount of foreign exchange available for special category imports is restricted by the government, the prices of promises to license are ordinarily bid up to a level which effectively discourages the importation of these items.

import, the proportion often depending on the nature of the commodity. Imports considered essential to the domestic economy may be exempted from the deposit requirement, while luxury goods may be subject to a deposit so prohibitive as to constitute a virtual embargo.³⁷

The period of the deposit is usually the same irrespective of the nature of the commodity involved. It may represent a serious deterrent to an importer who lacks sufficient financial resources to permit him to tie up funds for this length of time. Moreover, a long deposit period is an additional obstacle in countries where inflation has caused high interest rates, thus materially increasing the total cost of the import transaction. Conditions in Brazil, where the cruzeiro has become drastically devalued and annual interest rates are often in the range of thirty to forty percent, illustrate the extent to which domestic inflation may aggravate the burden imposed by deposit requirements.

6. *Formal Customs Provisions*

In addition to the tariff schedules themselves, there are certain formal provisions of the customs laws that may restrict imports. Among the most important are procedural formalities and methods of valuation. Customs formalities, if disproportionate to the necessary processing of the transaction, theoretically can constitute a substantial barrier to imports. It may be doubted, however, whether this type of impediment (as contrasted, for example, with delay in issuing import licenses, which appears to be a relatively common and effective device in some countries) has in fact been a major deterrent to trade in recent years. The various efforts which are currently being made to reduce and standardize customs formalities are primarily designed to simplify and facilitate import transactions which would probably occur in any event.³⁸

By contrast, the valuation provisions of the customs laws may

³⁷ In Chile, for example, deposit requirements frequently amount to as much as 200% of the value of the proposed import, and in rare cases reach 10,000%. In Brazil, the deposit amounts to 200% in the case of all special category imports and 100% to 200% in the case of commodities in the general category. Certain commodities considered essential to the Brazilian economy are exempted from deposit requirements.

³⁸ Unnecessary customs formalities may, of course, be a considerable nuisance in import transactions, and attempts to eliminate them are to be commended. The Commission of the European Economic Community, for example, has taken cognizance of "all the administrative checks carried out when frontiers are crossed" and has commented that "for the efficient working of the Common Market and doing away with physical frontier checks within a reasonable period, these administrative obstacles to trade must also be abolished." Memorandum of the Commission, *supra* note 14, at 14.

have a considerable influence on the volume of trade. In the United States, for example, legislation was adopted in 1956 which altered the basis of valuation in a number of respects. These changes have been regarded as slightly reducing the extent of protection afforded by the tariff schedules, although the tariffs themselves remained unchanged.³⁹ Their effect would have been considerably greater if the new act had not specifically provided that items subject to a reduction in duty of five percent or more as a result of the new provisions would continue to be valued under the old act. The Treasury Department, having found that the reduction would have amounted to as much as thirty or forty percent in the case of some commodity groups, thereupon issued a "final list" of articles for which the prior methods of valuation were to be maintained.⁴⁰

Another example of the manner in which customs valuation provisions may affect international trade is afforded by the current controversy over "American selling price." Under both the Tariff Act of 1930 and the Customs Simplification Act of 1956, certain commodities have been valued for duty purposes on the basis of the United States price of the comparable commodity produced in this country.⁴¹ The effect of this method of valuation is to increase substantially the dutiable value of many commodities to which it

³⁹ The valuation provisions of the Tariff Act of 1930 were originally contained in § 402, 46 Stat. 708 (1930). The Customs Simplification Act of 1956, 70 Stat. 943, 19 U.S.C. § 1401a (1958), redesignated § 402 as § 402a and enacted a new § 402 containing the revised basis of valuation. Briefly, the 1956 act eliminated "foreign value" as the principal basis of valuation and adopted "export value" in its stead. "United States value" and "constructed value" (formerly "cost of production") were continued as alternative bases of valuation, subject to certain modifications. "American selling price" was also retained, similarly modified, in the case of certain classes of commodities.

As noted in the text, the application of these changes was subject to the Treasury Department's designation of articles to be included in the "final list" required by § 6(a) of the 1956 act, for which the prior methods of valuation were to be continued. The final list is reprinted in BUREAU OF CUSTOMS, U.S. TREAS. DEP'T, EXPORTING TO THE UNITED STATES 70 (Dec. 1962). For a general discussion of the changes introduced by the 1956 act, see *id.* at 14-17.

⁴⁰ Although the final list was necessary in 1956 to prevent the change in valuation methods from producing unintended alterations in the dutiable value of a number of commodities, its continuance to the present time has been criticized by commentators. See, e.g., MASSON & WHITELY, BARRIERS TO TRADE BETWEEN CANADA AND THE UNITED STATES 27-30 (1960). The authors state that "Congress was so impressed with the protective effects of the old valuation procedures that in enacting the change it provided for certain commodities to be exempted from the new definitions For the time being, then, the United States is operating on a dual valuation system, with old, more ambiguous and more protective standards applicable to one group of commodities, and a modernized set of standards applicable to all other dutiable imports." *Id.* at 29.

⁴¹ For the definition of American selling price, see the Tariff Act of 1930, § 402(e), 46 Stat. 708, 19 U.S.C. § 1402(e) (1958), as amended by the Customs Simplification Act of 1956, 70 Stat. 943, 19 U.S.C. § 1401a (1958).

applies. Since coal tar products are primarily affected, the provision has been extensively criticized by foreign chemical firms. It has been defended with equal vigor, however, by the United States chemical industry.⁴²

7. *Customs Levies Other Than Normal Tariffs*

Tariffs are by no means the only customs charges applicable to imported commodities. In many foreign countries additional levies exist. They are most frequently referred to as surcharges, import taxes, or supplementary taxes, although other terms are occasionally used. Although they are prevalent in the less developed countries, many industrialized nations also employ them.⁴³

A similar form of customs levy, particularly common in the less developed countries, is the luxury tax. Despite its name, this tax is frequently applied not only to luxuries (which the importing country presumably does not produce but feels it can do without) but also to commodities which the country does produce and which it wishes to insulate from foreign competition. The luxury tax is often imposed in addition to both the tariff and the surcharge.

The cumulative effect of these levies can be formidable. In Chile, for example, there exists a normal ad valorem or specific tariff, an "additional tax" which is typically thirty percent of the

⁴² For a recent statement of the position of foreign chemical manufacturers, see Chem. & Eng'r News, Oct. 28, 1963, p. 26, reporting the attitude of the German Verband der Chemischen Industrie. The association strongly objects to the continuation of the American selling price provision and urges that the matter be considered at the 1964 negotiations pursuant to the General Agreement on Tariffs and Trade. To the same effect is a recent speech by Dr. Victor M. Umbricht, President of CIBA North American, at a Briefing Conference on Tariffs and Other Barriers to European-American Trade, Washington, D.C. (Nov. 8-9, 1963) [hereinafter cited as Briefing Conference]. Dr. Umbricht maintains that the use of American selling price as a basis of valuation may raise the effective rate of duty to as much as two or three times the level that would otherwise exist.

The position of the United States chemical industry in support of the American selling price method of valuation is conveniently summarized in SYNTHETIC ORGANIC CHEM. MFRS. ASS'N OF THE UNITED STATES, THE CASE FOR AMERICAN SELLING PRICE (Nov. 1963).

⁴³ For examples, see *Hearings on H.R. 9900*, *supra* note 2; *Hearings on H.R. 11970*, *supra* note 17. Many of these examples are found in the industrialized countries, particularly in Western Europe. The United States industry has recently protested an Italian "import equalization tax" on television receivers which is asserted to raise total customs charges from 20% (the normal duty) to over 31%. See J. Commerce, June 18, 1963.

It may be noted that prior to the recent adoption of revised tariff schedules pursuant to the Tariff Classification Act of 1962, 76 Stat. 72, 19 U.S.C. § 168 (Supp. IV, 1963) the United States imposed certain import taxes under the INTERNAL REVENUE CODE OF 1954. These have been incorporated in the revised tariff schedules in the form of specific duties, and the corresponding sections of the Code repealed.

duty-paid value, a luxury tax of thirty-two percent on luxury items, and a temporary surcharge of up to 200 percent. Articles subject to all or most of these charges face a major import barrier.⁴⁴

In some instances, surcharges have been adopted for the purpose of alleviating a payments deficit rather than protecting domestic industries. This is true of the temporary Chilean surcharge referred to above. The recent action by Canada provides another illustration of the use of this technique. In mid-1962, the Canadian Government, concerned over the nation's international payments situation, imposed temporary import surcharges ranging from five to fifteen percent.⁴⁵ As the Canadian payments position subsequently improved, these charges were withdrawn.

In addition to the foregoing levies, it is normal for countries to impose various customs fees. In theory, and usually in practice, these fees are solely for the purpose of recouping expenses incurred in processing the import transaction. They are, therefore, too minor to deter trade. In a few instances, however, they have been set at levels disproportionate to the expense involved, with the effect of creating an additional import barrier.

Finally, it should be noted that ordinary tariffs may be imposed in a manner that creates restrictions in addition to those inherent in tariff schedules of general applicability. Preferences created by customs unions and free trade areas provide an illustration. The Commonwealth preference system constitutes a somewhat comparable case. Canada, for example, maintains a three-column tariff schedule, consisting of a Commonwealth preference rate, a most-favored-nation rate, and a general rate which is of slight significance today. The Commonwealth preference rate on many items is appreciably lower than the most-favored-nation rate. As in the case of regional trading arrangements, the result of the Commonwealth preference is to accord a competitive advantage to favored suppliers at the expense of outsiders.

⁴⁴ Chile is by no means an isolated case. A measure of the magnitude of the barrier that can be presented by these additional duties is afforded by the customs treatment of imports in Argentina. A new, unified tariff schedule has recently been adopted which largely retains the restrictive character of the previous system of cumulative levies. Under the new schedule, duties range up to 320% of C.I.F. value. The former supplementary surcharge of 5% continues to be imposed on most items as a temporary measure (it is scheduled to be terminated on Oct. 1, 1964).

⁴⁵ For detail, and a copy of the Order in Council adopting the surcharges, see *Hearings on H.R. 11970*, *supra* note 17, at 1768-1834. The Canadian action required a waiver under the General Agreement on Tariffs and Trade, which was subsequently obtained.

8. *Intergovernmental Commodity Agreements*

One further type of formal governmental restriction on imports requires brief mention. Unlike the controls discussed above, it consists of multilateral rather than unilateral governmental action. Although the mechanics of these intergovernmental agreements differ, each of them is designed to regulate the availability in international trade of the commodity to which it relates.

Insofar as the underlying motivation is concerned, there are two distinct categories of commodity agreements: those in which the principal objective is to assist producers and the producing countries, and those in which the objective is to protect competing domestic industries within the consuming countries. Agreements such as those relating to tin, wheat, sugar, and coffee are detailed documents which provide elaborate procedures intended to assure the producers of these commodities that they will receive adequate and relatively stable prices in world markets.⁴⁶ By contrast, the current textile agreement is designed to restrict cotton textile imports into the United States for the protection of the domestic textile industry.⁴⁷

Intergovernmental commodity agreements of the former type tend to reflect in general the interests of the principal parties. Producing countries approve them because of the benefits to their domestic economies. Consuming countries are motivated by a variety of considerations, not the least of which is a desire to increase the economic and political stability of the producing countries. Agreements of the second type, however, are beneficial principally to competing industries within the consuming countries. Such agreements are accepted by the producing countries largely because they foresee that refusal to do so is likely to cause the consuming countries to impose unilateral controls which might be both more restrictive and less amenable to subsequent modification than the terms of the agreement.

⁴⁶ See, e.g., International Wheat Agreement 1959, T.I.A.S. No. 4302; International Sugar Agreement 1959, T.I.A.S. No. 4389.

⁴⁷ The Long Term Arrangement Regarding Trade in Cotton Textiles was concluded at Geneva on Feb. 9, 1962. By the beginning of 1963, it had been accepted by 22 countries. It followed an interim arrangement for the same purpose which became effective Oct. 1, 1961 for a one-year period. The Long Term Arrangement is implemented in the United States by Exec. Order No. 11052, 27 Fed. Reg. 9691 (1962), which delegated to the President's Cabinet Textile Advisory Committee the responsibility for supervising the administration of the Arrangement and for negotiating the bilateral agreements contemplated thereby. For a summary of the role of the Contracting Parties to the General Agreement on Tariffs and Trade in concluding the Arrangement, see, e.g., PRESIDENT'S 6TH ANN. REP. ON THE TRADE AGREEMENTS PROGRAM 9, 72 (1962); PRESIDENT'S 7TH ANN. REP., *op. cit. supra* note 21, at 7.

For these reasons, agreements of the second type have been criticized on the ground that they are the equivalent of unilaterally imposed quotas, but are more objectionable because they are not subject to the limitations provided in existing trade agreements legislation.⁴⁸ Nevertheless, a number of industries in the United States have urged that such arrangements be concluded to protect their interests.⁴⁹ Similar suggestions have been made by the European Economic Community⁵⁰ and the European Coal and Steel Community.⁵¹

B. *Administrative Restrictions on the Entry of Goods*

Each of the formal restrictions referred to above must necessarily be effectuated through administrative procedures. These procedures afford opportunities for imposing restrictions on imports in addition to those inherent in the formal controls. Certain examples, such as the use of licensing or exchange controls to exclude imports of commodities produced domestically, have been suggested in the previous discussion.

The potentially restrictive effects of administrative procedures may be illustrated by reference to customs classification and valuation.⁵² In general, it may be said that the opportunity to create administrative barriers to trade is implicit in every aspect of the

⁴⁸ For an example of such criticism, see *Separate Views of the Republicans on H.R. 11970*, H.R. REP. NO. 1818, 87th Cong., 2d Sess. 83 (1962).

⁴⁹ See, e.g., *Hearings on H.R. 11970*, *supra* note 17, at 1767, 1838 (softwood lumber). The Administration has indicated a willingness to discuss softwood lumber imports with the Canadian Government. *Id.* at 1835. See also *Hearings on H.R. 9900*, *supra* note 2, at 1842 (sulphur).

⁵⁰ Memorandum of the Commission, *supra* note 14, at 75. The Commission states that "in order to establish a common point of view for the Community, the Commission took an active part in the negotiations for the cotton textile arrangement and, if the arrangement works satisfactorily in practice, intends to propose that the same method be used for other products."

⁵¹ The Council of Ministers of the ECSC is considering action to protect steel producers within the Community from the increasing volume of steel imports. One possible long-term solution reported to be under consideration is an intergovernmental commodity agreement for steel. Wall Street J., Nov. 4, 1963, p. 2, col. 3.

⁵² See the classic comment of B. A. Levett: "Let me write the Administrative Act and I care not who fixes the rates of duty." LEVETT, *THROUGH THE CUSTOMS MAZE* 11 (1923). Recent commentators on trade between the United States and Canada have stated: "It is no exaggeration to say that valuation and classification practices alone could easily be manipulated to exclude almost any dutiable import from the United States or Canada." MASSON & ENGLISH, *INVISIBLE TRADE BARRIERS BETWEEN CANADA AND THE UNITED STATES* 1 (1963). *PROCEEDINGS, op. cit. supra* note 19, calls attention to the significance of the classification of proposed imports as "essential" or "non-essential" in some Latin American countries and notes that "a change in classification from essential to non-essential can be ruinous to an exporter who has developed the market and established a working distribution system." *Id.* at 260. While these classifications are often made within the framework of statute or regulation, they may nonetheless represent the exercise of *ad hoc* administrative discretion with respect to specific cases.

classification and valuation provisions which entail the exercise of discretion. There are many such instances in the customs laws of every country.

The significance of classification procedures is reflected in the fact that the recent promulgation of the revised tariff schedules of the United States was preceded by a series of hearings intended to ensure that the adoption of the new classification would not alter applicable rates of duty.⁵³ A few of the more significant problems relating to classification may be summarized for illustrative purposes.

Composition: Many tariff classifications depend upon whether the article in question is "wholly," "in chief part," or "in part" composed of certain materials. The difference in the possible rates of duty may be substantial. When the article contains a number of different components, the proportions of which may differ depending upon whether they are based on value, weight, volume or some other unit of measure, classification may entail considerable administrative discretion. When the unit of measure is value, fluctuations in the prices of the components may further complicate the determination.

Component parts: This is a different problem from that of determining the composition of an article. Many items are subject to different rates of duty depending upon whether they are classified as component parts or as separate items. Experienced exporters are accustomed to ship composite articles either assembled or in their separate components, according to which procedure results in the lower total duty.

End use: In a number of countries, the ultimate use of the article may be an important factor in establishing its classification for duty purposes. One common criterion is whether the article is intended to become a component in domestic manufacture. If so, the applicable duty is often substantially reduced. The uncertainty of distinguishing between identical imports on the basis of their eventual use is apparent.⁵⁴

Origin: This is an important criterion of classification in the tariff schedules of most countries. It is necessary to determine whether most-favored-nation or Commonwealth preference rates

⁵³ The revision does not appear to have altered significantly the average level of duties, although some individual items have been affected. It resulted in sufficient changes, however, to require the United States to enter into negotiations with other countries to provide compensatory concessions in some instances.

⁵⁴ One objective of the recent tariff revision in the United States was to eliminate, insofar as possible, the reference to ultimate use as a criterion of classification.

apply. Determination of origin may present difficulties when the article contains components from different sources or when it has been produced or processed in more than one country. In certain countries, for example, an article cannot qualify for preferential tariff treatment under the country-of-origin provisions unless it has been shipped directly to the port of entry.

Valuation, like classification, frequently entails the exercise of administrative discretion. Under United States law, for example, the determination of export value, United States value, or constructed value requires a decision as to what constitutes "such or similar merchandise" to be used as the basis for valuing the imported article.⁵⁵ Furthermore, customs officials must decide whether the preferred basis of valuation can be "determined satisfactorily" in order to establish which basis to apply.⁵⁶ Various additional decisions must be made, such as whether the merchandise to be used as the basis for valuation is "freely sold or, in the absence of sales, offered for sale," whether it is sold or offered "to all purchasers at wholesale" or, if to selected purchasers, whether "in the ordinary course of trade . . . at a price which fairly reflects the market value of the merchandise," and whether it is sold or offered in "the usual wholesale quantities."⁵⁷ When constructed value is used, numerous accounting determinations must be made.

These examples serve to indicate the extent to which the classification and valuation provisions of the customs laws of any country entail the exercise of administrative discretion.⁵⁸ It is not suggested that in the great majority of instances this discretion is exercised in other than a conscientious and equitable fashion. Nevertheless, the provisions afford a continuing opportunity to impose additional restrictions against imported articles, either deliberately or by inadvertence. In such circumstances, the diffi-

⁵⁵ See Customs Simplification Act of 1956, §§ 402(b)-(d), 70 Stat. 943, 19 U.S.C. §§ 1401a(b)-(d) (1958).

⁵⁶ Customs Simplification Act of 1956, § 402(a), 70 Stat. 943, 19 U.S.C. § 1401a(a) (1958).

⁵⁷ Customs Simplification Act of 1956, §§ 402(b)-(d), (f), 70 Stat. 943, 19 U.S.C. §§ 1401a(b)-(d), (f) (1958). The same problems are involved in determining American selling price under § 402(e).

⁵⁸ A useful discussion of these administrative techniques and other forms of trade barriers as employed in the United States and Canada is contained in MASSON & ENGLISH, *op. cit. supra* note 52; MASSON & WHITELEY, *op. cit. supra* note 40; and SOUTHWORTH & BUCHANAN, *CHANGES IN TRADE RESTRICTIONS BETWEEN CANADA AND THE UNITED STATES* (1960). For additional information on administrative techniques in Canada, see relevant portions of ARTHUR ANDERSEN & CO., *TAX AND TRADE GUIDE: CANADA* (1963); CANADIAN IMPERIAL BOARD OF COMMERCE, *DOING BUSINESS IN CANADA* (1961). Administrative barriers in the customs laws of the United States are discussed in HUMPHREY, *AMERICAN IMPORTS* 188-207 (1955).

culty of detecting the discrimination contributes materially to its effectiveness.

C. *National Policies Underlying Restrictions on the Entry of Goods*

The preceding discussion has sought to illustrate the principal non-tariff methods, both formal and administrative, by which national governments may limit the entry of commodities in international trade. It has been suggested that these techniques should be distinguished from the purposes motivating the restrictions. This is necessary not only for conceptual clarity but also because both law and diplomatic practice take cognizance of the purpose as well as the method of restriction in assessing its propriety.

No useful purpose would be served by attempting to enumerate all of the possible reasons for which the importation of goods may be controlled by governments. A wide range of political, economic and other motivations are conceivable. As a background for the consideration of legal remedies, however, it is desirable to summarize the principal purposes for which restrictions are most commonly imposed.

1. *Protection of National Security*

It is widely recognized that nations may regulate the importation of commodities that threaten their essential security interests.⁵⁹ The form of the domestic legal authority for such action differs in different countries. In the United States, specific legislation for this purpose has been in effect since 1954.⁶⁰ Its scope was successively expanded in 1955 and 1958.⁶¹ It currently appears as section 232 of the Trade Expansion Act of 1962.⁶²

⁵⁹ See, e.g., the General Agreement on Tariffs and Trade, art. XXI(b).

⁶⁰ Trade Agreements Extension Act of 1954, § 2, 68 Stat. 360; subsequently Trade Agreements Extension Act of 1955, § 7, 69 Stat. 166; and Trade Agreements Extension Act of 1958, § 8, 72 Stat. 678.

⁶¹ In its original form, the national security provision was quite limited. It merely provided that "no action shall be taken pursuant to [the Trade Agreements Act] to decrease the duty on any article if the President finds that such reduction would threaten domestic production needed for projected national defense requirements." Trade Agreements Extension Act of 1954, § 2, 68 Stat. 360.

In 1955, this authority was substantially extended by directing the President to "take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security." Trade Agreements Extension Act of 1955, § 7, 69 Stat. 166. A procedure was provided by which the question was to be investigated by the Office of Defense Mobilization and recommendations made to the President.

The 1958 amendment sought to clarify the criteria to be considered by the executive branch in evaluating the effect of imports on the national security. It also introduced

Section 232 prohibits the granting of a trade concession on imports of any article when the President finds that the concession would threaten to impair the national security. It establishes a procedure for investigating the national security implications of imports of any article and directs the President, unless he concludes that a threat to the national security does not exist, to "take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security."⁶³ Various investigative criteria are enumerated in the act, including domestic production necessary for defense purposes, the current and anticipated capacity of the domestic economy to meet such requirements, and the effect of imports on the foregoing.⁶⁴

The executive branch has recognized that such restrictions may be required in certain instances.⁶⁵ Nevertheless, although

various changes in language which were viewed as rendering the provision more protective. See, *e.g.*, the requirement that the President, on receipt of an affirmative finding from the Office of Civil and Defense Mobilization, must take restrictive action "unless" he found that imports "do not" threaten the national security. The 1955 act had directed such action only "if" he found such a threat. For discussion of the implications of this change, see S. REP. No. 1838, 85th Cong., 2d Sess. 5-6 (1958). Representative Mills took the view that the amendment did not materially alter the effect of the national security provision, since final determination remained with the President. See 104 CONG. REC. 16542 (Aug. 7, 1958).

A number of additional changes were adopted in 1958 which provoked controversy, both in and out of Congress, as to the proper objectives of the national security provision. It was widely agreed that, within reasonable limits, domestic industries directly essential to the national defense are legitimate and necessary subjects of protection. But the attempt to determine the point at which the economic condition of an individual industry is related to the welfare of the domestic economy as a whole, and the extent to which either consideration falls properly within the ambit of the national security provisions, engendered strongly divergent views. In this connection, the House Ways and Means Committee stated:

"Your Committee was guided by the view that the national security amendment is not an alternative to the means afforded by the escape clause for providing industries which believe themselves injured a second court in which to seek relief. Its purpose is a different one. . . . Serious injury to a particular industry, which is the principal consideration in the escape-clause procedure, may also be a consideration bearing on the national security position in particular cases, but the avoidance or remedy of injury to industries is not the object *per se*." H.R. REP. No. 1761, 85th Cong., 2d Sess. 13 (1958).

⁶² 76 Stat. 877, 19 U.S.C. § 1862 (Supp. IV, 1963). Section 232 is substantively identical with § 8 of the 1958 act. H.R. REP. No. 1818, 87th Cong., 2d Sess. 41 (1962). The administration had originally proposed a procedural change, of conjectural practical significance, by which the President would himself conduct the requisite investigation. This proposal was deleted from the act as subsequently adopted.

⁶³ Section 232(b), 76 Stat. 877, 19 U.S.C. § 1862(b) (Supp. IV, 1963).

⁶⁴ Section 232(c), 76 Stat. 877, 19 U.S.C. § 1862(c) (Supp. IV, 1963).

⁶⁵ See, *e.g.*, testimony of Deputy Secretary of Defense Gilpatric:

"I would want to see certain safeguards. That is why I refer to the importance of section 232. We must always have in mind the importance of maintaining our own

"I think interdependence is important, but I always want to have, right here at defense industry in this country.

nearly forty applications have been filed for relief under the national security provision, affirmative action has been taken only in the case of petroleum imports. These restrictions, in the form of import quotas, were imposed March 10, 1959,⁶⁶ and continue in effect today.⁶⁷ They follow a series of investigations and recommendations by various governmental bodies and a program of voluntary restrictions which was in effect during 1958.⁶⁸

2. *Relief of Injury Caused by Trade Concessions*

A second widely recognized ground for restricting imports is to relieve injury to a domestic industry resulting from trade concessions previously granted. In an attempt to ensure that controls of this nature will be invoked only in appropriate instances, nations have sought to define in general terms the criteria justifying their use.⁶⁹ In the United States, this "escape clause" procedure⁷⁰ has been embodied in legislation since 1951.⁷¹ Successive amendments, generally designed to facilitate the obtaining of relief, culminated in the Trade Agreements Extension Act of 1958.⁷² The 1962 act contains further revisions,⁷³ the net effect of which is probably to make relief somewhat more difficult to obtain.

Only a relatively small proportion of applications for relief under the escape clause have been successful. During the period from 1948 to 1962, prior to the passage of the Trade Expansion

home, an industrial base which we can look to for our support of our Military Establishment.

"I do not think the two are inconsistent. I think they are supplementary."
Hearings on H.R. 9900 Before the House Committee on Ways and Means, 87th Cong., 2d Sess. 762 (1962).

⁶⁶ Presidential Proclamation No. 3279, 24 Fed. Reg. 1781 (1959). The proclamation has been modified by a succession of subsequent directives.

⁶⁷ For a simplified summary of the mechanics of the quota, see note 29 *supra*.

⁶⁸ A history of these controls and a description of their present operation is contained in a speech by J. Cordell Moore, Administrator, Oil Import Administration, Department of the Interior, at Briefing Conference.

⁶⁹ See the General Agreement on Tariffs and Trade, art. XIX.

⁷⁰ Technically, escape clause relief has been redesignated "tariff adjustment" under the Trade Expansion Act of 1962. The old term is so well entrenched by usage, however, that it will probably continue to be employed. In the present discussion, use of the older term is to be taken as referring to the procedure under either the 1962 or earlier acts, as the context indicates.

⁷¹ See Trade Agreements Extension Act of 1951, 65 Stat. 73. Prior to 1951, the President by executive order had specified the procedures by which the Tariff Commission was to administer the escape clause.

⁷² 72 Stat. 675 (1958).

⁷³ As noted above, the escape clause appears in the 1962 act under the title of tariff adjustment. The mechanism by which tariff adjustment operates is distributed through §§ 301, 302, and 351 of the act. The substantive criteria by which the Tariff Commission is to evaluate an application for relief appear in § 301(b).

Act, 135 applications were filed with the Tariff Commission. Of these, thirty-two were subsequently dismissed or withdrawn. In the remaining 103 cases, the Tariff Commission found no injury in fifty-eight. Relief was denied by the President in twenty-six cases and granted in fifteen. Four were still pending at the beginning of 1963, in all of which the Commission has subsequently found no injury under the criteria established by the 1962 act.⁷⁴

3. *Prevention of Unfair Competitive Practices*

A number of international trading practices have generally been regarded as forms of unfair competition. Insofar as these practices are relevant to a discussion of import restrictions, they include the sale of goods in the import market at prices below those obtained in the home market,⁷⁵ patent, copyright or trademark infringement by imported goods, failure to identify the country of origin, use of convict or forced labor in the manufacture of imported goods, and similar techniques. While there is general agreement that these practices are objectionable and may properly be prevented,⁷⁶ they nevertheless afford occasional opportunities for restricting imports which may not in fact compete unfairly with domestic goods.

In the United States, the most general provision relating to unfair import competition is section 337 of the Tariff Act of 1930, as amended.⁷⁷ It prohibits "unfair methods of competition and unfair acts in the importation of articles into the United States" where the "effect or tendency . . . is to destroy or substantially injure" a domestic industry or to restrain or monopolize United States commerce. Final decision is made by the President following an investigation by the Tariff Commission, the remedy for viola-

⁷⁴ Data are taken from MASSON & ENGLISH, *op. cit. supra* note 52, at 29.

⁷⁵ Probably the most comprehensive discussion of this practice, known as "dumping," is contained in VINER, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (1923). Most countries accord relief where dumping results in injury to a domestic industry. It has occasionally been suggested, however, that the practice is objectionable only when accompanied by a predatory intent. By contrast, the Secretariat of the European Free Trade Association suggests that, although dumping is classified by the Stockholm Convention as a rule of competition, "it is legitimate to regard it as more like an escape clause than as part of a code of behavior." See SECRETARIAT OF THE EUROPEAN FREE TRADE ASS'N, *STOCKHOLM CONVENTION EXAMINED* 42 (Jan. 1963).

⁷⁶ See, e.g., the General Agreement on Tariffs and Trade, arts. VI, XX(d)-(e). Comparable provisions are found in international conventions establishing the various regional trading arrangements among nations.

⁷⁷ 46 Stat. 703, as amended, 19 U.S.C. § 1337 (1958). The predecessor of § 337 is § 316 of the Tariff Act of 1922, 42 Stat. 943.

tion being denial of entry. Most of the proceedings brought under this provision have involved patent or trademark infringement.⁷⁸

Imports of patented, trademarked or copyrighted articles can also be hindered by the absence or inadequate enforcement of laws designed to prevent infringement within the importing country. During hearings on the Trade Expansion Act, Senator Javits proposed an amendment (which was not adopted) which would have specified that "infringements of U.S. patents, copyrights, and registered trademarks will be considered as actions unjustifiably restricting U.S. commerce and as cause for retaliatory measures by the United States."⁷⁹

Identification of marks of origin is enforced under section 304 of the Tariff Act of 1930.⁸⁰ Although exceptions to marking requirements are permitted under specified circumstances, there have been examples of the application of these requirements which appear to have imposed an undue burden on importers.⁸¹

Articles produced by convict or forced labor are prohibited importation by section 307 of the Tariff Act of 1930.⁸² An exception is permitted in situations in which the domestic supply of such articles is inadequate.

The sale of imported goods at prices below those prevailing in the country of origin is prohibited in many countries by anti-dumping laws.⁸³ The numerous adjustments necessary to arrive at a valid comparison between the price of an article in the importing market and in the home market will necessarily entail, in complex cases, the frequent exercise of administrative discretion. Particularly troublesome problems relate to the treatment of quantity discounts in the importing market when the article is not sold in comparable quantities in the home market⁸⁴ and to the

⁷⁸ It may be observed that the copyright laws severely curtail protection to works published abroad and subsequently imported into this country. Copyright Act § 1, 61 Stat. 652 (1947), as amended, 17 U.S.C. § 1 (1958).

⁷⁹ *Hearings on H.R. 11970 Before the Senate Committee on Finance*, 87th Cong., 2d Sess. 1288 (1962). Senator Javits asserted that "infringements of U.S. patents and other rights have demonstrably interfered with our ability to export . . ." *Ibid.*

⁸⁰ 46 Stat. 687, as amended, 19 U.S.C. § 1304 (1958). The Trade-Mark Act of 1946, §§ 42, 43, 60 Stat. 440, 441, 15 U.S.C. §§ 1124, 1125 (1958) prohibit marking which misrepresents the origin or nature of imported articles.

⁸¹ See, e.g., *MASSON & WHITELEY, op. cit. supra* note 40, at 33-34.

⁸² 46 Stat. 689, as amended, 19 U.S.C. § 1307 (1958).

⁸³ See generally the Antidumping Act of 1921, 42 Stat. 11-15 (1930), as amended, 19 U.S.C. §§ 160-69 (1958). Dumping laws in a number of other countries have roughly the same effect, although they differ considerably as to procedure and in some instances as to the criteria applied. In Canada, for example, the dumping duty is applied if the goods are of a class or kind made in that country, without inquiry as to injury.

⁸⁴ In Canada, an extra discount may not be allowed for valuation purposes where

allocation of various selling expenses between the two markets. Moreover, fluctuations in prices or rates of exchange during the period under review can create additional complications.

When there are insufficient sales to permit valid price comparisons, administrative discretion is frequently required in determining costs of production, particularly where accounting methods differ. In countries in which injury is a prerequisite to the imposition of dumping duties, difficult questions arise concerning the identification of the relevant domestic industry (either geographically or in terms of product lines), the presence or absence of predatory intent and its significance, the extent, if any, to which the price of the imported article is less than the domestic price, the volume of imports and their probable duration, the nature and extent of the adverse effects on the domestic industry and similar problems.⁸⁵

4. *Protection of Public Health, Safety and Morals*

Import regulations of this character are universally recognized among nations. Their general purpose is unexceptionable. They may relate to standards of identity, quality, and purity for food-stuffs, labelling of medicines and potentially harmful substances, quarantine and inspection of plants and animals, registration or exclusion of dangerous articles, and similar matters. These regulations are sanctioned by the General Agreement on Tariffs and Trade⁸⁶ and by regional trading arrangements among nations.⁸⁷ Controls of this type have, however, occasionally been employed to impose additional administrative burdens on imports which may not in fact constitute a threat to health, safety, or morals. Attempts which have been made to simplify and harmonize such restrictions reflect an awareness of this potential abuse of a legitimate regulatory power.⁸⁸

imported goods are sold in larger quantities than in the home market, whereas sales in unusually small quantities will be credited with a smaller discount than exists in the home market. See MASSON & ENGLISH, *op. cit. supra* note 52, at 12.

⁸⁵ For a useful discussion, see background material for speech by James Pomeroy Hendrick, Deputy Assistant Secretary of the Treasury, at Briefing Conference. This material also contains a summary of Treasury Department actions in antidumping proceedings since the act was adopted in 1921.

⁸⁶ Art. XX(a), (b).

⁸⁷ See, e.g., Stockholm Convention Establishing the European Free Trade Ass'n art. 12; Montevideo Treaty Establishing the Latin American Free Trade Ass'n art. 53.

⁸⁸ See Memorandum of the Commission on the Action Programme of the Community for the Second Stage 15 (Oct. 24, 1962) urging harmonization of these provisions or in some instances their codification in a single European body of regulations. See also art. 12

5. *Other Common Objectives of Restrictions on the Entry of Goods*

It has been suggested in connection with the previous reference to exchange controls that the conservation of scarce foreign exchange is a frequent objective of import restrictions. Another purpose that has been mentioned is the encouragement of domestic industries by insulating them from foreign competition. Restrictions of both types are prevalent in, although not limited to, the less developed nations. There is evidence that restrictions in favor of domestic industries may be increasing in those areas.⁸⁹

D. *Non-Tariff Import Barriers Other Than Restrictions on Entry*

In addition to restrictions on entry, there exist a variety of other techniques, both governmental and private, by which imports may be placed at a competitive disadvantage or excluded altogether. Prospective exporters have frequently found these methods to be at least as restrictive as those previously discussed. They may be generally classified as discriminatory practices relating to government procurement, taxes (either national or local) other than import levies, and programs of government subsidy. In addition, import restrictions may result from private action.

1. *Government Procurement Policies*

It is common practice for governments to give preference to domestic industries in the award of public contracts. In some in-

of the Stockholm Convention, providing that these restrictions as therein authorized shall not be used "as a means of arbitrary or unjustifiable discrimination between Member States or as a disguised restriction on trade between Member States. . . ."

⁸⁹ The PRESIDENT'S 7TH ANN. REP. ON THE TRADE AGREEMENTS PROGRAM 10 (1963) comments that "restrictions in less developed countries have become increasingly widespread on imports for which substitutes are available from local production." For examples from industrialized countries, see SOUTHWORTH & BUCHANAN, *op. cit. supra* note 58, at 32, citing instances in which Canadian tariff classification depends on whether the imported article is of a "class or kind made in Canada" (a lower duty being assessed if it is not). See also testimony by William R. Hewlett with respect to H.R. 9900: "Most of the equipment that we manufacture is classified by the United Kingdom as equipment that may enter duty free if there is no comparable product in the United Kingdom. If, however, such a product is available from local sources, then our product carries a 33½ percent tariff." *Hearings on H.R. 9900, supra* note 65, at 2206.

The Commonwealth preference system constitutes a form of restriction in favor of Commonwealth industry, both in manufacturing the final product and—through the Commonwealth content requirements—in supplying the component parts. By allowing preferential rates of duty only on articles of Commonwealth origin, and by specifying that to qualify under this criterion the article must have not less than a prescribed Commonwealth content, the preference system encourages Commonwealth manufacturers to use local materials insofar as possible. See, e.g., Armstrong, *How Canadian Exports Can Enjoy British Preference*, INDUSTRIAL CANADA 47-51 (Sept. 1963).

stances, this policy is embodied in legislation; in others, it results from administrative action.⁹⁰ Particularly in the case of industries in which the government is a major customer, "buy national" policies can greatly restrict purchases from foreign suppliers. The Commission of the European Economic Community has recently commented:

"Entrepreneurs and their products, in quite a number of cases concerning the award of public contracts, still have to contend with extra formalities if not actual discrimination in other Member States. Since the public sector takes such a large slice of the national product, these practices constitute no mean obstacle to freedom of trade."⁹¹

Restrictive government purchasing policies have various motivations. They may result from the same desire to encourage the development of domestic industry that was previously mentioned in connection with restrictions on the entry of goods, or they may be attributable to a concern for the country's international payments position.⁹² They may also reflect a desire to protect domestic industries irrespective of their stage of development.⁹³ Characteristically, these policies derive from a combination of motives.

It follows that restrictions on government procurement are not confined to less developed countries. Indeed, their prevalence

⁹⁰ Compare, for example, the operation of the Buy American Act, 47 Stat. 1520 (1933), 41 U.S.C. § 10(a)-(c) (1958), as implemented by Exec. Order No. 10582, 19 Fed. Reg. 8723 (1954) in the United States, with the informal administrative policy employed in Canada. Both appear to constitute effective deterrents to imports in many industries. (It should be noted that, for purposes of defense procurement, the United States has waived the applicability of the Buy American Act under certain circumstances with respect to specified articles.)

⁹¹ Memorandum of the Commission, *supra* note 88, at 15. For one listing of restrictive government procurement practices in Western Europe and the United States, see testimony of Seymour Graubard with respect to H.R. 9900, *Hearings on H.R. 9900*, *supra* note 65, at 3590-92.

⁹² The United States Government has recently taken a renewed interest in the application of the Buy American Act, particularly in the field of defense procurement, because of continued concern regarding the payments deficit. There is also a recent article in *Nihon Keizai Shimbun* (Sept. 24, 1963) announcing the decision of the Japanese Government "to institute a new policy to have Ministries and other governmental agencies give priority to purchases of domestically-made products as part of its program to preserve the nation's international payments balance." A special agency is to be established within the Prime Minister's Office "to encourage the use of domestically-made products by governmental organs."

⁹³ See, for example, the announcement on July 26, 1962, of a governmental program to aid the United States softwood lumber industry. The program includes "the establishment of a preference for American products in the purchase of lumber by the Department of Defense, the General Services Administration and other Federal departments and agencies [which] could be particularly significant in connection with the various aspects of the AID program." *Hearings on H.R. 11970*, *supra* note 79, at 1835.

among industrialized nations constitutes an important obstacle to the effectiveness of multilateral tariff reductions in expanding the volume of international trade. An example of foreign purchasing restrictions is provided by the experience of the United States electrical wire and cable industry. Official procurement policies are particularly significant in that industry since foreign governments and government purchasing agencies frequently constitute the principal customers for many types of wire and cable. The industry has recently stated:

"[W]e have been refused permission to submit bids, or even to obtain specifications, in the case of bids solicited by the purchasing agents of a number of foreign governments. We have also found that foreign governments make use of 'grandfather' clauses and similar techniques to preclude bids by United States wire and cable companies. In addition, instances have occurred in which a foreign government has sought the advice of the local wire and cable industry in determining whether a United States company should be allowed to submit a bid to that government, and has accepted the recommendation of its industry that the United States company not be permitted to bid. In some instances, bid requests from foreign government agencies require the bidder to show the percentage of proposed manufacture within the territory of that government, and expressly state that consideration will be given to this information in evaluating the bid."⁹⁴

As the foregoing quotation suggests, restrictive procurement policies may be applied not only in the case of purchases made directly by governments, but also in those situations in which procurement is conducted through government purchasing organizations of various types. One of the problems faced by the United States coal industry, for example, in seeking to develop an export market in France, is the procurement policy of the Association Technique l'Importation Charbonnière. The ATIC is a public corporation which is the only authorized importer of coal from sources outside the European Coal and Steel Community, and its operations are subject to the coal import policies of the French Government. Sales to the United Kingdom are similarly discouraged by the purchasing policies of the National Coal Board.⁹⁵

⁹⁴ Statement of the Import Committee of the Wire and Cable Division of the National Electrical Manufacturers Association Before the United States Tariff Commission (March 6, 1964).

⁹⁵ A general discussion of barriers to United States coal exports is contained in

Restrictive procurement practices are not limited to national governments. In a number of countries, local governments impose comparable barriers to imports either from outside national boundaries or, in some instances, from outside the local jurisdiction. An illustration of the latter form of restriction is afforded by the recent Canadian controversy over "buy provincial" practices. One Canadian observer has remarked that "the growing trend in Canada to give local suppliers and contractors special preference when awarding government and even private business contracts is producing what amounts to an internal 'tariff' structure. . . ."⁹⁶

2. *Taxes Other Than Import Levies*

Internal taxes that apply equally to domestic and imported articles are ordinarily not discriminatory per se, even though they are based on duty-paid value in the case of an import. In such instances, it is the duty, not the tax, that causes the absolute amount of the tax to be higher on the imported than on the domestic product.⁹⁷ There are, however, internal taxes which, while on their face nondiscriminatory, are in fact discriminatory because

ROBERT R. NATHAN ASSOCIATES, THE FOREIGN POTENTIAL FOR UNITED STATES COAL, REP. TO THE DEPT OF THE INTERIOR, OFFICE OF COAL RESEARCH (1963) [hereinafter cited as NATHAN REP.].

⁹⁶ Financial Post (Oct. 19, 1963). The article cites the following as examples:

"Some local authorities are paying premiums of as much as 10%–15% to local suppliers.

"Quebec has spelled out in some detail a policy of favoring Quebec manufacturers and other business firms.

"Many other provinces are following similar policies, although they are frequently less explicit in setting out the rules.

"Even municipalities in some areas make it difficult for outside suppliers to win municipal contracts."

⁹⁷ The fact that the tax, in absolute terms, is higher on the imported article may of course adversely affect its competitive position. Where the imported article is priced sufficiently below the comparable domestic article to enable it to reach a different price market, the application of a relatively large internal tax to both articles may disproportionately injure the competitive position of the import by increasing its price to the point where it cannot retain its former market. Such a tax would not, however, contravene art. III, para. 2 of the General Agreement on Tariffs and Trade as interpreted by its supplementary provisions.

It should be observed that whereas in the United States tax revenues derive principally from income taxes, with state and local sales taxes generally at very low levels, the revenues of European countries depend to a much greater extent on sales and similar taxes. In a number of such countries, sales or turnover taxes may amount to 25%. Where the amount of the tariff is appreciable, a sales tax of this magnitude applied to the duty-paid value of the imported article may considerably increase its total cost. The foregoing effect is magnified where more than one turnover tax is imposed. The Commission of the European Economic Community is studying means of abolishing the so-called "cascade" tax on gross turnover, Memorandum of the Commission, *supra* note 88, at 25.

of the manner of their incidence. Taxes of this nature may constitute serious deterrents to prospective exporters and importers.

The hearings on the Trade Expansion Act have publicized one of the classic examples of discriminatory internal taxation. This is the annual use or road tax which exists in some European countries. France and Italy provide the best-known instances. In neither case is the tax discriminatory in form, since its ostensible objective is proper and it applies to all vehicles irrespective of origin. The discrimination consists in the sharply disproportionate increase in the levy on automobiles above a certain horsepower. In France, for example, the tax on automobiles of low "fiscal horsepower" is nominal, the annual rate on sixteen horsepower being only thirty dollars. Above sixteen horsepower, however, the rate on new automobiles begins at 203 dollars.⁹⁸ The adverse effect on imports of larger American cars is obvious.

3. *Subsidy Programs and Price Controls*

Virtually all governments provide economic assistance in some degree to particular domestic industries. The forms that these benefits can take are as numerous as the purposes for which they may be provided. They include not only outright grants but also various forms of tax benefits, preferential treatment in the administration of loan programs, administration of procurement and stockpiling programs, minimum price regulations, and a wide variety of other techniques.⁹⁹ These benefits are relevant to the present discussion to the extent that they may constitute a form of discrimination against imported goods. In a sense, any subsidy that assists a domestic industry can be so considered, since it strengthens *pro tanto* the competitive position of the domestic article relative to that of its imported counterpart. This is true whether or not the subsidy is designed as a form of protection against import competition. In Canada, for example, the subventions paid on the transportation of domestic coal have recently been calculated to average more than five dollars per ton.¹⁰⁰ This is a considerably more significant obstacle to sales of United States coal in Canada than the tariff of fifty cents per ton on bituminous coal imports.

⁹⁸ See statement of American Automobile Manufacturers Association, *Hearings on H.R. 9900*, *supra* note 65, at 4089.

⁹⁹ For an indication of the possible scope of subsidy programs, see JOINT ECONOMIC COMM., 86TH CONG., 2D SESS., SUBSIDY AND SUBSIDYLIKE PROGRAMS OF THE U.S. GOVERNMENT (1960).

¹⁰⁰ NATHAN REP. vol. I, ch. VII, at 4.

Some types of benefits are specifically designed to assist domestic industries against foreign competition. In France, both the wholesale and the retail price of coal imported from countries outside the European Coal and Steel Community is regulated to prevent it from underselling domestic coal.¹⁰¹ These controls effectively deprive United States coal of the price advantage it would otherwise possess in the French market. A different form of assistance is provided by the maritime subsidy program in the United States. To protect the domestic shipbuilding industry, a construction-differential subsidy is authorized under the Merchant Marine Act of 1936¹⁰² to compensate for the difference between domestic and foreign shipbuilding costs. To assist the ship operators, the act also authorizes an operating-differential subsidy¹⁰³ to compensate for higher operating costs. To qualify for these benefits, the United State operator must, *inter alia*, agree to use domestic materials and supplies and to have his vessel repaired in the United States. Both of these subsidies have the effect of depriving foreign shipyards and materials suppliers of the price advantages which they could otherwise offer in competing for business in the United States.

4. *Private Practices*

In addition to the various restrictions resulting from governmental policies and programs, import barriers may result from private action. A common instance is the preference of many consumers for goods of national origin. This preference, which is understandably encouraged by domestic suppliers,¹⁰⁴ may range from outright refusal to purchase foreign articles when the domestic counterpart is available, to the more common case in which the consumer will buy domestically unless a significant price dif-

¹⁰¹ *Id.* ch. VI, at 22. The *Report* also notes that because of governmental price and subsidization programs, "the price at which coal is marketed in France, whether of imported or indigenous origin, does not reflect true cost relationships." Vol. III, annex D, at 142.

The *Report* concludes that "subsidies are likely to be used increasingly as a means of protecting indigenous coal production, which would negate the effect of reduced import barriers. An approach to the problem that did not take this into account would be futile." Vol. I, ch. X, at 24.

¹⁰² 49 Stat. 1995-2001, as amended, 46 U.S.C. §§ 1151-61 (Supp. IV, 1963). See generally SUBSIDY AND SUBSIDYLIKE PROGRAMS OF THE U.S. GOVERNMENT, *op. cit. supra* note 99, at 39-48.

¹⁰³ 49 Stat. 2001-08, as amended, 46 U.S.C. §§ 1171-82 (Supp. IV, 1963).

¹⁰⁴ A typical example is the "Buy Canadian—Make Canadian—Sell Canadian" promotion program conducted by the Canadian Manufacturers' Association. See INDUSTRIAL CANADA, *op. cit. supra* note 89, at 64.

ferential or other advantage exists in favor of the foreign article. The extent of this national preference obviously varies widely among individual consumers. Since it is affected by the relationship between the consumer and his domestic supplier, it tends to be more prevalent in commercial transactions than among retail customers.¹⁰⁵

Cartel and other concerted business practices are probably the most widely recognized instances of private action that may restrict the importation of goods. The European Economic Community and similar regional bodies have given considerable attention to these arrangements, lest they impair the progress being made in reducing other forms of trade restraints. There is a corresponding risk that such arrangements may tend to vitiate the effects of tariff reductions.

The most familiar form of cartel restriction consists of an international undertaking among suppliers not to sell in each others' markets. The obligation may be absolute, or it may take the form of an agreed quota or a requirement of prior concurrence by suppliers located within the market in question. United States firms which have sought to expand their export markets have found that concerted practices among their foreign competitors can also comprise a serious deterrent. Joint pricing and marketing policies on the part of such competitors can make entry into their market substantially more difficult. A potentially more serious impediment is the occasional practice by which foreign suppliers, acting in concert, designate their members in rotation to undersell the imported article.

Ocean freight rates established by private international shipping conferences are also an important factor in international trade. Not only is the level of rates significant in determining the profitability of export shipments, but disparities between rate levels may benefit one group of exporters at the expense of another. Considerable attention has recently been directed to differences between eastbound and westbound rates on Atlantic crossings, which are frequently to the disadvantage of United States exporters.¹⁰⁶ Comparisons of freight rates charged for shipments from the United States and from Europe to various Asian, African

¹⁰⁵ Articles of foreign origin, such as British woolens or Italian shoes, are, of course, frequently at a premium in the retail industries.

¹⁰⁶ *Discriminatory Ocean Freight Rates and the Balance of Payments, Hearings Before the Joint Economic Committee*, 88th Cong., 1st Sess. (1963).

and Latin American destinations have provided a more direct measure of this competitive disadvantage.¹⁰⁷

E. *Effect of Non-Tariff Barriers on the Volume of International Trade*

It is hazardous to attempt any quantitative assessment of the extent to which the foregoing restrictions may have reduced the volume of international trade. Where they have resulted in an embargo or a quota of known dimensions, a rough estimate of their effect may be obtained by calculating the volume of trade that would have occurred in the absence of such restrictions. Where they are less readily identifiable and the extent of their application is less certain, it becomes virtually impossible to arrive at any reliable quantitative conclusion. There can be no doubt, however, that their cumulative effect is substantial.¹⁰⁸

As suggested at the outset of this discussion, the policy objectives of the United States and the continuing concern regarding the balance of payments deficit require that increased attention be given to means of reducing foreign non-tariff import barriers.

¹⁰⁷ See statement by Robert C. Clark, Vice-President, FMC International, *id.* at 307. Mr. Clark reported that for seven chemical commodities studied, the average rate from Europe to third country destinations was \$1.54 per 100 lbs., as contrasted with \$2.33 in the case of shipments from the United States to the same destinations. Concern over the rate disadvantage to which United States exporters are subject has prompted the Administration to suggest that, unless the disparities can be removed by other means, legislative remedy may be required. See President's Special Message on Balance of Payments, 109 CONG. REC. 12113 (daily ed. July 18, 1963).

Shipowners have agreed that eastbound rates are often higher than westbound rates and that rates from the United States to third countries may exceed those over comparable distances from foreign ports. They maintain, however, that this circumstance results not from discriminatory intent but rather from competitive factors. Among the latter they cite higher stevedoring and port charges in the United States. They also assert that the prevailing smaller volume of non-bulk dry cargoes in shipments to the United States must be compensated by somewhat higher rates on comparable outbound shipments. See, e.g., 37 INT'L TRADE REV. 86 (1963).

¹⁰⁸ MASSON & WHITELY, BARRIERS TO TRADE BETWEEN CANADA AND THE UNITED STATES 65 (1960) comment that "these 'invisible' barriers are multitudinous, and make their effects felt in a variety of ways." The authors attempt some general conclusions as to the effects of United States import barriers on Canadian industrial raw materials and fuels (*id.* at 72-76) and manufactured intermediate products and consumers' goods (*id.* at 76-82). The effects of Canadian barriers on selected categories of United States exports are considered *id.* at 83-95.

The *Nathan Report* estimates that by 1970 United States coal exports could be increased by as much as 250% over the 1962 level, "depending largely on the extent to which the foreign nations relax their barriers to the entry of imported coal and other protective measures for their coal industries." NATHAN REP. vol. I, ch. I, at 1. The Sulphur Export Corporation has noted that "the countries restricting imports from the United States in one way or another account for 50 percent of the sulfur consumed outside of the United States, but they take only 25 percent of our exports, whereas those countries not restricting United States imports account for 75 percent of our exports." *Hearings on H.R. 9900, supra* note 65, at 1843.

Unless this can be done, the benefits which this country has hoped to derive from its export expansion program and from the 1964 round of multilateral tariff negotiations are in danger of being materially diminished. It is therefore relevant to examine the authority that exists for this purpose in the domestic law of the United States, and to attempt to form an estimate of the extent to which these remedial provisions may become effective instruments of national policy.

III. THE REMEDIES AVAILABLE IN THE DOMESTIC LAW OF THE UNITED STATES

Legislative provisions relating to non-tariff import restrictions maintained by foreign nations are of two general types. The first includes statutory authority to negotiate with other countries concerning the existence and removal of these barriers. It also includes the administrative procedures established to bring them to the attention of United States government officials, to process complaints by domestic firms which consider their export trade adversely affected, and to conduct the negotiations intended to remove them. The second category comprises the substantive authority to deal with such restrictions, either by offering inducements to their removal or by threatening retaliatory action.

A. *Negotiating Authority and Procedures for Dealing with Non-Tariff Import Restrictions*

1. *Authority To Negotiate*

The authority of the President to negotiate with foreign nations concerning non-tariff trade barriers has long been recognized by statute.¹⁰⁹ The Dingley Tariff Act of 1897 contained the first explicit delegation of authority to enter into agreements for the purpose of terminating discriminatory treatment of United States exports.¹¹⁰ Agreements concluded by the executive branch pur-

¹⁰⁹ Because the statutory basis of the President's authority is clear, no consideration is given to the constitutional question as to the extent of the authority that would exist in the absence of legislative delegation. It should be recognized, however, that the inherent authority of the President to conduct the actual negotiations with foreign nations is beyond dispute. This power exists irrespective of delegation, since it derives directly from the Constitution. As stated in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936):

"In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it."

¹¹⁰ Section 3, 30 Stat. 203-04 (1897).

suant to that act related to a variety of foreign restrictive devices other than tariffs.¹¹¹

This authority has been part of the trade agreements program since its inception. Section 350(a)(1) of the Tariff Act of 1930, as amended, authorized the President

“For the purpose of expanding foreign markets for the products of the United States . . . whenever he finds as a fact that any existing duties or other import restrictions . . . are unduly burdening and restricting the foreign trade of the United States . . . to enter into foreign trade agreements with foreign governments or instrumentalities thereof”¹¹²

The express statutory reference to non-tariff import restrictions was the deliberate consequence of congressional concern that such obstacles might otherwise vitiate the benefits of tariff concessions obtained from foreign nations. During legislative hearings on the Trade Agreements Act, much testimony had been presented concerning the existence of these restrictions. Secretary of State Cordell Hull, among others, stated that in view of their prevalence and variety, the statute should provide explicit authority to negotiate concerning them.¹¹³ The House Ways and Means Committee, in its report on the bill, pointed out that it was specifically drafted to include reference to import restrictions other than tariffs.¹¹⁴

The present statutory authority to enter into trade agreements with foreign nations appears in section 201(a) of the Trade Ex-

¹¹¹ For examples, see *Principal Legal Questions Raised Relating to H.R. 5550*, Office of the Legal Adviser, Dep't of State, *Hearings on H.R. 5550 Before the House Committee on Ways and Means*, 84th Cong., 2d Sess. 65-80 (1956). The memorandum also cites instances of such agreements concluded prior to 1897 pursuant to the Tariff Act of 1890, which sought to terminate “unequal and unreasonable treatment of American exports.” Section 3, 26 Stat. 612 (1890). The 1890 act contained no express agreement-making authority.

¹¹² 48 Stat. 943 (1934), as amended, 19 U.S.C. § 1351(a) (Supp. IV, 1963). (Emphasis added.)

¹¹³ *Hearings on H.R. 5550*, *supra* note 111, at 67.

¹¹⁴ *Ibid.* The language of the Ways and Means Committee was quoted in the report of the Senate Finance Committee.

The constitutionality of the delegation of agreement-making authority is solidly established. In *Hampton & Co. v. United States*, 276 U.S. 394 (1928), the Supreme Court upheld the provision of the Tariff Act of 1922 which delegated wide discretion to the President to adjust tariffs in order to equalize foreign and domestic costs of production. See also *Field v. Clark*, 143 U.S. 649 (1892), sustaining the validity of certain discretionary provisions of the Tariff Act of 1890. In *Star-Kist Foods, Inc. v. United States*, 47 C.C.P.A. (Customs) 52 (1959), it was held that the delegation of agreement-making authority under the trade agreements program is constitutional.

pansion Act of 1962.¹¹⁵ As originally drafted, this authority was to be exercised "in order to further the purposes" of the act.¹¹⁶ Unlike section 350(a)(1) of the 1930 act, no express reference was made to foreign non-tariff restrictions, although one of the objectives of the act was stated to be the expansion of United States export markets "by lowering trade barriers."¹¹⁷ An analysis of the bill prepared by the executive branch explained that despite the change in language, which was designed to make the requisite presidential finding less formal, the new provision was "based largely" on section 350(a)(1).

As finally enacted, the language of section 201(a) closely resembles that of the prior legislation and continues the explicit reference to foreign non-tariff import restrictions. It provides:

"Whenever the President determines that any existing duties or other import restrictions of any foreign country . . . are unduly burdening and restricting the foreign trade of the United States and that any of the purposes stated in section 102 [including stimulation of the domestic economy, enlargement of export markets, and strengthening of economic relations with free-world nations "through the development of open and nondiscriminatory trading"] will be promoted thereby, the President may . . . enter into trade agreements with foreign countries or instrumentalities thereof" (Emphasis added.)

As in the case of the previous trade agreements legislation, therefore, permission to negotiate for the removal of foreign import restrictions other than tariffs is clearly delegated in the basic trade agreements authority of the 1962 act. An implicit confirmation of this authority appears in the statement of purposes, which refers not only to the maintenance and enlargement of United States markets but also to the achievement of "open and nondiscriminatory trading."

It may also be observed that the 1962 act, like its predecessors, requires the President to submit annual reports to Congress on the operation of the trade agreements program. Section 402 specifies that these reports shall include information as to "the results of action taken to obtain removal of foreign trade restrictions (including discriminatory restrictions) against United States

¹¹⁵ 76 Stat. 872, 19 U.S.C. § 1821(a) (Supp. IV, 1963).

¹¹⁶ H.R. 9900, 87th Cong., 2d Sess. (1962).

¹¹⁷ *Id.* § 102.

exports, remaining restrictions, and the measures available to seek their removal in accordance with the purposes of this Act"¹¹⁸ This language would seem plainly to contemplate presidential authority to negotiate with foreign nations in seeking the elimination of such restrictions.

The existence of authority to negotiate concerning foreign non-tariff barriers does not necessarily define its scope. Part II above describes a wide range of such restrictions. Some of these may be maintained by local as readily as by national governments, while some are attributable wholly to private action. These restrictions result from a diversity of motives. It has been occasionally suggested that certain of these classes of restrictions may be beyond the ambit of the President's statutory negotiating authority.

The 1962 act, continuing almost verbatim the language of the prior trade agreements legislation, defines the phrase "other import restriction" to include any "limitation, prohibition, charge, and exaction other than duty, imposed on importation or imposed for the regulation of imports."¹¹⁹ This language seems adequate to reach any form of restriction imposed at the time of importation, although it might be questioned whether arbitrary customs classification and valuation methods are strictly describable as "limitations, prohibitions, charges or exactions." In regard to restrictions imposed after the time of entry, however, the language is perhaps not as unqualified as could be desired, since it might suggest that in order to be included within the definition the restriction must have the primary objective of regulation, rather than having merely the purpose or effect of discriminating against imported goods. Nonetheless, the long-continued use of virtually identical language in prior legislation, in conjunction with the clear history of congressional concern with foreign import restrictions of all types, strongly supports an unqualified interpretation of the statutory definition.

The converse question relates to the authority of a foreign government to undertake commitments with respect to certain classes of restrictions. The legislative history of the 1962 act contains an occasional suggestion that some restrictions may be of such an essentially domestic character as to be non-negotiable.¹²⁰

¹¹⁸ Section 402(a), 76 Stat. 902, 19 U.S.C. § 1803(a) (Supp. IV, 1963). The language is virtually identical with that contained in § 350(e) of the prior law.

¹¹⁹ Section 405(2), 76 Stat. 903, 19 U.S.C. § 1806(2) (Supp. IV, 1963).

¹²⁰ See, *e.g.*, the comments of Representative Knox during hearings on the bill: "I was very much concerned about this so-called road tax that was imposed in accordance

The argument appears to be either that restrictions of this nature are not within the legal authority of the foreign government to regulate and are therefore not proper subjects for trade negotiation, or that they involve domestic issues as to which the foreign government will not wish to assume an international commitment.

In considering this question, it is necessary to distinguish the domestic authority of the foreign government over certain types of practice, from its legal capacity to undertake a binding international obligation with respect to them. Since the latter depends only upon the apparent authority of the negotiator, it follows that the foreign nation should be able to assume an international obligation to regulate virtually any form of restrictive practice complained of by the United States. Whether it will thereafter be legally in a position to fulfill its commitment is a separate question which turns upon its own domestic law.

As a practical matter, of course, the foreign government may refuse to discuss what it may regard as a purely domestic matter. Moreover, it would be profitless to seek a concession which, if granted, could not legally be fulfilled by the other party. It is possible that in some countries, particularly in those which most sharply differ from our own in antitrust attitudes, certain forms of restrictions resulting from private action might be so classified.¹²¹

2. *Procedures To Obtain Evidence and To Conduct Negotiations*

To enable the executive branch to negotiate effectively concerning foreign import restrictions, an adequate mechanism must be provided by which it can be advised of their existence in specific instances. It has been suggested in the foregoing discussion that, although there is much that government officials can and should do to keep themselves apprised of these restrictions, information of this nature is most readily available to domestic firms that seek to sell abroad.

It has always been possible, of course, for private parties to

with horsepower Is not that actually a foreign-domestic law and could not be taken into consideration as far as negotiations on tariffs are concerned?" *Hearings on H.R. 9900 Before the House Committee on Ways and Means*, 87th Cong., 2d Sess. 1549 (1962).

¹²¹ It is perhaps partly for this reason that the questionnaire recently circulated by the Department of Commerce to United States business firms and trade associations (see note 25 *supra*) defines a non-tariff trade barrier as any restrictive governmental practice, and stipulates that "for the purposes of this questionnaire, this definition does not include impediments to trade resulting from the operation of foreign cartels, private monopolies, or other non-governmental business practices."

advise the government informally concerning foreign import barriers. Information obtained in this manner has frequently constituted the basis of *ad hoc* diplomatic representations by the United States to the foreign governments concerned. This technique, although not an adequate substitute for more formal procedures, is nonetheless a useful adjunct which will undoubtedly continue to be employed in many instances.

The hearings required by statute to be held in advance of trade negotiations have afforded an additional forum for the presentation of such information. Section 4 of the Trade Agreements Act of 1934, as amended, required that public notice, and an opportunity for interested parties to present their views, be accorded in advance of any proposed trade agreement.¹²² Section 3 of the Trade Agreements Extension Act of 1951, as amended, directed the Tariff Commission to investigate and report, with respect to each commodity considered for possible inclusion in trade agreement negotiations, the extent to which United States duties or other import restrictions might be modified without causing or threatening serious injury to the competitive domestic industry.¹²³ In each instance, data and views were also required to be obtained from other government departments and agencies. Particularly in the case of investigations conducted pursuant to section 4 of the 1934 act, domestic industries have frequently included in their presentations information concerning import restrictions which they have encountered abroad.

The Trade Expansion Act of 1962 has continued the requirement that investigations be held in advance of proposed trade negotiations. Public hearings are provided before both the Tariff Commission¹²⁴ and "an agency or an interagency committee" designated by the President.¹²⁵ Preparations for the 1964 round of tariff negotiations demonstrate that considerably greater attention is currently being given to foreign import restrictions. The Trade Information Committee, which is the agency charged with conducting public hearings pursuant to section 223 of the act, has indicated a particular interest in "non-tariff barriers imposed by other nations which the United States should seek to have removed or modified."¹²⁶

¹²² 48 Stat. 945 (1934), as amended, 19 U.S.C. § 1354 (1958).

¹²³ 65 Stat. 72 (1951), as amended, 19 U.S.C. § 1360 (1958).

¹²⁴ Section 221, 76 Stat. 874-75, 19 U.S.C. § 1841 (Supp. IV, 1963).

¹²⁵ Section 223, 76 Stat. 875, 19 U.S.C. § 1843 (Supp. IV, 1963).

¹²⁶ Office of the Special Representative for Trade Negotiations, Negotiations Under

The increased concern with foreign import restrictions during pre-negotiation investigations is clearly desirable. It would not, however, have constituted more than a partial response to the criticism raised during legislative hearings on the Trade Expansion Act. Much of this criticism was directed to the absence of formal and definite procedures by which private parties could present such evidence to government officials at any time. As a corollary, it was urged that responsibility for receiving and acting on this evidence was not adequately defined and centralized within the executive branch. Prior to 1962, the formal hearing procedure was specifically provided by statute only as a prelude to trade negotiations. Moreover, responsibility for the administration of the trade agreements program was divided among various government departments and agencies. The Interdepartmental Committee on Trade Agreements, which was established to obtain detailed information and to evolve specific recommendations regarding the operation of the program, was composed of representatives of nine departments and agencies and chaired by the representative from the Department of State. The Committee for Reciprocity Information, which conducted pre-negotiation hearings, had generally the same composition but was chaired by the representative from the Tariff Commission. The cabinet-level Trade Policy Committee was chaired by the Secretary of Commerce.¹²⁷

The Trade Expansion Act abolished this tripartite division of responsibility, and in its place established a single administrative agency which is charged with continuing responsibility for

the Trade Expansion Act of 1962 (Oct. 21, 1963). The Committee is also interested in United States import restrictions as to which concessions might be offered. Its "Suggestions on the Preparation of Written Briefs and Oral Testimony" contains the following statement:

"The Committee hopes that witnesses will particularly endeavor to provide it with specific information on non-tariff barriers which hamper export sales and to estimate the effects their removal would have upon American exports Since many of the restrictions in this category involve, among other elements, varying degrees of administrative interpretation and discretion, witnesses are urged to provide fully documented illustrations based on their own experience." *Id.* at 6.

To the same effect see Ambassador Herter's statement at the White House Conference on Export Expansion:

"We shall need your more specific help when the Trade Information Committee holds its hearings [W]e should like its hearings to focus largely upon determining which foreign tariffs and trade restrictions are most burdensome to United States exporters. We hope, therefore, that you will take full advantage of this opportunity to share with us this vital information, which your first-hand experience in the markets of the world uniquely qualifies you to give." U.S. Dep't of Commerce, *Int'l Commerce* 10 (Sept. 23, 1963).

¹²⁷ See generally Catudel, *How a Trade Agreement Is Made*, Dep't of State Pub. No. 7305 (Nov. 1961).

the trade agreements program. Section 241¹²⁸ directs the President to appoint a Special Representative for Trade Negotiations, who is to lead the United States delegation at such negotiations and serve as chairman of the interagency trade organization established pursuant to section 242.¹²⁹ This organization, which consists principally of the heads of government departments or their representatives, assists the President in administering the program and handling tariff adjustment cases.

By Executive Order, the interagency trade organization has been designated the Trade Expansion Act Advisory Committee.¹³⁰ It supersedes the prior Trade Policy Committee. Similarly, the Committee for Reciprocity Information has been replaced by the Trade Information Committee, and the Interdepartmental Committee on Trade Agreements has become the Trade Staff Committee. The latter two committees are chaired by members of the office of the Special Representative.¹³¹ Although the change in names is unimportant, it is significant that this administrative structure now reports directly to a single government official who has express statutory responsibility for assisting the President in administering the trade agreements program.

The 1962 act also establishes a clearly defined procedure by which private parties can, at any time, present evidence of foreign non-tariff restrictions which they believe to have hindered their export trade. This procedure has no antecedent in prior trade agreements legislation. Section 252(d) directs the President to "provide an opportunity for the presentation of views concerning foreign import restrictions which . . . are maintained against United States commerce" and to arrange for public hearings with respect thereto.¹³² This function has been delegated to the Trade Information Committee.¹³³ A definite procedure has been established by which evidence regarding such restrictions may be sub-

¹²⁸ 76 Stat. 878, 19 U.S.C. § 1871 (Supp. IV, 1963). The regulations relating to the establishment, structure, and functions of the Office of the Special Representative appear at 48 C.F.R. § 201 (1964).

¹²⁹ 76 Stat. 878, 19 U.S.C. § 1871 (Supp. IV, 1963).

¹³⁰ Exec. Order No. 11075, 28 Fed. Reg. 473 (1963), as amended by Exec. Order No. 11106, 28 Fed. Reg. 3911 (1963), and Exec. Order No. 11113, 28 Fed. Reg. 6183 (1963).

¹³¹ See 48 C.F.R. § 202 (1964). There is also a Trade Executive Committee established by 48 C.F.R. § 202.1 (1964). Its membership consists of departmental representatives at the assistant secretary level. It is chaired by a Deputy Special Representative for Trade Negotiations.

¹³² 76 Stat. 880, 19 U.S.C. § 1882(d) (Supp. IV, 1963).

¹³³ Exec. Order No. 11075, 28 Fed. Reg. 473 (1963), as amended by Exec. Order No. 11106, 28 Fed. Reg. 3911 (1963), and Exec. Order No. 11113, 28 Fed. Reg. 6183 (1963); 48 C.F.R. § 202.3(b)(2) (1964).

mitted to the Committee, either in written form or through the medium of public hearings.¹³⁴ Information so obtained is furnished in summary form to the Trade Staff Committee and to the Trade Expansion Act Advisory Committee.¹³⁵ The Trade Staff Committee, in turn, reviews the information and transmits its recommendations through the Trade Executive Committee to the Trade Expansion Act Advisory Committee.¹³⁶ The latter committee informs the President as to the results of such hearings and recommends appropriate action.¹³⁷

Although it is too early to judge the effectiveness of this new procedure, it appears to have considerable potential value for domestic firms which have been able to obtain concrete evidence of foreign trade barriers.¹³⁸ Section 252(d) does not limit the types of restrictions as to which evidence may be presented. By its terms, the procedure is available irrespective of whether the restrictions are asserted to be legally justifiable.¹³⁹ It may be invoked at any time, and is not contingent upon the existence of a trade concession with respect to the article involved.¹⁴⁰ Its broad availability remedies a deficiency which had become increasingly apparent in prior trade agreements legislation.

¹³⁴ 48 C.F.R. § 211.3 (1964).

¹³⁵ 48 C.F.R. § 202.3(b)(2) (1964).

¹³⁶ 48 C.F.R. § 202.2(b)(3) (1964).

¹³⁷ Section 242(b)(3), 76 Stat. 878, 19 U.S.C. § 1872(b)(3) (Supp. IV, 1963); Exec. Order No. 11075, 28 Fed. Reg. 473 (1963), as amended by Exec. Order 11106, 28 Fed. Reg. 3911 (1963), and Exec. Order 11113, 28 Fed. Reg. 6183 (1963).

¹³⁸ "The importance of this [new procedure] should not be played down. It can be an effective force in the effort to establish the type of fair trade practices in international commerce which are essential to the stimulation of increased foreign trade." Separate Views of Hon. Thomas B. Curtis on H.R. 11970, H. REP. NO. 1818, 87th Cong., 2d Sess. 98 (1962).

The regulations of the Trade Information Committee indicate that general allegations as to foreign restrictions will not support a request for a hearing, although the language of § 252(d) suggests that discretion to refuse a hearing may be limited. 48 C.F.R. § 211.3 (1964) states that a request pursuant to § 252(d) will be granted "only if it identifies with particularity the foreign import restriction complained of, states the reasons why the restriction is believed to be of the kind covered by Sec. 252 of the Act, and describes concisely the effect of the restriction upon United States exports." Attempted use by a domestic firm of the procedures provided in § 252(d) as a means of obtaining otherwise unavailable information concerning the business operations of foreign competitors is not likely to be successful. 48 C.F.R. § 211.8 (1964) exempts from public inspection data submitted in confidence which the Committee considers to be of this character, and permits the submitting party to withdraw any such data to which the Committee denies confidential status.

¹³⁹ See also 47 DEP'T STATE BULL. 847, 849 (Dec. 3, 1962), stating that "a new provision has been added which requires the interagency trade organization to hold public hearings at which any interested persons may present their views on unjustifiable and unreasonable foreign import restrictions."

¹⁴⁰ The availability of a remedy may, of course, be affected by the existence or absence of a trade concession. See text *infra*.

After specific evidence of foreign import restrictions has been obtained by the executive branch, international negotiations to secure their removal may be conducted by a variety of means. It has been indicated that diplomatic representations are often made on an *ad hoc* basis to the foreign governments concerned. In addition, consultations are frequently conducted pursuant to the provisions of bilateral or multilateral international undertakings to which the United States is a party. These primarily include bilateral treaties of friendship, commerce and navigation, bilateral trade agreements,¹⁴¹ and various multilateral arrangements such as the General Agreement on Tariffs and Trade, the Organization for Economic Cooperation and Development, and the International Monetary Fund. These international undertakings not only obligate the parties to observe codes of fair trade practice,¹⁴² but also establish procedures for handling alleged violations.

These procedures may be illustrated by reference to the General Agreement on Tariffs and Trade. Representations concerning foreign import restrictions may be made by the United States either in the course of trade negotiations conducted under the auspices of the General Agreement¹⁴³ or in accordance with the various consultation and complaint procedures which the Agreement specifically provides. The most general of these provisions is Article XXII, which requires each contracting party to give "sympathetic consideration" and "adequate opportunity for consultation" in the case of representations made by any other party, and permits the Contracting Parties, acting jointly, to participate in the consultation at the request of any party involved. Article XXIII requires each party to consider sympathetically the assertion by another party that a benefit accruing from the General Agreement is being nullified or impaired. If the parties are unable to reach an accord, the question may be referred to the Contracting Parties in their collective capacity. The Contracting Parties may,

¹⁴¹ It should be observed that most bilateral trade agreements concluded by the United States have been superseded by the subsequent accession of the parties to the General Agreement on Tariffs and Trade.

¹⁴² The substantive remedial rights to which these arrangements may give rise are beyond the scope of the present discussion.

¹⁴³ Non-tariff import restrictions will receive greater consideration in the 1964 tariff negotiations than on any previous occasion. The resolution adopted by the Ministerial Conference of the General Agreement on May 21, 1963, outlining principles and procedures to guide the 1964 negotiations, expressly provides that they "shall deal not only with tariffs but also with non-tariff barriers." The Conference established a Trade Negotiations Committee to determine detailed procedure for the negotiations, including the "rules to govern and the methods to be employed in the treatment of non-tariff barriers."

in their discretion, authorize compensatory action under Article XXIII or waive the obligation of a party under Article XXV.

More specific provisions of the General Agreement require any party maintaining quantitative restrictions for balance of payments reasons to consult periodically with the Contracting Parties.¹⁴⁴ Consultation is also required if a party initiates or substantially increases such restrictions.¹⁴⁵ Various other provisions require notice or consultation, or authorize compensatory adjustments, in the case of specific restrictive actions by a party.

Pursuant to the requirement for periodic consultations regarding balance of payments restrictions, the Contracting Parties have met with a number of countries to examine the extent of these restrictions, their significance for other parties and their compatibility with the General Agreement.¹⁴⁶ The Contracting Parties have also required periodic reports from each party maintaining restrictions inconsistent with the General Agreement, whether or not within the terms of the protocol of provisional application.

The United States has participated in these consultations and has invoked the formal complaint procedure on various occasions. It has recently taken steps under Articles XXIV and XXVIII to compensate for limitations imposed by the European Economic Community on imports of poultry from the United States. The language and legislative history of the Trade Expansion Act suggest that this country may henceforth be more inclined to invoke the remedial provisions of the General Agreement in the case of foreign restrictions on industrial as well as agricultural commodities.

B. *Substantive Authority To Seek Removal of Foreign Non-Tariff Import Restrictions*

Although the President's authority to negotiate regarding foreign non-tariff import restrictions is clear, a more complex question arises with respect to the scope of his substantive authority to bargain for or demand their removal. What inducements may he offer, or in what forms may he threaten retaliation, in order to achieve his purpose?

¹⁴⁴ Article XII requires annual consultations. Article XVIII:B requires consultations at not less than two-year intervals in the case of less developed countries.

¹⁴⁵ General Agreement on Tariffs and Trade, arts. XII(4)(a), XVIII:B.

¹⁴⁶ As an example, consultations were held during 1962 with Brazil, Ceylon, Denmark, Finland, Ghana, Greece, India, Israel, Japan, New Zealand, the Republic of South Africa, and Uruguay.

It is apparent that the United States has a wide range of possible means available to induce or coerce other nations to discontinue such restrictions. Virtually every aspect of its relations with an offending nation may afford, at least in theory, a potential leverage for this purpose. In many instances, the trade agreements program as such may not be involved. The Randall Commission has suggested, for example, that the principle of domestic preference contained in the Buy American Act should be suspended in evaluating bids submitted by nationals of countries whose procurement policies do not discriminate against United States suppliers.¹⁴⁷

Such methods for seeking the removal of foreign restrictions undoubtedly are invoked from time to time. Frequently, however, they are not well adapted to that purpose. Moreover, their use may tend to interfere with the achievement of other objectives for which they were originally intended. For these reasons, the trade agreements program and related legislation ordinarily provide the most appropriate measure of the President's delegated authority to offer reciprocal concessions or to take retaliatory action.¹⁴⁸

To a limited degree, the basic authority to negotiate trade agreements provides an inherent mechanism both for persuasion and for coercion. Although the effectiveness of persuasion unaccompanied by the offer of a corresponding concession is plainly limited, it may occasionally be effective where the inequity of the foreign restriction is apparent and the reasons for its retention are not compelling. Conversely, the refusal to negotiate further trade agreements with a country maintaining such restrictions may comprise a useful form of coercion in some circumstances. Its effectiveness is considerably limited, however, both by the potential trade disadvantages to the United States and by the fact that under the most-favored-nation principle concessions granted in other trade negotiations ordinarily would become available automatically to the offending nation.

Domestic legislation contains three specific grants of authority which the President may employ in seeking the removal of foreign import barriers. One of these provisions, originally enacted in 1890, permits him to refuse entry to articles from a foreign country

¹⁴⁷ COMMISSION ON FOREIGN ECONOMIC POLICY, REPORT TO THE PRESIDENT AND THE CONGRESS 45 (1954).

¹⁴⁸ As in the case of the authority to negotiate, the present discussion does not consider the extent to which the President may possess independent constitutional authority in this area.

which is unjustly discriminating against United States commerce.¹⁴⁹ This potentially drastic retaliatory measure is framed in discretionary rather than mandatory language, and by its terms applies only to discrimination "made by or under the authority of" the foreign state. It would not appear, therefore, to authorize retaliation in those situations in which the discrimination results from purely private action. Moreover, as suggested below, the reference to "unjust" discrimination would presumably be construed to render the statute inapplicable in the case of restrictions which are legally valid, however burdensome in effect.

The second specific legislative authorization is contained in section 338 of the Tariff Act of 1930, as amended.¹⁵⁰ Unlike the preceding provision, section 338 reaches "unreasonable" as well as unjustifiable restrictions, but is more clearly limited to those which discriminate in the sense of placing United States commerce at a disadvantage compared with that of any *third country*. It directs the President, within certain limits and to the extent that he believes the national interest will thereby be benefited, to retaliate against such discrimination by imposing countervailing import duties. If this form of retaliation proves ineffective, the President is authorized, in his discretion, to refuse entry to articles produced in the offending country or transported in its vessels.

It will be observed that both of these statutory provisions relate to foreign discrimination against any article of United States commerce. Furthermore, they authorize retaliation against any article imported from the offending country, whether or not it is subject to a trade concession granted by the United States. In several respects, the two provisions differ from the authority contained in the trade agreements legislation itself.

1. *Trade Agreements Authority To Offer Concessions
To Obtain the Removal of Foreign Restrictions*

By definition, the basic trade agreements authority permits the President to offer an inducement in order to secure the removal of a foreign import restriction. This authority has been continued without substantive change since the program was initiated, and currently appears in section 201(a) of the Trade Expansion Act of 1962. This provision permits the President, when he finds that United States exports are being hindered either by tariffs or by

¹⁴⁹ 26 Stat. 415-16 (1890).

¹⁵⁰ 46 Stat. 704, as amended, 19 U.S.C. § 1338 (1958).

other import restrictions, to enter into trade agreements and to "proclaim such modification or continuance of any existing duty or other import restriction, such continuance of existing duty-free or excise treatment, or such additional import restrictions, as he deems to be required or appropriate to carry out any such trade agreement."¹⁵¹

The basic trade agreements authority has consistently limited the extent to which the President is permitted to adjust tariffs.¹⁵² In addition, his right to do so has, with certain exceptions,¹⁵³ been subject to the general obligation to observe the standard of most-favored-nation treatment.¹⁵⁴ Subject to these qualifications, and except as limited elsewhere in the act, the President has been free to offer tariff concessions in return for the reduction or removal of any form of foreign import restriction. The basic trade agreements authority, however, has not limited his right to modify or continue United States import restrictions other than tariffs.

Prior to 1962, no other limitation existed in trade agreements legislation. The only specific delegation of authority to deal with foreign import restrictions, other than the basic agreement-making authority itself, was contained in the proviso of section 350(a)(5) of the Tariff Act of 1930, as amended. It constituted an exception to the requirement of most-favored-nation treatment which comprised the remainder of the section. The proviso directed the President to suspend the application of a trade concession to imports from any country which discriminated against United States commerce or engaged in other acts which in his opinion tended to defeat the objectives of the trade agreements program. It did not limit his authority to offer reciprocal concessions in return for the elimination of such restrictions.¹⁵⁵

¹⁵¹ Section 201(a)(2), 76 Stat. 872, 19 U.S.C. § 1821(a)(2) (Supp. IV, 1963).

¹⁵² Under the 1962 act, the President may not, with certain exceptions (*e.g.*, in the case of trade with the European Economic Community where certain criteria are met), reduce a United States tariff by more than 50% below the rate existing on July 1, 1962 (§ 201(b)(1)), or increase it by more than 50% above the rate existing on July 1, 1934 (§ 201(b)(2)).

¹⁵³ The principal exception relates to imports from Communist countries. Insofar as the Trade Expansion Act of 1962 is concerned, see § 231, 76 Stat. 876-77, as amended, 19 U.S.C. § 1861 (Supp. IV, 1963). The extent to which § 252 of the act constitutes an additional exception is discussed in text *infra*.

¹⁵⁴ See the Trade Expansion Act of 1962, § 251, 76 Stat. 879, 19 U.S.C. § 1881 (Supp. IV, 1963).

¹⁵⁵ The directive to suspend concessions where foreign restrictions exist was not logically incompatible with the existence of authority to offer concessions to remove them. In any specific case, the President might have concluded, under the pre-1962 legislation, that retaliation would tend to defeat the purposes of the act whereas the negotiation of reciprocal concessions would have the opposite effect. He would therefore not have been

The successor to the proviso of section 350(a)(5) is section 252 of the Trade Expansion Act of 1962. Unlike the prior legislation, section 252 distinguishes between two categories of foreign import restrictions—those which are “unjustifiable” in the sense that they violate international obligations such as those contained in the General Agreement on Tariffs and Trade, and those which, although legally justifiable, are regarded as “unreasonable.”¹⁵⁶ Section 252(a)(2) specifically precludes the President from “negotiating the reduction or elimination of any United States import restriction” pursuant to the basic trade agreements authority in order to obtain the removal of an unjustifiable foreign restriction. No such limitation appears in the case of unreasonable restrictions.

This modification of prior legislation was deliberate. The qualifying language did not appear in the bill as originally drafted. It was added by the House Ways and Means Committee, which reported, “Your committee feels that the United States should not make concessions in exchange for removal or reduction of such unwarranted restrictions.”¹⁵⁷ Administration witnesses took the same position. Under Secretary of State George Ball advised the Ways and Means Committee that, insofar as unjustifiable foreign restrictions are concerned, “we shouldn’t pay anything for the elimination of these and we don’t intend to.” In those cases in which the restrictions are legal but disadvantageous to United States commerce, he concluded that “this is a matter where we can use the bargaining powers that are provided under the Trade Act as well as we use them to obtain reductions in tariffs, and we intend to do so.”¹⁵⁸

2. *Trade Agreements Authority To Impose Domestic Import Restrictions To Obtain the Removal of Foreign Restrictions*

Trade agreements legislation has always authorized the President, in specified circumstances, to impose domestic import

bound by the proviso of § 350(a)(5) and would have been free to act pursuant to § 350(a)(1). Alternatively, he might initially have invoked the proviso, and thereafter, if retaliation proved unsuccessful, have concluded a new agreement under § 350(a)(1) in order to achieve his purpose. Furthermore, the proviso could not logically have been construed as an implied prohibition against offering concessions to secure the removal of restrictions imposed by nations which had received no previous concessions from the United States.

¹⁵⁶ For one discussion of this distinction, see testimony of Under Secretary of State George Ball, *Hearings on H.R. 11970 Before the Senate Committee on Finance*, 87th Cong., 2d Sess. 2204-05, 2264 (1962). The House and Senate committee reports also recognize the distinction. See, e.g., S. REP. No. 2059, 87th Cong., 2d Sess. 2-3 (1962).

¹⁵⁷ H. REP. No. 1818, 87th Cong., 2d Sess. 21 (1962).

¹⁵⁸ *Hearings on H.R. 11970*, *supra* note 156, at 2246.

restrictions as a means of seeking the removal of foreign trade barriers. An express statutory provision for this purpose has been included in each successive enactment of the program.¹⁵⁹ It has been noted above that prior to 1962 this provision directed the President to suspend concessions to any country imposing restrictions which in his view tended to nullify the objectives of the program.¹⁶⁰ The statutory language was succinct. It did not distinguish between these restrictions on the basis of their legal validity.¹⁶¹ With the exception of a single parenthetical reference to international cartels, it avoided the uncertainties which tend to result from the inclusion of specific examples in legislation of general applicability. By contrast, section 252 of the Trade Expansion Act is verbose and repetitive. It contains ambiguities caused largely by provisions designed to benefit particular interests. The section classifies foreign restrictions according to legal distinc-

¹⁵⁹ The basic trade agreements authority may afford an additional ground for retaliatory action. Section 201(a)(2) of the Trade Expansion Act permits the President to proclaim "such additional import restrictions, as he deems to be required or appropriate to carry out any such trade agreement." Prior trade agreements legislation contained virtually identical language. The provision has customarily been regarded as authorizing increases in duties or other import restrictions pursuant to an escape clause or tariff adjustment action. It would also appear, however, to permit the President, if he finds that the benefits of a trade concession obtained by the United States are being impaired as a result of restrictions imposed by the nation granting the concession, to take retaliatory action as a means of persuading that nation to "carry out" the trade agreement according to its original terms. Such action would, of course, be proper only if consistent with the purposes stated in § 102 of the act.

Although no instance is known in which retaliation has been sought to be justified by reference to the basic trade agreements authority, there would seem to be no conceptual difficulty with this approach. Its potential significance results from the fact that the scope of permissible action under § 201 would differ from that under § 252. Under the former provision, the President could retaliate against any article imported from a country which imposes restrictions impairing the value of a concession previously granted to the United States, if he considered that such action would encourage the offending country to honor its original commitment. Under § 252, by contrast, he is limited to the withdrawal of concessions granted by the United States to that country. On the other hand, under § 252 the President may retaliate against any restriction imposed by another country, whether or not it affects an article as to which the United States has received a concession. Section 201 would permit him to take such action only to protect the value of a concession previously obtained by the United States. The scope of retaliation under § 201 would therefore be both broader and narrower than under § 252.

¹⁶⁰ Prior to 1955, the language was permissive rather than mandatory. Since in either case retaliation was contingent on presidential discretion as to the impact of foreign restrictions on the operation of the act, the 1955 amendment can only be regarded as a mild form of legislative exhortation.

¹⁶¹ In practice, the United States has consistently invoked this distinction when deciding whether to take retaliatory action pursuant to the proviso of § 350(a)(5). Where, for example, foreign restrictions have been sanctioned for balance of payments reasons under articles XII or XIV of the General Agreement on Tariffs and Trade, this country has refused to apply the proviso on the ground that the restrictions neither discriminate against United States commerce nor tend to defeat the objectives of the trade agreements program. See, e.g., Metzger, *The Trade Expansion Act of 1962*, 51 GEO. L.J. 425, 436 (1963).

tions which, although important, may prove to extend its language more than they affect its administration.

The retaliatory provisions of section 252 are best understood by reference to their legislative history. As originally drafted by the executive branch, they followed closely the language of the proviso of section 350(a)(5).¹⁶² The Ways and Means Committee rewrote the section in a manner intended to emphasize congressional concern with illegal foreign restrictions. To this end, the committee (1) added language characterizing such restrictions as "unjustifiable" or "inconsistent with provisions of trade agreements," (2) amplified the directive to the President to withhold trade concessions from the offending nation by specifying not only that he is to suspend, but alternatively that he is to withdraw, prevent the application of, or refrain from proclaiming such concessions,¹⁶³ and (3) directed the President generally to "take all appropriate and feasible steps within his power," other than offering reciprocal concessions, in order to remove foreign restrictions.¹⁶⁴

As noted above, the first of these changes makes explicit the interpretation which the executive branch had consistently given to the previous statutory language. The second has a comparable effect. The third might initially appear to have a broader significance. Depending on the construction given to the words "appropriate and feasible," which would presumably be determined by the President, the language could be regarded on its face as authorizing retaliation in any form against any article imported from a country maintaining unjustifiable restrictions adversely affecting United States commerce. For several reasons, however, such an interpretation is unlikely. First, it would represent a major extension in the scope of the retaliatory authority as consistently embodied in prior trade agreements legislation. Despite increased congressional concern with foreign restrictive devices, there is no indication in the legislative history of the 1962 act that any such sweeping alteration was intended. Second, so broad an authorization would necessarily include, and thereby render super-

¹⁶² Section 242, H.R. 9900, 87th Cong., 2d Sess. (1962).

¹⁶³ It may be observed that under this provision, as under prior trade agreements legislation, the President may withdraw all existing concessions on a commodity. In such a case, the effect would be to return to the rate of duty established by the Tariff Act of 1930. See Dep't of State memorandum, *Hearings on H.R. 11970*, *supra* note 156, at 2278.

¹⁶⁴ For these amendments, see generally § 252, H.R. 11970 in the House of Representatives, 87th Cong., 2d Sess. (1962). As noted *supra*, the committee also added to § 252 a paragraph specifying the procedure by which information concerning foreign restrictions can be presented to the executive branch.

fluous, the more limited language providing for the withdrawal of concessions. Consistency between the two provisions is assured only if the former is regarded as merely hortatory. Finally, the Senate appears to have followed this interpretation in adopting the Williams amendment,¹⁶⁵ which provides for a broader scope of retaliatory action than might be required if the House language embodied an additional substantive authority.

The net effect of the retaliatory amendments adopted by the Ways and Means Committee, therefore, is to focus attention on the existence of these remedial measures and to communicate more forcefully to the executive branch the intention that they be used. The committee report states:

"Your committee does not believe that there can be effective use of the trade agreement process to lower trade barriers if unjustifiable restrictions of a tariff or nontariff nature are maintained or erected, or other actions are taken which are inconsistent with trade agreement commitments Your committee expects that every reasonable effort will be made to bring about the removal of such unjustifiable restrictions so that the objectives of the trade agreements program will be attained. Your committee also expects that as new obstructions to trade appear, every reasonable effort will be made to stop them."¹⁶⁶

The purpose of the House amendments is commendable. As a matter of legislative drafting, however, it is regrettable that the method adopted was to extend and complicate unnecessarily the statutory language. The consequence was to create apparent distinctions which in fact do not exist.

The preceding discussion has indicated that the separate and coordinate treatment of the authority to "take all appropriate and feasible steps" to remove unjustifiable foreign restrictions, and the authority to withdraw trade concessions for this purpose, might seem to suggest the delegation of two substantive powers where only one was intended. Similarly, the drafting distinction between countries maintaining restrictions "inconsistent with provisions of trade agreements" and those engaged in acts "unjustifiably restricting United States commerce"¹⁶⁷ could logically imply

¹⁶⁵ Section 252(a)(3), 76 Stat. 879 (1962), 19 U.S.C. § 1882(a)(3) (Supp. IV, 1963). See text *infra*.

¹⁶⁶ H. REP. No. 1818, 87th Cong., 2d Sess. 21-22 (1962).

¹⁶⁷ Sections 252(b)(1), (2), 76 Stat. 879 (1962), 19 U.S.C. §§ 1882(b)(1), (2) (Supp. IV, 1963).

a legal distinction not contemplated by the legislation. In fact, the separate reference to restrictions inconsistent with trade agreements may have been primarily intended as a drafting vehicle for the inclusion of language relating specifically to variable import fees, which were of particular concern to agricultural interests.

Instead of simplifying the House language, the Senate further complicated it. The two principal additions were the Williams amendment, relating to agricultural products, and the Douglas amendment, which is concerned with foreign restrictions that are "unreasonable" but not illegal. Although the Williams amendment is included in the portion of section 252 which by its terms relates exclusively to unjustifiable restrictions, and although grammatically the amendment refers only to such restrictions, it nonetheless provides for retaliatory action "notwithstanding any provision of any trade agreement under this Act." Moreover, retaliation is not limited to the withdrawal of trade concessions, but may consist of either tariff or non-tariff restrictions applied against any article imported from the offending country. In the case of agricultural products, therefore, the amendment significantly extends the prior legislative authority to retaliate.¹⁶⁸ It reflects the underlying concern with foreign agricultural restrictions, particularly those maintained by the European Economic Community, which largely influenced the drafting of section 252.

The Douglas amendment is a logical consequence of the House revisions which had limited the scope of section 252 to foreign restrictions that are legally unjustifiable. In order to preserve the President's right under the trade agreements legislation to retaliate against foreign trade barriers which, although legal, are burdensome to United States commerce,¹⁶⁹ it was necessary either to revert

¹⁶⁸ The Senate version of the Williams amendment gave the President no discretion to refrain from taking retaliatory action against imports from countries maintaining restrictions on United States agricultural exports, except that he was permitted to determine the extent to which retaliation was necessary to remove the restrictions and to obtain access to the foreign market. The House accepted the amendment with the modification that the President is required to retaliate only "to the extent he deems necessary and appropriate." H.R. REP. NO. 2518, 87th Cong., 2d Sess. 2 (1962).

¹⁶⁹ As discussed in text *infra*, exercise of this authority could involve the United States in a breach of its international obligations. Its existence, however, may be helpful in negotiating with the offending country. See the statement of the Senate Finance Committee:

"It is anticipated that the authority of the new subsection (c) of section 252 will prove useful in direct negotiations with other countries as a means of persuading them to reduce unreasonably high import restrictions prior to the bargaining process or as the means for inducing that country to end its discriminatory treatment of goods from third countries, or to induce a third country benefiting indirectly from U.S. concessions to grant the U.S. concessions in return for such indirect benefits." S. REP. NO. 2059, 87th Cong., 2d Sess. 3 (1962).

to the earlier formula contained in the proviso of section 350(a)(5) of the Tariff Act of 1930 or to incorporate an additional provision dealing specifically with this category of restrictions. The Senate chose the latter course. It recognized, however, that retaliation against justifiable trade barriers might involve the United States in an undesirable breach of its international commitments. Accordingly, whereas retaliation in the case of unjustifiable restrictions is mandatory to the extent that it is consistent with the purposes of the act, in the case of unreasonable restrictions the statutory language is permissive. Moreover, in the latter case the President is to consider not only the purposes of the act but also the international obligations of the United States. The purpose of the second qualification is, as stated by the Senate Finance Committee, to avoid "any indiscriminate breach" of such obligations.¹⁷⁰

As finally adopted, therefore, section 252, like prior trade agreements legislation, authorizes retaliation against foreign restrictions on non-agricultural imports only to the extent of withdrawing concessions previously granted to the offending country or refusing to proclaim concessions negotiated but not yet in effect. In the case of foreign agricultural restrictions, section 252 permits retaliation against any article imported from that country, at least where the restriction is unjustified. In all cases, the President's obligation to act in accordance with the purposes of the statute affords him considerable discretion to decline to take retaliatory measures.

During legislative consideration of the 1962 act, various additional amendments were proposed which were designed to encourage the use of retaliation against foreign trade barriers. These proposals were of two general types. The first would have extended the application of the retaliatory authority in all cases to commodities not subject to trade concessions and would have enlarged the sanctions which the President could invoke. The second would have limited his discretion to refrain from taking retaliatory action. The fact that the Congress declined to adopt these proposals affords additional evidence of the scope of the authority as finally enacted.

The first of these categories is illustrated by the proposal to supplement the provision for the withdrawal of concessions granted to an offending country, by authorizing the President to "impose

¹⁷⁰ *Ibid.*

additional import restrictions on the products of such country."¹⁷¹ This proposal would have extended to all products the additional authority specifically delegated by the Williams amendment in the case of agricultural commodities.

The Senate Finance Committee proposed an amendment in even broader terms. It would have authorized the President, whenever he found such action to be in the national interest, to impose new or increased duties or other import restrictions to whatever extent he deemed necessary on any imported article.¹⁷² The committee asserted:

"This additional authority . . . is . . . based on the national interest and is intended to give the President broad powers to meet any trends toward unreasonable foreign restrictions on U.S. exports or imports from third countries which must otherwise find a market in the United States. This provision strengthens the President's hand in any negotiations or representations to foreign governments when any unreasonable restrictions on U.S. trade are being imposed abroad."¹⁷³

The Finance Committee proposal largely reflected legislative concern that the President's powers might not be adequate to secure the removal of foreign trade restrictions. On several occasions during hearings on the bill, the suggestion was made that he be delegated authority to "increase" duties for this purpose.¹⁷⁴

¹⁷¹ *Hearings on H.R. 11970, supra* note 156, at 1322-23. There is some indication that the proposal was predicated on the erroneous assumption that subparagraphs (A) and (B) of § 252(b) only authorize the withdrawal of tariff concessions. The brief in support of the proposed subparagraph (C) states that "subsections [(A) and (B)] approach the problem from the duty standpoint. The proposed amendment authorizes an approach from an additional angle. There will be instances where the suspension, withdrawal, etc., of a duty might not provide the necessary leverage but the imposition of additional import restrictions on products of a recalcitrant country would force that country to live up to its obligations by removing unjustified barriers." Other language in the brief recognizes, however, that concessions may take the form either of reduction (or binding) of duties or of "removal of restriction or barriers to trade."

¹⁷² Section 353, H.R. 11970 in the Senate of the United States, 87th Cong., 2d Sess. (1962). Section 353 would have delegated this authority unreservedly "notwithstanding any other provision of law," upon a finding by the President that such action would be in the national interest.

¹⁷³ S. REP. NO. 2059, 87th Cong., 2d Sess. 2 (1962).

¹⁷⁴ See, e.g., the comments of Senator Douglas, *Hearings on H.R. 11970, supra* note 156, at 168-70, and his statement at 1879:

"I tend to favor an amendment which would give to the President the power to increase tariffs if that power can be used to obtain decreases in the tariffs or restrictions which other countries impose upon us. But I do not want to negate the basic principle of the Trade Expansion Act. I would like to have this as an exception to the powers granted to the President, and as a supplementary power granted to him to induce the European countries to reduce their tariffs in case mutual reductions are not sufficient to move them."

Administration officials pointed out that, because the United States has given concessions on most imported articles since 1930, the authority to withdraw concessions in fact comprises a substantial authority to increase duties.¹⁷⁶ Furthermore, they correctly observed that an unjustified increase in duty, whether or not effected through the withdrawal of a concession, would necessitate compensatory concessions to, or give rise to a right of retaliation by, any adversely affected party to the General Agreement on Tariffs and Trade.¹⁷⁶

The provision adopted by the Finance Committee would have conferred an unqualified discretion on the President. Unlike the authority to withdraw concessions, it would have been subject to no standards except his judgment as to the national interest. In addition to providing a further basis for retaliation, therefore, it would have comprised a continuing invitation to circumvent the statutory criteria for tariff adjustment and other forms of relief to domestic interests. Largely for these reasons, it was deleted by the conference committee.¹⁷⁷

Another proposal to increase the severity of retaliatory sanctions would have required at least partial return to the standard of conditional most-favored-nation treatment. Since 1923, the United States has followed an unconditional most-favored-nation policy by which trade concessions granted to any country are automatically generalized to others without regard to benefits obtained from them in return.¹⁷⁸ The principal motivations for this policy have been to broaden the liberalizing impact of concessions on international trade and to reduce the complexity of negotiations. An integral element of its effectiveness has been the adoption of comparable policies by other nations.

By contrast, under the policy of conditional most-favored-nation treatment, the generalization of trade benefits to third countries is a negotiating matter which depends upon the offer of equivalent concessions. During the legislative hearings, it was

¹⁷⁶ See note 163 *supra*.

¹⁷⁶ Statement of Assistant Secretary of Commerce Jack N. Behrman, *Hearings on H.R. 11970*, *supra* note 156, at 170. See also letter from Secretary Hodges to Senator Douglas, *id.* at 2280-81.

¹⁷⁷ H.R. REP. NO. 2518, 87th Cong., 2d Sess. 13 (1962). For one statement of objections to § 353, see individual views of Senator Carl T. Curtis on H.R. 11970, S. REP. NO. 2059, 87th Cong., 2d Sess. 39 (1962).

¹⁷⁸ A limited number of exceptions to this principle have been adopted by statute. These have included preferential treatment to certain countries and denial of most-favored-nation treatment to others. As noted at note 153, *supra*, the principal exception today is the denial of such benefits to Communist countries.

suggested that a return to this policy might provide further leverage for the removal of foreign import restrictions.¹⁷⁹ It would almost certainly have caused other countries, however, to curtail most-favored-nation treatment to the United States. In view of the adverse consequences to United States exports, as well as to international trade generally, it is fortunate that the proposal was not adopted.

The second type of proposed amendment would have qualified the President's discretion to refrain from retaliating against foreign trade barriers. One method suggested for this purpose was to delete the statutory reference to the purposes of the act in the provision relating to the withdrawal of concessions.¹⁸⁰ This change would have made retaliation mandatory against every foreign restriction to which the provision applied. It was further suggested that the word "unjustifiable" also be deleted, thereby requiring the application of sanctions in the case of any foreign restriction against United States commerce irrespective of its legal validity.¹⁸¹ A third proposal would have amended the agreement-making authority to require each such agreement to prohibit enumerated discriminatory practices, thereby limiting presidential discretion to determine whether these specific acts by foreign countries were intended to be made subject to the retaliatory sanction.¹⁸²

Although some of the foregoing proposals were undoubtedly

¹⁷⁹ See, e.g., the inquiry of Senator Douglas, *Hearings on H.R. 11970*, *supra* note 156, at 2277. As advocated during the hearings, the proposal to "deny most-favored-nation treatment" had several possible meanings, including (1) to preclude the generalization of any trade concession to a nation other than the one with which it was negotiated; (2) to suspend most-favored-nation treatment to any nation imposing import restrictions on any United States export (*Hearings on H.R. 9900 Before the House Committee on Ways and Means*, 87th Cong., 2d Sess. 1235 (1962)); (3) to suspend the generalization of any trade concession to a nation declining to grant as favorable terms to the comparable commodity imported from the United States (*id.* at 1546); (4) to suspend the generalization of any such concession to a nation discriminating against imports from third countries (*id.* at 3132). It is apparent that, in differing degrees, these proposals would have extended the sanctions available under § 252.

¹⁸⁰ *Id.* at 2773. See also the amendments to H.R. 11970 proposed by Senator Bush, *Hearings on H.R. 11970*, *supra* note 156, at 1128.

¹⁸¹ *Ibid.* Senator Bush maintained that deletion of the word "unjustifiable" would not make presidential action mandatory where the foreign restriction was legal. He based his argument on the fact that the proposed amendment would retain the provision for retaliation against restrictions "inconsistent with provisions of trade agreements." *Id.* at 1854-55. It would also, however, have required such action in the case of foreign import barriers that were otherwise restrictive of United States commerce. Since the two provisions were alternative and coordinate, his amendment would clearly have made retaliation mandatory even in the case of justifiable restrictions.

¹⁸² *Hearings on H.R. 9900*, *supra* note 179, at 2773. By its terms, the proposal would have amended only the special authority to conclude trade agreements with the European Economic Community.

motivated by protectionist sentiments, it seems clear that others resulted from a genuine concern that foreign non-tariff restrictions might vitiate the benefits sought to be obtained through reductions in rates of duty. It is to be hoped that the legislative history will be useful in prompting remedial action by the executive branch in appropriate cases. In view of the close interrelationships that necessarily exist, however, between international trade policy and other foreign economic and political objectives of the United States, it would have been unwise to deprive the President of discretion to determine whether specific circumstances warrant imposition of the statutory sanctions.

It should be presumed that the United States will normally wish to exercise these sanctions consistently with its international obligations. Before deciding what action to take regarding a foreign import restriction, therefore, the United States must ascertain whether the restriction is legally valid. In event of controversy, it will presumably be necessary to invoke the mechanism for resolving such disputes provided in the instrument asserted to have been infringed. In the most common case, this will be the General Agreement on Tariffs and Trade. It has been noted that under Article XXIII of the General Agreement, a contracting party which believes that a benefit accruing under the Agreement is being impaired by the action of another party, and which receives no satisfaction in bilateral consultations, may raise the question with the Contracting Parties collectively. The Contracting Parties may, if they believe the circumstances warrant, authorize the offended party to retaliate to the extent they deem appropriate, irrespective of whether they conclude that the original impairment was the result of action inconsistent with the obligations of the Agreement. In exceptional circumstances, they may grant the offending party a waiver under Article XXV even if the action involved has violated the Agreement.

The provisions of section 252 and those of the General Agreement thus do not fully correspond. If the United States were to assert that a given foreign import restriction violates the Agreement, and the Contracting Parties were to permit retaliation without affirming the violation, a question might arise as to whether the criterion of "unjustifiability" under section 252 had technically been met.¹⁸³ Conversely, if the Contracting Parties were

¹⁸³ In this event, the United States could presumably base retaliation on the "unreasonable" rather than the "unjustifiable" authority of § 252.

to recognize the violation but waive the obligation, retaliation pursuant to section 252 might be inconsistent with the commitments of the United States under the General Agreement.¹⁸⁴

It is conceivable that the foreign nation imposing the restriction may be neither a party to a multilateral international undertaking such as the General Agreement nor to any commercial treaty, trade agreement, or other bilateral instrument defining its trade obligations toward the United States. Moreover, import restrictions of the types under consideration are not normally within the purview of customary international law. In these circumstances, retaliation under section 252 would presumably not violate any international obligation of the United States. It would, however, be necessary to characterize the foreign restriction as "unreasonable" rather than "unjustifiable" within the meaning of that section.

In seeking to invoke the provisions of section 252(c), relating to unreasonable restrictions substantially burdening United States commerce, comparable considerations apply. Although on its face this determination is to be made unilaterally by the United States, in fact the withdrawal of a trade concession where the action of the other party is not illegal (or where, under the General Agreement, the Contracting Parties have not authorized retaliation irrespective of the legality of the original restriction) might involve the United States in a breach of its international obligations.¹⁸⁵

IV. CONCLUSION

The executive branch has long possessed authority under trade agreements and other legislation to seek the removal of foreign import restrictions other than tariffs. In part, this authority is inherent in the statutory right to conclude trade agreements with foreign nations; in part, it derives from express legislative pro-

¹⁸⁴ These distinctions between § 252 and the General Agreement on Tariffs and Trade arise from the fact that the latter instrument recognizes that commitments between the contracting parties are based on the principle of mutual benefit. Consequently, where circumstances have sufficiently altered, the General Agreement may allow commitments to be modified although no breach of contractual obligation by another party may have occurred. The same essentially pragmatic attitude underlies the waiver provision. It may not always be possible, on the technical level, to reconcile this approach with that of § 252, which is framed in terms of legal rather than economic justification.

¹⁸⁵ It is for this reason that § 252(c) provides for retaliation "to the extent that such action is consistent with" the objectives of the act, and directs the President to have a "due regard for the international obligations of the United States." The effect of the statutory language is therefore hortatory.

visions relating to the use of inducement or coercion for this purpose.

It is frequently asserted that the Trade Expansion Act of 1962 significantly broadens these statutory powers. Secretary of Commerce Hodges, in testimony before the Senate Finance Committee, expressed the view that the bill "strengthens our hand against both tariff and nontariff barriers."¹⁸⁶ The 1963 report of the President on the trade agreements program asserts that "the new Act strengthens previous provisions for dealing with unjustifiable or unreasonable restrictions that impede the access of American products to foreign markets."¹⁸⁷

In fact, however, the 1962 act narrows rather than extends the President's statutory right to offer trade concessions to obtain the removal of foreign restrictions. Except in the case of agricultural products, it does not significantly affect the scope of his power under trade agreements legislation to retaliate against such restrictions. It makes no change in prior statutory provisions authorizing him to impose additional duties on, or to exclude, articles imported from countries discriminating against United States commerce. These latter sanctions, which are not part of the trade agreements program, are potentially severe. Like the retaliatory provisions contained in trade agreements legislation, however, they have rarely been invoked.

It may be concluded that these statutory powers afford the President adequate authority to act with respect to foreign nontariff import barriers. In practice, however, his freedom to do so is circumscribed by pragmatic considerations which legislation cannot resolve. He must act within the context of a system of international obligations which the United States will not ordinarily wish to breach. In practice, therefore, the negotiation of reciprocal concessions will probably continue to be the preferred means of obtaining the removal of foreign restrictions which are legally justifiable.¹⁸⁸

It should also be recognized that nations which persist in maintaining legally indefensible restrictions, despite strong external pressures to remove them, may be motivated by compelling domestic reasons which the withdrawal of a trade concession or the

¹⁸⁶ *Hearings on H.R. 11970, supra* note 156, at 54.

¹⁸⁷ PRESIDENT'S 7TH ANN. REP. ON THE TRADE AGREEMENTS PROGRAM 18 (1963).

¹⁸⁸ In the case of a restriction which, although inconsistent with the General Agreement, has been granted a waiver by the Contracting Parties, a question might arise as to the propriety of offering a concession under § 252(a)(2) of the Trade Expansion Act.

imposition of additional import restrictions by the United States is unlikely to outweigh. In many instances, however, restrictions originally justified for balance of payments or other reasons are continued primarily at the urging of domestic interest groups which have become accustomed to rely upon them. Under such circumstances, the statutory sanctions available to the President may prove effective.

Finally, any exercise of retaliation is *pro tanto* a further restriction upon trade. Moreover, even where it is legally justified it may invite reciprocal action by the affected nation. For these reasons, the executive branch will presumably resort to retaliation principally in those instances in which it appears likely to have a relatively prompt remedial effect.

The primary significance of section 252, therefore, is not that it effects a major change in the substantive power to eliminate foreign non-tariff import barriers, but rather that it constitutes a mandate to the executive branch to give greater attention to the disruptive effects of these barriers and to undertake determined efforts to remove them. The more formal and definite procedures for this purpose established by the 1962 act are potentially its most important contribution to this end. Their effectiveness will depend not only on the seriousness with which the problem of foreign restrictions is regarded within the executive branch, but also upon the vigor and thoroughness with which private parties prepare and present their cases through the mechanism provided by section 252(d). Effective utilization of this procedure could have a substantial influence on the eventual success of the United States in expanding foreign markets for its products.