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Legal Effects of the Multilateral Trade Negotiations: Agricultural Commodities

REX J. ZEDALIS

I. INTRODUCTION

On April 12, 1979, ministers from a majority of developed and developing nations initialed various multilateral and bilateral agreements concluded in Geneva during the course of the Tokyo Round of the Multilateral Trade Negotiations (MTN). Consonant with the Tokyo Declaration of September 14, 1973,¹ which commenced the round, many of the agreements reflect the desire of the negotiators to deal with the particularly troublesome problems created by non-tariff barriers (NTB's) and international trade in agricultural commodities. Given the earlier preoccupation with efforts to reduce tariff levels and the reluctance of the European Economic Community (EEC) to negotiate issues affecting the fledgling Common Agricultural Policy (CAP),² it is not surprising that NTB's and agriculture were not dealt with sooner.

The objective of this article is to discuss briefly the multilateral codes of conduct, bilateral trade concessions, and international commodity agreements concluded during the MTN which will affect both imports into and exports from the United States of agricultural commodities. Since some of these measures serve to elaborate established principles of the General Agreement on Tariffs and Trade (GATT), and other measures which have been enshrined in U.S. municipal law through the various provisions of the Trade Agreements Act of 1979 (TAA),³ this article analyzes a selected MTN measure, with reference to the relevant GATT principles. Those portions of the MTN measure dealing explicitly with international trade in agricultural commodities will be emphasized. The analysis concludes with some observations about the provisions of the TAA designed to implement the MTN measure domestically. A special effort will be made throughout to call attention to those instances where the provisions of the TAA change previously existing municipal law.

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1. *Declaration of Ministers Approved At Tokyo on 14 September 1973*, GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 19 (Supp. 20, 1974).

2. CAP consists of several measures designed to protect and promote the EEC agricultural community.

3. Trade Agreements Act, Pub. L. No. 96-39, 93 Stat. 144 (1979) (to be codified in scattered sections of 19 U.S.C.).

II. MULTILATERAL CODES OF CONDUCT

Six major agreements designed to reduce or restrict the adverse consequences of NTB's were produced during the course of the MTN.⁴ Four of these will be discussed in this article: the Agreement on Government Procurement (Government Procurement Code),⁵ the Agreement on Technical Barriers to Trade (Standards Code),⁶ the Agreement on Interpretation and Application of Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade (Subsidies/Countervailing Duties (CVD) Code),⁷ and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (Antidumping Code).⁸ The other measures are unquestionably of some importance, but it is unlikely they will affect international trade in agricultural commodities quite as much as the four to be addressed.

A. *The Government Procurement Code*

The laws, regulations, procedures, and practices of several nations concerning government procurement of items for public use either require or result in suppliers of domestic products being given preference over suppliers of imported foreign products.⁹ The GATT generally prohibits importing nations from engaging in discriminatory practices,¹⁰ but article III, paragraph 5 explicitly sanctions discrimination of the sort mentioned. Specifically, it states that the other provisions of article III, particularly that of paragraph 2, which prohibits across-the-board discrimination against foreign products in respect of all laws, regulations, and requirements affecting internal sale, offering for sale, or purchase,¹¹ do not apply in those instances where such laws, regulations, and requirements concern government procurement of items for public use.¹² The effect of this is to except current discriminatory government procurement practices from

4. *Multilateral Trade Negotiations*, GATT BASIC INSTRUMENTS AND SELECTED DOCUMENTS 3 (Supp. 26, 1980), also in AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS, H.R. DOC. NO. 153, PART 1, 96th Cong., 1st Sess. (1979) [hereinafter cited as MTN AGREEMENTS].

5. MTN/NTM/W/211/Rev.2 and Add. 1 [hereinafter cited as GOVERNMENT PROCUREMENT CODE], also in MTN AGREEMENTS, *supra* note 4, at 69.

6. MTN/NTM/W/192/Rev.5 [hereinafter cited as STANDARDS CODE], also in MTN AGREEMENTS, *supra* note 4, at 211.

7. MTN/NTM/W/236 and Corr. 1 [hereinafter cited as SUBSIDIES/COUNTERVAILING DUTIES CODE], also in MTN AGREEMENTS, *supra* note 4, at 259.

8. MTN/NTM/W/232 [hereinafter cited as ANTIDUMPING CODE], also in MTN AGREEMENTS, *supra* note 4, at 311.

9. One such law is the Buy American Act, 41 U.S.C. §§ 10a-10d (1976). For similar foreign laws, regulations, procedures, and practices, see Comment, *Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Government Procurement*, 12 N.Y.U. J. INT'L L. & POL. 315, 328-33 (1980).

10. General Agreement on Tariffs and Trade, Oct. 30, 1947, arts. I, III, 61 Stat. 73 (1947), T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as General Agreement on Tariffs and Trade]. Article I contains the most-favored-nation obligation and article III contains the national-treatment obligation.

11. *Id.* art. III, para. 2.

12. *Id.* art III, para. 5.

the national treatment obligations of article III.

The Government Procurement Code, which takes effect on January 1, 1981,¹³ attempts to deal with the adverse effects caused by government entities giving preference to domestic products when purchasing items for public use. Part II of the Code states rather explicitly that all laws, regulations, procedures, and practices of states parties shall accord products originating within the customs territory of another state party treatment no less favorable than that accorded to domestic producers and suppliers.¹⁴ In order to reduce or eliminate the discriminatory effect of procedures and practices utilized in awarding contracts, the Code prescribes specific rules for drafting specifications for items to be procured,¹⁵ giving notice of proposed purchases,¹⁶ the preparation and submission of bids and the awarding of contracts,¹⁷ and the review of protests concerning rejected bids.¹⁸

While all of these provisions promise to increase the opportunities for suppliers of imported foreign products to sell to government entities, it must be noted that the provisions of the Code apply to contracts of purchase by the government entities listed in Annex I,¹⁹ and then only when such contracts involve an amount which equals or exceeds 150,000 SDR's²⁰ (Special Drawing Rights).²¹ The provisions of the Code do not apply to purchases by entities not listed in Annex I, purchases of less than 150,000 SDR's, or purchases by regional or local government entities,²² even though such purchases may be made with funds granted by the national government.²³ Nevertheless, states parties are required to inform all regional and local government entities, and all national government entities not listed in Annex I, of the objectives, principles, and rules of the Code and to draw attention to the benefits of the liberalization of government procurement.²⁴

It has been estimated that the Government Procurement Code will produce twenty billion dollars worth of new markets for exporters of United States products.²⁵ However, it seems unlikely that it will affect the

13. GOVERNMENT PROCUREMENT CODE, *supra* note 5, Part IX(3).

14. *Id.* Part II(1)(a). Even though not so stated, this provision presumably refers to "like" products.

15. *Id.* Part IV.

16. *Id.* Part V(3).

17. *Id.* Part V(14).

18. *Id.* Part VI.

19. *Id.* Part I(1)(c).

20. *Id.* Part I(1)(b).

21. A unit of measurement used by the International Monetary Fund. 150,000 SDRs equals approximately \$190,000.

22. This appears from the fact that such are not included in Part I(1)(c) of the Code.

23. SENATE COMM. ON FINANCE, TRADE AGREEMENTS ACT, S. REP. NO. 249, 96th Cong., 1st Sess. 130 (1979) [hereinafter cited as SENATE FINANCE COMM. REPORT].

24. GOVERNMENT PROCUREMENT CODE, *supra* note 5, Part I(2).

25. SENATE FINANCE COMM. REPORT, *supra* note 23, at 128.

U.S. agricultural community to any significant degree. As previously mentioned, the provisions of the Code apply only to those national government entities listed in Annex I. A perusal of the entities subsumed under the various states parties listed in Annex I reveals that, in a great many cases, entities involved in purchasing agricultural commodities have explicitly excepted such purchases from their commitments under the Code.²⁶ For instance, purchases of agricultural products²⁷ by most ministries of agriculture (including the U.S. Department of Agriculture) in furtherance of agricultural support programs or food programs have been excepted.²⁸ Similarly, purchases of agricultural supplies²⁹ by some ministries of defense (especially the U.S. Department of Defense) have been excepted from the provisions of the Code.³⁰ Government purchases from the U.S. agricultural community will thus remain relatively insulated and new market opportunities abroad will exist only to the extent that states parties have seen fit to subject national government entities which purchase agricultural commodities to the liberalizing provisions of the Government Procurement Code.

In implementing the obligations of the United States under Part II of the Government Procurement Code, section 301 of the TAA³¹ authorizes the President, effective January 1, 1981,³² to waive the applicability of all laws, regulations, procedures, or practices regarding procurement for public use which would, if applied, result in an imported foreign product being treated less favorably than a domestic product.³³ According to the terms of section 301, however, the President is authorized to issue such waivers only with respect to: a country which is a state party to the Government Procurement Code;³⁴ a non-major industrial country which, though not a state party, will otherwise assume the obligations of the

26. For example, under the United States it reads: "Department of Agriculture (This Agreement does not apply to procurement of agricultural products made in furtherance of agricultural support programmes or human feeding programmes.)" GOVERNMENT PROCUREMENT CODE, *supra* note 5, Annex I.

27. The term "agricultural product" is not defined in the Code. Does it mean "raw" commodities or "processed" commodities?

28. See GOVERNMENT PROCUREMENT CODE, *supra* note 5, Annex I, European Economic Community, Part I, n.2. These items were obviously excepted because it would be absolutely impossible to support domestic agriculture by purchasing foreign commodities.

29. In some places the term "food stuffs" is utilized. This difference in terms could lead to dispute about what items have been excepted from the Code's coverage.

30. See GOVERNMENT PROCUREMENT CODE, *supra* note 5, Annex I, European Economic Community, Finland, Japan, Norway, Sweden, United States. In contradistinction to the exception pertaining to support programs, the exception of agricultural supplies by ministries of defense appears to be based on the notion that required purchases of foreign food would imperil the ability of the military to operate during times of crises.

31. Trade Agreements Act, Pub. L. No. 96-39, § 301, 93 Stat. 236 (1979).

32. *Id.* § 309(2) 93 Stat. 242.

33. Though not explicitly stated, this presumably applies to "like" products.

34. Trade Agreements Act, Pub. L. No. 96-39, § 301(b)(1), 93 Stat. 236 (1979) (to be codified in 19 U.S.C. § 2511(b)(1)).

Code;³⁵ a non-major industrial country which, though not necessarily assuming the obligations of the Code, will provide competitive government procurement opportunities to U.S. products;³⁶ or, a "least developed country."³⁷ Furthermore, such waivers apply only to those entities and products covered by the Government Procurement Code. In essence, this provision has the effect of precluding the issuance of waivers involving agricultural commodities purchased by the Department of Defense or the Department of Agriculture since, as we have already seen, both have excepted from the Code their purchases of agricultural commodities.

Apparently, it is not anticipated that agricultural products should forever remain beyond the coverage of the liberalizing provisions of the Code. This is evidenced by the fact that section 304 of the TAA states that in the renegotiations contemplated by Part IX, paragraph 6(b) of the Code the President "shall" seek improved market access abroad with a view to maximizing the economic benefits to the United States through efforts to maintain and enlarge foreign markets for products of, *inter alia*, U.S. agriculture.³⁸ It is difficult, however, to imagine that foreign states will acquiesce in U.S. efforts to obtain unilateral concessions designed to benefit the U.S. agricultural community. More than likely, if the Code is eventually altered so as to cover purchases of agricultural commodities, this will come about as a result of concessions which will either have to be mutual in nature or at least entail some *quid pro quo*.

B. *The Standards Code*

Product standards are perhaps the most troublesome of the various NTB's affecting international trade in agricultural commodities. The standards generally relate to quality, nutritive value, wholesomeness, and other specifications which an item must meet before it may be shipped to or sold in the importing country.³⁹ Product standards often are designed to attain some legitimate objective such as the protection of human, animal, or plant health or safety. There have been instances, however, where product standards have been deliberately used to obstruct the free flow of goods in international commerce.⁴⁰

Certain provisions of the GATT would seem to prohibit the use of

35. *Id.* § 301(b)(2), 93 Stat. 236 (to be codified in 19 U.S.C. § 2511(b)(2)).

36. *Id.* § 301(b)(3), 93 Stat. 236 (to be codified in 19 U.S.C. § 2511(b)(3)).

37. *Id.* § 301(b)(4), 93 Stat. 236 (to be codified in 19 U.S.C. § 2511(b)(4)).

38. Specifically, § 304(a) of the Trade Agreements Act, Pub. L. No. 96-39, 93 Stat. 238 (1979), states in pertinent part: "The President shall seek in . . . renegotiations . . . more open and equitable market access abroad . . . with the overall goal of maximizing the economic benefit to the United States through maintaining and enlarging foreign markets for products of United States agriculture . . ."

39. See generally United States Cotton Standards Act, 7 U.S.C. §§ 51-65 (1976); United States Grain Standards Act, 7 U.S.C. §§ 71-87h (1976); Naval Stores Act, 7 U.S.C. §§ 91-99 (1976); Federal Plant Pest Act, 7 U.S.C. §§ 150aa-150jj (1976); Plant Quarantine Act, 7 U.S.C. §§ 151-167 (1976); Federal Meat Inspection Act, 21 U.S.C. §§ 601-695 (1976).

40. *Technical Analysis of the Technical Barriers to Trade Agreement*, 12 L. & POL'Y INT'L BUS. 179, 183 (1980).

standards in a fashion which discriminate between or against foreign trading partners. Specifically, article I provides that the treatment which is accorded to products imported from the territory of one state party shall also be accorded immediately and unconditionally to like products imported from the territory of all other states parties.⁴¹ Article III, paragraph 4, goes even further and provides that products imported from the territory of any state party shall be accorded treatment no less favorable than that accorded to like domestic products.⁴² Neither of these two provisions, however, addresses standards which, though not discriminating between or against foreign trading partners, actually have the effect of erecting barriers to international trade. In short, articles I and III of the GATT proscribe discriminatory standards but say nothing of nondiscriminatory standards which obstruct international trade.

The Standards Code,⁴³ effective January 1, 1980,⁴⁴ reiterates the obligations extant in the opening provisions of the GATT by stating that technical regulations, standards,⁴⁵ testing methods and procedures,⁴⁶ and certification systems shall accord products imported from the territory of a state party no less favorable treatment than that accorded to like products of domestic origin or like products imported from the territory of another state party.⁴⁷ Of much greater significance than this nondiscriminatory obligation, article 2.1 of the Code provides that states parties shall ensure that technical regulations, standards,⁴⁸ and certification systems⁴⁹ are not prepared or adopted "with a view to creating obstacles to international trade" or applied so as to create "unnecessary obstacles to international trade." In essence, unlike GATT, article 2.1 of the Standards Code proscribes the adoption of standards for the purpose of intentionally obstructing international trade as well as the application of standards which, though not adopted with such an intention in mind, have the effect of unnecessarily obstructing international trade. Since the term "unnecessary" is not defined, it would seem that whether a standard unnecessarily obstructs international trade turns upon an evaluation of factors such as the nature of the standard itself, the extent of the impact of the standard on international trade, the importance of the objective which the standard seeks to attain, and the availability of equally efficacious yet less restrictive alternative methods of accomplishing the same objective.⁵⁰

In addition to the foregoing, the Code requires states parties, "[w]herever appropriate," to state "technical regulations and standards in

41. This is known as the most-favored-nation (MFN) obligation.

42. This is known as the national treatment obligation.

43. STANDARDS CODE, *supra* note 6.

44. *Id.* art. 15.5.

45. *Id.* art. 2.1.

46. *Id.* art. 5.1.

47. *Id.* art. 7.2.

48. *Id.* art. 2.1.

49. *Id.* art. 7.1.

50. See text accompanying notes 81 and 82 *infra*.

terms of performance rather than design or descriptive characteristics.”⁵¹ Further, states parties are required—except where inappropriate for reasons of national security, prevention of deceptive practices, or protection of human health or safety, animal or plant life or health, or the environment—to use relevant international standards as a basis for standards of central government bodies.⁵² If relevant international standards do not exist and technical regulations or standards are being considered which may have a significant impact on trade of other states parties, then the state party interested in promulgating such regulations or standards is required to publish the proposal for comment, notify all states parties through the GATT Secretariat of the products to be covered, provide copies of the proposal to states parties upon request, and allow a reasonable time during which states parties may submit written comments on the proposal.⁵³ Article 7.3 makes the same rulemaking procedure applicable to certification systems.⁵⁴ Finally, the Code obligates each state party to accept, “whenever possible,” the results of tests conducted by relevant entities located in other states parties,⁵⁵ and to establish an “enquiry point” for answering questions from entities located in other states parties concerning adopted or proposed technical regulations, standards, or certification.⁵⁶

Unlike the Government Procurement Code, the provisions of the Standards Code apply to both industrial and agricultural products.⁵⁷ Since they are not explicitly limited, it would appear that the provisions of the Code govern mandatory as well as voluntary technical regulations, standards, and certifications systems.⁵⁸ The Code distinguishes between standards-related activities engaged in by central government bodies⁵⁹ and those engaged in by local⁶⁰ or nongovernmental bodies.⁶¹ Specifically, while central government bodies are required to adhere to the obligations of the Code, local or nongovernmental bodies are not. However, central government bodies are obligated to take “such reasonable measures as may be available” to ensure that local and nongovernmental bodies abide by the terms of the Code.⁶² If such efforts prove unsuccessful, it would appear that states parties adversely affected might be entitled to subject the state party in whose territory the local or nongovernmental body is located to international dispute resolution proceedings spelled out in the

51. STANDARDS CODE, *supra* note 6, art. 2.4.

52. *Id.* art. 2.2.

53. *Id.* art. 2.5.

54. *Id.* art. 7.3.

55. *Id.* art. 5.2.

56. *Id.* art. 10.1.

57. *Id.* art. 1.3.

58. SENATE FINANCE COMM. REPORT, *supra* note 23, at 149.

59. STANDARDS CODE, *supra* note 6, Annex I, art. 6.

60. *Id.* Annex I, art. 7.

61. *Id.* Annex I, art. 8.

62. *Id.* art. 3.

Code and, if appropriate, legitimate retaliation.⁶³

Articles 13 and 14 establish the procedures for resolving disputes arising under the provisions of the Code. Basically, these articles provide for the creation of a Committee on Technical Barriers to Trade composed of representatives of each state party to the Code.⁶⁴ Disputes incapable of being resolved by the states concerned⁶⁵ can be referred to the Committee, which shall meet within thirty days of a request received from any party to the dispute.⁶⁶ Investigations of the matter in dispute shall proceed expeditiously and in the case of perishable (for example, agricultural) products "in the most expeditious manner possible with a view to facilitating a mutually satisfactory solution within three months of the request for the Committee investigation."⁶⁷ The Committee will make "every effort" to resolve within a twelve month period disputes affecting products with a definite crop cycle of twelve months.⁶⁸ The Committee may enforce its decisions concerning matters in dispute by authorizing the suspension of obligations established by the Code with respect to any party.⁶⁹

Article 14.25⁷⁰ provides that any state party who "considers that obligations under this Agreement are being circumvented" by the drafting of standards-related requirements in terms of processes and production methods (PPM), rather than product characteristics, is entitled to invoke the dispute settlement procedures set out in articles 13 and 14. In essence, this provision would seem to permit a party to a dispute to request the Committee on Technical Barriers to Trade to exercise jurisdiction over the matter whenever the party itself "considers" that circumvention is taking place. The jurisdictional standard would appear to be purely subjective and based totally on the perception of the aggrieved party. Once the Committee has assumed jurisdiction, it would seem that if a

63. The language of article 5.1 of the Code somewhat confuses this point, however. Since it appears only to fix an obligation on central government bodies (states parties) to avoid violations with respect to testing methods and procedures, it might be argued that violations committed by local or nongovernmental bodies are not actionable under the Code. On the other hand, to the extent that article 2.1 states the controlling principle applicable to all sorts of standards-related activities, it would appear to make violations of article 5.1 by local or nongovernmental bodies actionable.

64. STANDARDS CODE, *supra* note 6, art. 13.1.

65. *Id.* art. 14.2.

66. *Id.* art. 14.4.

67. *Id.* art. 14.6.

68. *Id.* art. 14.7.

69. *Id.* art. 14.21.

70. In view of the fact that it was not definitively settled until December of 1978 that standards for agricultural products would be covered by the Code, most of the Code's provisions are drafted in language reflecting a preoccupation with industrial products. Given the fact that many of the standards applicable to agricultural products are drafted in terms of processes and production methods (PPM), rather than product characteristics as is the case with industrial goods, there is some question as to whether the Code will effectively restrain the use of standards as an NTB to international trade in agricultural commodities. It would appear, however, that article 14.25 should go a long way toward accomplishing such a result.

circumvention is in fact occurring, then it could, where appropriate, authorize the retaliatory suspension of obligations under the Code.⁷¹

The provisions of the Standards Code are implemented domestically through Title IV of the TAA. Specifically, section 402 of the TAA states that federal agencies are prohibited from engaging in standards-related activities that create unnecessary obstacles to the foreign commerce of the United States. No comparable prohibition exists with respect to standards-related activities of state agencies and private persons.⁷² Standards-related activities which create unnecessary obstacles include: tests or test methods subjecting imported products to treatment less favorable than that accorded to like domestic or imported products;⁷³ domestic standards which fail to take into consideration relevant international standards;⁷⁴ domestic standards based on design rather than performance criteria;⁷⁵ and certification systems which fail to give foreign suppliers access on the same basis as suppliers of like domestic or imported products.⁷⁶

In addition to these obstacles, which are considered *per se* unnecessary, it would appear that there are other standards-related activities which might well be considered violative of Title IV. Specifically, section 401 intimates that any standards-related activity having a great enough impact on the foreign commerce of the United States, which does not have as its demonstrable purpose the attainment of a legitimate domestic objective⁷⁷ or which operates to exclude imported products that fully meet such an objective, may also be viewed as creating an unnecessary obstacle.⁷⁸ The explicit language of section 401 indicates that legitimate domestic objectives include "the protection of legitimate health or safety, essential security, environmental, or consumer interest. . . ."⁷⁹ Standards-related activities unquestionably designed to accomplish some legitimate domestic objective may still be found to create an unnecessary obstacle to foreign commerce if they operate to exclude imported products which fully meet the legitimate objective.⁸⁰

71. This would seem to result from the broad language in article 14.2, which speaks of "any benefit" under the Code being "nullified or impaired" and the fact that article 14.25 invokes the dispute settlement procedures set out in the Code. The retaliatory suspension of obligations under the Code is provided for in article 14.21 which authorizes the Committee to suspend "the application of obligations including those in Articles 5 to 9, in order to restore mutual economic advantage and balance of rights and obligations."

72. Trade Agreements Act, Pub. L. No. 96-39, § 403, 93 Stat. 243 (1979) (to be codified in 19 U.S.C. § 2533).

73. *Id.* § 402(1), 93 Stat. 242 (to be codified in 19 U.S.C. § 2532(1)).

74. *Id.* § 402(2), 93 Stat. 242 (to be codified in 19 U.S.C. § 2532(2)).

75. *Id.* § 402(3), 93 Stat. 243 (to be codified in 19 U.S.C. § 2532(3)).

76. *Id.* § 402(4), 93 Stat. 243 (to be codified in 19 U.S.C. § 2532(4)).

77. SENATE FINANCE COMM. REPORT, *supra* note 23, at 152.

78. Trade Agreements Act, Pub. L. No. 96-39, § 40, 93 Stat. 242 (to be codified in 19 U.S.C. § 2531).

79. *Id.*

80. *Id.*

The approach intimated in section 401 comports with the multi-factor-oriented configurative analysis suggested for determining whether, under article 2.1 of the Code, some standards-related activity creates an unnecessary obstacle to international trade.⁸¹ More precisely, it will be recalled that since the Code does not define "unnecessary," it was suggested earlier that in order to determine whether a standards-related activity creates an unnecessary obstacle to international trade, one should look at a host of factors associated with the activity itself and its impact on international trade. Standards-related activities are to be designed to accomplish legitimate domestic objectives, such as *legitimate* health and safety, essential security, environmental or consumer interests, and yet to avoid excluding products which fully meet any such objective. Thus it appears that the Congress recognizes that many factors considered during the course of evaluating standards-related activities under article 2.1 of the Code should also receive consideration when evaluating standards-related activities undertaken pursuant to U.S. municipal law. The value of such an approach would seem to be in the liberalization of international trade. The requirement that a health and safety standards-related activity be designed to protect "legitimate" health and safety interests would indicate that standards establishing unreasonably high health and safety levels might create unnecessary obstacles in violation of section 402 if the impact on foreign commerce of the United States is great enough.⁸² Similarly, a standards-related activity which has an indiscriminate impact on international trade, resulting in the exclusion of wholesome products, might also be of questionable validity. In each case it would appear that the concern is to strike a balance between the protection of legitimate domestic interests and the liberalization of international trade.

Section 414 of the TAA requires the Secretary of Commerce to establish a standards information center within the Department of Commerce.⁸³ This assures compliance with article 10 of the Standards Code which requires that each state party establish an "enquiry point" for the collection and dissemination of information concerning technical regulations, standards, or certification systems which have been adopted or proposed within the territory of the state party. Further, with the standards information center serving as the national collection and dissemination facility for standards-related information, whether public or private, domestic or foreign, or international, regional, or local, entities located in the United States should have ready access to materials which cast light on all types of standards-related activities affecting the foreign commerce of the United States.⁸⁴

If a federal agency engages in some standards-related activity which

81. See text accompanying notes 48-50 *supra*.

82. This, of course, assumes that there is some impact on international trade.

83. Trade Agreements Act, Pub. L. No. 96-39, § 414(a), 93 Stat. 245 (1979) (to be codified in 19 U.S.C. § 2544).

84. *Id.* § 414(b), 93 Stat. 245 (to be codified in 19 U.S.C. § 2544(b)).

creates an unnecessary obstacle to international commerce or violates some provision of the Standards Code, then any state party to the Code may make a "representation" to the Special Representative for Trade Negotiations so long as it can provide some reasonable indication that the standards-related activity is having a significant trade effect.⁸⁵ Since section 421 speaks only of standards-related activities "engaged in within the United States," it would appear that representations could also be made with respect to activities by state agencies or private persons. Title IV does not provide for the receipt of representations from domestic entities interested in assuring that federal agencies comply with the TAA's proscription of standards-related activities which create unnecessary obstacles to foreign commerce.⁸⁶ Alleged violations of the Standards Code by other states parties which impact U.S. commerce may be remedied in two distinct fashions. First, in accordance with articles 13 and 14 of the Code, the United States may proceed through international channels, including the Committee on Technical Barriers to Trade.⁸⁷ Second, any interested domestic person may petition the Special Representative for Trade Negotiations⁸⁸ to request the President to take whatever actions are necessary under section 301 of the Trade Act of 1974⁸⁹ to enforce the rights of the United States under the Code.⁹⁰ These enforcement provisions should go a long way toward obtaining the benefits of efforts to reduce or eliminate standards-related activities as an effective NTB.

C. *The Subsidies/Countervailing Duties (CVD) Code*

The granting of subsidies has been described as one of the most pernicious practices in international trade.⁹¹ Since subsidies are frequently used by governments to support the domestic agricultural community, it is only fitting that some discussion in this article be devoted to the modifications in the rules governing the use of subsidies and the circumstances under which countervailing action is permissible.

The GATT does not proscribe the utilization of subsidies in all instances. Rather, it simply provides guidelines which must be followed if subsidies are to be consonant with accepted international principles. Specifically, article XVI states that export subsidies are permitted on primary products—including agricultural commodities—so long as they do not result in the subsidizing state obtaining more than an equitable share of the world export trade in such product, with account being taken of trade during a previous representative period.⁹² Export subsidies on non-

85. *Id.* § 422, 93 Stat. 247 (to be codified in 19 U.S.C. § 2552).

86. *Id.* § 421, 93 Stat. 247 (to be codified in 19 U.S.C. § 2551).

87. See text accompanying notes 64-69 *supra*.

88. Trade Agreements Act, Pub. L. No. 96-39, § 901, 93 Stat. 296 (1979) (amending 19 U.S.C. § 2412 (1976)).

89. *Id.* § 901, 93 Stat. 295 (amending 19 U.S.C. § 2411 (1976)).

90. *Id.* § 424(b), 93 Stat. 248 (to be codified in 19 U.S.C. 2554(b)).

91. SENATE FINANCE COMM. REPORT, *supra* note 23, at 37.

92. General Agreement on Tariffs and Trade, *supra* note 10, art. XVI, para. 3, as amended by Protocol Amending The Preamble and Parts II and III of the General Agree-

primary products are permitted so long as they do not result in the subsidized product being sold in the importing country at a price below the domestic market price of like domestic products.⁹³ Article XVI also provides that states parties granting any form of subsidy which operates to increase exports or decrease imports must notify other states parties of the nature and extent of the subsidy.⁹⁴ If such subsidy causes or threatens to cause "serious prejudice" to the interests of another state party, then the subsidizing state must, upon request, consult with the affected state with a view to limiting the subsidization.⁹⁵

The Subsidies/CVD Code, effective January 1, 1980, and applicable only between states parties, changes the GATT rules on subsidies in three pertinent respects. First, article 9 of the Code specifically prohibits states parties from granting export subsidies on non-primary products.⁹⁶ The prohibition no longer turns on whether subsidization results in the product being sold at a price below the domestic market price of like domestic products. Second, while export subsidies on primary products continue to be permitted, they are compatible with the obligations of article 10 of the Code only so long as they neither result in the subsidizing state obtaining more than an equitable share of the world export trade in such product,⁹⁷ or the subsidized product being sold at prices materially below those of other suppliers to the same market.⁹⁸ The prohibition of subsidies resulting in the subsidized product being sold at prices materially below those of other suppliers is new and should be subject to less dispute than the earlier GATT standard. Also new is a provision which attempts to define the phrases "equitable share of world export trade" and "previous representative period."⁹⁹ Third, article 12 provides that states parties granting any form of subsidy which causes "injury" to the domestic industry of another state party or "nullification or impairment of benefits" accruing to that state party under the GATT must, upon request, enter into consultations with the affected states as soon as possible so that they can achieve a mutually satisfactory solution.¹⁰⁰ Though article 12 also requires consultations whenever the subsidy causes "serious prejudice" to the interests of another state party, it would appear that the Code increases access to the kind of consultation mechanism initially set out in article XVI of the GATT. Violations of any of the obligations of the Code which are not satisfactorily resolved may result in the Committee of Signato-

ment On Tariffs and Trade, Mar. 10, 1955, 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168.

93. *Id.* art. XVI, para. 4.

94. General Agreement on Tariffs and Trade, *supra* note 10, art. XVI, para. 1.

95. *Id.*

96. SUBSIDIES/COUNTERVALUING DUTIES CODE, *supra* note 7, art. 9.

97. *Id.* art. 10(1).

98. *Id.* art. 10(3).

99. *Id.* art. 10(2).

100. *Id.* art. 12.

ries¹⁰¹ making "recommendations to the parties as may be appropriate" and, if such recommendations are not followed, authorizing counter-measures as may be appropriate.¹⁰²

Traditionally, whenever states have subsidized the export of products to make them more attractive to foreign purchasers, the country of importation has responded by imposing a CVD equal to the amount of the subsidy. Article VI of the GATT states the principles applicable to the imposition of such CVD's. In essence, article VI provides that a CVD may be imposed on an imported product only if it can be demonstrated that a subsidy is being bestowed on the manufacture, production, or exportation of the product and that such subsidization is causing or threatening to cause material injury to a domestic industry or materially retarding the establishment of such an industry.¹⁰³ Though it would seem that article VI establishes a relatively precise principle, in practice it has not served to promote a great deal of uniformity in the imposition of CVD's by the various states parties to the GATT.

The provisions of the Subsidies/CVD Code applicable to the imposition of CVD's on products imported from other states parties are designed to correct this deficiency. Specifically, notwithstanding the fact that states parties to the GATT may have had some perfectly legitimate reasons in the past for not complying with the terms of article VI when assessing CVD's,¹⁰⁴ the Code now makes it eminently clear that a CVD may be imposed on a product imported from another state party only after it has been demonstrated that the product is being subsidized and that this results in material injury to a domestic industry.¹⁰⁵ Further, articles 2 through 5 of the Code establish extensive procedural requirements incident to the imposition of CVD's and article 6 enumerates factors to be considered when attempting to determine whether a domestic industry is being materially injured. Article 6 states essentially that injury should be determined by examining the volume of imports and the effects of such on domestic prices of like products, as well as the consequent impact of such imports on domestic producers of like products. With particular respect to agricultural products, article 6(3) provides that when examining the impact on domestic producers, special consideration should be given to determining whether the economic conditions created by the subsidized imports have increased the burden on government support programs. The mere fact that producers of agricultural products are not experiencing a decline in output, sales, market share, or productivity does not alone indicate that imported agricultural commodities benefitting

101. *Id.* art. 16.

102. *Id.* art. 13(4).

103. General Agreement on Tariffs and Trade, *supra* note 10, art. VI.

104. Under the Protocol of Provisional Application to the GATT, states parties to that agreement were permitted to continue to operate under antedating municipal laws inconsistent with the principles stated in GATT.

105. SUBSIDIES/COUNTERVALUING DUTIES CODE, *supra* note 7, art. 1.

from subsidies are not having any impact on the domestic industry. The absence of a decline in any of these areas may be attributable to increased government price support activity and such activity may be indicative of injury warranting imposition of a CVD. Article 4(1) of the Code, however, makes it clear that the imposition of a CVD on agricultural products, or any other type of imported item, is not mandatory.

The provisions of the Subsidies/CVD Code are implemented domestically by title I of the TAA, which adds a new title VII to the Tariff Act of 1930.¹⁰⁶ However, since there would be serious questions about the legislative jurisdiction, not to mention the efficacy and political propriety, of Congress enacting a statute designed to proscribe foreign entities from granting subsidies on products imported into the United States, title I of the TAA merely purports to establish when subsidies will warrant the imposition of a CVD and does not provide for the prohibition of subsidies granted by foreign entities.

Title I of the TAA,¹⁰⁷ apart from establishing extensive procedural requirements which must be followed whenever a CVD is to be imposed, provides for countervailing action only in those instances where an imported product is benefitting from a subsidy which is resulting in material injury or threat of material injury to a domestic industry producing like products.¹⁰⁸ The application of the standard enunciated in title I is limited to those products imported from countries which are states parties to the Code or which extend the benefits of the Code to products imported from the United States.¹⁰⁹ Products imported from the territory of other countries will not be accorded such treatment but will remain subject to CVD's imposed pursuant to section 303 of the Tariff Act of 1930.¹¹⁰ In essence, this means that products imported from countries which are not states parties to the Code or do not extend the benefits of the Code to products imported from the United States will continue to be subject to CVD's without regard to whether subsidization is resulting in material injury or threat of material injury to a domestic industry.¹¹¹ This dichotomy between treatment accorded products imported from countries which adhere to the obligations of the Code and products imported from all other countries is consistent with the commitments of the United States under both the Subsidies/CVD Code and the GATT.¹¹²

In explication of the standard stated in title I of the TAA, section

106. Trade Agreements Act, Pub. L. No. 96-39, § 101, 93 Stat. 150 (1979) (amending 19 U.S.C. §§ 1202-1654 (1976)).

107. *Id.* §§ 101-107, 93 Stat. 150-93 (to be codified in 19 U.S.C. §§ 1671-1677(g)).

108. *Id.* § 101, 93 Stat. 150 (to be codified in 19 U.S.C. § 1671).

109. *Id.*

110. *Id.* See also Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1976).

111. Trade Agreements Act, Pub. L. No. 96-39, § 101, 93 Stat. 151 (1979) (to be codified in 19 U.S.C. § 1671(c)). SENATE FINANCE COMM. REPORT, *supra* note 23, at 43-44.

112. Article 1 of the Code makes it clear that the provisions of the Code apply only between States Parties. Other states will continue to be treated under section 303 of the Tariff Act of 1930, 19 U.S.C. § 1303 (1976).

771 of the Tariff Act of 1930, as added by title I, defines several pertinent terms. Specifically, the term "subsidy" is defined as including those export subsidies described in Annex A of the Code and certain enumerated domestic subsidies paid or bestowed directly or indirectly on the manufacture, production, or export of any product.¹¹³ The term "domestic industry" is defined as including domestic producers as a whole, producers whose collective output constitutes a major proportion of the total domestic production, and, in certain limited situations, regional producers.¹¹⁴ Perhaps most importantly, however, the term "material injury" is defined as harm which is not inconsequential, immaterial, or unimportant.¹¹⁵ In determining whether the requisites of this definition have been satisfied, section 771 directs that consideration be taken of the volume of imports, the effect of such imports on domestic prices of like products, and the impact of such imports on domestic producers.¹¹⁶

Of particular interest to this discussion, section 771 provides, consistent with article (3) of the Code, that when attempting to determine whether imports of subsidized agricultural products are causing material injury, consideration "shall" be given to whether there has been any increased burden on government income or price support programs.¹¹⁷ As a corollary, section 771 states further that it "shall not" be determined that there is no material injury or threat of material injury to domestic producers of like agricultural products merely because the prevailing market price is at or above the minimum support price.¹¹⁸ Both principles should prove significantly helpful in attempting to deal with the difficulties incident to efforts to determine whether producers of supported agricultural products are being injured by imported agricultural products.¹¹⁹

D. *The Antidumping Code*

Frequently, imported products are sold in the country of importation at prices below their fair value or home market price. When such sales cause or threaten to cause material injury to a domestic industry, or retard materially the establishment of such an industry, article VI of the GATT entitles the country of importation to assess a duty on such products equal to the difference between the fair value and the price at which the products are actually being sold.¹²⁰ This duty, known as a dumping duty, is designed to increase the price of the imported product to a more representative level thereby averting the economic dislocations associated with unfair price advantage.

113. Trade Agreements Act, Pub. L. No. 96-39, § 101, 93 Stat. 177 (1979) (to be codified in 19 U.S.C. § 1677(5)).

114. *Id.* § 101, 93 Stat. 176 (to be codified in 19 U.S.C. § 1677(4)).

115. *Id.* § 101, 93 Stat. 178 (to be codified in 19 U.S.C. § 1677(7)).

116. *Id.*

117. *Id.* § 101, 93 Stat. 179 (to be codified in 19 U.S.C. § 1677(7)(D)(ii)).

118. *Id.* § 101, 93 Stat. 179 (to be codified in 19 U.S.C. § 1677(7)(D)(i)).

119. SENATE FINANCE COMM. REPORT, *supra* note 23, at 87-88.

120. General Agreement on Tariffs and Trade, *supra* note 10, art. VI.

The Antidumping Code, recently completed in Geneva,¹²¹ reiterates the GATT standard for the imposition of dumping duties by stating that such duties may not be imposed unless the requisites of article VI of the GATT have been satisfied.¹²² In addition, articles 3 and 4 of the Code go further than article VI of the GATT and attempt to suggest definitions for both material injury and domestic industry. These definitions are essentially identical to those used in the Subsidies/CVD Code. In one respect, however, the definition of material injury in article 3 differs from that in article 6 of the Subsidies/CVD Code. Specifically, it will be recalled that article 6(3) of the Subsidies/CVD Code states that whenever attempting to determine whether domestic producers of agricultural products have suffered material injury, consideration should be given to whether the importation of the subsidized agricultural products has increased the burden on government support programs. Article 3 of the Antidumping Code contains no reference to special factors deserving consideration when the dumped products are agricultural. It should be noted, however, that by stating that the definition of material injury does not list all the factors to be examined, the last sentence of article 3(3) would seem to indicate that the impact of dumping on government support programs may be considered in determining whether material injury exists.

The provisions of the Antidumping Code, effective January 1, 1980,¹²³ are implemented domestically by title VII of the Tariff Act of 1930, as added by title I of the TAA. As we have seen previously, title VII also implements the Subsidies/CVD Code. Section 731 of the Tariff Act of 1930 provides, consistent with the Antidumping Code, that imported products sold or likely to be sold at less than fair value—that is, normal value or home market price—are subject to dumping duties if such sales result in material injury or threat of material injury to a domestic industry or retard materially the establishment of such an industry.¹²⁴ In most respects this standard is identical to that used pursuant to section 701 when determining whether the imposition of a CVD is warranted. More precisely, both standards refer to the fact that the improper activity must result in or threaten to result in material injury to a domestic industry. For this very reason, the terms “material injury” and “domestic industry” as used in that portion of title VII dealing with the imposition of dumping duties have the same meaning as when used in that portion dealing with the imposition of CVD’s.

One important consequence proceeds from the fact that the term “material injury” is given the same meaning under section 731 of the

121. During the Kennedy Round of the MTN an Antidumping Code was formulated. Subsequently, Congress enacted municipal measures severely restricting the significance of that Code for the United States.

122. ANTIDUMPING CODE, *supra* note 8, art. 1.

123. *Id.* art. 16(4).

124. Trade Agreements Act, Pub. L. No. 96-39, § 101, 93 Stat. 162 (1979) (to be codified in 19 U.S.C. § 1673).

Tariff Act of 1930 as it is under section 701 dealing with CVD's. Section 731 states that whenever imported agricultural products are the concern, consideration "shall" be given to whether imports of such products have resulted in any increased burden on government income or price support programs. Thus it is made explicitly clear that even though article 3 of the Code does not require that consideration be taken of such concerns, section 731 does. This would seem to rectify the omission which was previously alluded to in the language of article 3 of the Code, thus eliminating questions that might arise over the discrepancy between material injury in the case of CVD's and material injury in the case of antidumping.

Apart from this, two other matters deserve consideration before moving to a discussion of the bilateral trade concessions granted by the United States during the course of the Tokyo Round of the MTN. First, it would appear that even though section 731 of the Tariff Act of 1930 uses the term "material"¹²⁵ to describe the type of injury requisite to the imposition of a dumping duty, Congress' expectation is that this should not increase the quantum of injury one is required to show over what was previously required under section 202 of the Antidumping Act of 1921.¹²⁶ That former provision did not contain the adjective "material" but was applied in a fashion equally as strict as section 731.¹²⁷ Second, the standard enunciated in article VI of the GATT and reaffirmed in the Antidumping Code, unlike that pronounced in the Subsidies/CVD Code, applies to products imported from all countries, including those which are not states parties to the Code. It is uncertain exactly why this distinction exists. The two most probable reasons, however, are that section 731 is seen largely as a re-enactment of the basic standard in section 202 of the Antidumping Act—a standard of general applicability—and that the language in article 1 of the Antidumping Code might very well require such a result. In particular, article 1 of the Antidumping Code does not provide for application only between states parties. On the other hand, it is perfectly clear that the liberal treatment accorded by article 1 of the Subsidies/CVD Code is limited to states parties.

III. BILATERAL TRADE CONCESSIONS

The bilateral trade concessions concerning agriculture granted by the United States during the recent round of trade negotiations concluded in Geneva are reflected in a host of agreements on meat, chocolate crumb, and cheese. While each agreement has indisputable importance to the parties affected, only the agreements on cheese merit more than passing reference in this brief survey.

A. *Agreements on Meat*

Under the Meat Import Act of 1964,¹²⁸ and the voluntary restraint

125. *Id.* § 101, 93 Stat. 178 (to be codified in 19 U.S.C. § 1677(7)(A)).

126. 19 U.S.C. § 161 (1976).

127. SENATE FINANCE COMM. REPORT, *supra* note 23, at 87.

128. Meat Import Act, Pub. L. No. 88-482, 78 Stat. 594 (1964) (codified in 19 U.S.C.

agreements negotiated under section 204 of the Agricultural Act of 1956,¹²⁹ the United States has for years managed to limit the amount of foreign meat entering the country. In response to requests and concessions from Australia, New Zealand, and Canada during the recent trade negotiations, the United States entered into bilateral agreements affecting foreign meat importation.¹³⁰ These agreements do two things: increase the access level for all suppliers of foreign beef and reduce the duty on certain high quality foreign beef imported from Canada.¹³¹ More precisely, the agreements with Australia and New Zealand commit the United States to a global access level of no less than 1.2 billion pounds of beef annually,¹³² and the agreement with Canada provides that the United States will reduce the duty on high quality control cuts of beef from ten to four percent.¹³³

B. *Agreements on Chocolate Crumb*

Chocolate crumb is basically chocolate containing up to approximately nine percent butterfat. Quotas have existed on chocolate crumb for some time, since imports might displace significant quantities of domestic butterfats, thus depressing the domestic price support programs.¹³⁴ The agreements negotiated in Geneva with Australia and New Zealand are designed to permit these countries to participate with Ireland, the United Kingdom, and the Netherlands in supplying chocolate crumb to the United States. Specifically, the agreement with Australia entitles it to supply 4.4 million pounds to the United States annually.¹³⁵ The agreement with New Zealand entitles it to supply 2.2 million pounds annually.¹³⁶ While the amount granted New Zealand is admittedly small, the fact that New Zealand is granted a specifically assigned quota share permits it to participate in country of origin adjustments made as a result of any of the other four countries being incapable of supplying their own quota share. Section 703¹³⁷ of the TAA implements the provisions of the two agreements on chocolate crumb.

C. *Agreements on Cheese*

Under section 22 of the Agricultural Adjustment Act of 1933,¹³⁸ the President is authorized to issue proclamations limiting the amount of any

§ 1202, sched. 1, pt. 2 (1976)).

129. 7 U.S.C. § 1854 (1976).

130. MTN AGREEMENTS, *supra* note 4, at 460, 510.

131. SENATE FINANCE COMM. REPORT, *supra* note 23, at 192-93.

132. Trade Agreements Act, Pub. L. No. 96-39, § 704, 93 Stat. 273 (1979) (to be codified in 19 U.S.C. § 1202 note).

133. *Id.* § 506, 93 Stat. 252 (to be codified in 19 U.S.C. § 1202, sched. 1, pt. 2).

134. HOUSE COMM. ON WAYS AND MEANS, TRADE AGREEMENTS ACT OF 1979, H.R. REP. No. 317, 96th Cong., 1st Sess. 141 (1979) [hereinafter cited as HOUSE COMM. REPORT].

135. *Id.* at 142.

136. *Id.*

137. Trade Agreements Act, Pub. L. No. 96-39, § 703, 93 Stat. 272 (1979) (to be codified in 19 U.S.C. § 1202 app. note).

138. 7 U.S.C. § 624 (1976).

agricultural product imported into the United States whenever the U.S. International Trade Commission (ITC) determines that the importation of any such product is interfering with a domestic price support program. Modifications increasing or decreasing the limitation so proclaimed may be made following similar consideration by the ITC.

Pursuant to section 22, the United States has long maintained a quota limiting the amount of imported cheese which may enter the country annually. However, since the quota on imported cheese essentially was designed to protect domestic dairy products benefitting from price support programs, the United States has largely refrained from limiting the importation of cheese not jeopardizing such programs. This is perhaps best indicated by the fact that the quota on imported cheese existing prior to the implementation of the results of the Tokyo Round did not cover certain foreign specialty cheeses (goat's milk and sheep's milk cheese, and certain soft-ripened cow's milk cheese) or imported cheese priced higher than the support price for domestic cheddar cheese (\$1.16/lb.) plus seven cents per pound—a figure known as the "price-break."¹³⁹ In 1978 only about fifty percent of the roughly 100,000 metric tons of imported cheese entering the United States was subject to the quota.¹⁴⁰

During the recent trade negotiations the United States concluded bilateral agreements on cheese with Austria, Norway, Finland, Israel, New Zealand, Canada, Switzerland, Portugal, Sweden, Iceland, Australia, Argentina, and the EEC.¹⁴¹ Each of these agreements commits the United States to permit the importation of a specified amount of cheese annually. The sum of the amounts stated in each of the agreements represents approximately all the quota and above price-break cheese imported during 1978, plus a small increase conceded by the United States during the course of the negotiations.¹⁴² In addition, each of the agreements, with the exception of those with Australia, New Zealand, Israel, and Argentina,¹⁴³ commits the United States to refrain from imposing CVD's on any of the cheese supplied in satisfaction of the amounts permitted under the agreements. In return for these commitments the United States received written assurances from the countries involved that they would not grant subsidies on such cheese in a manner which would result in the undercutting of the domestic wholesale price of like domestic cheese.¹⁴⁴

The commitments to permit the importation of a specified amount of cheese annually are implemented domestically by section 701 of the TAA.¹⁴⁵ Section 701 directs the President to issue a proclamation, to be

139. SENATE FINANCE COMM. REPORT, *supra* note 23, at 193-94.

140. HOUSE COMM. REPORT, *supra* note 134, at 135.

141. *Id.*

142. *Id.*

143. SENATE FINANCE COMM. REPORT, *supra* note 23, at 191.

144. *See, e.g.*, the agreement with the EEC in MTN AGREEMENTS, *supra* note 4, at 417, paras. 3, 4.

145. Trade Agreements Act, Pub. L. No. 96-39, § 701, 93 Stat. 268 (1979) (to be codified

considered as issued under section 22, limiting the amount of quota cheese which may enter the United States annually to an amount of not more than 111,000 metric tons. The need for such a Congressional directive existed for two distinct reasons. First, the quota level under U.S. law in 1978 and 1979 was considerably lower than the quota level needed in order to permit the United States to comply fully with the thirteen bilateral agreements on cheese concluded in Geneva. And second, it was unclear whether the time consuming consultations with the ITC required by section 22 would produce the kind of result necessary to authorize the President to issue an amending proclamation increasing the quota level above that then existing. In order to bring the quota level under U.S. law into line with the international commitments of the United States, avert potential problems accompanying consultations with the ITC, and at the same time assure the domestic dairy industry of the continuing viability of section 22, Congress simply required the issuance of a proclamation establishing a quota roughly equal to the sum of the amounts specified in all of the bilateral agreements.¹⁴⁶ Presumably, interest in protecting the price support programs received some consideration by Congress prior to its approval and implementation of the bilateral agreements entered into by the executive branch.

Apart from altering the method by which quotas on cheese have traditionally been established, section 701 changes the cheese quota system in another significant respect. Since 1968 imported cheese priced higher than the price-break has been permitted to enter the United States free of quota. By directing the issuance of a proclamation limiting the amount of quota cheese which may enter the United States annually and then defining the term "quota cheese" without reference to any support price figure,¹⁴⁷ section 701 effectively eliminates the price-break. As a result, rather than having a system comprised of quota cheese, above price-break cheese, and non-quota cheese, section 701 creates a system comprised of only quota cheese and non-quota cheese. This change, which will bring about eighty-five percent of all cheese imported into the U.S. within the quota system, represents concern with projected increases in importations of above price-break cheese. The only cheese now entitled to enter the United States free of quota will be the specialty cheese.¹⁴⁸

The commitments of the United States to refrain from imposing CVD's on quota cheese imported from countries which have obligated themselves not to undercut the domestic wholesale price of like domestic

in 19 U.S.C. § 1202 note).

146. If one looks closely at figures, it is apparent that only approximately 109,000 of the 111,000 metric tons authorized by Congress to be allocated had, as of August 1, 1980, actually been allocated.

147. Trade Agreements Act, Pub. L. No. 96-39, § 701(c), 93 Stat. 269 (1979) (to be codified in 19 U.S.C. § 1202 note).

148. SENATE FINANCE COMM. REPORT, *supra* note 23, at 194-95.

cheese are implemented by section 702(f) of the TAA.¹⁴⁹ In view of the fact that section 702(f) applies only to quota cheese imported from countries which have agreed not to engage in price-undercutting, nothing in the TAA would seem to prohibit the imposition of CVD's on items of non-quota cheese or items of quota cheese imported from countries, such as Australia, New Zealand, Israel, and Argentina, which have not obligated themselves to avoid price undercutting. However, before CVD's may be imposed in such cases, it must at least be demonstrated that the imported cheese is benefitting from a subsidy. Whether the subsidy must also cause or threaten to cause material injury to the domestic industry will depend upon whether section 303 of the Tariff Act of 1930 or section 701 of the Tariff Act of 1930, as added by title I of the TAA, applies.

The commitment to refrain from imposing CVD's on quota cheese imported from countries agreeing not to engage in price undercutting does not leave the domestic dairy industry subject to foreign deprecation. Subsections (b) through (e) of section 702 provide the President authority to penalize transgressions of the international obligations to avoid sales undercutting the domestic wholesale price of like domestic cheese. Specifically, these subsections provide that the President may impose fees or quantitative limitations on subsidized quota cheese imported into the United States whenever such cheese is being offered for sale at a duty-paid wholesale price below the domestic wholesale market price of similar domestic cheese. Fees imposed pursuant to this authority are clearly distinct from CVD's in that they do not exceed what is necessary to eliminate the price undercutting. Furthermore, it would appear that they are consonant with the bilateral agreements, since the bilaterals do not prohibit the United States from penalizing violations of the international obligations to avoid price undercutting.

IV. INTERNATIONAL COMMODITY AGREEMENTS

Two international commodity agreements, both effective January 1, 1980, deserve passing consideration in concluding this brief survey of the results of the Tokyo Round of the MTN which affect international trade in agricultural commodities. These agreements are the Arrangement Regarding Bovine Meat¹⁵⁰ and the International Dairy Arrangement.¹⁵¹ In general, both agreements are designed primarily to establish an informational and consultative network. Attached to the International Dairy Arrangement, however, are three protocols containing substantive economic provisions.

A. *Arrangement Regarding Bovine Meat (ARBM)*

The purpose of the ARBM, which covers trade in live bovine animals, as well as fresh, chilled, frozen, salted, dried, smoked, and prepared

149. Trade Agreements Act, Pub. L. No. 96-39, § 702, 93 Stat. 269 (1979) (to be codified in 19 U.S.C. § 1202 note).

150. MTN/ME/8, also in MTN AGREEMENTS, *supra* note 4, at 585.

151. MTN/DP/8, also in MTN AGREEMENTS, *supra* note 4, at 339.

or preserved meat and edible offals of bovine animals,¹⁵² is to facilitate the expansion, liberalization, and stability of the international meat and livestock market.¹⁵³ This purpose is to be accomplished by assisting in the progressive dismantling of obstacles and restrictions to world trade in bovine meat and live animals.¹⁵⁴

The fundamental instrument established by the ARBM to satisfy its stated purpose is the International Meat Council.¹⁵⁵ The Council is to be comprised of representatives from all states parties to the agreement and shall meet at least twice each year or at any other time requested by its chairman upon his own initiative or following the urging of a state party.¹⁵⁶ If a state party urges the chairman to call a meeting of the Council to consider a matter affecting the ARBM, the Council shall meet within fifteen days of such request.¹⁵⁷

Article III of the ARBM provides that states parties are to transmit regularly to the Council information which will permit the Council to monitor and access the overall situation of the world market for meat.¹⁵⁸ Such information shall include data on the past performance and current situation with respect to meat, and an assessment of the outlook regarding meat production, consumption, prices, stocks, and trade.¹⁵⁹ States parties are also required to provide the Council with information concerning domestic policies and trade measures in the bovine sector.¹⁶⁰ Based on such information the Council shall evaluate the world supply and demand situation and outlook.¹⁶¹ If such evaluation indicates the existence of a "serious imbalance" or threat thereof in the international meat market, then the Council will proceed by "consensus"¹⁶² to identify possible solutions to remedy the situation.¹⁶³ These possible solutions are merely for the "consideration" of the states parties to the ARBM and need not be adopted or implemented.¹⁶⁴

B. *International Dairy Arrangement (IDA)*

The IDA, which covers trade in milk and cream, butter, cheese and curd, as well as casein,¹⁶⁵ is designed to promote the expansion and liberalization of world trade in dairy products.¹⁶⁶ In order to attain this objec-

152. Arrangement Regarding Bovine Meat, *supra* note 150, art. II.

153. *Id.* art. I.

154. *Id.*

155. *Id.* art. V(1).

156. *Id.* art. V(2).

157. *Id.* art. IV(6).

158. *Id.* art. III(1).

159. *Id.* art. III(3).

160. *Id.*

161. *Id.* art. IV(1)(a).

162. *Id.* art. V(3) (indicating that "consensus" means unanimity).

163. *Id.* art. IV(2).

164. HOUSE COMM. REPORT, *supra* note 134, at 150.

165. International Dairy Arrangement, *supra* note 151, art. II.

166. *Id.* art. I.

tive, the IDA establishes an International Dairy Products Council comprised of representatives from all states parties,¹⁶⁷ vests the Council with responsibilities and powers virtually identical to those assigned by the ARBM to the International Meat Council,¹⁶⁸ and obligates states parties to the IDA to adhere to the provisions of three protocols attached thereto.¹⁶⁹ The Protocols Regarding Certain Milk Powders, Milk Fat, and Certain Cheeses enunciate minimum price levels for sales to commercial markets.

Specifically, the Protocol Regarding Certain Milk Powders sets prices of \$425, \$725, and \$425 per metric ton for skimmed, whole, and butter-milk powders respectively.¹⁷⁰ The price levels per metric ton established by the Protocol Regarding Milk Fat are \$1100 for anhydrous milk fat and \$925 for butter.¹⁷¹ The price stated in the Protocol Regarding Certain Cheeses is \$800 per metric ton.¹⁷² The minimum price levels provided for in the three protocols do not apply to sales made to non-commercial markets.¹⁷³ Further, each of the protocols provides that the price levels stated therein are subject to annual review and adjustment¹⁷⁴ by one of the three appropriate committees set up by the Council under the authority of article VII(2) of the IDA to assure compliance with and implementation of the provisions of each of the various protocols.

V. CONCLUSION

Though it is still far too early to assess the real impact of the results of the Tokyo Round on United States international agricultural trade, it seems safe to posit one observation. Unlike previous rounds of trade negotiations conducted under the auspices of the GATT, the round concluded in Geneva in April of 1979 makes an attempt to deal comprehensively with the issues which have plagued U.S. international agricultural trade during the post-World War II era. Most of these issues have developed out of the use of various NTB's and the absence of an effective informational and consultative network between trading partners. The four multilateral codes of conduct and two international commodity agreements discussed here should contribute substantially to the resolution of these issues and the promotion of agricultural trade in general.

167. *Id.* art. VII.

168. *Id.* art. V.

169. *Id.* art. VI.

170. *Id.* Annex I, art. 3(2)(b).

171. *Id.* Annex II, art. 3(2)(b).

172. *Id.* Annex III, art. 3(2)(b).

173. HOUSE COMM. REPORT, *supra* note 134, at 149.

174. International Dairy Arrangement, *supra* note 151, Annex I, art. 3(3)(b); *id.*, Annex II, art. 3(3)(b); *id.*, Annex III, art. 3(3)(b).

