

1982

# Agricultural Trade and Section 22

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## Recommended Citation

31 Drake L. Rev. 587 (1981-82).

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# AGRICULTURAL TRADE AND SECTION 22

*Rex J. Zedalis*†

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## I. INTRODUCTION

In response to the growing concern that imports of items from abroad were threatening to jeopardize the progress which had been made during the Great Depression in improving the agricultural sector of the economy, Congress in mid-1935 enacted legislation adding section 22<sup>1</sup> to the Agricultural

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1. Act of Aug. 24, 1935, Pub. L. No. 74-320, § 31, 49 Stat. 773 (1935) (current version at 7 U.S.C. § 624 (1976)). The current version of section 22 reads:

(a) Whenever the Secretary of Agriculture has reason to believe that any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under this chapter or the Soil Conservation and Domestic Allotment Act, as amended, or section 612c of this title or any loan, purchase, or other program or operation undertaken by the Department of Agriculture, or any agency operating under its direction, with respect to any agricultural commodity or product thereof, or to reduce substantially the amount of any product processed in the United States from any agricultural commodity or product thereof with respect to which any such program or operation is

Adjustment Act of 1933.<sup>2</sup> Amended several times since, section 22 provides

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being undertaken, he shall so advise the President, and, if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made by the United States International Trade Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties, and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such fees not in excess of 50 per centum ad valorem or such quantitative limitations on any article or articles which may be entered, or withdrawn from warehouse, for consumption as he finds and declares shown by such investigation to be necessary in order that the entry of such article or articles will not render or tend to render ineffective, or materially interfere with, any program or operation referred to in subsection (a) of this section, or reduce substantially the amount of any product processed in the United States from any such agricultural commodity or product thereof with respect to which any such program or operation is being undertaken: *Provided*, That no proclamation under this section shall impose any limitation on the total quantity of any article or articles which may be entered, or withdrawn from warehouse, for consumption which reduces such permissible total quantity to proportionately less than 50 per centum of the total quantity of such article or articles which was entered, or withdrawn from warehouse, for consumption during a representative period as determined by the President: *And provided further*, That in designating any article or articles, the President may describe them by physical qualities, value, use, or upon such other bases as he shall determine.

In any case where the Secretary of Agriculture determines and reports to the President with regard to any article or articles that a condition exists requiring emergency treatment, the President may take immediate action under this section without awaiting the recommendations of the International Trade Commission, such action to continue in effect pending the report and recommendations of the International Trade Commission and action thereon by the President.

(c) The fees and limitations imposed by the President by proclamation under this section and any revocation, suspension, or modification thereof, shall become effective on such date as shall be therein specified, and such fees shall be treated for administrative purposes and for the purposes of section 612c of this title as duties imposed by the Tariff Act of 1930, but such fees shall not be considered as duties for the purpose of granting any preferential concession under any international obligation of the United States.

(d) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended or terminated by the President whenever he finds and proclaims that the circumstances requiring the proclamation or provision thereof no longer exist or may be modified by the President whenever he finds and proclaims that changed circumstances require such modification to carry out the purposes of this section.

(e) Any decision of the President as to facts under this section shall be final.

(f) No trade agreement or other international agreement heretofore or hereafter entered into by the United States shall be applied in a manner inconsistent with the requirements of this section.

7 U.S.C. § 624 (1976).

2. Pub. L. No. 73-10, 48 Stat. 31 (1933)(current version in scattered sections of 7 U.S.C.).

the President with the basic statutory authority for issuing proclamations<sup>3</sup> imposing import limitations designed to protect the domestic agricultural community from an influx of foreign items. Essentially, limiting actions are to be taken whenever the President determines that any article or articles are being or are practically certain to be imported so as render or tend to render ineffective or, materially interfere with, certain agricultural programs, or to reduce substantially the amount of any product processed domestically from agricultural commodities benefiting from such programs.<sup>4</sup> More specifically, section 22 contemplates that this determination will be made initially by the Secretary of Agriculture who will then advise the President.<sup>5</sup> If the President agrees that there is reason to believe such to be the case, he shall cause the United States International Trade Commission (hereinafter ITC) to investigate the matter.<sup>6</sup> Following such investigation, a report of findings and recommendations will be submitted to the President who, on the basis of the report, will make the final decision.<sup>7</sup>

The objective of this Article is not to analyze each and every issue related to the functioning and use of section 22. Rather, an attempt has been made to select only those issues thought to be of particular interest or contemporary relevance. In addressing many of these issues, primary reference will be made to the documents comprising section 22's legislative history, although relevant court decisions and ITC opinions will be mentioned where appropriate. Described very generally, the major concerns focused on in this Article include the statutory criteria relating to the imposition of import limitations, the problem of presidential discretion, and the relationship of section 22 to outstanding international obligations.

## II. IMPOSING LIMITATIONS ON IMPORTS

### A. *The What and When*

The admittedly subjective estimation of the Secretary of Agriculture that items shipped to the United States are rendering or tending to render ineffective, or are materially interfering with, programs or operations conducted under any of the legislative authorities recited in section 22(a), must be based on the belief that the items fall within the statutory prescription covering "any article or articles" which are being or are "practically certain" to be imported. Though not specifically defined, "any article or articles" and "practically certain" each has its own particular meaning. While one might

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3. This authority has been used to issue, modify, or terminate restrictions almost sixty times. See U.S. TARIFF COMM'N AND U.S. INT'L TRADE COMM'N, PUB. NO. 246, INVESTIGATIONS UNDER SECTION 22 OF THE AGRICULTURAL ADJUSTMENT ACT (1975).

4. See note 1 *supra*.

5. *Id.*

6. *Id.*

7. *Id.*

not think so from looking at the legislative history, the apparent circumscription of the term "practically certain" depends in large measure not so much on the meaning of the term itself, but rather on the President's role in evaluating the judgment of the Secretary of Agriculture with respect to impending importations. On the other hand, it would appear that the definition of "any article or articles" is something much less affected by presidential oversight.

The basic thrust of section 22 is the protection of certain domestic farm programs from the deleterious impact of foreign imports. By stating that the protection can be utilized to restrict "any article or articles" producing such impact, it appears that Congress has authorized the imposition of limitations on not just agricultural commodities identical to or like those benefiting from a domestic farm program,<sup>8</sup> but on a wide range of items irrespective of whether they are even considered commodities. This seems evident for several reasons.

Initially, from its inception in 1935<sup>9</sup> the opening stanza's description of

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8. *But see* letter from Don Parel, Associate Director, American Farm Bureau Federation, to Edward J. Thye, United States Senator (June 15, 1950), *reprinted in* 96 CONG. REC. 9129 (1950).

9. *See* note 1 *supra*. The 1935 version of section 22 read:

(a) Whenever the President has reason to believe that any one or more articles are being imported into the United States under such conditions and in sufficient quantities as to render or tend to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which an adjustment program is in operation, under this title, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which an adjustment program is in operation, under this title: *Provided*, That no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

the foreign item subject to restriction has never been cast in terms of commodity or agricultural commodity, let alone identical or like agricultural commodity.<sup>10</sup> Rather, reference has always been made to some grammatical form of the word "article." While this alone may not seem terribly persuasive, especially in light of the existence of oblique references in the legislative history intimating that the term may mean "commodity,"<sup>11</sup> it becomes increasingly difficult to refute when it is noted that the same subsection which refers to "any article or articles," uses the term "agricultural commodity" when describing the kinds of domestic items eligible for protection. Arguably, had Congress intended that restrictions under section 22 be limited to foreign agricultural commodities identical to or like those benefiting from a domestic farm program, or even to dissimilar items which could be viewed as either agricultural commodities or simply commodities, it surely would have said so. In addition, the precise focus of the subsection's language suggests that the concern is not that of a comparison of the characteristics of the foreign item with those of the domestic one, but rather whether the foreign item is rendering or tending to render ineffective or materially interfering with an authorized program or operation. Therefore, it would seem that while perhaps useful, even the question of substitutability<sup>12</sup> is not critical. Irrespective of the nature or characteristics of the item, if it produces the necessary adverse impact<sup>13</sup> on a domestic farm program, it would likely be subject to import limitations.<sup>14</sup>

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(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision thereof no longer exist, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.

Pub. L. No. 74-320, § 31, 49 Stat. 773 (1935).

10. For the succeeding amendments to section 22, see Act of February 29, 1936, Pub. L. No. 74-461, § 5, 49 Stat. 1152; Act of June 3, 1937, Pub. L. No. 75-137, § 1(k), 50 Stat. 246; Act of January 25, 1940, Pub. L. No. 76-406, 54 Stat. 17; Act of July 3, 1948, Pub. L. No. 80-897, § 3, 62 Stat. 1248; Act of June 28, 1950, Pub. L. No. 81-579, § 3, 64 Stat. 261; Act of June 16, 1951, Pub. L. No. 82-50, § 8(b), 65 Stat. 75; Act of August 7, 1953, Pub. L. No. 83-51, § 104, 67 Stat. 472.

11. See H.R. REP. No. 1241, 74th Cong., 1st Sess. 22 (1935). It is there stated with respect to section 22: "Congress cannot now ascertain and provide specifically for the varieties of circumstances under which and *the commodities* the importation of which will endanger the effort to attain parity price." *Id.* (Emphasis added).

12. See remarks of Congressman Boileau on substituting beef for pork, 79 CONG. REC. 9469 (1935).

13. It would appear that there is no need for the different types of items to be related to each other. The focus is on the impact alone.

14. In this regard, it should be noted that section 22 speaks of any article or articles being imported under "such conditions." This would seem to recognize that there may be instances where an imported item which is not even of the name nature as the domestic commodity may be subject to import limitation. See also the statement suggesting flexibility in H.R. REP. No.

Prior to the 1948 amendment,<sup>15</sup> the language referred not to "any arti-

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1241, 74th Cong., 1st Sess. 22 (1935).

15. Act of July 3, 1948, Pub. L. No. 80-897, § 3, 62 Stat. 1248 (1948). The text of section 22 read:

Sec. 22.(a) Whenever the President has reason to believe that any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under this title or the Soil Conservation and Domestic Allotment Act, as amended, or section 32, Public Law Numbered 320, Seventy-fourth Congress, approved August 24, 1935, as amended, or any loan, purchase, or other program or operation undertaken by the Department of Agriculture, or any agency operating under its direction, with respect to any agricultural commodity or product thereof, or to reduce substantially the amount of any product processed in the United States from any agricultural commodity or product thereof with respect to which any such program or operation is being undertaken, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties, and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such fees not in excess of 50 per centum ad valorem or such quantitative limitations on any article or articles which may be entered, or withdrawn from warehouse, for consumption as he finds and declares shown by such investigation to be necessary in order that the entry of such article or articles will not render or tend to render ineffective, or materially interfere with, any program or operation referred to in subsection (a), of this section, or reduce substantially the amount of any product processed in the United States from any such agricultural commodity or product thereof with respect to which any such program or operation is being undertaken: *Provided*, That no proclamation under this section shall impose any limitation on the total quantity of any article or articles which may be entered, or withdrawn from warehouse, for consumption which reduces such permissible total quantity to proportionately less than 50 per centum of the total quantity of such article or articles which was entered, or withdrawn from warehouse, for consumption during a representative period as determined by the President: *And provided further*, That in designating any article or articles, the President may describe them by physical qualities, value, use, or upon such other bases as he shall determine.

(c) The fees and limitations imposed by the President by proclamation under this section and any revocation, suspension, or modification thereof, shall become effective on such date as shall be therein specified, and such fees shall be treated for administrative purposes and for the purposes of section 32 of Public Law Numbered 320, Seventy-fourth Congress, approved August 24, 1935, as amended, as duties imposed by the Tariff Act of 1930, but such fees shall not be considered as duties for the purpose of granting any preferential concession under any international obligation of the United States.

(d) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended or terminated by the President whenever he finds and proclaims that the circumstances requiring the proclamation or provision thereof no longer exist or may be modified by the President whenever he finds and proclaims that changed circumstances require such modifica-

cle or articles," but to "any one or more articles."<sup>16</sup> Under some standards, it is at least arguable that the 1948 change evidenced an increase in the number of instances when section 22 could be utilized. By referring to "any article or articles" rather than "any one or more articles," the language may have moved beyond concern with addressing the problem of the number of items of a single type to that of the number of types of items as well. Though the legislative history of the 1948 amendment<sup>17</sup> fails to reveal anything of substance about the meaning of or motivation for this change in language, the argument that it served to increase the number of instances when section 22 limitations could be imposed seems weakened by two facts.

When H.R. 8492, the bill which went on to become the 1935 Act,<sup>18</sup> was

tion to carry out the purposes of this section.

(e) Any decision of the President as to facts under this section shall be final.

(f) No proclamation under this section shall be enforced in contravention of any treaty or other international agreement to which the United States is or hereafter becomes a party.

*Id.*

16. The words "any one or more articles" appeared in the 1935 act. *See note 9 supra.* The language was changed in 1948.

17. Nothing of substance about this change appears in either H. R. REP. No. 1776, 80th Cong., 2d Sess. 1 (1948) or S. REP. No. 1295, 80th Cong., 2d Sess. 1 (1948).

18. As originally introduced, H.R. 8492, 74th Cong., 1st Sess. 1 § 30 (1935) read:

(a) Whenever the President has reason to believe that any one or more articles are being imported or are likely to be imported into the United States under such conditions and in sufficient quantities to render ineffective or materially interfere with any program or operation undertaken under this title, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this subsection, to determine such facts. Such investigation shall be made after such notice and hearing and subject to such regulations as the President shall specify.

(b) If, after such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by order direct that the entry into the United States of such article or articles shall, for such time as may be specified by him, be permitted subject to (1) such terms and conditions, (2) such limitations on the total quantities thereof which may be imported, or (3) the payment of such compensating taxes as he finds necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with such program or operation undertaken under this title. Any compensating tax imposed under this section shall be in addition to any tax imposed under section 15(e) and the provisions of such section shall apply thereto.

(c) Any decision of the President as to facts under this section shall be final.

(d) Upon information of any order of the President under subsection (b), the Secretary of the Treasury shall permit entry of any article or articles specified therein only in conformity with such order.

(e) After investigation, report, and finding in the manner provided in the case of an original order, any order or provision thereof may be suspended or revoked by the President whenever he finds that the circumstances requiring the order or provision no longer exist, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the provisions of this section.



referred by the House Committee on Agriculture to the full House, the Committee reported that it read "any one or more articles" to be the equivalent of "any article or articles."<sup>19</sup> Additionally, since the 1948 amendment seems in large measure to have been proposed by the Department of Agriculture,<sup>20</sup> the absence of congressional statements to the contrary would suggest that the department's view, in 1947, that the change from "any one or more articles" to "any article or articles" was not "substantial" indicates that the availability of section 22 limitations was in no way intended to be affected by the use of different language.<sup>21</sup> It would seem inaccurate to conclude from all of this that, as it now stands, section 22 action can only be taken to limit importations of items of a single type. Rather, in light of the fact that the language of section 22 as originally enacted in 1935 provided in its reference to "any one or more articles" for attention to "any . . . articles," the better view seems to be that section 22 has always permitted evaluation of the impact which two or more distinctly different types of items may impose on a domestic program or operation.

Apart from the foregoing conclusions concerning the characteristics and the types of foreign items which may produce the impact needed to trigger import restrictions is the issue of exactly how many articles must be imported, or practically certain to be imported, before section 22 action can be taken. Query: Is it conceivable that action may be taken to limit the importation of a single, solitary foreign item? The language of the statute certainly does not preclude that possibility.<sup>22</sup>

The reference to any "article" is not to be taken as simply a reference to any group of identical items, though it surely includes that. Used in juxtaposition with the plural term "articles," and in the context of a belief by the Secretary of Agriculture that any article or articles are being or are practically certain to be imported "under such conditions" and in such quantities<sup>23</sup> as to impact on a farm program or operation, it would seem that a single foreign item could be subject to limitation if the circumstances were just right. Surely if the government took it upon itself to initiate a program under one of the authorities cited in section 22(a) in order to support some

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The Senate Committee on Agriculture and Forestry deleted section 30 before reporting the bill to the full Senate. See remarks of Senator Smith, 79 CONG. REC. 10,934 (1935). Senator LaFollette then proposed to amend H.R. 8492 as reported to the full Senate by restoring language similar to that of section 30. See 79 CONG. REC. 11,497 (1935). That proposal was adopted.

19. H. R. REP. No. 1241, 74th Cong., 1st Sess. 21 (1935).

20. Letter from Clinton P. Anderson, Secretary of Agriculture, to Congressman Joseph W. Martin (February 4, 1947)(on file with University of Tulsa Law Review).

21. *Id.*

22. It should be noted, however, that section 22(b) provides that restrictions shall not reduce the amount permitted to be imported to less than 50 percent entered during a representative period. See note 1 *supra*.

23. As originally enacted, section 22 referred to "sufficient quantities." See note 9 *supra*. This was changed to "such quantities" in 1948. See note 15 *supra*.

infant operation incapable of generating more than a handful of items in any given period of time, the "conditions" might indeed be such that a single imported item would constitute the "quantities" needed to render or tend to render ineffective or materially interfere with that program. In such an instance, the literal meaning of the term "article" would in fact facilitate the effectuation of the statutory objective of section 22. While instances of this nature may be unlikely to occur, it would be erroneous to conclude that the reference to any article cannot be read so as to include them.

The prescription that the Secretary of Agriculture must have reason to believe that any article or articles are being or are "practically certain" to be imported under such conditions and in such quantities as to produce the necessary impact on a farm program or operation before proceeding to advise the President demonstrates that the reference to any article or articles is not without competition in a statutory construction exercise. The term "practically certain" clearly has a history and meaning interesting enough to rival that of the words "any article or articles."

Although there had been an attempt to phrase the language of section 22 as originally passed in 1935 so that it would cover more than just actual imports,<sup>24</sup> no authority for undertaking such action appeared until the passage of the 1940 amendment.<sup>25</sup> The proposal to expand section 22 so that it could be used against items "practically certain," as well as those actually imported, undoubtedly grew out of the concern of the Department of Agriculture and others that limitations could not be imposed under the 1935 language until importations had actually occurred and adversely impacted a farm program or operation.<sup>26</sup> The original proposal to expand section 22's coverage appeared in H.R. 7171, and was designed to apply to items "likely to be" as well as those actually imported.<sup>27</sup> Though reported on favorably by the House Committee on Agriculture,<sup>28</sup> the chairman of the Committee, Congressman Jones, proposed, without explanation, to replace "likely to be" with "practically certain"<sup>29</sup> when the bill was before the full House. The proposal was adopted without debate.<sup>30</sup> The language was then passed by

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24. Section 30 of H.R. 8492 dealt with articles "likely to be" imported. See note 18 *supra*. The Senate Committee deleted this language before reporting it to the full Senate. During the debates on the bill, Senator LaFollette was successful in restoring most of that original language. His amendment, however, did not contain reference to items "likely to be" imported. The LaFollette language, as amended, was later enacted into law. See note 18 *supra*.

25. Act of January 24, 1940, Pub. L. No. 76-406, 54 Stat. 17 (1940).

26. Letter from H. A. Wallace, Secretary of Agriculture, to Senator Pat Harrison (August 5, 1939), reprinted in 84 CONG. REC. 11,162-63 (1939).

27. As originally introduced in the House, H.R. 7171 read exactly as the 1940 act, except for the use of the words "likely to be" where "practically certain" ultimately appeared. H.R. 7171, 76th Cong., 2d Sess. 1 (1939).

28. H.R. REP. NO. 1166, 76th Cong., 2d Sess. 2 (1939).

29. See 84 CONG. REC. 10,354 (1939).

30. *Id.*

the House and subsequently by the Senate.

As with most terms, "practically certain" to be imported would appear to have a specific and objective meaning. There is little doubt, however, that it does not simply mean "likely to be" imported. This construction is indicated not only by the House's substitution of "practically certain" for "likely to be," but also by the fact that since the latter term leaves enough flexibility to include everything from "remotely likely" to "imminently likely," any reading which equates the two could well result in a situation where "practically certain" means what one wants it to mean. Likewise, it would seem that from an objective perspective "practically certain" does not quite mean "overwhelmingly certain."<sup>31</sup> Granted, references of this nature are found in both the House<sup>32</sup> and the Senate<sup>33</sup> Committee Reports on H.R. 7171. Yet when sedulously scrutinized, it is obvious that the references are not to how certain the prospect of importation must be under the standard proposed in the bill, but to the certainty of the effects of the impeding imports which, under the 1935 language, could not be limited until they had occurred and worked their mischief.<sup>34</sup>

What then is the objective meaning of "practically certain?" There has been at least one suggestion that it means "reasonably certain."<sup>35</sup> While this point is clearly arguable, two things seem to operate against that definition. First, when the House Committee on Agriculture reported H.R. 7171 to the full House, it used "reasonably certain" to describe the words "likely to be."<sup>36</sup> By voting in favor of replacing those words with "practically certain," there is no doubt that the full House rejected the notion that "practically certain" meant the same thing as "likely to be," and, therefore, "reasonably certain." Admittedly, it is possible that the House's action was designed to do no more than bring the language of the bill into line with the language of the House Committee's report. But interestingly enough, when the Senate Committee on Agriculture and Forestry had an opportunity to comment on the meaning of "practically certain," it refrained from reporting that it simply meant "reasonably certain," choosing instead to state that it meant

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31. On a spectrum, "practically certain" would seem to fall between "undoubtedly or overwhelmingly certain" and "reasonably certain." The latter would then be followed by "likely to be."

32. H. R. REP. NO. 1166, 76th Cong., 2d Sess. 2 (1939).

33. S. REP. NO. 1043, 76th Cong., 2d Sess. 2 (1939).

34. See letter from A. R. DeFelice, Attorney, U.S. Dep't of Agriculture, to Edgar B. Bresard, Chairman, U.S. Tariff Comm'n (September 9, 1953)(on file with University of Tulsa Law Review).

35. *Id.* at 4.

36. H.R. REP. NO. 1166, 76th Cong., 2d Sess. 2 (1939). "Consequently, the bill provides that restrictions against foreign importations may be imposed under the provisions of section 22 whenever it appears to be *reasonably certain* that such importations would increase and affect a farm program adversely." *Id.* (Emphasis added.)

“practically certain.”<sup>37</sup>

Secondly, it would seem that on its face “practically certain” does not mean “reasonably certain.”<sup>38</sup> That term almost suggests that the standard is simply one of whether the belief that items will be imported is reasonable. “Practically certain” seems to leave aside even the faintest subjective aspects that a standard of reasonableness implies, placing more importance on objective accuracy. Stated in another fashion, “practically certain” is tantamount to suggesting that there is only a “slight or theoretical possibility” that the importations will not occur, while “reasonably certain” is tantamount to suggesting that there is an actual “possibility” that they will not occur.<sup>39</sup>

The real problem with “practically certain,” however, is that unlike “any article or articles,” its meaning is actually the meaning the Secretary of Agriculture gives it. Reference is made to both “any article or articles” and “practically certain” in the statement of section 22(a) that “[w]henver the Secretary of Agriculture has reason to believe that any article or articles are being or are practically certain to be imported . . .” under such conditions and in such quantities as to “adversely impact a farm program or operation he shall advise the President.”<sup>40</sup> But in view of the fact that there is a fundamental difference between the reference to any article or articles and the reference to practically certain, the one is susceptible to a definition formulated by the Secretary while the other is not.

As previously suggested, the words “any article or articles” are virtually boundless. This is clearly not so of “practically certain.” The foregoing review suggests that “practically certain” surely means more than “remotely possible,” “likely to be,” or “reasonably certain,” though not quite “overwhelmingly or undoubtedly certain.” Given this, the latitude vested in the Secretary by the statute’s reference to “[w]henver the Secretary of Agriculture has reason to believe” is extraordinarily effective in developing a definition for “pratically certain,” yet unnecessary in developing one for any article or articles. From this it would seem that even though “practically certain” may have a specific and objective meaning, the Secretary could, through his actions, define it to mean “reasonably certain”<sup>41</sup> or even “likely to be.” The principal factor in keeping the Secretary of Agriculture honest in this respect is the President’s role in evaluating the Secretary’s judgment

37. S. REP. No. 1043, 76TH CONG., 2d Sess. 2 (1939). “Consequently, the bill provides that restrictions . . . may be imposed . . . whenever it appears to be *practically certain* that such importations would increase . . .” *Id.* (Emphasis added.)

38. Senator Connally was the only person in Congress to offer the slightest comment on “practically certain.” See 86 CONG. REC. 465 (1940).

39. Cf. REPORT TO THE PRESIDENT ON INVESTIGATION No. 22-43 UNDER SECTION 22 OF THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED, U.S.I.T.C. PUB. NO. 1174 (August 1981) (“practically certain” is the equivalent of “highly likely”).

40. See note 1, *supra*.

41. See Department of Agriculture regulations, 7 C.F.R. §§ 6.2-75 (1981).

with regard to impending importations.<sup>42</sup>

### B. *Programs Eligible for Protection*

Any article or articles which are being or are practically certain to be imported into the United States may be subject to section 22 restriction whenever they render or tend to render ineffective, or materially interfere with, "any program or operation" undertaken under title I of the Agricultural Adjustment Act<sup>43</sup> (as reenacted by the Agricultural Marketing Agreement Act of 1937);<sup>44</sup> or under the Soil Conservation and Domestic Allotment Act, as amended;<sup>45</sup> or under section 32 of Public Law 74-320, as amended;<sup>46</sup> or under "any loan, purchase, or other program or operation" conducted by the Department of Agriculture or any agency operating under its direction. The striking similarity in breadth between these two quoted references and

42. In 1953, Senator Magnuson proposed to amend section 22(a) to read:

Sec. 22(a) Whenever any article or articles are being or are practically certain to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with the national objective of achieving full parity prices for agricultural commodities, or products thereof, in the domestic market place, or any program or operation undertaken under this title or the Soil Conservation and Domestic Allotment Act, as amended, or section 32, Public Law 320, 74th Congress, approved August 24, 1935, as amended, or any loan, purchase, or other program or operation undertaken by the Department of Agriculture, or any agency operating under its direction with respect to any agricultural commodity or product, or to reduce substantially the amount of any product processed in the United States from any agricultural commodity or product thereof with respect to which any such program or operation is being undertaken, the Secretary of Agriculture shall, and any interested party may, petition the United States Tariff Commission to make an immediate investigation. Upon receipt of any such petition an immediate investigation shall be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigations shall be made after due notice and opportunity for hearing to interested parties, and shall be conducted subject to such regulations as the Tariff Commission shall specify. The Tariff Commission shall make and publish its report to the President at the earliest possible date but in no event more than 6 months after the day on which a petition for investigation was filed.

See 99 CONG. REC. 7876 (1953). It seems this proposal suggested a slightly more objective form of "practically certain" by not starting off with the notion of "whenever the Secretary of Agriculture has reason to believe."

43. Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31 (current version at 7 U.S.C. § 601 (1976)).

44. Agricultural Marketing Agreement Act of 1937, Pub. L. No. 75-137, 50 Stat. 246 (current version in scattered sections of 7 U.S.C.). For some of the current marketing control regulations, see 7 C.F.R. §§ 900, 904-908, 910, 912-913, 915-919, 921-932, 944-948, 950, 953, 958-959, 965-967, 971, 979-980 (1981).

45. Soil Conservation and Domestic Allotment Act of 1936 Pub. L. No. 74-461, 49 Stat. 1148 (current version at 16 U.S.C. § 590(g) (1976)). Current regulations include 7 C.F.R. §§ 701.1, 722-726, 729-730 (1981).

46. Act of August 24, 1935, Pub. L. No. 74-320, § 32, 49 Stat. 774 (1935). Regulations include 7 C.F.R. §§ 247.1, 250.1, 250.3; 2880.1-21, 2800.25-.45, 2880.50-.70 (1981).

“any article or articles” might lead one to conclude that, just as every imaginable sort of foreign item is subject to import limitation under section 22, every sort of program or operation undertaken by the Department of Agriculture pursuant to one of the enumerated authorities is eligible for protection under section 22. A close reading of the statutory language, however, suggests that this conclusion may be inaccurate. Furthermore, when compared with the slender and inconclusive legislative history regarding “any article or articles,” the legislative history of “any program or operation” and “other program or operation” seems weighty and quite categorical.

As enacted in 1935, section 22 referred only to any program or operation undertaken under “this title”; specifically, title I of the Agricultural Adjustment Act (AAA) of 1933.<sup>47</sup> A review of title I suggests that it sought to correct the vast disparity between prices of farm products and those of industrial products by authorizing the use of both production and marketing controls to reduce the supply of domestic agricultural commodities, thereby increasing the price those which remained could command. By modifying the reference to any program or operation with the words “undertaken under this title,” the 1935 Act undoubtedly was designed to restrict the use of import limitations to only those instances in which a price support program conducted under title I of the AAA would be rendered ineffective, or materially interfered with, if competitive foreign items were permitted to be imported into the United States. That this was indeed the thrust of the section 22 authority is well evidenced by the legislative history surrounding its passage.<sup>48</sup> Repeated statements in the House<sup>49</sup> and Senate<sup>50</sup> by proponents and opponents alike leave no question on this matter.

The control of production contemplated by title I of the AAA was to be accomplished by making payments to farmers who voluntarily reduced production of certain basic commodities. Revenues for such payments were to be derived from a tax levied on domestic processors of the basic commodities.<sup>51</sup> In 1936, however, the Supreme Court in *United States v. Butler*<sup>52</sup> struck down the processing tax and declared the production controls unconstitutional.<sup>53</sup> The effect of this decision was to jeopardize the goal of narrowing the gap between agricultural and industrial product prices. In response to both this decision and severe long-term weather conditions,

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47. Pub. L. No. 73-10, 48 Stat. 31 (current version at 7 U.S.C. § 601 (1976)).

48. H.R. 8492, as originally introduced, and the LaFollette proposal both referred to “this title.” See text accompanying note 18 *supra*. H.R. REP. No. 1241, 74th Cong., 1st Sess. 21-22 (1935) explains this to mean the adjustment programs of the AAA.

49. See remarks of Congressman Boileau, 79 CONG. REC. 9464-69 (1935). See also remarks of Congressman Cooley, 79 CONG. REC. 9486 (1935).

50. See remarks of Senator LaFollette, 79 CONG. REC. 11,498 (1935). See also remarks of Senator Vandenberg, 79 CONG. REC. 11,500 (1935).

51. Pub. L. No. 73-10, 48 Stat. 31 (1933).

52. 297 U.S. 1 (1936).

53. *Id.* at 72.

Congress enacted the Soil Conservation and Domestic Allotment Act of 1936.<sup>54</sup> Section 5 of that legislation extended the coverage of section 22 by adding after the words "this title," a reference to the Soil Conservation and Domestic Allotment Act (SCDA).<sup>55</sup> Curiously enough, however, the meaning of the words "any program or operation" as modified by reference to the SCDA is not at all as clear as "any program or operation" modified by the words "this title."

Unlike title I of the AAA, the SCDA had five basic objectives, four aimed at improving soil fertility, soil conservation, and navigable waterways, and only one aimed at supporting the prices of agricultural commodities.<sup>56</sup> Therefore, if one were to adopt a literal approach to defining section 22's reference to "any" program or operation undertaken under the SCDA, it is conceivable that it encompasses not only programs or operations designed to support the prices of domestic agricultural commodities, but also programs or operations which are purely conservational in both purpose and effect.<sup>57</sup>

The sparse legislative history regarding the 1936 amendment which included reference to the SCDA in section 22 has been read by some as unequivocally refuting any inclusive approach comparable to that just mentioned.<sup>58</sup> In all candor, however, there is clearly reason to doubt that the matter is quite that settled. As originally reported by the Senate Committee on Agriculture and Forestry to the full Senate,<sup>59</sup> S. 3780, the bill which ultimately became the 1936 legislation, did not contain any language amending section 22. Soon after initial consideration, the Committee's chairman, Senator Smith, offered an amendment to the full bill in the form of a substitute.<sup>60</sup> Section 4 of that amendment proposed to amend section 22 in a manner not substantively distinct from the final legislation.<sup>61</sup> No explanation was offered with respect to the meaning of the language of section 4, and the bill passed the Senate without debate on that provision<sup>62</sup> and was then referred to the House.

During the course of the House's consideration of the Senate bill, an amendment to substitute the language of H.R. 10835 for that of S. 3780 was

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54. See note 45 *supra*.

55. Pub. L. No. 74-461, 49 Stat. 1148, 1152 (current version at 7 U.S.C. § 624 (1976)).

56. Many congressmen contended, however, that the legislation was really nothing but production control and price support legislation in disguise. See, e.g., 80 CONG. REC. 2463, 2470-71, 2465 (1936).

57. This assumes, of course, that one can demonstrate that the imports are causing material interference.

58. See Memorandum from Norbert A. Schlei, Assistant Attorney General, U.S. Department of Justice, to Myer Feldman, Deputy Special Counsel to the President, 17-19 (March 1, 1963)(on file with University of Tulsa Law Review) [hereinafter cited DOJ Memo].

59. S. REP. No. 1481, 74th Cong., 2d Sess. 1 (1936).

60. 80 CONG. REC. 1566 (1936).

61. It would have inserted "or the Soil Conservation Act, as amended" after "this title."

62. 80 CONG. REC. 2165 (1936).

proposed. Like the original Senate bill reported from Committee, H.R. 10835 made no mention of amending section 22. Several congressmen noted that absent some authority for limiting imports, the production control aspects of the soil conservation program would be rendered ineffective.<sup>63</sup> To remedy this, Congressman Jones proposed that language identical to section 5 of the 1936 act be added to S. 3780.<sup>64</sup> He noted that the language was intended to make the import limitation authority of section 22 just as available "under this act as it was under the AAA."<sup>65</sup> Without further discussion, Congressman Jones' amendment was adopted<sup>66</sup> and the bill, as amended by the House, was then passed and sent to conference. In conference, Congressman Jones' language was accepted and reported without explanation.<sup>67</sup>

Surely it is difficult to draw any comfortable conclusions from legislative history of this nature. The brief statement offered by Congressman Jones in explanation of his proposal to amend section 22 refers to the protection of programs "under this act." Arguably, that might even include non-price support programs because, after all, they too were authorized by the SCDA. In addition, the language proposed by Congressman Jones and reflected in the legislation as passed also amended the second clause in the first sentence of section 22(a) so as to replace reference to "an adjustment program" with reference to "any program." It does not seem far-fetched to suggest that had the amendment to section 22 been aimed at bringing only the price support aspects of the SCDA within the protection of the executive's authority to impose import limitations, language of a different nature would have been used.

All of this is not to suggest, however, that there are no arguments on the other side of this matter as well. Several arguments exist. First, when Congressman Jones stated his reason for proposing an amendment to add a section 5 to the language of the Senate bill which was before the full House, he not only mentioned that it would have the effect of making section 22 available for protecting programs "under this act," but that this was to be just "as it was under the AAA."<sup>68</sup> If by this he meant to signify precisely what SCDA programs were thus to be eligible for section 22 protection, the price supporting nature of the AAA would indicate that he did not envision section 22 being used to protect SCDA programs which were purely conservation in both purpose and effect. Second, the few references to the need for import limitations made on the House floor prior to the proposal of the Jones amendment all contemplated the limitations being used to protect

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63. See, e.g., remarks of Congressman Robsion, 80 CONG. REC. 2474-75 (1936).

64. 80 CONG. REC. 2547 (1936).

65. *Id.*

66. *Id.* at 2551.

67. H.R. REP. NO. 2079, 74th Cong., 2d Sess. 1 (1936).

68. 80 CONG. REC. 2547 (1936).



programs designed to control production and thereby support prices.<sup>69</sup> Third, if the SCDA, as claimed by several Congressmen,<sup>70</sup> was merely designed to find some less direct mechanism for supporting prices through the use of production controls in the post-*United States v. Butler* period, the substitution of "any program" for "an adjustment program" in the second clause of the first sentence of section 22(a) might well have been designed, *inter alia*, to develop a complete, palatable package more than able to withstand a challenge based on the *Butler* decision. Much was assured by stating that the SCDA had several objectives in addition to supporting prices. But since section 22 was being amended to include reference to the SCDA, permitting any language, however innocuous, to remain in a statute referring to the SCDA left open the possibility that that language would be pointed to by opponents in a court challenge.<sup>71</sup> Finally, in view of the fact that the other authorities cited in section 22 are designed largely for price support purposes,<sup>72</sup> it would seem anomalous to suggest that reference to "any program or operation" undertaken under the SCDA should also include those undertaken for non-price support purposes.<sup>73</sup>

Without subscribing to any strong view about the persuasiveness of either of the two positions on the matter, it would seem safest to say that the better position would limit the availability of section 22 import limitations under the SCDA to those programs or operations avowedly undertaken for, and actually calculated to, support prices. In this context, of course, it would not appear to matter whether price support is the only stated purpose of the program or merely one of several stated purposes. Conversely, however, section 22 protection would not be available for SCDA programs or operations which are stated as being purely conservational in purpose or which have only that effect.

In 1940, section 22 was amended to further expand its protective coverage.<sup>74</sup> Reference to section 32 of Public 74-320 was inserted immediately fol-

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69. See the remarks of Congressman Coffee, 80 CONG. REC. 2472 (1936). See also remarks of Congressman Robison, 80 CONG. REC. 2474-75 (1936).

70. See note 56 *supra*.

71. There is nothing explicit in the legislative history to support this proposition, but given the interest in controlling production in a manner that would avert problems under *Butler*, it does not seem all that far-fetched.

72. Title I of the AAA was clearly designed to support prices. Section 32 of Public Law 74-320 had several objectives, only one of which was to support prices. See note 46 *supra*. Yet, as will be pointed out, Congress intended only section 32 price support programs to be protected by section 22. See text accompanying notes 79-87 *infra*. The same can be said of loan and purchase authorities as well.

73. Interestingly enough, Congressman Jones remarked in 1939 that section 22 was designed to protect price support programs. 84 CONG. REC. 10,352 (1939). If the reference in 1936 to the SCDA was intended to cover non-price support programs as well, his remark would seem difficult to explain.

74. Act of January 25, 1940, Pub. L. No. 76-406, 54 Stat. 17 (1940) (current version at 7 U.S.C. § 624 (1976)).

lowing the reference to the AAA and the SCDA.<sup>75</sup> Section 32, as originally enacted in 1935,<sup>76</sup> followed the section of the enacting legislation which added section 22 to the AAA. In essence, section 32 provided that thirty percent of all customs receipts collected annually could be used by the Secretary of Agriculture for encouraging and supporting agricultural exports, stimulating domestic consumption, and controlling agricultural production.<sup>77</sup> Though these three purposes may have been broad enough to include the initiation and maintenance of programs not specifically designed to support the price of domestic agricultural commodities, the legislative history of the successful effort to place section 32 programs under the protection of section 22 suggests that, unlike the problem mentioned above in connection with the SCDA, there is no doubt that only section 32 price support programs were intended to be covered.

H.R. 7171, alluded to in connection with section 22's use of the words "practically certain," served as the vehicle for the inclusion of reference to section 32 of Public Law 74-320.<sup>78</sup> As reported by the House Committee on Agriculture, it contained language identical to the 1940 legislation as enacted.<sup>79</sup> The Committee's report<sup>80</sup> and the House debates,<sup>81</sup> as well as the Senate Agriculture and Forestry Committee's report,<sup>82</sup> the debates on the Senate floor,<sup>83</sup> and correspondence of August 5, 1939 from the Department of Agriculture,<sup>84</sup> make it clear that the reference to section 32 was designed

75. *Id.*

76. Act of August 24, 1935, Pub. L. No. 74-320, § 32, 49 Stat. 774 (current version at 7 U.S.C. § 612(c) (1962)).

77. *Id.*

78. The reference in section 22 to title I of the AAA was not enough to permit the imposition of import limitations designed to protect programs conducted under section 32. This was because section 32 was not located in title I. *See* remarks of Congressman Jones, 84 CONG. REC. 10,353 (1939).

79. *See* H.R. REP. No. 1166, 76th Cong., 1st Sess. 1 (1939).

80. *See id.* at 1-2. The report stated:

Under the provisions of the bill, the protection afforded by section 22 . . . would be extended to programs carried out under section 32 of public, [law] No. 320. As in the case of certain other farm programs, some of those carried out under the provisions of section 32 involve the support of domestic prices at levels higher than the prices that would make the export portion of a crop fully competitive in the low-priced world market. It is clearly necessary for the successful operation of such programs that some means, such as is provided in section 22, be available to prevent a backwash of low-priced exports into a higher-priced domestic market.

*Id.*

81. *See* remarks of Congressman Jones, 84 CONG. REC. 10,353 (1939). He indicates that section 22 can be used to protect section 32 price support programs.

82. *See* S. REP. No. 1043, 76th Cong., 1st Sess. 1 (1939).

83. *See* remarks of Senator Connally, 86 CONG. REC. 465 (1940). He links section 22's utilization to subsidized exports, thus intimating it would be tied to section 32 price support programs.

84. Letter from H. A. Wallace, Secretary of Agriculture, to Senator Pat Harrison (August 5, 1939), *reprinted in* 84 CONG. REC. 11,162-63 (1939). The reference here also is to section 32

to bring only section 32 price support programs within the import limiting protection of section 22. Thus, despite the fact that the reference is presented in the context of "any program or operation" undertaken under section 32, the intent was that it not extend beyond those section 32 programs directed at supporting the price of domestic agricultural items.<sup>85</sup>

With the post-World War II shift in policy,<sup>86</sup> generated in part by increased consumer demand, from supporting prices through controlling production and disposing of surpluses<sup>87</sup> to supporting prices through the use of loans<sup>88</sup> and direct purchases,<sup>89</sup> it became apparent that section 22 required further amendment. In response to this need, Congress provided in section 3 of the Agricultural Act of 1948 that section 22 be amended by inserting after the reference to section 32 of Public Law 74-320 the words "any loan, purchase, or other program or operation" conducted by the Department of Agriculture or any agency operating under its direction.<sup>90</sup> Without being tied to any particular legislative enactment authorizing loans or purchases, one cannot, merely on the basis of the language alone, say that the amendment did not contemplate extending section 22 protection to undertakings using loans or purchases for purposes other than supporting prices.<sup>91</sup> By contrast, the references to "any program or operation" conducted under title I of the AAA clearly restricted section 22's application because title I was designed to do no more than support prices. In addition, the 1948 amendment's reference to "any . . . other program or operation" could also be read as extending the protection of section 22 to programs or operations not remotely connected with supporting agricultural prices.

The plain language of the amendment is admittedly broad enough to give support to both of these expansive readings. Yet, as is so often the case, the legislative history suggests that the language is to be read much more restrictively. When the House Committee on Agriculture reported H.R. 6248, the bill which eventually became the 1948 Act, it did not characterize

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support programs.

85. See DOJ Memo, *supra* note 58, at 19-22.

86. See generally, LONG-RANGE AGRICULTURAL POLICY AND PROGRAM, S. REP. NO. 885, 80th Cong., 2d Sess. 22-23 (1948).

87. Production control was accomplished through title I of the AAA and, after *Butler*, through the SCDA. Surplus disposal was accomplished through section 32 of Public Law 74-320.

88. As best as can be determined, the loan authority first appeared with the Agricultural Adjustment Act of 1938, Pub. L. N. 75-430, 52 Stat. 31 (current version at 7 U.S.C. § 1281 (1976)).

89. This authority seems to have appeared with the Agricultural Act of 1948, Pub. L. No. 80-897, 62 Stat. 1247 (current version at 7 U.S.C. § 1282 (1976)).

90. *Id.*

91. This is not to suggest, however, that non-price support loan and purchase authority exists. Rather, if it does, the reference in section 22 to "any" loan and purchase program creates problems. Some of the loan and purchase regulations include 7 C.F.R. §§ 1421, 1427, 1430, 1434-1435, 1438, 1443, 1446, 1464, 1472 (1981).

the language amending section 22<sup>92</sup> as having the effect of bringing every conceivable program or operation of the Department of Agriculture within the purview of that section's protective power. On the contrary, it stated that the amendment was designed to do no more than strengthen price-support programs.<sup>93</sup> Since up to that time section 22 had made no reference to loan and purchase authorities, this could only be accomplished by amending it to refer to those authorities as well.<sup>94</sup> There was no real debate on the floor of the House concerning the language of the section of the bill that would amend section 22 so as to refer to "any loan, purchase, or other program or operation." The few explanatory statements offered, however, were consonant with the Committee's view, and demonstrated an appreciation of the need to include in section 22 some reference to loan and purchase programs of a price support nature.<sup>95</sup>

In the Senate, the companion bill was S. 2318. Though it differed from the House bill in several respects, the language referring to section 22 was identical.<sup>96</sup> Commenting on the language, the report of the Senate Committee on Agriculture and Forestry left no doubt that the objective of the bill was to accord to price support programs conducted pursuant to various loan, purchase or other authorities the same sort of protection to which support programs conducted under production control and surplus disposal authorities had long been entitled.<sup>97</sup> Senator Aiken, the principal sponsor of S. 2318, reiterated that view during the full Senate's consideration of the bill.<sup>98</sup> That this understanding of the reference to "any loan, purchase, or other program or operation" was widely shared is demonstrated by the fact that even the comprehensive amendment to S. 2318 proposed unsuccessfully by Senator Russell left the wording of that portion of the bill dealing with section 22 untouched.<sup>99</sup> Clearly, Senator Russell must have agreed that no matter how broad the language may have appeared, it was designed to do no more than bring price support activities pursued through loan, purchase, or other programs under the protection of section 22. After all, he surely would have proposed to change that language as well had he felt it was being read

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92. Section 3 of the bill contained the section 22 language. Section 3 read exactly as section 3 of the 1948 act. H.R. 6248, 80th Cong., 2d Sess. 1 (1948).

93. See, H.R. REP. No. 1776, 80th Cong., 2d Sess. 6 (1948).

94. This was pointed out in a letter from Clinton P. Anderson, Secretary of Agriculture, to Congressman Joseph W. Martin, Jr. (Feb. 4, 1947)(on file with University of Tulsa Law Review).

95. Congressman Hope remarked: "There is no logic and no reason in supporting the price of an agricultural commodity in this country if we are going to permit that program to be rendered ineffective by imports." 94 CONG. REC. 7901 (1948).

96. S. 2318, 80th Cong., 2d Sess. § 402 (1948) was identical to H.R. 6248, § 3.

97. S. REP. No. 1295, 80th Cong., 2d Sess. 7 (1948).

98. Senator Aiken said: "Section 402 would amend section 22 . . . . The bill is designed to strengthen price-support programs for American agricultural commodities and to prevent their disruption through excessive imports of foreign commodities." 94 CONG. REC. 8307 (1948).

99. The Russell proposal can be found at 94 CONG. REC. 8567-68 (1948).

too restrictively, or that Congress' intent as to what it meant might be misconstrued.

### C. Processing Clause

According to section 22(a), the authority to impose import restrictions is not only available in those instances where items shipped to the United States render or tend to render ineffective, or materially interfere with, a price support program conducted under one of the authorities therein mentioned, but also in certain situations where impact of such a magnitude is not encountered.<sup>100</sup> Specifically, a provision is made for limiting the importation of items whenever their importation would "reduce substantially the amount of any product processed in the United States from any agricultural commodity or product thereof" with respect to which a price support program is in operation.<sup>101</sup> It has recently been suggested that the *Butler* decision left this second, or processing clause, test meaningless.<sup>102</sup> That position, however, does not seem to be fully supported by section 22's legislative history.

Since its enactment in 1938, section 22 has always contained a processing clause. Its inclusion apparently resulted from an amendment offered by Senator Bailey to Senator LaFollette's proposal to restore to H.R. 8492, the original House bill, the section 22 language which the Senate Committee on Agriculture and Forestry had earlier decided to remove. Neither an interpretation of its meaning nor a statement of its objective was ventured when the language was offered.<sup>103</sup> It would appear from Senator Bailey's reported colloquy with Senators Walsh and Smith several days earlier that he was especially disturbed by the fact that many processors of supported cotton had been driven out of business.<sup>104</sup> As he described the situation, since the processors had to pay and then pass along to their customers the processing tax provided for in title I of the AAA, they were unable to price their products so as to compete with less expensive imported cotton products.<sup>105</sup> Presumably, his amendment was designed to remedy this situation.<sup>106</sup> After being rewritten by the conferees, to read "reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which an adjustment program is in operation,"<sup>107</sup> Sena-

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100. See note 1 *supra*.

101. 7 U.S.C. § 624(a) (1976).

102. REPORT TO THE PRESIDENT ON INVESTIGATION No. 22-43 UNDER SECTION 22 OF THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED, U.S.I.T.C. PUB. No. 1174 at 23-24 (August 1981).

103. See 79 CONG. REC. 11,523 (1935).

104. See 79 CONG. REC. 11,501-02 (1935).

105. *Id.*

106. Senator Bailey's proposal read: "or to reduce or tend to reduce the amount of any commodity processed in the United States subject to this title." *Id.*

107. H.R. REP. No. 1757, 74th Cong., 1st Sess. 35-36 (1935).

tor Bailey's proposal was enacted.<sup>108</sup>

As will be recalled, the Supreme Court's 1936 decision in *United States v. Butler*<sup>109</sup> declared the processing tax unconstitutional. Given the ancient legal maxim *cessante ratione legis, cessat et ipsa lex* (the reason of the law ceasing, the law itself also ceases), it is quite understandable that some might be led to conclude that the *Butler* decision rendered the processing clause meaningless.<sup>110</sup> Before looking at the arguments suggesting the opposite view, however, it is worthwhile to emphasize an important point about the processing clause itself.

There seems to be no indication that the purpose of the processing clause was to support the price of raw agricultural commodities. From the plain language of the 1935 legislation, as well as the various amendments enacted over the years, it appears that the clause provided protection against imports for all items processed from commodities benefiting from support programs, even though the support programs were not themselves being rendered ineffective or materially interfered with by the imports.<sup>111</sup> Indeed, when Senator Bailey, the clause's sponsor, expressed his anguish over domestic processors being driven out of business by low-priced competitive imports, he did not seem to be concerned with whether the imports were jeopardizing the price support program for cotton. As a matter of fact, his use of an illustration involving a foreign processor *buying price supported cotton in the United States*, taking it half way around the world for processing and then exporting the finished cloth back to the United States, clearly suggests his concern was only with the impact the imports were having on domestic processors.<sup>112</sup> The importance of this point cannot be over emphasized. In effect, it leaves no doubt that from the time section 22(a) was first enacted, it provided two distinct legal standards. The first, which dealt with commodity producers alone, required a showing of material interference. The second, which dealt with processors of supported commodities, required a showing of substantial reduction. Since these standards were unrelated, domestic producers might successfully request the imposition of import limitations on any item causing material interference with a price support program, even though domestic processors of those same commodities

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108. For the language, see note 9 *supra*.

109. 297 U.S. 1 (1936).

110. See MEMORANDUM FROM THE GENERAL COUNSEL TO THE COMMISSION ON INVESTIGATION No. AAA22-43, TOBACCO (July 20, 1981) reprinted in REPORT TO THE PRESIDENT ON INVESTIGATION No. 22-43 UNDER SECTION 22 OF THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED, U.S.I.T.C. PUB. No. 1174 at 93-103 (August 1981).

111. Such instances might arise where a widely produced commodity (e.g., wheat) is under support and is processed into a whole range of different items. While importations competitive with one of the types of processed items might cause substantial reduction in domestic production of that type of item, the importations might not be sufficient to cause material interference with the support program for the raw commodity itself.

112. See 79 CONG. REC. 11,501-02 (1935).

may not be facing problems of their own. Conversely, domestic processors engaged in converting price supported commodities into various items might successfully request the imposition of import limitations on any item causing a substantial reduction in their output, even though the price support program for that commodity remained as sound as ever.

With this background in mind, there are three basic arguments which raise some questions about the accuracy of the view that the *Butler* decision rendered the second of these tests meaningless. First, section 22, with the processing clause intact, has been reenacted on numerous occasions since the *Butler* decision was handed down.<sup>113</sup> Moreover, the 1937 reenactment, contained in section 1 of the Agricultural Marketing Agreement Act,<sup>114</sup> was clearly pursued in light of effects of that decision.<sup>115</sup>

Second, while there may be no doubt that Senator Bailey and many others in the Congress viewed the processing clause in the 1935 Act as designed to provide processors subject to the processing tax with the same kind of protection producers of price supported commodities were entitled to, there might very well have been others who, without saying so, supported the clause because it was cast in terms broad enough to cover all processors of supported commodities, and not just those subject to the processing tax. This sort of negative proof might seem unconvincing but for a couple of facts. Initially, it is clear that the language of the processing clause has never been tied explicitly to the processing tax. As a result, the possibility exists that some legislators may have supported the legislation for a reason like the one just suggested. What makes this more than a mere possibility, however, is another extremely important fact. When the legislation was enacted, there were support programs in operation which had nothing to do with the processing tax, and which came within the terms of the processing clause itself.

As previously mentioned, title I of the AAA used both production and marketing controls to support the price of domestic agricultural commodities.<sup>116</sup> The production controls were voluntary in nature and applied only to "basic agricultural commodities."<sup>117</sup> Voluntary compliance was elicited through the use of benefit payments taken from a pool of revenues obtained by imposing a tax on all processors of those basic agricultural commodities.<sup>118</sup> The marketing control program operated in conjunction with the

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113. The first such reenactment was in 1936, followed by 1937, 1940, 1948, 1950, and 1953. For references to the appropriate language of each reenactment see note 10 *supra*.

114. Pub. L. No. 75-137, 50 Stat. 246 (1937) (current version in scattered sections of 7 U.S.C.).

115. See generally H.R. REP. No. 468, 75th Cong., 1st Sess. \_\_\_\_ (1936); S. REP. No. 565, 75th Cong., 1st Sess. \_\_\_\_ (1937).

116. See text accompanying notes 46-53 *supra*.

117. Agricultural Adjustment Act of 1933, Pub. L. No. 73-10, 48 Stat. 31, 38 (1933) (current version at 7 U.S.C. § 611 (1976)).

118. *Id.*, 48 Stat. at 35 (current version at 7 U.S.C. § 609 (1976)).

program designed to control production.<sup>119</sup> One important distinction between the two programs, however, was that while the production control processing tax program applied only to basic agricultural commodities, the marketing control program applied to "any agricultural commodity."<sup>120</sup> Thus, when the processing clause was inserted into section 22 there were clearly two distinct categories of price supported items in existence: "any agricultural commodity" under the marketing control program; and "basic agricultural commodities" under the production control-processing tax program.

Therefore, it is probable that some congressmen voted for section 22 thinking that both categories of price supported items were intended to be covered by the processing clause. Again, the language of the clause was not, and never has been, limited to the production control processing tax category alone. It covered all processors of "any commodity subject to and with respect to which an adjustment program is in operation" under title I of the AAA. Some might maintain that the requirement of an "adjustment" program was intended to distinguish the production control from the marketing control program, thereby negating the inclusive reading of the processing clause.<sup>121</sup> That point is troublesome. But since the term "adjustment" was inserted by the conferees without explanation,<sup>122</sup> is nowhere defined by title I of the AAA, and could well be a general term designed to connote adjusting the prices of farm products relative to the prices of industrial products, there is no reason to accept that contention without question.

Even if either of the two foregoing arguments is unpersuasive, the third seems especially sound. Specifically, when Congress, immediately after the *Butler* decision, provided in section 5 of the Soil Conservation and Domestic Allotment Act of 1936 that the very words of the processing be amended by substituting "any program" for "an adjustment program,"<sup>123</sup> it signified that it understood the clause as still having some meaning. Had that not been the case, it surely would have refrained from acting as it did. For instance, if Congress understood the processing clause to protect only those processors subject to the processing tax, the *Butler* decision<sup>124</sup> would have given Congress no reason for doing anything other than repealing the clause. By making a slight change in its language, however, Congress left little doubt that it viewed the clause to be as healthy as ever.<sup>125</sup>

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119. See *id.*, 48 Stat. at 32 (current version at 7 U.S.C. § 602 (1976)).

120. *Id.*, 48 Stat. at 34 (current version at 7 U.S.C. § 608(b) (1976)).

121. As proposed by Senator Bailey, the processing clause made no reference to "an adjustment program." See note 106 *supra*.

122. See H.R. REP. No. 1757, 74th Cong., 1st Sess. 35-36 (1935).

123. Soil Conservation and Domestic Allotment Act of 1936, Pub. L. No. 74-461, 49 Stat. 1148 (1936) (current version at 16 U.S.C. § 590(g) (1976)).

124. See text accompanying notes 52-54 *supra*.

125. The mere fact that "any program" was substituted for "an adjustment program" does not mean the second argument suggested above is inaccurate. One might argue this posi-



As it stands today, the processing clause would be available for use in the protection of a domestic processor of "any agricultural commodity or product thereof with respect to which" a price support program of some sort is in operation.<sup>126</sup> Since the substantial reduction test of the processing clause is distinct from the material interference test, it is possible that a processor might obtain relief from imports, even though the effect of the imports on the price support program applicable to the commodity which is processed can hardly be detected. Such a situation might arise in those instances where the commodity under support is produced in large volume and then processed into numerous, diverse products. Imported items causing a substantial reduction in the amount processed domestically would be subject to limitation.

### III. PRESIDENTIAL DISCRETION

#### A. *Report of the International Trade Commission*

If the President agrees with the Secretary of Agriculture that foreign items are being or are practically certain to be imported under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, a price support program, or to reduce substantially the amount of any product processed domestically from any commodity benefiting from such a program, he is required under section 22(a) to cause the United States International Trade Commission (ITC) to undertake an investigation of the matter.<sup>127</sup> On the basis of the investigation, the ITC then prepares for the President an official report of its findings and recommendations.<sup>128</sup> An interesting question is whether the President, after receiving the ITC's report, is entitled to take action contrary to that recommended. Conceivably, this question might arise on at least two distinct occasions: The ITC *recommends* the imposition of limitations which the President determines should not be imposed, or the ITC *does not recommend* the imposition of limitations which the President determines should be imposed.

The language of section 22(b), though perhaps more directly addressing the President's discretion to decide against the imposition of import limitations notwithstanding a recommendation of the ITC to the contrary, deals as well with the matter of the President's discretion to impose limitations in

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tion, of course, if one accepts the view that "an adjustment program" meant to refer to production controls only and that the change to "any program" was meant to demonstrate this. The fact of the matter, however, is that the change to "any program" had nothing to do with suggesting whether "an adjustment program" covered production controls alone. As was pointed out in the text accompanying notes 70-71 *supra*, the change was merely designed to take into account the SCDA price support programs.

126. 7 U.S.C. § 624(a) (1976).

127. *Id.* ITC regulations for section 22 investigations are found in 19 C.F.R. § 204 (1981).

128. 19 C.F.R. § 204.5 (1981).

the face of a negative recommendation from the ITC. By stating that "[i]f, on the basis of [the ITC's] investigation and report . . . of findings and recommendations . . . , the President finds" material interference with a price support program, or substantial reduction in the output of domestic processors,<sup>129</sup> section 22(b) leaves little doubt that the ultimate decision as to whether to respond to imports of foreign items is vested in the President alone. The only specific requirement is that the President's findings of fact be based on the investigation and report of the ITC.<sup>130</sup> In the final analysis, this clearly allows the President to disagree with the ITC's evaluation of the facts,<sup>131</sup> and then act in a manner completely different from that recommended.

The legislative history of section 22(b) suggests that it is entirely appropriate to read the language under consideration as according the President great latitude with respect to following the ITC's recommendations to either impose or refrain from imposing limitations on imports.<sup>132</sup> When originally taken up for consideration by the House in 1935, the relevant language of H.R. 8492 tracked very closely with that which appears in the current version of section 22(b). The wide discretion which it purported to grant the President was found disturbing by some. In fact, Congressman Crawford, a leading critic who objected to granting the President any latitude with respect to imposing limitations,<sup>133</sup> proposed to amend the relevant portion of the bill so that the President would be required to implement the Tariff Commission's decisions.<sup>134</sup> The Crawford amendment, however, was over-

129. 7 U.S.C. § 624(a) (1976).

130. *Id.*

131. Factual findings made by the President are final. *See* 7 U.S.C. § 624(e) (1976).

132. Note, however, that the language of section 22(b) seems primarily concerned with requiring the imposition of limitations unless the President makes a contrary "finding." But it would seem, given this concern, that if the President has latitude to find against imposing limitations the ITC has recommended, he surely should have latitude to impose limitations which have not been recommended. On instances where the President has not followed the ITC's recommendations, see *TUNG NUTS AND TUNG OIL: REPORT TO THE PRESIDENT UNDER SECTION 22 OF THE AGRICULTURAL ADJUSTMENT ACT, U.S. TARIFF COMM'N INV. NO. 22-10 (1954)* and *CERTAIN COTTON, COTTONWASTE AND COTTON PRODUCTIONS: REPORT TO THE PRESIDENT ON INV. NO. 22-37, TC Pub. No. 658 (1947)*.

133. *See* 79 CONG. REC. 9499 (1935)(remarks of Rep. Crawford).

134. Congressman Crawford's proposal would have amended H.R. 8492 so that the reference to section 22 would have stated:

(a) In order to put into force and effect the policy of Congress by this act intended, the United States Tariff Commission (1) upon the request of the President, or (2) upon resolution of either or both Houses of Congress, or (3) upon its own motion, or (4) when in the judgment of the Commission there is good and sufficient reason therefor, upon application of any interested party, shall investigate and find upon such investigation that any one or more articles are being imported or are likely to be imported into the United States under such conditions and in sufficient quantities to render ineffective or materially interfere with any program or operation undertaken by this title, the said United States Tariff Commission shall certify its findings to the

whelmingly defeated.<sup>135</sup> The implication of this rejection seems clear: The President's discretion on the matter of imposing import limitations should not be fettered.

Although the issue of Presidential discretion under section 22 resurfaced again and again over the years, an especially telling event occurred in 1953. At that time, Senator Magnuson, apparently disgruntled that a succession of Presidents had failed to utilize the authority of section 22 to impose limitations on imports often enough, proposed, as had Congressman Crawford in 1935, to severely limit the President's discretion.<sup>136</sup> He requested that section 22 be amended in several respects. Most importantly, he proposed that the opening stanza of section 22(b) be amended to provide that if the Tariff Commission reports to the President that imports are materially interfering with a price support program, or substantially reducing the output of domestic processors, the President is required to impose the limitations found necessary by the Tariff Commission.<sup>137</sup> Immediately after his

President. Such investigation shall take precedence over any investigation authorized by any previous act of Congress.

(b) Upon the receipt by the President of such certificate issued by the aforesaid Commission, the President shall by order direct that the entry into the United States of such article or articles shall, for such a time as may be specified by him, be permitted subject to (1) such terms and conditions, (2) such limitations on the total quantities thereof which may be imported, or (3) the payment of such compensating taxes as he finds necessary to prescribe in order that the entry of such article will not render or tend to render ineffective or materially interfere with such program or operations undertaken under this title. Any compensating tax under this section shall be in addition to any tax imposed under section 15(e) and the provisions shall apply thereto.

79 CONG. REC. 9499 (1935).

135. 79 CONG. REC. 9591 (1935)(the vote was 51 in favor, 111 against).

136. See 99 CONG. REC. 7876 (1953)(remarks of Sen. Magnuson).

137. Section 22(a) of the Magnuson proposal is referred to in note 42 *supra*. It was followed by section 22(b) which read:

(b) If, on the basis of such investigation, the Tariff Commission finds and reports to the President the existence of such facts, he shall, within 30 days, by proclamation impose such fees not in excess of 50 percent ad valorem or such quantitative limitations on any article or articles which may be entered, or withdrawn from warehouse, for consumption as the Tariff Commission has found and declared in its report to be necessary in order that the entry of such article or articles will not render or tend to render ineffective, or materially interfere with the national objective of achieving full parity prices for agricultural commodities, or products thereof, in the domestic market place, or any program or operation referred to in subsection (a) of this section, or reduce substantially the amount of any product processed in the United States from any such agricultural commodity or product thereof with respect to which any such program or operation is being undertaken: Provided, That no proclamation under this section shall impose any limitation on the total quantity of any article or articles which may be entered, or withdrawn from warehouse, for consumption which reduces such permissible total quantity to proportionately less than 50 percent of the total quantity of such article or articles which was entered, or withdrawn from warehouse, for consumption during a representative period as determined by the Tariff Commis-

amendment was read by the legislative clerk, Senator Magnuson moved to have his section 22(b) language modified so that the President would not be required to implement the limitations declared necessary by the Tariff Commission unless the President had made findings comporting with those of the Commission.<sup>138</sup> This modification restored much of the President's discretion to disagree with the findings of the Commission.

Though Senator Magnuson's modified proposal was ultimately rejected,<sup>139</sup> it is worth noting that during its consideration by the Senate, Senator Magnuson, apparently somewhat of an opponent of unlimited Presidential discretion, observed that his language made it clear that "the recommendations of the Tariff Commission are not binding on the President."<sup>140</sup> He further explained that "the President, as Chief Executive . . . has the right to exercise his own judgment as to whether or not to follow the [Commission's] recommendations."<sup>141</sup> The Senator's statements are not only consistent with the long-held perception of the Commission as a fact-finding body which serves as an adviser to the President,<sup>142</sup> but are also consistent with the very language of section 22(b). If, "on the basis" of the ITC's investigation and report, the "President finds" that import limitations should or should not be imposed, a contrary recommendation of the ITC cannot stand in the way. The President alone has the final authority to determine whether or not import limitations will be imposed.

### B. Fees or Quotas

If the President, whether in agreement or disagreement with the ITC, finds that actual or impending imports might run afoul of either the material interference or the substantial reduction test, he is required to issue a proclamation imposing whatever fees or quantitative limitations he deter-

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sion: And provided further, That in designating any article or articles, the Tariff Commission may described them by physical qualities, value, or use, or upon such other basis as it shall determine.

In any case where the Secretary of Agriculture determines and reports to the President with regard to any article or articles that a condition exists requiring emergency treatment, the President may take immediate action under this section without awaiting the recommendations of the Tariff Commission, such action to continue in effect pending the report and recommendations of the Tariff Commission and action thereon by the President.

99 CONG. REC. 7876 (1976).

138. 99 CONG. REC. 7876 (1953).

139. *See id.* at 7908.

140. *Id.* at 7876.

141. *Id.*

142. *See generally* United States v. Bush & Co., 310 U.S. 371, 379 (1940); 34 Op. Attn'y Gen. 77 (1924); and also Letter from Paul A. Sweeney, Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, to Phillip Areeda, Assistant Special Counsel to the President (August 4, 1959)(on file with University of Tulsa Law Review).

mines to be necessary.<sup>143</sup> Fees imposed by the President, however, shall not be in excess of fifty per centum ad valorem.<sup>144</sup> Similarly, quota limitations shall not reduce the amount of the item imported to proportionately less than fifty per centum of the total quantity of the item imported during a representative period as determined by the President.<sup>145</sup>

The President has always been vested with the legislative authority to determine independently the extent of the limitations to be imposed. But the opportunity to select either fees or quotas in order to effectuate the limitations has existed only since 1940.<sup>146</sup> Some officials have been prompted to contend that by adding to section 22(b) the authority to impose fees as well as quotas, Congress signified its intention to permit the President to use both in the same proclamation.<sup>147</sup> Conceivably, support for this position takes several forms.

At the outset, it might be argued that since the opening language of section 22(c) reads "fees *and* limitations,"<sup>148</sup> Congress meant that the reference to "fees . . . or . . . quantitative limitations" in section 22(b) need not necessarily be read in the disjunctive. Further, support might also be found in the fact that during the course of consideration of H.R. 7171, the bill which contained the 1940 amendment to include fees in section 22(b), Senator Harrison inserted in the record a letter from the Secretary of Agriculture which served to explain the need for authorizing the use of fees on the basis that differing situations required differing responses.<sup>149</sup> Extending this rather obvious perception, it could be suggested that Congress recognized that some situations might best be handled through the use of a combination of fees and quotas and, therefore, it did not intend to preclude their

143. Under the 1935 version of section 22, *supra* note 9, proclamations became effective 15 days after the date of issuance. In 1940, that was changed so they became effective immediately. On the matter of goods in transit at the time the proclamation is issued, see *C. Tennant, Sons & Co. v. Dill*, 158 F. Supp. 63 (S.D.N.Y. 1957). It should be noted that once a limitation has been imposed, section 22 authorizes the President to subsequently reduce, terminate, or modify it. See 7 U.S.C. § 624(d) (1976).

144. 7 U.S.C. § 624(b) (1976).

145. *Id.* Note that in the 1935 version of section 22, *supra* note 9, a specific representative period of July 1, 1928 to June 30, 1933, was provided. This was changed in 1940, note 25 *supra*, to January 1, 1928, to December 31, 1933. Specific dates were deleted altogether in 1948. On the meaning of representative period, see U.S. TARIFF COMM'N, CERTAIN ARTICLES CONTAINING 45 PERCENT OR MORE OF BUTTERFAT OR OF BUTTERFAT AND OTHER FAT OR OIL: REPORT TO THE PRESIDENT ON INVESTIGATION No. 16 at 12-15 (July 1957).

146. Act of January 25, 1940, Pub. L. No. 76-406, 54 Stat. 17 (1940) (current version at 7 U.S.C. § 624 (1976)). On the idea of fees as well as quotas see the original version of H.R. 8492 referred to note 18 *supra*.

147. See Letter from Edward M. Shulman, General Counsel, Department of Agriculture, to Richard E. Fitzgibbon, Assistant Attorney General, Civil Division, Customs Section, Department of Justice (May 10, 1957)(on file with University of Tulsa Law Review).

148. 7 U.S.C. § 624(c) (1976).

149. See 84 CONG. REC. 11,162-63 (1939).

simultaneous use.<sup>150</sup> Finally, one might suggest it is significant that H.R. 8492—the bill from which section 22 was originally enacted—described the possible devices available to the President for limiting imports as “(1) such terms and conditions, (2) such limitations on the total quantity . . . imported, or (3) . . . such compensating taxes as he finds necessary.”<sup>151</sup> The argument would be that if the term “or” in the recitation mentioned were not read as meaning “either or both,” a decision by the President to state the “terms and conditions” of importation would prevent him from imposing fees or quotas, thus leaving the price support programs subject to foreign depredation. One might insist, therefore, that precedent exists in the context of section 22’s development which supports the notion that “or” should be read as authorizing the use of fees and quotas in the same proclamation.<sup>152</sup>

Each of these three arguments suffers from a fatal defect. First, section 22(c) does indeed refer to fees *and* limitations. To argue from this, however, that the reference in section 22(b) to fees *or* limitations is not meant to simply present the President with a choice between one or the other ignores the context in which fees *and* limitations is used. Specifically, the conjunctive “and” in section 22(c) appears to be the only appropriate method for expressing the idea that both fees and limitations must have precise effective dates.<sup>153</sup> Use of the conjunctive “and” is needed to produce that result. The use of the conjunctive where the conjunctive is needed strengthens the presumption that Congress intended to use the disjunctive wherever it might be found.<sup>154</sup>

Second, there is no dispute about the fact that Congress intended to give the President added flexibility when it provided him with the authority to impose fees as well as quotas. Both the report of the House Committee and the report of the Senate Committee on H.R. 7171, however, make it explicitly clear that the President was to have the authority to impose either a fee or a quota, not both.<sup>155</sup> There is nothing particularly inconsistent between requiring the President to choose between fees or quotas and increasing his flexibility. Under section 22, as originally enacted, he could use quotas only. The 1940 amendment increased his flexibility by giving the President authority to choose between one of two possible methods for restricting imports of items interfering with the price support programs.

150. This is the contention found in Memorandum of Law filed by the Department of Agriculture at 5, U.S. Tariff Comm’n Investigation No. 6, Section 22 of the Agricultural Adjustment Act, as Amended (August 1955) (on file with University of Tulsa Law Review) [hereinafter Memorandum of Law].

151. See note 18 *supra* (emphasis added).

152. Memorandum of Law, *supra* note 150, at 6-7.

153. See *United States v. Best Foods, Inc.*, 47 C.C.P.A. 163, 167-68 (1960).

154. *Id.* at 168.

155. See H.R. REP. No. 1166, 76th Cong., 1st Sess. 2 (1939) and S. REP. No. 1043, 76th Cong., 1st Sess. 2 (1939).

Finally, while there is a good chance that the term "or" as used in H.R. 8492's listing of devices available to the President for limiting imports may have meant "either or both," that language was rejected<sup>156</sup> and never found its way into the original enactment. Therefore, the only language of concern is that which appears in the current version of section 22(b). Since the legislative history recounted above clearly suggests that the "fees or limitations" language was intended by Congress to mean either a fee or a quota, any reading to the contrary seems unpersuasive.

#### IV. SECTION 22 AND INTERNATIONAL AGREEMENTS

Through the Trade Agreements Extension Act of 1951,<sup>157</sup> Congress amended section 22 to provide that no international agreement entered into by the United States shall be applied in a manner inconsistent with the President's authority to impose import limitations. In effect, this provision directs that international trade agreements, as well as obligations under the General Agreement on Tariffs and Trade (GATT),<sup>158</sup> shall not be followed to the extent that they would be inconsistent with section 22. Stated another way, the executive branch is directed to recognize that section 22 prevails over all other inconsistent bilateral and multilateral international commitments.

As originally formulated in 1948,<sup>159</sup> section 22(f) read exactly the opposite of the way it reads now. At that time, there was concern over assuring certain countries that import limitations would not be imposed under section 22 so as to frustrate any reciprocal trade agreements those countries might have with the United States.<sup>160</sup> Countries not fortunate enough to be under a trade agreement remained subject to section 22 limitations to the extent consistent with article XI 2(c) of the GATT.<sup>161</sup> Of course, since the

156. It will be recalled that when H.R. 8492 was referred to the Senate Committee on Agriculture and Forestry, the section 22 language was deleted. *See supra* note 18. As restored by Senator LaFollette, only the authority to impose quotas survived.

157. Act of June 16, 1951, Pub. L. No. 82-50, 65 Stat. 72 (1951)(current version at 19 U.S.C. § 1352 (1976)).

158. 61 Stat. 73, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (1947).

159. On the evolution *see* H.R. 6248, § 3, 80th Cong., 2d Sess. — (1948) and the companion bill S. 2318, § 402, 80th Cong., 2d Sess. — (1948). For accompanying reports *see* H.R. REP. 1776, 80th Cong., 2d Sess. — (1948); S. REP. 1295, 80th Cong., 2d Sess. — (1948).

160. Act of July 3, 1948, Pub. L. No. 80-897, 62 Stat. 1250 (1948)(current version at 7 U.S.C. § 1301 (1976)), read: "No proclamation under this section shall be enforced in contravention of any treaty or other international agreement to which the United States is or hereafter becomes a party."

161. Article XI read then, and continues to read:

1. No prohibition or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation or any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Protocol of Provisional Application—the instrument by which states became parties to the General Agreement—provided that antedating laws inconsistent with GATT principles could still be enforced, no claim could be made by such countries with respect to limitations designed to protect a price support program carried out under title I of the AAA, the SCDA, or section 32 of Public Law 74-320.<sup>162</sup> Only limitations imposed to protect a program carried out under loan or purchase authorities could be attacked on the basis of article XI 2(c), because these authorities alone were added to section 22 subsequent to the advent of GATT.<sup>163</sup> The likelihood of such a situation arising, however, was virtually non-existent in view of the fact that the 1948 version of section 22(f) obligated the President to refrain from applying section 22 in a manner inconsistent with “international agreements” like GATT.<sup>164</sup>

In 1950, the Senate Committee on Agriculture and Forestry reported H.R. 6567, a bill to extend the Commodity Credit Corporation’s borrowing authority, to the full Senate with an amendment designed to change section

2. The provision of paragraph 1 of this Article shall not extend to the following:

(c) import restrictions on any agricultural or fisheries product, imported in any form, necessary . . . to the enforcement of governmental measures which operate:

(i) to restrict the quantities of the like domestic product permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, or a domestic product for which the imported product can be directly substituted; or

(ii) to remove a temporary surplus of the like domestic product, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be directly substituted, by making the surplus available to certain groups of domestic consumers free of charge or at prices below the current market level; or

(iii) to restrict the quantities permitted to be produced of any animal product the production of which is directly dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is relatively negligible.

Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give public notice of the total quantity or value of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, any restrictions applied under

(i) above shall not be such as will reduce the total of imports relative to the total of domestic production, as compared with the proportion which might reasonably be expected to rule between the two in the absence of restrictions. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a previous representative period and to any special factors . . . which may have affected or may be affecting the trade in the product concerned.

*Id.*, 62 Stat. at A32-34, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (1947).

162. Protocol of Provisional Application to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 308 (1947).

163. Even in such a case, the grounds for attack would be few since section 22 and article XI 2(c) of GATT are so much alike. Interestingly enough, though, article XI 2(c) speaks of limiting “agricultural products” while section 22 extends to “any article or articles.”

164. Agricultural Act of 1948, Pub. L. No. 80-897, 62 Stat. 1250 (1948)(current version at 7 U.S.C. § 1301 (1976)).



22(f) as enacted in 1948.<sup>165</sup> The amendment would have removed the existing section 22(f) language and substituted a reference to the effect that in the future no reciprocal trade agreements could be entered into, renewed or extended if they contained anything inconsistent with the President's authority to limit imports pursuant to section 22.<sup>166</sup> Although it is not exactly clear whether this proposal contained an implicit suggestion that section 22 should not be used in a manner inconsistent with then existing reciprocal trade agreements, there is no doubt that it reflected the opinion of many who advocated a complete reversal of policy with respect to future reciprocal trade agreements.<sup>167</sup> When the measure was taken up by the conferees, the Senate Committee's proposal on section 22(f) was rejected in favor of a compromise which left the 1948 section 22(f) language intact, and merely added thereto the idea that no future reciprocal trade agreements, or amendments to those then in existence, could be entered into if they contained anything which did not permit the utilization of section 22 in instances where such would be permitted by article XI 2(c) of the GATT.<sup>168</sup>

The Conference Committee's proposal was debated at length in both the House and Senate. Some legislators criticized it as reinforcing protectionism,<sup>169</sup> while others attacked it as subordinating domestic law to the GATT.<sup>170</sup> Sentiment was also strong in some quarters for returning the matter to the conferees.<sup>171</sup> In the end, the conferees' compromise language on

165. See S. REP. NO. 1375, 81st Cong., 2d Sess. — (1950).

166. It read: "No international agreement hereafter shall be entered into by the United States or renewed extended or allowed to extend beyond its permissible termination date in contravention of this section." *Id.* at 9.

167. Senator Magnuson was said to be the sponsor of this language. From all indications he was strongly opposed to the 1948 version of section 22(f). On another matter, there were no debates on the Magnuson language when it went before the full Senate. See 96 CONG. REC. 8096-97 (1950).

168. See H.R. REP. NO. 2269, 81st Cong., 2d Sess. — (1950). The Conferees language was like that proposed by a subcommittee of the Senate's Committee on Agriculture and Forestry. See S. REP. NO. 1375, 81st Cong., 2d Sess. 6 (1950). It read:

(f) No proclamation under this section shall be enforced in contravention of any treaty or other international agreement to which the United States is or hereafter becomes a party; but no international agreement or amendment to an existing international agreement shall hereafter be entered into which does not permit the enforcement of this section with respect to the articles and countries to which such agreement or amendment is applicable to the full extent that the general agreement on tariffs and trade, as heretofore entered into by the United States, permits such enforcement with respect to the articles and countries to which such general agreement is applicable. Prescription of a lower rate of duty for any article than that prescribed by the general agreement on tariffs, and trade shall not, if subject to the escape provisions of such general agreement, be deemed a violation of this subsection.

*Id.*

169. See 96 CONG. REC. 8925-26 (1950)(remarks of Rep. Fulton).

170. See *id.* at 9166 (remarks of Sen. Magnuson).

171. See *id.* at 8928 (remarks of Rep. Phillips); *id.* at 8927 (remarks of Rep. Werdel); *id.* at 9001 (remarks of Rep. Ellsworth); *id.* at 9130-31 (remarks of Sen. Magnuson).

section 22(f) was enacted.<sup>172</sup> Its effect was to continue to insulate those countries under existing trade agreements from actions pursuant to section 22, and prohibit the executive branch from entering into new trade agreements not permitting section 22 actions consistent with GATT.<sup>173</sup> The status of countries not fortunate enough to be under trade agreement remained unchanged.<sup>174</sup>

In the first session of the Eighty-Second Congress, the Senate Committee on Finance reported H.R. 1612, which ultimately became the Trade Agreements Extension Act of 1951, to the full Senate with an amendment to change the language of section 22(f) as enacted to 1950.<sup>175</sup> Basically, the amendment substituted for the existing provision language stating that no reciprocal trade agreement or any other international agreement, whether presently in force or hereafter entered into, should be applied in a manner inconsistent with section 22.<sup>176</sup> From both the Committee's report<sup>177</sup> and the Senate debates,<sup>178</sup> it is clear the amendment was designed to indicate that neither reciprocal trade agreements nor the GATT impair the operation of section 22. In short, as far as domestic law was concerned, section 22 was to prevail.

The immediate effect of this provision, which continues in the current version of section 22, was to subject all countries to the possible imposition of import limitations. Unlike the 1948 and 1950 enactments, the 1951 legislation did not distinguish between countries under and countries not under trade agreement. All were equally exposed to the possibility of import limitations imposed pursuant to section 22. Further, the provision authorized section 22 limitations in order to protect price-support programs conducted through the loan and purchase authorities, even if the limitations were invoked or applied in some manner inconsistent with article XI 2(c) of the GATT. The reaction of other GATT signatories was immediate and predictable.

In order to avoid openly breaching the GATT, thus diminishing the instrument's importance in regulating international economic relations, the United States moved in 1954 and 1955 to obtain a waiver of its obligation to

172. Conference proposal passed the House easily, 96 CONG. REC. 9001-02 (1950), but the vote of 35 for, 35 against, and 26 abstaining in the Senate required the President of the Senate to cast a tie breaking vote in favor of the proposal. See 96 CONG. REC. 9176 (1950).

173. See H.R. REP. No. 2269, 81st Cong., 2d Sess. 5 (1950). See also 96 CONG. REC. 8925 (1958)(remarks of Rep. Spense); *id.* at 8926 (remarks of Rep. Wolcott).

174. Bear in mind the comment found in note 163 *supra*.

175. As originally referred by the House, H.R. 1612 contained no language amending section 22(f). For Senate Committee's report see S. REP. No. 299, 82d Cong., 1st Sess. \_\_\_\_ (1951).

176. *Id.*

177. *Id.* at 7.

178. 97 CONG. REC. 5492 (1951)(remarks of Sen. George); *id.* at 5669 (remarks of Sen. Butler); *id.* at 5730 (remarks of Sen. Milliken).

follow article XI 2(c).<sup>179</sup> In view of the effect of the Protocol of Provisional Application, however, the effort was particularly relevant only with respect to limitations that might be imposed to protect a price support program conducted under some loan or purchase authority. The waiver was granted on March 5, 1955.<sup>180</sup> Although it establishes certain procedural conditions required to be followed in the administration of section 22 import limitations, it clearly permits the United States, consistent with article XI 2(c) of the GATT, to impose limitations pursuant to section 22.<sup>181</sup> To this day, the waiver remains in place, and section 22 remains viable against all trading partners.

## V. CONCLUSION

For more than forty years, section 22 has remained the basic authority for limiting the importation of items materially interfering with price support programs or causing substantial reduction in the amount of products processed domestically from commodities benefiting from such programs. Sensitive to the changing needs of the domestic agricultural community, Congress has acted on several occasions to enact appropriate amendments. Many would argue that the power evident in section 22 has not been exercised as often or with as much conviction as they might have preferred, but there is little doubt that it serves as a most virile and potent instrument in international trade. As the full measure of the significance of international trade in agricultural commodities becomes increasingly apparent, changes in the pattern of its use, and perhaps even in its basic wording, can be expected to take place.

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179. See J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 983 (1977).

180. GATT, 3d Supp. BISD 32 (1955), *reprinted in id.* at 983-85.

181. *Id.*