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Legal Developments in US-ROC Trade Since Derecognition

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LEGAL DEVELOPMENTS IN US - ROC TRADE SINCE DERECOGNITION

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This article sets forth the principal legal developments affecting trade between the United States and the Republic of China (Taiwan) between January 1, 1979 and October 31, 1982. This period was marked by the American withdrawal of diplomatic recognition as to the Republic of China on January 1, 1979 and the subsequent passage of the Taiwan Relations Act, as well as by the adoption of the Trade Agreements Act of 1979 implementing the Multilateral Trade Negotiations. During this period, U.S. trade with Taiwan continued to flourish; indeed, neither derecognition nor the restructuring of much of U.S. trade law appears to have materially affected US-ROC trade.

This article begins with a discussion of the Taiwan Relations Act and the Trade Agreements Act of 1979 insofar as they relate specifically to US-ROC trade. Next, an overview of US-Taiwan trade relations is presented. Then the principal trade cases are discussed and the results for US-ROC trade are analyzed. In a final section, pending matters of concern to US-ROC trade are set forth.

I. THE STATUTES

A. The Taiwan Relations Act

The Taiwan Relations Act[1] was signed into law on April 10, 1979; it provides the statutory basis for continued relations between the United States and Taiwan, following President Carter's withdrawal of diplomatic recognition from the Republic of China effective January 1, 1979.

In Section 2, entitled "Findings and Declaration of Policy," the TRA states that it is the policy of the United States to "preserve and promote extensive, close, and friendly commercial, cultural and other relations between the people of the United States and the people of Taiwan,"[2] and to "consider any effort to determine the future of Taiwan by other than peaceful means, *including by boycotts and embargoes,* a threat to the peace and security of the Western Pacific area and of grave concern to the United

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1. 22 U.S.C. §§ 3301-3316 (Supp. V 1981) [hereinafter referred to as TRA]. For text and legislative history, see LEGISLATIVE HISTORY OF THE TAIWAN RELATIONS ACT: AN ANALYTIC COMPILATION (L. Wolff and D. Simon eds. 1982).

2. 22 U.S.C. §3301(b)(1) (Supp. V 1981).

States."[3] It is therefore American policy to continue to promote US-Taiwan trade relations, with the express understanding that any attempt by the People's Republic of China (PRC) to interfere with Taiwan's commerce, anywhere in the world, by boycott or embargo, would not be countenanced.

Section 4 of the TRA provides that all U.S. laws shall apply to Taiwan as they did before derecognition.[4] It also approves the continuation in force

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3. 22 U.S.C. §3301(b)(4) (Supp. V 1981) (emphasis added).

4. The provisions ensuring continued application of U.S. laws and international agreements to Taiwan are most comprehensive, to wit:

> (a) The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.
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> (b) The application of subsection (a) of this section shall include, but shall not be limited to, the following:
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> (1) Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.
>
> (2) Whenever authorized by or pursuant to the laws of the United States to conduct or carry on programs, transactions, or other relations with respect to foreign countries, nations, states, governments, or similar entities, the President or any agency of the United States Government is authorized to conduct and carry out, in accordance with section 6 of this Act, such programs, transactions, and other relations with respect to Taiwan (including, but not limited to, the performance of services for the United States through contracts with commercial entities on Taiwan), in accordance with the applicable laws of the United States.
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> (3)(A) The absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way any rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan.
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> (B) For all purposes under the laws of the United States, including actions in any court in the United States, recognition of the People's Republic of China shall not affect in any way the ownership of or other rights or interests in properties, tangible and intangible, and other things of value, owned or held on or prior to December 31, 1978, or thereafter acquired or earned by the governing authorities on Taiwan.
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> (7) The capacity of Taiwan to sue and be sued in courts in the United States, in accordance with the laws of the United States, shall not be abrogated, infringed, modified, denied, or otherwise affected in any way by the absence of diplomatic relations or recognition.
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> (8) No requirement, whether expressed or implied, under the laws of the United States with respect to maintenance of diplomatic relations or recognition shall be applicable with respect to Taiwan.
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> (c) For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements,

of all treaties and multilateral agreements to which the United States and Taiwan are both signatories[5] and further states that, "Nothing in this Act may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any other international organization."[6]

Section 5 of the TRA ensures for Taiwan the continued availability of coverage by the Overseas Private Investment Corporation (OPIC)[7] for "insurance, reinsurance, loans, or guarantees with respect to investment projects on Taiwan."[8]

Thus Sections 4 and 5 constitute the legal basis to ensure that trade and investment with Taiwan shall not be adversely affected by the severance of diplomatic ties.

Sections 6 through 11 of the TRA provide the organizational basis for relations between the United States and Taiwan,[9] namely, the American Institute in Taiwan (AIT)[10] and the Coordination Council for North American Affairs (CCNAA).[11]

Thus the Taiwan Relations Act provides a comprehensive legal and institutional format under which US-Taiwan trade should be able to maintain the growth it experienced prior to derecognition.

B. The Trade Agreements Act of 1979

The Trade Agreements Act of 1979[12] implements in the United States the results of the Tokyo Round of the Multilateral Trade Negotiations (MTN). The principal titles of TAA 79 applicable now or in the future to US-Taiwan trade are as follows:

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including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

22 U.S.C. §3303 (Supp. V 1981).

5. *Id.*

6. 22 U.S.C. §3303(d) (Supp. V 1981).

7. 22 U.S.C. §3304 (Supp. V. 1981) removes the OPIC per capita income restriction as to the Taiwan for a three-year period ending April 10, 1982. However, OPIC coverage remains available by virtue of the increase in the OPIC per capita income restriction to $2,950 in 1979 dollars. 22 U.S.C. §2191 (1976 & Supp. V 1981).

8. 22 U.S.C. §3304(a) (Supp. V 1981).

9. 22 U.S.C. §§3305-3310 (Supp. V 1981).

10. 22 U.S.C. §3305 (Supp. V 1981).

11. 22 U.S.C. §3309 (Supp. V 1981).

12. 19 U.S.C. §§2501-2582 (Supp. V 1981) [hereinafter referred to as TAA 79].

—Title I: Antidumping and Countervailing Duties. These provisions, *inter alia,* apply an injury test for dutiable imports under a countervailing duties (CVD) investigation; provide strict time limits for both antidumping and CVD cases; provide for the exchange between the parties, under protective order, of confidential information; provide for increased judicial review; require the collection of estimated duties upon entry for goods imported after the suspension of liquidation; and provide for annual review of dumping and CVD cases.[13]

—Title II: Customs Valuation.[14] This title replaces prior methods of valuation, including American Selling Price and Final List, with a hierarchy of five valuation methods.

—Title III: Government Procurement.[15] This title requires signatory countries to apply uniform and open procedures to purchases by covered national agencies. Signatories of the Agreement on Government Procurement (AGP) shall be able to bid on government procurements opened for bid by covered national agencies. Taiwan is not at present an AGP signatory.

—Title IV: Product Standards.[16] This title implements the Agreement on Technical Barriers to Trade; its purpose is to discourage discriminatory manipulations of product standards, testing, and certification systems.

—Title V: Implementation of Tariff Negotiations. This title implements the tariff concessions negotiated during the Tokyo Round. Taiwan has entered into an agreement with the United States under which it receives the Tokyo Round tariff concession in exchange for certain concessions of its own.[17]

Titles VI, VII, and VIII of TAA 79 relate to civil aircraft, agriculture measures, and treatment of distilled spirits, respectively. Title IX revises section 301 of the Trade Act of 1974[18] providing for presidential retaliation

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13. Taiwan is a "country under the agreement" for purposes of entitlement to an injury determination in a CVD investigation of dutiable goods. Office of the STR, *Determination Regarding Application of Certain International Trade Agreements,* 45 Fed. Reg. 1181 (1980).

14. 19 U.S.C. §1401(a) (Supp. V 1981). The Customs Valuation Code was implemented in the United States by Pres. Proc. 4768 (June 28, 1980), 45 Fed. Reg. 45135 (1980).

15. Notices relating to the Customs Valuation, Government Procurement, and other MTN Codes are found at 44 Fed. Reg. 74784 (1979), 45 Fed. Reg. 1181 (1980), 45 Fed. Reg. 18547 (1980), 45 Fed. Reg. 36569 (1980), 46 Fed. Reg. 24059 (1981).

16. *See* note 15, *supra.*

17. Agreement on Multilateral Trade Negotiation Matters (October 24, 1979), *reprinted at* 1 CHINESE YEARBOOK OF INTERNATIONAL LAW AND AFFAIRS 196 (1981).

18. 19 U.S.C. §§2411-16 (Supp. V 1981).

and relief against foreign unfair actions and enforcement of U.S. rights under the MTN agreements.[19] Title X of TAA 79 provides increased opportunity for judicial review, particularly in antidumping and countervailing duties cases. Finally, Title XI incorporates miscellaneous changes, including extension of the presidential negotiating authority, authorization of the auctioning of import licenses in certain cases, and the establishment of civil penalties (fines) in section 337 cases for violation of a cease and desist order.

For the present, TAA 79 is expected to have its greatest impact on US-Taiwan commercial relations by virtue of the tariff concessions and the revisions in antidumping and countervailing duties laws. It does not appear that Taiwan is prepared to sign the product standards and other agreements the applicability of which depends upon multilateral or bilateral agreements.

II. OVERVIEW OF US-ROC TRADE RELATIONS

U.S. trade with Taiwan does not appear to have been affected by the withdrawal of U.S. diplomatic recognition. While its strong dependence on external trade[20] renders Taiwan especially vulnerable to international economic downturns, the country has succeeded in maintaining its strong and growing economic ties throughout the world.

The United States remains Taiwan's biggest trading partner, buying over 36% of Taiwan's exports ($8.163 out of $22.611 billion in 1981)[21] and supplying 22.4% of Taiwan's imports ($4.766 out of $21.200 billion in 1981).[22] In the first six months of 1982, the U.S. share of both exports from Taiwan and imports to Taiwan increased to 39.1% and 24.5%, respectively.[23] In 1981, two-way U.S.-Taiwan trade was $12.9 billion, out of

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19. For a discussion of two significant section 301 cases, see Echols, *Section 301: Access to Foreign Markets from an Agricultural Perspective*, 6 INT'L TRADE L.J. 4 (1980-81); Stoler, *The Border Broadcasting Dispute: A Unique Case Under Section 301*, 6 INT'L TRADE L.J. 39 (1980-81).

20. Taiwan's total external trade for 1981 amounted to $43.8 billion, or 94.8% of Taiwan's $46.2 billion GNP. Exports of $22.6 billion accounted for 48.9% of the GNP. U.S. Department of Commerce, International Trade Administration, *Foreign Economic Trends and their Implications for the United States-Taiwan* (June 1982) (preliminary draft) [hereinafter, *FET 6/82*]. Other U.S. government-generated data and analyses are available in the annual papers entitled "Trade Outlook for Taiwan," available from the American Institute in Taiwan [hereinafter cited as *AIT Outlook*].

21. *FET 6/82, supra* note 20.

22. *Id. See also AIT Outlook 1982, supra* note 20.

23. *AIT Outlook 1982, supra* note 20, at 2.

which Taiwan had a record surplus of $3.4 billion.[24] In the first five months of 1982, Taiwan's exports to the United States increased by over 17%, in spite of the U.S. recession.[25] For all of 1982, U.S.-Taiwan trade is expected to grow by 12.4% over 1981, to $14.5 billion, with Taiwan having a $3.5 billion surplus.[26] Thus, Taiwan is likely to remain the United States' eighth largest trading partner.[27]

Nevertheless, the economic picture is not unblemished. Taiwan's 1981 real GNP grew at a rate of 5.5%, down sharply from the average of 9% per year over the last 30 years.[28] Growth in the first quarter of 1982 was even lower, at 3.5%.[29] These figures are balanced by Taiwan's low inflation rate of 2.5% in 1981 as measured by the wholesale price index[30] and by its approximately 1.4% unemployment rate.[31] Taiwan's 1981 inflation rate is especially significant in view of its 19.9% wholesale price index inflation rate for 1980.[32]

Taiwan's capital inflow outlook remains quite good. In 1981, the country had a capital inflow of $839 million,[33] down from $1.2 billion in 1980.[34] The decrease in capital inflow appears to be the result of the decision to delay certain infrastructure programs as a result of Taiwan's 1981 budget deficit.[35] The availability of foreign funds, including U.S. Eximbank loans, for Taiwan remains strong, in spite of Taiwan's having lost its membership in the IMF and the World Bank.[36] Some 45% of Taiwan's external funds came from U.S. Eximbank and commercial loans.[37]

In summary, Taiwan's economy seems to have ignored the loss of U.S. diplomatic relations and the passage of the Taiwan Relations Act. While Taiwan's economy has had its difficulties—all relatively minor compared to those of other countries, both industrialized and developing—those problems have been linked to global economic movements rather than to

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24. *FET 6/82, supra* note 20, at 3.
25. *Id. But see AIT Outlook 1982, supra* note 20, at 2, giving a figure of 15.8%.
26. *FET 6/82, supra* note 20, at 3.
27. *Id.*
28. *AIT Outlook 1982, supra* note 20, at 1.
29. *Id.*
30. *Id.*
31. *Id.*
32. *FET 6/82, supra* note 20, at 11.
33. *Id.* at 12.
34. U.S. Department of Commerce, International Trade Administration, *Foreign Economic Trends and their Implications for the United States-Taiwan,* FET 81-095 at 12 (August 1981) [hereinafter, *FET 6/81*].
35. *FET 6/82, supra* note 20, at 12.
36. *Id.*
37. *Id.*

Taiwan's particular diplomatic status.

III. CASES INVOLVING U.S.-TAIWAN TRADE

This section reports on particular U.S. cases involving products imported in significant quantity from Taiwan.[38] It is divided into subsections corresponding to the relevant statutes.

A. Escape Clause Cases

The escape clause provisions of the Trade Act of 1974[39] allow the President to provide import relief for up to five years, in the form of a tariff increase or quantitative restriction, when increased imports are the substantial cause of serious injury to a domestic industry producing like or directly competitive articles, in order to facilitate an orderly adjustment to import competition. Although there was pressure during the Tokyo Round MTN to allow for selective safeguards which would affect only the chief suppliers of an article, the law currently requires that import relief be imposed on a nondiscriminatory basis. However, the President may negotiate orderly marketing agreements (OMAs) with individual countries to restrict imports selectively.

Procedurally, escape clause actions are instituted by the International Trade Commission, usually following receipt of a petition therefor by the affected domestic industry. The Commission is required to report its recommendations to the President within six months from the time a petition is received. If the Commission finds that the statutory elements for import relief are lacking, the investigation is terminated and the President may not provide import relief under the escape clause. If, on the other hand, the Commission finds that the domestic industry has suffered serious injury substantially caused by increased imports, it recommends the type and quantum of relief which it finds necessary to enable the industry to adjust to import competition. Thereafter, the President has 60 days within which to determine the type and quantum of relief, if any, that will be granted. If the President's decision is different from the ITC's recommendation, the Congress may by joint resolution disapprove the President's determination within 90 legislative days after the President's determination; in such a

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38. For a more detailed treatment of cases between January 1, 1979 and June 15, 1981, see D. Simon, *Legal Developments in US-ROC Trade from January 1, 1979 through June 15, 1981*, 1 CHINESE YEARBOOK OF INTERNATIONAL LAW AND AFFAIRS 97 (1981) [hereinafter, "Simon, *Legal Developments*"].

39. 19 U.S.C. §§2251-2298 (1976 & Supp. V 1981).

case, the relief recommended by the ITC will be implemented.[39.1]

Thus the escape clause is a fair-trade statute providing relief when increased imports substantially cause serious injury; there is no requirement that an unfair practice be alleged.

The escape clause enjoyed a vogue during the period March 1976-December 1980, when the ITC handed down decisions in no fewer than 34 escape clause cases.[40] However, since the December 1980 negative determination in the automobile case,[41] the ITC has heard only two escape clause investigations.[42] This is surprising in light of the tendency for trade cases to increase during a recession, but may be explained by such factors as the uncertainty of receiving meaningful relief even if the ITC finds in the affirmative, the perceived difficulty in obtaining an affirmative ITC recommendation, the increasing cost of such investigations, and the large amount of discretion vested in the President under the escape clause.

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Mushrooms.[43] Effective November 1, 1980, the President imposed a three-year duty increase on imported canned mushrooms as follows: year 1, 20% ad val.; year 2, 15% ad val.; year 3, 10% ad val.[44] These increases are superimposed on the column 1 rates.[45] The import relief will expire on October 31, 1983,[46] unless extended via the escape clause review procedures.[47]

The mushroom case is especially significant for Taiwan because of the strong involvement of the PRC in the trade, as set forth below.[48]

In its escape clause report, the ITC recommended that the President implement a quota on mushroom imports for three years, to be allocated by country as the President deemed appropriate.[49] The Commission's quota

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39.1. The Constitutionality of the legislative veto (and, indeed, the entire Escape Clause) is questionable in light of Chadha v. INS, 51 U.S.L.W. 4907 (U.S. June 21, 1983), *affirming* 634 F.2d 408 (9th Cir. 1980).

40. From *Mushrooms*, USITC Investigation No. TA-201-10, USITC Pub. No. 761 (March 1976) through *Certain Motor Vehicles*, USITC Investigation No. TA-201-44, USITC Pub. No. 1110 (December 1980).

41. *Id.*

42. *Fishing Rods*, USITC Investigation No. TA-201-45, USITC Pub. No. 1194 (November 1981) (negative determination); *Tubeless Tire Valves*, USITC Investigation No. TA-201-46, USITC Pub. No. 1286 (September 1982) (negative determination).

43. *Mushrooms*, USITC Investigation No. TA-201-43, USITC Pub. No. 1089 (August 1980).

44. Pres. Proc. 4801 (October 29, 1980), 45 Fed. Reg. 72617 (1980).

45. *Id.*

46. *Id.*

47. 19 U.S.C. §2253(i) (1976).

48. *See also* Simon, *Legal Developments*, *supra* note 38, at 107-111.

49. *Mushrooms*, *supra* note 43, at 1-2.

recommendation was predicated on the finding that—

> It is possible that [Taiwan and Korea] would absorb at least part of any given tariff to maintain their existing share of the U.S. market. There is also a possibility that [the PRC] might absorb any tariff increases in order to increase its small but growing market share.[50]

The Commission, however, avoided the difficult problem of how to allocate imports between Taiwan, Korea and the PRC[51] by recommending that the President set the allocation. The President, in turn, avoided the allocation problem by imposing a tariff increase instead.[52]

The Commission's statement, quoted above, was prescient, at least as to the PRC. Since the imposition of relief, the PRC has captured a major share of the U.S. mushroom import market. Between 1979 and 1981, Taiwan's exports of mushrooms to the United States fell from 50.8 million to 24.6 million pounds, while the PRC's increased from 265 thousand to 27.4 million pounds. In 1980, the PRC directly accounted for 12.6% of U.S. imports; in 1981, that figure increased to 30.96%.[53] For the second half of 1981, the PRC accounted for 38.0% of total U.S. imports.[54] Moreover, PRC prices have declined, apparently to offset the tariff increase and increase market share: in 1980, the average PRC unit value was $0.91 per pound; in 1981, it decreased to $0.84, with a further decline to $0.79 in the second half of 1981.[55]

The ability of the PRC to increase market share and quantity has undermined the effectiveness of the import relief, leading in turn to efforts to further restrict PRC mushrooms. In July 1982 the domestic industry filed a petition at the ITC under section 406 of the Trade Act of 1974[56] alleging that mushroom imports from the PRC were causing market disruption with the United States.[57] The ITC decision was evenly divided (by 2-2 vote) on

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50. *Id.* at 24.

51. 19 U.S.C. §2253(d)(2) (1976)requires that a quota permit imports at not less than the level of the most recent "representative" period. However, before it received MFN status, effective February 1, 1980 (45 Fed. Reg. 6882 (1980)), the PRC had been effectively excluded from the U.S. market by virtue of the high column 2 duty rate on canned mushrooms (10 cents per lb. v. 3.2 cents per lb. for column 1). Therefore, it could be — and was — argued that there was no "representative" period for PRC imports.

52. Note 44, *supra.*

53. *Certain Mushrooms,* USITC Investigation No. TA-203-13, USITC Pub. No. 1239 at A-60, 61 (April 1982).

54. *Id.* at A-61.

55. *Id.*

56. 19 U.S.C. §2436 (1976 & Supp. V 1981).

57. Notice of Investigation at 47 Fed. Reg. 31631 (July 21, 1982).

the question of the existence of market disruption.[58] Consequently, the U.S. Trade Representative (USTR) solicited comments on the advisability of relief.[59]

In addition, on October 18, 1982 a different faction of the domestic industry filed an antidumping petition with respect to mushrooms from the PRC, Hong Kong and Macao.[60] As of this writing, no action has been taken in this petition. It is of interest that the petition suggests that the Department of Commerce choose Taiwan as the "surrogate" country for the PRC for purposes of a cost-of-production analysis; however, it remains to be seen whether the action will be instituted and whether the Taiwan industry will consent to being so used.

Other recent mushroom actions include the following. In September 1981 the ITC recommended that the President remove the duty increase for certain exotic mushrooms;[61] thereafter, the President so lifted the import relief.[62] In a different investigation, the ITC found that termination of relief as to mushrooms broiled in butter would have an adverse economic effect on the domestic industry.[63] Subsequently, the USTR reviewed the ITC's advice, but no changes in the relief were made.[64]

In summary, the President's choice of a tariff increase as import relief in the mushroom escape clause investigation has enabled the PRC to make tremendous inroads into the U.S. market, to the detriment of both Taiwan and the domestic industry.

Non-electric cookware.[65] On January 11, 1980, President Carter imposed a tariff increase on certain porcelain-on-steel cookingware (except teakettles).[66] The amount of relief given was 20 cents per pound for each of

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58. *Canned Mushrooms from the PRC,* USITC Investigation No. TA-406-9 (unpublished at the time of this writing).

59. 47 Fed. Reg. 44652 (October 8, 1982). The case is pending at the time of this writing.

60. Petition dated October 13, 1982, filed on behalf of the Four "H" Corporation.

61. *Certain Mushrooms,* USITC Investigation No. TA-203-9, USITC Pub. 1184 (September 1981). Specifically, the ITC, under the statutory mandate of section 203 of the Trade Act of 1974, 19 U.S.C. §2253(i)(2) (1976), advised that exclusion of certain listed mushrooms from import relief "will not have an adverse economic effect on the domestic industry." *Id.* at 1.

62. Pres. Proc. 4904, February 27, 1982, 47 Fed. Reg. 8753 (1982).

63. *Certain Mushrooms,* USITC Investigation No. TA-203-13, USITC Pub. No. 1239 (April 1982).

64. USTR Request for Comment was published at 47 Fed. Reg. 20060 (1982).

65. *Non-electric Cookware,* USITC Investigation No. TA-201-39, USITC Pub. No. 1008 (November 1979). For further details and analysis, see Simon, *Legal Developments, supra* note 38, at 101-3.

66. Pres. Proc. 4713, 45 Fed. Reg. 3561 (1980).

the first two years, 15 cents per pound for the third year, and 10 cents per pound for the fourth year, all in addition to the column 1 rate.[67] In the fifth year, the duty would revert to the column 1 rate, currently 3.2% ad valorem.[68] The relief order also provided for a midpoint review after 2 years;[69] that review was held, and the ITC advised the President that termination of relief would have an adverse economic effect on the domestic industry,[70] and the President decided not to terminate relief.[71]

The relief implemented in this case had a significant effect on U.S. imports of enamelware from Taiwan. From an initial level of $85,000 in 1976, U.S. imports from Taiwan increased tenfold to $808,000 in 1977, then more than quintupled in 1978 to $4.5 million. In 1979, U.S. imports from Taiwan were $4.7 million.[72] In 1980, imports from Taiwan of cookingware subject to the relief[73] amounted to $1.7 million—a 64% decline. However, total enamel cookingware imports from Taiwan, including articles exempted from the duty increase, amounted to $3.2 million,[74] for a gross decline of 32%.[75] In 1981, U.S. imports of covered enamelware from Taiwan[76] totaled $2.6 million—a decline of 44.7% from the pre-relief peak, but an increase of 52.9% from the preceding year. Total enamelware imports from Taiwan in 1981 amounted to $4.8 million—approximately the same level as the pre-relief peak.[77]

Leather Wearing Apparel.[78] In this escape clause case, the ITC unanimously recommended the imposition of import relief; however, President Carter decided against relief, and the industry was unable to secure a Congressional veto which would have required implementation of the Commission's recommendation.

The U.S. leatherwear industry had sought import relief since at least 1976, in actions involving petitions to remove the product from the GSP (Generalized System of Preferences) eligibility list and countervailing

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67. *See* TSUS items 923.60, 654.02.

68. TSUS item 654.02. The LDDC rate is 2.7% ad valorem.

69. 45 Fed. Reg. 759 (1980).

70. USITC Investigation No. TA-203-10, USITC Pub. No. 1190 (1981).

71. The USTR Solicitation of Comments appeared at 46 Fed. Reg. 56099 (1981).

72. Bureau of Census statistics, FT 246.

73. *I.e.,* enamelware other than teakettles, valued not over $2.25/lb. TSUS item 654.0224.

74. *I.e.,* TSUS items 654.0215, 654.0224, and 654.0225.

75. Bureau of Census statistics, FT 246.

76. TSUS 654.0224.

77. Bureau of Census statistics, FT 246.

78. *Leather Wearing Apparel,* USITC Investigation No. TA-201-30, USITC Pub. No. 1030 (1980). For a more detailed analysis, see Simon, *Legal Developments, supra* note 38, at 103-7.

duties.[79]

In its escape clause report, the Commission unanimously found the industry entitled to relief and recommended a three-year duty increase beginning with a 25% ad valorem surcharge for all items valued not over $150.00 each.[80] The President subsequently rejected the ITC recommendation and denied relief.[81] Finally, the domestic industry waged a strong and sharply contested effort in Congress to obtain a legislative override, but that effort was unsuccessful.[82] In his denial of relief, President Carter listed, *inter alia,* three factors that may be useful for citation in subsequent cases:

1. Import relief would be inflationary.
2. Price increases would further erode consumer demand.
3. It was "not clear that the industry would be in a position to compete once relief expires."[83]

Subsequent testimony of executive branch officials before the appropriate House and Senate subcommittees indicated that the President's chief concern as to the import relief was its effect upon his anti-inflation plan, which had been announced fewer than 10 days prior to the President's decisions denying relief.[84] Thus the factors listed above may be of somewhat limited use as precedent; apparently, the President's "motivation" was the need to show a consistently united front on inflation issues.

In spite of Taiwan's success in the leatherwear case, the mere existence of the investigation introduced significant uncertainties into the leatherwear market and were doubtless a factor in the decline of leatherwear imports from Taiwan from $35.6 million in 1979 to $24.6 million in 1980 in spite of a stiff increase in hide prices.[85]

B. Escape Clause Review Cases

Import relief provided under the escape clause is of limited duration: the statute limits relief to an initial period of not more than five years; thereafter, relief may be extended for an additional period of not more than

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79. *Id.*

80. *Leather Wearing Apparel, supra* note 78.

81. 45 Fed. Reg. 19543 (1980).

82. 126 Cong. Rec. S.12713-17 (1980).

83. 45 Fed. Reg. 19543 (1980).

84. *See* Statement of Assistant U.S. Trade Representative Ann Hughes in *Hearing Before the Subcommittee on International Trade of the Committee on Finance of the U.S. Senate, 96th Cong. 2d Sess., on S. Con. Res. 108* at 6 (Comm. Print 1980).

85. Bureau of Census statistics.

three years.[86] Thus the maximum period of escape clause relief is eight years. In effect, however, relief is rarely granted for the full initial five years permitted by the statute, so that the eight-year maximum period is generally not over five or six years.

Extension of relief upon the termination of the initial period is not automatic; section 203 of the statute provides that between nine and six months prior to the expiration of the initial period, the domestic industry may request that the Commission investigate the probable economic effects of termination of the relief.[87] Alternatively, the President may himself request such an investigation, or the Commission may initiate *sua sponte*.[88]

Extension hearings and proceedings under section 203 are similar in most respects to escape clause hearings and proceedings, with staff investigations, public hearings and a published report to the President. There are significant differences, however, in the legal effect of the ITC decision. Under the escape clause, an affirmative ITC finding constitutes a relief recommendation to the President, given added credibility by the possibility of a congressional veto, while a negative finding absolutely precludes the President from imposing import relief under the escape clause. In extension proceedings, on the other hand, the Commission's decision—whether affirmative or negative—is wholly recommendatory, and there is no provision for Congressional veto. In fact, in section 203 extension cases the Commission is not required to propose a particular level of relief; rather, it informs the President as to the probable economic effect if relief is terminated, but need not propose a particular level if further relief is recommended.

Under section 203, furthermore, the level of extension relief may not exceed the relief in effect on the last day prior to the extension.[89] Also, the act calls for a phasing down of relief over the relief period:

> To the extent feasible, any import relief provided pursuant to this section for a period of more than 3 years shall be phased down during the period of such relief, with the first reduction of relief taking effect no later than the close of the day which is 3 years after the day on which such relief first took effect.[90]

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86. 19 U.S.C. §2253(h) (1976 & Supp. V 1981).
87. 19 U.S.C. §2253(i) (1976).
88. *Id.*
89. 19 U.S.C. §2253(h) (1976 & Supp. V 1981).
90. *Id.*

Footwear.[91] The Orderly Market Agreements (OMAs) in effect between the United States and both Taiwan and Korea from June 1977 were allowed to expire on June 30, 1981, when President Reagan declined to negotiate further relief.[92] In spite of the lifting of the OMA, however, Taiwan's 1981 footwear output suffered considerable declines of 21.4% for leather shoes, 7.3% for rubber shoes and 9.4% for plastic shoes.[93] Footwear exports decreased by 0.1%.[94]

The ITC completed the escape clause investigation that led to the OMAs in February 1977, unanimously recommending relief.[95] In June 1977, the United States entered into OMAs with Taiwan and Korea.[96]

The ITC review investigation was instituted on December 5, 1980 following receipt of a petition therefor on October 23, 1980. A public hearing was held on March 9-10, and the Commission's report was transmitted to the President on April 22, 1981. The Commission unanimously advised that termination of the Taiwan OMA would have a significant adverse economic impact on the domestic industry and recommended the extension of that relief for two years at then-current levels on all categories except athletic footwear. Three Commissioners (Alberger, Calhoun and Stern) also advised that termination of the Korean OMA and of the restrictions on athletic footwear from Taiwan would not have significant adverse economic effect and therefore advised in favor of such termination.[97] Commissioner Bedell advised that termination of the Korean OMA or of the protection for athletic footwear would have an adverse economic effect and therefore advised such continuations.[98] On June 30, 1981, President Reagan decided not to extend the import relief on footwear, and the OMAs expired by their terms.[99]

The President's decision was the subject of sharp Congressional criticism, predictably from representatives of shoe-producing states.[100] In addition, the domestic industry filed a petition for a tariff reclassification of certain footwear which, if granted, could have a substantial effect on Tai-

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91. *Nonrubber Footwear*, USITC Investigation No. TA-203-7, USITC Pub. No. 1139 (April 1981).

92. *See* BNA, *U.S. Import Weekly*, No. 84, at AA-1 (July 1, 1981). For a more detailed analysis, see Simon, *Legal Developments*, *supra* note 38, at 112-15.

93. *FET 6/82*, *supra* note 20, at 6.

94. *Id.* at 8.

95. *Footwear*, USITC Investigation No. TA-201-18, USITC Pub. No. 799 (1977).

96. *Nonrubber Footwear*, *supra* note 91, at A-5. For highlights of the OMAs, see Simon, *Legal Developments*, *supra* note 38, at 112-13.

97. *Nonrubber Footwear*, *supra* note 91, at 1-2.

98. *Id.* at 17ff.

99. *See supra* note 92.

100. *Id.*

wan's exports.[101] Finally, in the last week of October 1982, the U.S. footwear industry filed a massive section 301 petition with the Office of the USTR alleging that the European Community, Taiwan and other countries have imposed unfair import restrictions on U.S. shoes.[102] Fifty U.S. Senators and 111 House members urged the USTR to accept and act on the petition, which alleges that unfair trade practices abroad have caused the diversion of world exports to the U.S. market, thereby injuring the U.S. industry.[103] The industry also announced it would institute countervailing duty actions against Taiwan and other principal exporters within several months.[104]

Thus footwear remains a volatile issue in US-Taiwan trade.

Color Televisions.[105] In March 1977, the ITC concluded an escape clause investigation of color television receivers,[106] as a result of which import relief was imposed in the form of orderly marketing agreements with Japan, Taiwan and Korea. In December 1979, the domestic color TV industry requested and the Commission instituted a section 203 investigation to advise the President as to the probable economic effects of the termination of relief on June 30, 1980. The Commission advised the President that termination of the Japan OMA would not have an adverse effect but that termination of the Taiwan and Korea OMA would be likely to result in injury to U.S. producers. Thereafter, extension OMAs with Taiwan and Korea were negotiated but that with Japan was allowed to expire. On June 30, 1982, the OMAs with Taiwan and Korea expired.[107] The domestic industry has announced its intention to continue its activities to combat imports, but to date its principal actions have been directed at the problem of the Commerce Department's settlement of the Japanese antidumping case.[108]

The *Color Television* case presents an unusual Taiwanese response to

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101. *Tariff Classification of Footwear-Request for Comments,* 47 Fed. Reg. 3375 (1982).

102. BNA, *U.S. Import Weekly,* Vol. 7, p. 106 (October 27, 1982).

103. *Id.*

104. *Id.*

105. *Color Television Receivers,* USITC Investigation No. TA-203-6, USITC Pub. No. 1068 (May 1980). *See also* the ITC's quarterly reports on prices, orders and expenditures (Investigation No. 332-112, USITC Pub. No. 1235 (March 1982)) and on U.S. production, shipments, inventories, etc. (Investigation No. 332-112, USITC Pub. No. 1245 (March 1982)). For a more detailed analysis of the legal issues, see Simon, *Legal Developments, supra* note 38, at 115-6.

106. *Color Television Receivers,* USITC Investigation No. TA-201-19, USITC Pub. No. 808 (March 1977).

107. BNA, *U.S. Import Weekly,* No. 135 at 423 (July 7, 1982).

108. *Id. See also* BNA, *U.S. Import Weekly,* No. 140 at 581 (August 11, 1982).

an escape clause action. During the relief period, several of the principal television manufacturers in Taiwan, including Tatung and Sampo, established assembly plants in the United States,[109] as did most of the major Japanese producers.[110] A similar relocation of production or assembly facilities has occurred in automobiles[111] and motorcycles.[112] Whether this global rationalization of facilities in an import-relief environment will remain viable in an open market remains to be seen.

Fishing Rods.[113] In November 1981, the ITC made a negative determination (Commissioner Frank dissenting) in this case, finding that fishing rods and parts thereof "are not being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry."[114] This was the second escape clause investigation of fishing rods in recent years; the first, completed in September 1978, also resulted in a negative determination.[115] (This investigation is considered in the Escape Clause Review Section because the ITC had recently conducted its first fishing rods investigation; the 1981 case, though, was not a review investigation in the strict sense.)

In the 1981 investigation, the ITC found that the U.S. industry was not seriously injured and that increased imports were not the substantial cause of such injury as may have been experienced.[116] Specifically, the Commission found that domestic production, shipments, sales and employment had all increased; that domestic inventories had decreased; that the larger, more efficient domestic firms were profitable; and that the decline in domestic capacity utilization was the result of an increase in domestic capacity.[117] Regarding causation, the Commission found that the small increase in imports was inconsistent with the statutory definition of substantial cause and that a shift in consumer preferences from tubular to solid rods was a cause of injury more important than increased imports.[118]

Between 1976 and 1980, Taiwan's share of the import market in fishing rods increased from 40% to 50%, chiefly at the expense of Japan.[119] In

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109. *See Color Television Receivers, supra* note 105, at A-41.

110. *Id.* at A-16, A-17.

111. *See, e.g., The Washington Post,* Nov. 2, 1982 at C-8, col. 1.

112. *Id.*

113. *Fishing Rods and Parts Thereof,* USITC Investigation No. TA-201-45, USITC Pub. No. 1194 (November 1981).

114. *Id.* at 1.

115. *Certain Fishing Tackle,* USITC Investigation No. TA-201-34, USITC Pub. No. 917 (September 1978).

116. *Fishing Rods, supra* note 113, at 4.

117. *Id.* at 7.

118. *Id.* at 12.

119. *Id.* at A-11.

absolute dollars, Taiwan's exports increased from $5.4 million in 1976 to $12.6 million in 1980. In 1980, Taiwan accounted for 25.8% of the market (imports plus domestic production) by quantity, up from 18.7% in 1976.[120]

C. *Antidumping Cases*

The antidumping law currently in effect[121] was enacted as a part of the Trade Agreements Act of 1979.[122] It provides that when goods are sold in the United States at "less than fair value" (LTFV) and when such LTFV sales materially injure a domestic industry, then there shall be imposed on such goods an antidumping duty equal to the LTFV margin. In general, LTFV sales occur where the price in the home market exceeds the U.S. price of the goods. This can occur, for example, where the home market tariff is high relative to the U.S. tariff. Then sales behind the home market tariff wall will tend to rise to near the prices commanded by imports in the home market, while prices in the United States will remain relatively lower because of the lower U.S. tariff. Such LTFV sales are subject to an antidumping duty only if they injure a cognate U.S. industry. The LTFV investigation is conducted by the Department of Commerce, while a concurrent injury investigation is conducted by the International Trade Commission.

Of the 83 dumping orders outstanding on March 28, 1980, three related to products from Taiwan, namely, carbon steel plate (determination date June 13, 1979), polyvinyl chloride sheet and film (June 30, 1978), and clear sheet glass (August 20, 1971).[123] By contrast, 24 of those cases involved exports from Japan.[124]

Bicycle Tires and Tubes. In January 1978, Carlisle Tire and Rubber Co. filed an antidumping petition with respect to bicycle tires and tubes from Taiwan.[125] That petition terminated in a negative determination.[126] The domestic industry appealed, and the Court of International Trade remanded with respect to two Taiwan exporters.[127]

In addition, the domestic industry filed a new antidumping action on

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120. *Id.* at A-10, A-11.

121. 19 U.S.C. §§1673-1673i (Supp. V 1981).

122. TAA 79, *supra* note 19.

123. Notice of Administrative Review, 45 Fed. Reg. 20511 (1980).

124. *Id.*

125. 43 Fed. Reg. 4396 (1978).

126. 43 Fed. Reg. 61066 (1978).

127. Carlisle Tire and Rubber v. United States, 3 ITRD 2074 (Slip. Op. 82-37, May 12, 1982). The affected producers were Cheng Shin and Kenda.

April 30, 1982 as to bicycle tires and tubes from Taiwan.[128] The ITC issued a preliminary affirmative finding in June 1982,[129] basing its determination particularly on the period January-April 1982.[130] Specifically, the Commission noted that the decline in Taiwan exports in 1979 through 1981 (from 11.8 million to 9.1 million units)[131] had been reversed by significant growth in the first four months of 1982 versus the same part of 1981. These partial-year figures showed a 41.2% increase, from 2.3 million to 3.3 million units, together with a decline in unit price from $1.77 to $1.42.[132]

At the present, the investigation is continuing, and a preliminary determination from the Department of Commerce is expected shortly.[133]

Carbon Steel Plate.[134] This antidumping investigation was self-initiated by the Department of Treasury under the Trigger Price Mechanism (TPM) on October 25, 1978.[135] The Treasury Department had determined that steel plate from China Steel Corp. (CSC) had entered the United States at prices below the appropriate trigger price and at prices that were likely to be at less than fair value. CSC is Taiwan's only integrated steel mill, a "greenfield" facility which had started full-scale commercial production in February 1978. CSC had been "caught" by the commencement of the TPM when it was unable to fill outstanding orders before the end of the pre-TPM "grace period" owing to difficulties experienced in the start-up of its plate production.[136]

In its preliminary determination, the Treasury Department found an LTFV margin of 34%.[137] The case then was referred to the ITC, where an evenly divided (2-2) Commission decided that CSC had caused injury in the West Coast regional market.[138]

As a result of the issuance of a final dumping order,[139] CSC has with-

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128. 47 Fed. Reg. 23797 (1982).

129. *Bicycle Tires and Tubes from Taiwan,* USITC Investigation No. 731-TA-94, USITC Pub. No. 1258 (June 1982).

130. *Id.* at 8.

131. *Id.* at A-13.

132. *Id.*

133. *See* 47 Fed. Reg. 23797 (1982).

134. For a more detailed discussion, see Simon, *Legal Developments, supra* note 38, at 117-20.

135. 43 Fed. Reg. 49875 (1978).

136. Simon, *Legal Developments, supra* note 38, at 117-18.

137. 44 Fed. Reg. 9639 (1978).

138. *Carbon Steel Plate from Taiwan,* USITC Investigation No. AA1921-197, USITC Pub. No. 970 (1979). See the analysis in Simon, *Legal Developments, supra* note 38, at 117-20.

139. 44 Fed. Reg. 33877 (1979).

drawn from the U.S. market.[140] It remains to be seen whether the recent settlement of the U.S.-EEC steel dispute[141] will enhance CSC's opportunity for reentry.

Motorcycle Batteries. In March 1982, the International Trade Commission made a final determination that motorcycle batteries from Taiwan were not the cause of material injury to the domestic industry, and the investigation was terminated.[142] Previously, the Department of Commerce had found that these products were being sold at less than fair value by Taiwanese manufacturers, with dumping margins ranging from 1.0% to 16.8%.[143] The weighted-average margin for all sales was 8%.[144]

The ITC decision[145] reveals several interesting analyses. First, the Commission determined that the market was divided into two segments, 6-volt batteries and 12-volt batteries, and that the 6-volt Taiwanese batteries were not competitive with 6-volt U.S. batteries because they were neither interchangable nor "like."[146] As to the 12-volt batteries, the Commission found that "the [domestic] industry prospered during times of greatest import penetration and did less well during times of decreased imports," leading to a finding that the imports could not have been the cause of the injury.[147]

In 1980, U.S. imports of motorcycle batteries from Taiwan amounted to 760.5 thousand units, up 10.6% from the preceding year, with a value of $5.26 million for 1980 and $5.25 million for 1979.[148] In 1980, Taiwan had captured 35.6% of apparent consumption.[149]

Fireplace Mesh Panels. On June 7, 1982, the Department of Commerce published an antidumping order as to fireplace mesh panels from Taiwan.[150] A margin of 4.7% was found for all but two companies; of the latter, one had a margin of 6.4% and the other had no margin (0%).[151] The latter firm was subjected to the order in spite of its lack of dumping "to enable [the Commerce Department] to monitor possible diversions of

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140. *See* 46 Fed. Reg. 48280 (1981) (final results of administrative review).

141. BNA, *U.S. Import Weekly*, Vol. 7, No. 4 at 99 (October 27, 1982).

142. *Motorcycle Batteries From Taiwan*, USITC Investigation No. 731-TA-42, USITC Pub. No. 1228 (March 1982).

143. 47 Fed. Reg. 9264, 9268 (1982).

144. *Id.*

145. *Motorcycle Batteries From Taiwan, supra* note 142.

146. *Id.* at 4-5.

147. *Id.* at 9.

148. *Id.* at A-24.

149. *Id.* at A-8, A-24.

150. 47 Fed. Reg. 24616 (1982).

151. *Id.*

merchandise."[152]

The International Trade Commission based its injury finding[153] on the following factors:

1. The margin of underselling by LTFV imports was substantial: 45% in 1978 and 29% in 1981.[154] (This was cited as a "weak" indicator of causation because of product differences.)[155]
2. Market penetration by imports increased between 1979 and 1981, to a level of 43.2% for the total market and 68% for the open (non-captive) market.[156]
3. There were significant lost sales.[157]

Therefore, even though imports had declined between 1979 and 1980,[158] the Commission found the requisite injury and causal link.

While this was not a major case in microeconomic terms—U.S. imports from Taiwan in 1980 were valued at only $785,000[159]—it may be expected that the dumping will prevent the expansion of Taiwan's U.S. sales.

Clear Sheet Glass. Clear sheet glass from Taiwan has been subject to a dumping order since 1971.[160] The administrative review conducted in 1981 disclosed that the two exporters under the order at that time, Hsinchu Glass Works and Taiwan Glass Corp., made no exports to the United States between July 1, 1979 and July 31, 1980.[161]

The 1982 administrative review disclosed that neither Hsinchu nor Taiwan Glass exported to the United States between August 1, 1980 and July 31, 1981.[162] However, a third firm, Yotak Trading Company, had made sales during the relevant period. Yotak failed to respond in a timely fashion to the International Trade Administration questionnaire, and it was therefore assigned a margin equal to the highest known margin from Tai-

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152. Final Determination of Sales at LTFV, 47 Fed. Reg. 15393 (1982).

153. *Fireplace Mesh Panels from Taiwan,* USITC Investigation No. 731-TA-49, USITC Pub. No. 1250 (May 1982).

154. *Id.* at 6-7.

155. *Id.* at 6-7, n. 15.

156. *Id.* at 6.

157. *Id.* at 7-8.

158. *Id.* at A-15.

159. *Id.* at A-13.

160. T.D. 71-226, 36 Fed. Reg. 16508 (1971).

161. Preliminary results, 46 Fed. Reg. 23278 (1981); final results, 46 Fed. Reg. 42315 (1981).

162. Preliminary results, 47 Fed. Reg. 8607 (1982); final results, 47 Fed. Reg. 42769 (1982).

wan, namely 6.0%.[163]

D. Countervailing Duties

The countervailing duty (CVD) statute now in effect in the United States[164] was enacted as part of the Trade Agreements Act of 1979.[165] It provides that when goods produced abroad and imported into the United States are benefited by a subsidy and a domestic industry is materially injured thereby, then a countervailing duty equal to the amount of the net subsidy shall be imposed. The predecessor statute did not contain an injury provision except for goods imported under the Generalized System of Preferences (GSP).[166] Thus CVD cases go to subsidization, while dumping cases go to price discrimination. Taiwan is a "country under the agreement" for CVD purposes and is therefore entitled to an injury investigation in all CVD cases.[167]

Bicycle Tires and Tubes. On February 17, 1982, the International Trade Administration issued a CVD order as to bicycle tires and tubes from Taiwan.[168] The order applies only to one exporter, Cheng Shin, and sets a net rate of 0.893% ad valorem.[169]

Similarly to the bicycle tires and tubes dumping case, the CVD case had a convoluted history. On January 8, 1979, the Secretary of Treasury[170] issued a negative CVD determination as to bicycle tires and tubes from Taiwan.[171] The Secretary found that benefits had been received under three programs—a preferential income tax ceiling, preferential export financing, and deferred duty payments on machinery and equipment imported into Taiwan—but that the net benefit received, 0.28% ad valorem, was *de minimis*.[172]

Petitioner Carlisle Tire and Rubber Co. appealed, and the Court of International Trade remanded to the International Trade Administration.[173]

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163. *Id.*

164. 19 U.S.C. §§1671-1671f (Supp. V 1981).

165. TAA 79, *supra* note 19.

166. 19 U.S.C. §1303 (1976) (prior to 1979 amendment). These provisions continue to apply to countries that are not signatories of the MTN subsidy code or otherwise entitled to the benefits of the new statute.

167. 46 Fed. Reg. 1181 (1980).

168. 47 Fed. Reg. 6913 (1982).

169. *Id.*

170. Then the administering authority for the CVD statute.

171. 44 Fed. Reg. 1815 (1979).

172. *Id.*

173. Carlisle Tire and Rubber Co. v. United States, 517 F. Supp. 704, 2 ITRD 1577 (C.I.T. 1981).

The court held that the *de minimis* rule is applicable to CVD cases but that factual questions as to the tax ceiling and the export financing remained, requiring a further investigation.[174]

Accordingly, the International Trade Administration reopened the investigation.[175] In its final determination, the agency addressed both the tax ceiling and the export financing issue.[176]

As to the preferential income tax ceiling, it was argued on behalf of Taiwan that any benefit thereunder was not countervailable since the tax ceiling benefit was generally available to all "productive enterprises" and hence was not "industry specific."[177] In response, the agency held that the benefit was countervailable because "only certain categories of industry may benefit from the maximum tax rate," namely, those that are listed in the "categories of industries" regulations promulgated to implement Taiwan's Statute for Encouragement of Investment.[178]

As to the preferential export financing issue, the agency determined that the preferential loan rate for raw material purchases under an export loan program was countervailable; the amount of the subsidy was the differential between the discounted loan rate and the commercial rate.[179]

The International Trade Administration determined that only Cheng Shin received a greater than *de minimis* benefit under these two programs, in a net amount of 0.893% ad valorem.[180] Consequently, an order was published to that effect.[181]

Fireplace Mesh Panels. On August 18, 1982, the International Trade Administration initiated a CVD investigation of fireplace mesh panels from Taiwan.[182] Thus this product, similarly to bicycle tires and tubes, is subject to both dumping and CVD investigations.[183] On August 31, the ITC made a preliminary affirmative determination,[184] but stated:

> Figures for January-June 1982 indicate that imports from Taiwan declined substantially in this period compared with the corresponding

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174. 2 ITRD, *supra* note 173, at 1578-1580.
175. 46 Fed. Reg. 39464 (1981).
176. 46 Fed. Reg. 53201 (1981).
177. 46 Fed. Reg. at 53202 (1981).
178. *Id.*
179. *Id.*
180. 46 Fed. Reg. at 53203 (1981).
181. 47 Fed. Reg. 6913 (1982).
182. 47 Fed. Reg. 36005 (1982).
183. *See* text at note 150, *supra.*
184. *Fireplace Mesh Panels from Taiwan,* USITC Investigation No. 701-TA-185 (Preliminary), USITC Pub. No. 1284 (September 1982).

> period of 1981. Similarly, the ratio of imports from Taiwan to apparent consumption and to apparent open-market consumption have declined significantly during this period. If this trend continues, it may well impact upon the Commission's determination of material injury or threat of material injury should a final investigation be conducted on this matter.[185]

Thus a continued decline in consumption may lead to a negative final determination.[186]

E. Unfair Competition

Section 337 of the Tariff Act of 1930, as amended, prohibits "unfair methods of competitive and unfair acts in the importation of articles into the United States, . . . the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States . . . . "[187]

Section 337 is generally invoked as a remedy to patent infringement by goods imported into the United States. Cases thereunder are heard under adjudicatory proceedings by an Administrative Law Judge of the ITC, with a full legislative-type hearing by the Commission following the ALJ's recommended determination.[188] If a patent is held valid and infringed, the usual remedy is an exclusion order.[189]

Skateboards. In November 1978, the ITC found that U.S. Patent No. 3,565,454 covering kicktail skateboards was invalid for obviousness.[190] The U.S. patentee/petitioner appealed to the Court of Customs and Patent Appeals (CCPA), and the court held the patent valid.[191] On remand, the Commission issued an exclusion order.[192]

Skateboards is significant in its embodiment of the standard of patentability as handed down by the CCPA. The Taiwan manufacturers had argued before the CCPA that the commercial success of an alleged invention has relevance as to validity only if the criteria of nonobviousness under 35

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185. *Id.* at 7 (footnote deleted).

186. At the time of this writing, the preliminary International Trade Administration finding was not available.

187. 19 U.S.C. §1337(a) (1976).

188. *Id.;* 19 C.F.R. § 12.39 (1983).

189. *See, e.g., Certain Skateboards,* USITC Investigation No. 337-TA-37, USITC Pub. No. 1101 (1980).

190. *Certain Skateboards,* USITC Investigation No. 337-TA-37, USITC Pub. No. 926 (1978).

191. Stevenson v. ITC, 612 F.2d 546 (CCPA 1979).

192. *Certain Skateboards, supra* note 189.

U.S.C. §103 do not produce a firm conclusion, i.e., only in a close case.[193] This is, in fact, the law among the circuit courts. The CCPA, disagreeing, held that:

> The inference of obviousness drawn from prior art disclosures is only prima facie justification for drawing the ultimate legal conclusion that the claimed invention is obvious under 35 U.S.C. §103. Therefore it is necessary that such secondary considerations [as commercial success] also be evaluated in determining the final validity of that legal conclusion.[194]

In other words, the secondary criteria (commercial success, long-felt but unsatisfied need, etc.) are sharply elevated from their usual status as determinants only in close cases.

The CCPA's apparent solicitude for patent holders has consequences beyond section 337 cases in view of the recent statute[195] vesting the CCPA—now the Court of Appeals for the Federal Circuit—with national jurisdiction over all appeals in cases where the validity or infringement of a patent is at issue.

In July 1981, the U.S. Court of Appeals for the Ninth Circuit affirmed a lower court decision finding U.S. Patent No. 3,565,454 to be invalid for obviousness.[196] The ITC subsequently reopened the investigation *sua sponte* to determine whether the exclusion order should be set aside,[197] and ultimately dissolved the exclusion order.[198]

Other cases. Section 337 is enjoying a vogue, and several cases have been filed naming respondents in Taiwan, including Coin-Operated Audio-visual Games,[199] Pump Top Insulated Containers,[200] Rotary Scraping Tools,[201] Airtight Cast-Iron Stoves,[202] Window Shades,[203] and Food Slicers.[204]

On an individual basis, these cases have little effect on overall U.S.-

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193. *See* 612 F.2d at 553.
194. *Id.*
195. Federal Courts Improvement Act of 1982, P.L. 97-164.
196. Stevenson v. Grentec, Inc., 652 F.2d 20 (9th Cir. 1981), *cert. denied* 50 U.S.L.W. 3854 (April 27, 1982).
197. 47 Fed. Reg. 28485 (1982).
198. 47 Fed. Reg. 39747 (1982).
199. USITC Investigation No. 337-TA-105, USITC Pub. No. 1267 (1982).
200. USITC Investigation No. 337-TA-59, USITC Pub. No. 1010 (1979).
201. USITC Investigation No. 337-TA-62, USITC Pub. No. 1027 (1980).
202. USITC Investigation No. 337-TA-69, USITC Pub. No. 1126 (1981).
203. USITC Investigation No. 337-TA-83, USITC Pub. No. 1152 (1981).
204. USITC Investigation No. 337-TA-76, USITC Pub. No. 1159 (1981).

Taiwan trade. However, the increasing resort to section 337 actions—especially coupled with the CCPA's solicitude for patentees, discussed above—increases the likelihood that patent cases may act as a restraint on U.S.-Taiwan trade relations.

IV. OUTSTANDING ISSUES

The principal outstanding issue[205] in U.S.-Taiwan trade is the problem of counterfeiting and infringement of intellectual property. The "International Anticounterfeiting Coalition" (IAC), based in New York and composed of large American, English and other European firms, has been applying continuous pressure for changes in Taiwan's anti-counterfeiting laws. The IAC labels Taiwan the center of the largest counterfeiting operations in the world.

The American Institute in Taiwan reports it has received at least 41 counterfeiting complaints to date in 1982, none of which has been settled. The AIT's *1982 Outlook,* however, indicates that this issue may be moving toward resolution:[206]

> Protection of intellectual property rights, including patents, trademarks, and copyrights, remains a difficult and contentious issue. Taiwan is not a member of any international agreement on patent and trademark protection, and is unlikely to become one. The International Anti-Counterfeiting Coalition recently identified Taiwan as the world's number one source of counterfeit goods. Major American consumer goods manufacturers have serious problems with copies of their products bearing similar or identical trademarks. Similar trademarks are most injurious in the Middle Eastern and African export markets where customers are relatively unsophisticated and frequently cannot read English. Even companies which have registered their trademarks in Taiwan find that trying to enforce their rights is expensive, frustrating, and frequently impossible.
>
> Many high-ranking officials are seriously concerned about the situation and are working to correct it. There can be no doubt that in recent years, such administrative authorities as the Board of Foreign Trade, the Patent Office, and the Bureau of Commodity Inspection and Quarantine have made efforts to help trademark owners. Penalties for

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205. Information in the remainder of this section was provided to the author in numerous recent interviews with officials of the U.S. Departments of Commerce and Agriculture, the American Institute in Taiwan and the Coordination Council for North American Affairs. The synthesis and conclusions are the author's.

206. *AIT Outlook 1982, supra* note 20, at 4.

> violations of local laws protecting patents and trademarks have been increased, and proposals now before the Legislative Yuan would broaden protection and further increase penalties. The current proposals, for instance, would close the very serious loophole denying protection to computer software and graphic design.
>
> Nonetheless, Taiwan has a long way to go before its patent and trademark protection meets the standards expected in the developed world. In practice, sentences handed down for violations are very light, and convictions of even the most flagrant violators are sometimes reversed on appeal. The agricultural chemicals industry is especially hard hit by the difficulty of protecting its patents. Foreign investors sometimes cite patent protection as a reason for reluctance to bring their best technology to Taiwan.

It is the author's understanding that the laws referred to in the *AIT Outlook* quoted above have been enacted and are expected to be implemented in early 1983. In addition, the IAC has apparently decided it would undertake the funding of prosecutions under the Taiwan law.

A second problem that surfaced in part of 1982 now appears to have been resolved. In the first eight months of 1982, there were between 10 and 20 instances where American businessmen had had their passports retained upon entry into Taiwan. These actions, which confined the businessmen to the island, were taken following the filing of criminal complaints by Taiwanese exporters alleging fraud in connection with letters of credit or business transactions. It is the author's understanding that this practice has ceased and that orders will no longer be issued to hold passports or otherwise interfere with business travellers in such cases.

A third problem appears to have surfaced recently in regard to Saudi Arabian financing of a Taiwanese telecommunications project. It is the author's understanding that the Saudi financing, which is on highly favorable terms, would require bidders to comply with information requests as to the bidder's business dealings with Israel, as part of the Arab boycott of Israel. Compliance with this request would run afoul of the antiboycott provisions of U.S. law.[207] This, in turn, could have repercussions far beyond the magnitude of the transactions directly involved, in spite of the fact that Taiwan would appear to be totally devoid of any intention to support the Arab boycott of Israel.

In addition to the foregoing particular problems, there are pending bi-

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207. P.L. No. 95-52, 91 Stat. 235 (1977); P.L. No. 96-72, 93 Stat. 503 (1979); P.L. No. 94-455, 90 Stat. 1520 (1976). *See generally*, A. Dubin, "A Journey Through the Antiboycott Laws," 14 TULSA L.J. 695 (1979).

lateral discussions on proposals for tariff concessions, particularly in certain agricultural products. These issues, however, do not appear extraordinary; indeed, they are a necessary part of strong bilateral relations.

Finally, the *AIT 1982 Outlook* lists several further issues and problems which are set forth below without further comment.[208]

Market Opportunities

The current recession has severely depressed Taiwan's imports from the United States particularly of capital goods. However, some immediate opportunities remain, and a gradual recovery starting late in 1982 should spark renewed demand for a wide range of products.

High Technology

Taiwan's electronics industry continues to show considerable strength despite the recession. Electronics industry production and test equipment is a good area for expanding U.S. exports. In electronics and other high-tech areas, the authorities are seriously concerned about the lack of research and development by Taiwan's industries. In electronics, only 0.9% of total revenue is spent on R & D, as opposed to the five to six percent that is common in other countries. The figure for manufacturing as a whole is only 0.6%. The authorities want this raised to 2.0%. In pursuit of this goal, various incentives are offered to investors. One of the most significant efforts has been the establishment of the "science industry park" at Hsinchu. An independent authority has been created that offers foreign investors who set up R & D facilities tax holidays, expedited approvals, and other incentives.

Increased emphasis on research should further improve the already excellent market opportunities for precision instrumentation, laboratory testing equipment, and computers, especially systems for computer assisted design.

Energy

Projections of Taiwan's energy situation have changed radically in the last year or two. After the last oil price shock, Taiwan was being touted as a major new market for American coal. However, the recession combined with conservation measures and a switch out of energy intensive industries such as aluminum produced a sharp reduction in total power consumption during 1981 and early 1982. Consequently, Taiwan Power Company (Taipower), the largest consumer, is now selling off excess supplies of coal to other domestic users such as the cement industry. Demand for imported coal will not increase substan-

208. *AIT Outlook 1982, supra* note 20, at 5-6.

tially in the near future. Both Taipower and China Steel believe their coal needs are covered by existing contracts until at least 1990.

For the longer term, Taiwan continues to be interested in coal. Port and handling facilities are being improved to handle ships of 125,000 tons and more that will be built for Taipower and China Steel. Future coal imports will come from areas that can handle these ships. Potential exporters should also realize that Taiwan buyers prefer to contract with owners of coal for long-term delivery contracts. They do not deal with brokers or buy spot coal except to make up contract shortfalls.

Taiwan remains committed to nuclear power, despite the recently announced two-year postponement of the seventh and eighth nuclear plants. The postponement is the result of lower demand projections and a desire to hold down public expenditures. Taipower still plans for nuclear power to provide a growing share of Taiwan's power needs.

Emphasis on energy conservation will create some export opportunities. Energy-saving equipment of all kinds, particularly process controls, combustion controls, and microprocessor applications, will enjoy a growing market where the vendor can demonstrate a satisfactory short payback period.

V. CONCLUSIONS

US-ROC trade relations appear to be little affected, if at all, by the U.S. withdrawal of diplomatic recognition. The passage of the Taiwan Relations Act appears to have satisfied the American business community as to the U.S. commitment to Taiwan. It may be expected that the strong and mutually beneficial U.S.-Taiwan relationship will continue, and it is to be hoped that the United States will remain sensitive to the business community's need for predictability and stability.