EXECUTIVE COMMITTEE MEETING

FRIDAY, APRIL 24, 1987

Senate Finance Committee

Washington,D.C.

The session was convened, pursuant to recess, at 9:44 a.m. in Room SD-215, Dirksen Senate Office Building, the Honorable Lloyd Bentsen (Chairman) presiding.

Present: Senators Bentsen, Baucus, Pryor, Rockefeller, Daschle, Chafee, Heinz, Wallop, Durenberger and Armstrong.

Also present: Bill Wilkins, Staff Director; Jeff Lang, Chief, International Trade Counsel; Marcia Miller, Professional Staff, Trade; Josh Bolten, Trade Counsel, Minority; Karen Phillips, Trade Staff, Minority.

Also present: Gilbert Kaplan, Deputy Assistant Secretary for Import Administration, Treasury Department; Alan Woods, Deputy U.S.T.R.; Alan Holmer, Chief Counsel, U.S.T.R.

The Chairman. Mr. Lang, we were on which page?

Mr. Lang. Page 57 of the spreadsheet, the beginning of the discussion of mandatory retaliation.

The Chairman. All right.

Mr. Lang. Under S. 490, the President is required to take action to offset foreign barriers under certain circumstances. The way the bill is written is to require the President -- that is, the word is "shall" -- to require the President to take actions authorized by 301 or any other action within his authority to offset the foreign unfair trade practice, and then there are a list of exceptions.

Before I go through the exceptions, the point of the list of exceptions was to distinguish between two classes of cases. In those cases in which there was an action by a foreign government that was inconsistent with their trade agreement obligations to the United States, the President's action has fewer outs, fewer loopholes for him, fewer ways of avoiding taking action.

The Chairman. Where they violate a trade agreement?

Mr. Lang. That is right. Then in other classes of cases that are subject to action under 301, those classes are known as "unreasonable" and "discriminatory" actions; that is, actions that aren't in violation of a trade agreement but, nevertheless, burden and restrict U.S. commerce in an unfair and inequitable way. And in that case, he has a

longer list of exceptions.

The Chairman. Do you have something that qualifies "unreasonable" or defines "unreasonable"?

Mr. Lang. Yes. "Unreasonable" is defined in the law.

The Chairman. In current law?

Mr. Lang. In current law. This distinction between trade agreement violations and other actions within the scope of section 301 is provided for in current law, and the way it works. Under this current law, if the President determines that action by the United States is appropriate in the following circumstances, then he shall take action within his power to enforce the rights and obtain the elimination of these acts."

Here are the situations: a) to enforce the rights of the United States under any trade agreement, or to respond to any act, policy, or practice of a foreign government that is inconsistent with the provisions of or denies benefits to the United States under any trade agreement, or is unjustifiable, unreasonable, or discriminatory, and burdens or restricts U.S. commerce."

And then, "unreasonable" is defined in current law as meaning "any act, policy, or practice that, while not necessarily in violation of or inconsistent with the international legal rights of the United States, is otherwise deemed to be unfair or inequitable." And there is a list of

examples in the statute denying equitable market opportunities and so on.

So, it is a clear distinction that is recognized in the statute between unjustifiable acts or trade agreement violations and unreasonable or discriminatory acts.

Now, the list of exceptions is shown beginning in the right column on the middle of page 57 of the spreadsheet, and I will just go through those exceptions:

"The President is not required to take action if the GATT makes a determination that conflicts with the U.S. view of its rights. The President is not required to take action if there is" -- 'Sub-B' there means a settlement is entered into that is agreeable to the U.S. industry. And 'Sub-C' is the one on which there is a differentiation. It continues over onto page 58, "The President submits to congress a written statement certifying that the enforcement of such rights and the elimination of such acts, policies, or practices is impossible, and retaliation would not be in the national economic interest." And then this important language, which is taken from S. 490, of course, "The Exception C is not available in the case of a self-initiated investigation involving an unjustifiable act" -- that is, a trade agreement violation.

So, the structure you have here is that, if the practice you are dealing with is a significant unjustifiable trade

agreement violation, the President has only two outs: Either the U.S. position is inconsistent with the GATT, or the case is settled.

The Chairman. So, there is no violation of GATT?

Mr. Lang. Well, GATT or some other trade agreement.

The Chairman. I understand. But if it is inconsistent with GATT, then the President has an out?

Mr. Lang. That is right.

The Chairman. All right.

Senator Baucus. Mr. Chairman?

The Chairman. Yes.

Senator Baucus. I might ask, Jeff, what would constitute a violation of international agreement? Does that have to be an agreement signed by the United States and the offending country? I ask because this parenthetical phrase says "or inconsistent with international legla rights." I am not clear as to what "legal rights" means.

Mr. Lang. There are basically two ways -- and Allan Holmer might want to speak to this as well -- there are basically two ways in which trade agreements are breached. The first is that there is an action directly inconsistent with the terms of the agreement, and the second is that a country undermines the agreement by a collateral action. For example, if a country agrees with the United States to reduce the rate of duty and then puts on a health

restriction that has the same effect as the rate of duty used to have, the only purpose of it being to replace the duty as an import barrier, that impairs the concession the government gave to us by reducing its rate of duty, it is therefore impairing the whole benefit of the agreement for us, and our law treats it as if it was a trade agreement violation. So, there are those two classes of violating our rights.

Our rights under trade agreements are not only, of course, under the GATT. The United States has bilateral trade agreement with Israel; it has a number of side letters and special bilateral arrangements such as the Multifiber Arrangement, so a very complex web of international legal rights exists here. So, when this language was formulated, which was first in 1962 but then a major revision in 1974, it was expanded to cover all conceivable expressions of our international legal rights.

Senator Baucus. So, it is treaties, and it is also executive agreements, and it is also collateral actions.

Mr. Lang. The Semiconductor Agreement I would assume would be within the scope of this language, for example.

Senator Baucus. Thank you.

The Chairman. It seems to me that a good example is what has just happened in our relationship with Mexico, where we have an agreement insofar as trade on milk, and they have

just put up an objection to the health standards of the United States on their dairies and stopped the importation of milk. I think it is outrageous, totally transparent. With all due respect, I have been around some of those Mexican dairies, and I will keep on drinking U.S. milk.

(Laughter)

The Chairman. Go ahead, Mr. Lang.

Mr. Lang. Mr. Chairman, the next subject in the spreadsheet is the time limits on action. "Action" here means action -- the President doing something.

Under current law, which is shown on page 59 in the left-hand column or the current law column, the President gets a recommendation from the Trade Representative, and within 21 days he has to announce what action if any he is going to take.

The problem that has been presented in this area has been that the President has frequently said, "Continue to talk. Continue to negotiate."

The proposal in S. 490, which is shown in the right-hand column on page 59 of the spreadsheet, is that the President be required to act under S. 490 -- that is, offset the foreign unfair trade practice -- within 15 months of the date the investigation is initiated, or nine months after the date on which the GATT contracting parties issue a ruling in the matter, but not later than that 15-month period, and the

action may be postponed twice, for two 60-day periods, if the President gives Congress a certification to the effect that it would be useful to continue to negotiate.

So, in effect, the President's period of time to take an action is extended from 21 days to 19 months; but at the end of that, if he is on this mandatory-action track, he has to take an offsetting action. Without employing one of the outs, he couldn't say, "Continue to negotiate." He has to offset the practice.

So, these two provisions together -- the time limit and the mandatory action -- are the mandatory retaliation provisions of S. 490.

The Chairman. Mr. Holmer or Mr. Woods, would one of you care to comment?

Mr. Woods. I thought what I would do is wait until he finished the two of them together before commenting.

Obviously we have some problems with the mandatory retaliation aspects of the bill, and I think you are well aware of that.

Let me address the easiest one first, if I may, and that is the timing question. In the Administration's bill we, too, recommend a time limit -- the time limit is 24 months. Obviously, the differences in views between your bill and ours are not so different, with one exception, and that is I think we are a little tougher on the GATT than you are;

we basically put a time limit of 24 months, under the GATT dispute settlement process, by which time the President must make a determination if the GATT has not acted in that time. Our purpose in doing that is to try to get the GATT to act. We believe that, as part of the GATT negotiations, we should have agreed time limits among GATT members for the dispute settlement process. We have had dispute settlement cases that have gone on in the GATT for as long as 16 years, and we find that unacceptable. We assume you do, too.

With regard to the mandatory aspects of retaliation, sometimes we have to remember again that this, as I said yesterday, is a negotiating tool, 301 is. We do not have, in many instances, an agreed-upon -- internationally agreed-upon -- set of principles as to what in fact constitutes an "unfair trade practice."

Most of the use of section 301 in the trade law is to open other markets. Retaliation in this respect is a sign of failure, not a sign of success. It seems to us that we don't want to mandate a failure.

You have to be prepared to retaliate -- there is no question about that in our minds, and in fact we have done so for the first time in the history of the trade law in recent months. But mandating it doesn't really help the trade negotiator; and in fact, it might drive some of our trading partners away from the negotiating table, because they will

like they are negotiating on opening their markets with a gun to their head.

I might also give you some examples of circumstances where mandatory retaliation could particularly be unhelpful. For example, we could be negotiating with a country to open their markets under section 301 at the same time as a major U.S. export sale is under consideration in that country, that is pending at precisely the time that the President is forced to retaliate. The foreign government, it would seem to us, is likely to counter-retaliate by precluding the sale, or I guess maybe the possibility would exist that the buyer nationalistically may decide on its own to buy non-U.S. That, of course, could be the subject, potentially, of a 301 case, but why shoot ourselves in the foot?

The second circumstances is that a country against which the President might be forced to retaliate might be a principal U.S. ally in the Multilateral Trade Negotiations, where we are dealing with a matter of value greater than the matter on which we would be forced to retaliate at a particular time; whereas, without that country's help, the U.S. might be significantly less likely to achieve our goals in a multilateral form.

Another example might be where a country has got to take some time to forge the necessary political consensus to be able to agree to those demands we are making on it. In many

instances some of hte practices which we consider to be unfair are practices which are very important in the domestic politics of another nation -- just as some of the practices that others consider unfair about us are the politically sensitive in the United States. It seems to us if a government is acting to change the political dynamic in their own country in order to accommodate our desires to open their markets, that is not a particularly good time to retaliate against them.

I could go through a list of practices like that; but, for the sake of time, I won't belabor the point. It just seems to us that there are times when mandating retaliation just doesn't make sense. And I believe the examples I have given here are not covered by any of the exceptions that Mr. Lang has gone over this morning.

The Chairman. Well, you have well stated your point of view. There is obviously a very basic difference of opinion as to what helps a negotiator and what doesn't. I think your point about the first time you have retaliated sort of gives us an indication of what the pattern has been and what the competitor looks at and says that has been the pattern of the case. Was this retaliation finally an aberration? Or is this the way that they are possibly going to retort to whatever we try to do?

It seems to some of us that you get some extra muscle if

there is a deadline, finally, and retaliation except under unusual circumstances. So that is the concern, and that apparently is part of the debate we have here.

Senator Baucus. Mr. Chairman, I would like to ask a question of Mr. Woods.

Are there any circumstances under which the deadlines do help the USTR?

Mr. Woods. There is no question about that, and there are deadlines under the current 301 law, and we use them. We oftentimes set artificial deadlines, to be quite frank with you, in order to provide negotiating leverage in a negotiation. So, the deadlines are not a problem from our perspective in that regard.

As I said, in the Administration bill we have set up deadlines in that legislation as well. Our problem is not the deadlines; it is the self-initiation, time schedule, timed to mandatory retailiation. The system that I have just described to you could cause us to be acting in other than our own interests in some instances.

Mr. Woods. That leads to my next question: Are there circumstances, any circumstances, under which mandatory retaliation helps the USTR reach an agreement?

Mr. Woods. I guess that I could see there might be some possibilities where that might be the case, but I have not figured out a way to write them into law; they are

situational, if I can use that terminology, and have to be judged somewhat on a case-by-case basis.

Senator Baucus. Well, it is all a question of degree, isn't it? It seems to me with reasonable deadlines and a reasonable degree of mandatoriness that we are in a better position. There are outs here in extreme cases, but you want to crank it up a little bit more than is currently the case in current law, so that we are more likely to get results.

Mr. Woods. Certainly if within mandatory you had some possibility of not retaliating due to reasons of the national economic interests, or some broader-based reasons than the ones that we would consider in this legislation that would be all too specific, that would be improvements on what is there now.

Senator Baucus. Thank you.

The Chairman. Go ahead, Mr. Lang.

Mr. Lang. At the bottom of page 59 on "Notice and Report Requirements," there is no S. 490 provision; but I want to mention that the Administration bill would require the President to hold a hearing if he is going to take an action of his own, as he did in the Semiconductor Case.

On page 60, S. 490 contains a provision that is also contained in the House Ways and Means Committee bill, adding specific authority for the Trade Represenatative to withdraw or not proclaim GSP beneficiary status -- that is, zero duties

for developing countries -- as part of a 301 action.

S. 490 would also permit the President to withdraw access to the United States by foreign suppliers of a product related to a service. That could mean a lot of things -- the telephone, I suppose.

On negotiated settlements on page 60, S. 490 contains a provision that adds specific authority to the President to enter into binding agreements with a foreign country to offset a practice. This, of course, just carries out the settlement option that the President has under the bill.

And on page 61 is the monitoring provision of S. 490. There is no analog to this in current law. The provision is that any action taken by the President will remain in effect as long as he thinks is necessary but not longer than seven years, if neither the petitioner nor any other representative of the domestic industry submits to USTR a written request for continuing within the last 60 days of the seven-year period. And then there is a procedure for review of the extension of the relief.

The House bill also contains a monitoring provision, but this is a unique aspect of S. 490 that would, in effect, take the retaliation out of effect after a period of time has elapsed, unless it would appear efficacious to keep it in effect.

On page 62 is a procedure for the President modifying or

terminating an action. There are several bases for doing this: First, if either the GATT or a GATT panel finds the action violates or is inconsistent with U.S. international obligations. The GATT, of course, acts in dispute settlement on the basis of the advice of panels of experts. The experts are appointed by the GATT as a whole in a little negotiation that precedes each dispute settlement, and each side suggests people they believe would be independent fact-finders in the matter. Once a panel of three or five such experts -- usually people permanently resident in Geneva -- are chosen, they hold hearings and receive briefs and give advice to the GATT. This would allow just the finding of the GATT panel to authorize the President to modify or terminate the action; you don't need the full action of the GATT.

Another basis for the President modifying or terminating the action would be an agreement between the United States and the foreign country resolving the matter; essentially the same settlement option he has to use in not starting the action in the first place.

And finally, a removal of the burden on U.S. commerce. If a foreign government continues a practice that is inconsistent with section 301 but removes its effect on U.S. commerce, then the President would be authorized to terminate the action.

Now, on page 63 begin a series of provisions that are designed to expand or at least define more particularly the practices that are actionable under section 301.

This section, which I read to the committee earlier defining the words "unreasonable, unjustifiable and discriminatory," has been amended several times in the history of the statute, and S.490 proposes to go into that area again.

At the top of page 63 in the right-hand column, the provision would specify that the acts, policies, or practices of a country "which burden or restrict U.S. commerce include but are not limited to" -- and the significance of this "burden or restrict" phrase is, an unreasonable discriminatory or unjustifiable action is not actionable under section 301 unless it also burdens or restricts U.S. commerce. So, this would expand that definition to include those that have an adverse effect on trade between the United States and a third country, subsidization of exports that displaces U.S. exports to a third country, the imposition of import restrictions or performance requirements that divert exports of a third country to the U.S. market, and the enforcement of trade-restraining agreements that divert exports of a third country to the U.S. market.

Senator Heinz. If I may just interrupt, Mr. Chairman.

Jeff, either the EC or France has a limitation on the import of Japanese cars that is set at 3 percent of their

market.

Mr. Lang. Yes.

Senator Heinz. What would be the meaning of that? If you made these definitions the law, would that in and of itself give rise to an action against Japan?

Mr. Lang. It might justify the USTR in determining that that action burdened or restricted U.S. commerce because it resulted in the diversion of automobiles that weren't exported to France -- because of the restriction, being exported to the United States.

Senator Heinz. Who would we take action against -- France, or Japan?

Mr. Lang. The action there would be against France, I would think.

Senator Heinz. Suppose it was a deal, a mutually agreed-to deal?

Mr. Lang. I think it is a trade-restraining agreement. I guess your point is that it could be both countries. I think it could be both countries.

Senator Heinz. And what do we do? How would it work? Clearly, that kind of an agreement is trade-restraining. Intuitively it results in diversion. Maybe it doesn't result in diversion, but intuitively it appears to. What steps does one go through?

Mr. Lang. Well, the first analysis that the Trade

Representative will go through -- and maybe Allan ought to speak to this as well as I -- would be to find an unjustifiable, unreasonable, or discriminatory act, as well as the provision we are talking about there: the burden or restriction on U.S. commerce. You will need both.

Assuming you have both, if the action is only unreasonable or discriminatory, the President would not be mandated to retaliate -- that is, completely offset the harmful effects on the United States of the action. He could simply negotiate about the matter. Or he could retaliate, if he thought that was the appropriate action.

The Chairman. That would be the "unreasonable degree" rather than the "unjustifiable degree" which you referred to in the violation of a trade agreement.

Mr. Lang. Right.

Senator Heinz. If it is "unjustifiable" he has to retaliate.

Mr. Lang. If it violates a trade agreement, then he has to retaliate after a period of time for negotiation; and of course current law also requires him to take a trade agreement violation to the GATT.

The Chairman. I think that is a good example that you brought up, Senator. Actually, as I understand it, almost every Western European country has that kind of a deal with Japan -- with the English, 11 percent, with France at 3, and

on down the line, with the possible exception of Germany.

Senator Heinz. If I might pursue it one more minute, Mr. Chairman.

What would a petitioner have to allege here? Could he allege that such an agreement was an unjustifiable violation of trade agreements -- could an American petitioner allege that the agreement between Japan and France was in and of itself unjustifiable, or would he have to be directly affected by it?

Mr. Lang. It is conceivable that there would be a way of interpreting existing U.S. agreements with Japan and France or both of them such that the agreement between the two of them would have come into play. But I think I would like to think about that a little bit; it is a rather complex question you have asked.

Senator Heinz. I assumed it might lead to that; I didn't mean it to. But very well. Thank you.

Thank you, Mr. Chairman.

The Chairman. Surely.

Mr. Woods. Senator, if I could?

The Chairman. Yes, Mr. Woods.

Mr. Woods. I will try to hold my fire here, to intervene only occasionally. But I should mention two items:

Back on page 62 there is, under "B" -- the first pick -- "a majority of the representatives of the domestic industry

would benefit from the enforcement of rights." I would just raise the question as to whether or not the agreement we made with Japan with regard to leather -- in which the Japanese both compensated us and we didn't feel that compensation was adequate, so we retaliated as well, and that is the way the circumstances stand today -- would somehow have been possible under that provision as it is currently written.

The second I would ask is, if under "C" -- if the burden of restriction has increased, you provide for a change in the retaliation. What if such burden or resriction was decreased? Would the retaliation be able to be modified as well?

On this last question, I think the question we have to think very seriously about when we are looking at it is mirror legislation. The circumstance that Senator Heinz described obviously was something akin to a voluntary restraint agreement. And whether a voluntary restraint agreement between two other nations places a burden or a restriction on us, sir, as unreasonable or unjustifiable, since we have ourselves a number of voluntary restraint agreements, I think would be one to be particularly careful about how we drafted that language, or we might be putting oureslves in the dock. I am not saying that this language does that, but I think we need to be very careful about that as we approach these kinds of issues.

The Chairman. I think that is a good point, and that is where we try to move it, I assume, to the "unreasonable" rather than to the "unjustifiable," giving the President more discretion.

Let me say what we are thinking about on this schedule. I hope we can finish up by 12:30 and walk through this. There are some provisions like 201 and perhaps in the dumping and subsidy provisions, where they get highly technical. Staff met the night before last until 11:00 and last night until 11:30 trying to work out consensus and improving some of the rough spots, and seeing that some of these objections that have been raised, if we can't address them, that we will reserve those until next week, and we will be meeting Tuesday, moving on to the markup, and providing the members what we hope will be the suggested changes to be considered prior to consideration within the committee.

When I stated that we would meet on through for the next two weeks if necessary, I want to underline that "necessary." If we can move faster than that, if we get finished next week or early in the following week, I certainly hope we can, we may be in for some long hours to try to bring that about.

But we have really got ourselves a very tight window in which to try to consider this trade bill, with reconciliation probably facing us on the budget and some of the concerns

we will have in this committee if we are charged with the responsibility of raising a very substantial amount of revenue.

Mr. Wilkins. Mr. Chairman, shall we continue with the 10:00 meeting times as we put out the agenda today?

The Chairman. Yes, we will continue to try to do it at 10:00. If we find that is not getting the job done, we will surely change it to 9:30, or we will change it to 9:00 --

Mr. Wilkins. We can modify that as we go along.

The Chairman. -- and we will make the hours longer.

Mr. Wilkins. Yes, sir.

The Chairman. That's fine.

Mr. Lang. Now, continuing on page 63 with amendments to actionable practices under section 301, the next practice is export targeting.

The Senate bill contains a provision on export targeting which has been considered for some years. It defines "export targeting" as "an unreasonable act, practice, or policy," and it is defined in the same way it is defined in the analagous provision in the House bill: "Export targeting is a government plan or scheme consisting of a combination of coordinated actions that are bestowed on a specific industry to assist the industry or group to become more competitive in the export of a class or kind of merchandise."

The Senate bill includes some descriptions of these

coordinated actions: "Protection of the home market, promotion or tolerance of cartels, special restrictions on technology transfer, imposed for reasons of commercial advantage" and so on, over on to page 64.

The next new subject that would be added to section 301 has no provision in the Senate bill. It is the worker rights provision mentioned in the House bill and described on page 65 of the spreadsheet. The House bill defines denial of worker rights as "unreasonable."

Senator Baucus. Mr. Chairman?

The Chairman. Yes.

Senator Baucus. I want to ask Jeff a question.

What is the best case to be made under export targeting that we, Americans, are guilty ourselves? I worry about the mirror question. For example, our farm price supports or housing support programs in this country. To what degree, if any, would those programs in the U.S. be subject to the same kind of action overseas? I just wonder what we are getting ourselves into here.

Mr. Lang. Well, Senator, I think these provisions, which have been massaged for quite some time, attempt to describe a pretty particular kind of program to promote the export of a product.

Clearly, in agriculture we have some export-promotion activities, but they don't involve a lot of the coordinated

actions that you have, such as tolerance of cartels and that kind of thing, that you have seen in these other foreign actions.

I suppose that if the United States starts defining "targeting" so as to include other countries' actions and not include its own, which is surely the intent of this provision, other countries would be free to define "targeting" any way they want.

But I think that it is intended to deal with a bit more specific programs than we have in such areas as agriculture, defense, housing, and that kind of thing. Those would be the examples that would be given, I am sure.

Senator Baucus. I wonder, Mr. Woods, is this written do you think in a way that would preclude those actions being taken against us?

Mr. Woods. Frankly, no. I have a list of products and industries which might be considered to be areas where we might be export targeting. In an open hearing with representatives of other governments sitting back there someplace behind me, I am a little hesitant to go into that out of a lack of desire to draw their ire, but we would be glad to supply that to you. They certainly, as defined here and otherwise, do exist.

I would say, however, that under the 301 law, broadly speaking, export targeting is addressed and is an item that

is already actionable under 301, but without quite so much definition as is provided here. So, we do have the ability to go after export targeting under section 301 laws as they now exist without quite so much specificity.

Senator Baucus. Have you ever considered doing so under current law?

Mr. Woods. We have in fact done so. The semiconductor thing would certainly be an example.

Senator Baucus. That is under an export target.

Mr. Woods. Well, it was under section 301 as well as under the dumping law. We went after it two ways, and we felt that both together in fact was a very effective way to deal with what normally might be considered export targeting practice.

Senator Heinz. Excuse me. You did find export targeting?

Mr. Woods. We reached an agreement, Senator, so we never got to the point where we made that determination.

Senator Heinz. So the answer is, they have never gone all the way through the process?

Mr. Woods. If I man, Senator, the idea is to succeed and not have to retaliate. So, that is preferable, in some respects.

The Chairman. Mr. Lang?

Mr. Lang. On page 66 is the next provision in S. 490

that expands the definition of actions under section 301. Here, this provision is drawn from the states trading bill. State trading is defined in Article XVII of the GATT already, and this provision follows very closely the GATT definition of "state trading." Moreover, since the provision is in the GATT itself, it is treated as unjustifiable.

Essentially what this does is provide that it is unjustifiable for state trading enterprises to buy and sell other than in accordance with commercial considerations such as price, quality, and terms of delivery and so on.

Senator Heinz. Jeff, in other words, this gets at preferential purchasing decisions by state controlled corporations?

Mr. Lang. That is right, and also selling actions by state-controlled organizations.

Mr. Woods. If I may on that one, on state trading, what we are doing in this law, as I would interpret it, is to unilaterally define Article XVII of the GATT. We are now engaged in a multilateral trade negotiation where one of our goals in that negotiation is to achieve some sort of multilateral agreement on that question, and we would hope that the committee would take that into consideration when deciding how to act on this particular section, because a multilateral agreement on it will achieve the same standards

for everyone and not have us imposing standards unilaterally from the United States in this area.

The Chairman. But by the same token, it is defined as "unreasonable" -- isn't it?

Mr. Lang. No, it is "unjustifiable," because there is a GATT provision. Article XVII of the GATT provides each contracting party undertakes that, if it establishes or maintains a state enterprise, wherever located, or grants to any enterprise formally or, in effect, exclusive or special privileges, such enterprise "shall, in its purchases or sales involving either imports or exports, act in a manner consistent with the general principles of nondiscriminatory treatment." And further on it provides that, "Such agencies shall make any purchases or sales solely in accordance with commercial considerations, including price, quality, availability, marketability, transportation, and other conditions of purchase or sale."

Senator Heinz. I am puzzled by Mr. Woods' comment, Mr. Chairman. It seems that what the print does is simply to write into our law the words from Article XVII with very little in the way of interpolation. For the life of me, I don't understand why that is wrong; and it seems to me that you may end up with a multilateral reinterpretation of Article XVII, but my guess is that it is unlikely to be broader than Article XVII. It could well be narrower. We

would be bound by that if we agreed to it. It seems to me this just preserves what Article XVII seems to say and puts it in our law. I don't quite understand your difficulty.

Mr. Woods. Actually, in some respect it goes quite beyond Article XVII to include the concepts of constructed value incorporated in the anti-dumping law, and that is on the middle of page 67 there, where it requires constructed value in making that determination. That is much more specific than what we would acknowledge is rather murky and ambiguous language in Article XVII of the GATT, which needs strengthening.

Senator Heinz. Article XVII doesn't deal with how a country goes about making determinations about what is and is not in keeping with normal commercial considerations; people have to figure that out pretty much on their own -- don't they, Allan?

Mr. Woods. Well, that is why I say Article XVII is quite ambiguous. It doesn't give any concept of procedure, and there has not been any procedure established in the GATT for establishing it.

Senator Heinz. Well, isn't that true of all articles of the GATT? That each country has to figure out ways to implement and enforce them?

Mr. Woods. Well, that is not true say for the countervailing duty law or the antidumping law, in which we

have got quite specific procedures and guidelines for establishing those kinds of things.

Senator Heinz. In our laws, yes; but in the codes? The codes do not tell you how to go about enforcing them, and the codes are supposed to be very specific.

Mr. Holmer. But what they do in the GATT is to have a relatively specific, detailed dispute-settlement mechanism that contracting parties are expected to follow, and which we can do. If there is a violation of Article XVII, we can currently address that under current law, under section 301.

The concern we have is a unilateral definition on the part of the U.S. Government that really goes substantially beyond what it is, whether there is any international consensus as to what is meant by Article XVII. It may be that at a technical level we can address some of the concerns that we have, and we would welcome working with staff to try to attempt to do that.

Senator Heinz. Thank you, Mr. Chairman.

The Chairman. Surely.

Mr. Lang?

Mr. Lang. Mr. Chairman, on page 69 is the S. 490 provision that --

The Chairman. On page 69, that deals with the adversarial trade question, and in turn the Gephardt Amendment. We have carried that in section 301, but really I

think that is something apart.

I would like to continue and finish 301 and then get to the adversarial trade, if we may, if there is no objection to that.

Mr. Lang. Yes, sir.

On page 70 is a provision that relates to something called "unfair trade concessions requirements." This reflects the language of a bill introduced last year or the year before by you and Senator Danforth, Mr. Chairman.

The idea is that a foreign government does not allow the United States to get the benefit of a trade agreement unless its firms first make an additional concession such as licensing technology, or building a plant in the foreign country, or something like that. The idea of the provision is that that impairs the concession, and the United States ought to treat that as actionable under section 301.

At the bottom of page 70 of the spreadsheet is an S. 490 provision on threat. It expands the definition of "burden" or "restriction" on commerce to include a threat to burden or restrict U.S. commerce. This is not unusual under U.S. trade law. Under both section 201 and under the injury standards in dumping and countervail, you can find injury to a U.S. industry either if there is direct injury or there is a threat of injury to the domestic industry. So, this just expands the threat concept to 301.

On page 71 are some rather technical provisions. The compensation authority that exists in current law -- that is, the authority of the President to compensate another government for a U.S. action in which a trade agreement requires us to compensate that government, either import relief or we have acted inconsistent with a trade agreement -- under S. 490 that would be expanded to include section 301 action if the President determines that compensation is necessary to meet a U.S. obligation; that is, if he is required to take an action under 301 and subsequently the GATT determines that that action was not consistent with U.S. authorities, this would expand the existing law on compensation to allow him to compensate the governments adversely affected. So, it is an incentive for him to make sure he is right about the GATT law before he takes the mandatory action.

Now, that completes the provisions on section 301. Did you want to go back, Mr. Chairman, to the adversarial trade?

The Chairman. Yes, let us get on to the adversarial and discuss that.

Mr. Woods. If I may -- this is quite technical, and I won't belabor it, but in the unfair trade concessions requirements --

Senator Heinz. What page are we on?

Mr. Woods. This would be page 70 in the middle of the

page, the unfair trade concessions requirement.

Again, I would be concerned about mirror legislation and about the effect we have particularly on defense trade in that arena, because much of defense trade between ourselves and other countries frequently has to do with technology transfer as part of the commercial arrangements or as part of the government-to-government arrangements involved.

The Department of Defense is quite concerned about this language. I think it is something that we can probably work out on a technical basis with the staff, but we need to be quite careful in how we handle that one, and I would just raise a flag on that.

The Chairman. All right, let us go to adversarial trade.

Mr. Lang. The adversarial trade provision is on page 69.

Senator Heinz. Could I ask one question on this?

The Chairman. Sure.

Senator Heinz. If there is a U.S. aircraft manufacturer that wants to sell commercial planes to France or England, and England says, "Fine, but they have to have Rolls Royce engines on them," and Boeing or Mcdonald Douglas says, "Fine, we'll do anything," is that actionable under this?

Mr. Lang. If it is part of that commercial transaction, and their judgment is that that is what they need to do to make the commercial deal, I don't think it would be.

This was designed to deal with a situation in which the foreign government requires that technology transfer or the relocation of a plant.

Senator Heinz. So, the simply performance requirement of having to buy UK to some kind of extent, whether it is formally required by the British Government or informally required by British Airways -- which at least used to have close ties to the British Government -- it would or would not be a cause of action?

Mr. Lang. I think it would not be, because it would be part of the commercial arrangements. But STR already interprets 301 as covering the performance requirement.

This was intended to be a condition on the importation of a product, but maybe we ought to look at this language closely with STR.

The Chairman. What kind of discretion does the President have?

Mr. Lang. This would probably be an unjustifiable act, because it is impairing a concession.

The Chairman. You have some tough language to write there. That is pretty difficult.

Mr. Lang. Yes.

Mr. Woods. If I may, Senator?

The Chairman. Sure.

Mr. Woods. Let me give you the kind of example we

would be concerned about. It is where a complex system --

The Chairman. I can think of several to be concerned about. That is why it is seemingly difficult to nail that one down.

Senator Heinz. It is also, however, nonetheless a very important issue, because one of the problems we have is that we have been required to share our technology and intellectual property with other people by just this kind of arrangement.

The Chairman. Without a question, Senator, that is right. And how are you going to nail down the difference between a government forcing you to give up your technology to open up the market, and on the other hand what is just a matter of trade between two commercial --

Senator Heinz. It is a little bit like pornography: "I can't define it, but I know it when I see it"?

The Chairman. Yes.

All right.

Mr. Lang. Adversarial trade appears on page 69 of the spreadsheet. The S. 490 provision requires the President to initiate negotiations with countries identified in the National Trade Estimate if they engage in unfair trade practices and they maintain a consistent pattern of trade barriers and market-distorting practices.

The purpose of the negotiation would be to eliminate

the practices listed in the National Trade Estimate, and the President would have until the end of 1988 to conclude such agreements.

The provision is written so as to include but not be limited to specifically, by name, Japan. There is no comprarable provision in current law or in the Administration bill, and really there is no comparable provision in the House bill; but we didn't know anyplace else to put this provision, so we put it here.

The provision shown in the H.R. 3 column here is the Ways and Means provision that seems to us more analogous to this. It is within the scope of section 301. Essentially what happens is, a country or a group of countries are identified by a series of parameters -- the size of their trade, the size of their trade surplus, and so on -- and the President is then instructed to negotiate an agreement with these countries that gives U.S. firms a realistic opportunity to improve trade with a country equal to the value of their unfair trade practices. Failing such an agreement, the President is required to take section 301 action equal in value to the burden of the identified foreign unfair trade practices from these countries, unless it would be contrary to the national economic interests or would harm the economic interests more than taking no action at all -- to take the action.

So that is the House provision. It is quite a bit more complex. The qualifications standards are what tends to distinguish the House provision. There are a lot of complex standards which are written in this center column on page 69 to identify the countries these negotiations would occur with.

Senator Rockefeller. Mr. Chairman?

The Chairman. Yes, Senator Rockefeller.

Senator Rockefeller. I would just ask Mr. Lang what the word "adversarial" in and of itself contributes to this definition.

The Chairman. Let me ask you, Senator, because I have heard some of the same objections by some of the Japanese as to the interpretation of the word "adversarial" in Japan. With your knowledge of the language, would you comment on that?

Senator Rockefeller. From the Japanese perspective, it is the most hostile word one can use. Therefore, there is just a question in my mind if that is a necessary word, within our language, to accomplish what it is you are trying to do here.

Mr. Lang. I don't know that the word was necessary; the word was developed in the formulation of this provision from a description of countries that run constant trade surpluses that are much greater -- twice as much exports as they

import, consistently, over a period of time; the idea being that these countries were not interested in reciprocal trading arragements but in adversarial trading relationships.

Senator Heinz. How about the word "mercantilist"? Jay, how would that translate?

Senator Armstrong. Probably no worse.

Senator Rockefeller. It would be more theoretical than "adversarial." I make no large point for this at the moment, but I just flag it as a matter of concern, simply in that it involves not a concept that we are talking about but a word that has special meaning and special repercussions.

Mr. Lang. I think the intention was probably "non-reciprocal."

The Chairman. Well, why don't we explore the possibility and see if possibility there is another word. I am not quite sure that we should react to how the Japanese interpret English any more than we interpret Japanese in our own perception. But at least let us look at it and see if we can get to the same point, possibly another word.

Mr. Lang. Yes.

Mr. Chairman, that completes section 301 and the adversarial trade provisions. The next section of the spreadsheet is devoted to antidumping and countervailing duty laws.

The Chairman. As I understand it, that is one that

staff has been working on.

Let me say something about staff. I am really pleased and impressed with the dedication and the effort of the staffs of the various Senators of this committee. They have been putting in some exceedingly long hours. One of the other things -- it has obviously been very much a bipartisan approach, trying to work out these concerns.

How much can we get done if we get into that, do you think?

Mr. Lang. Mr. Chairman, there are only five. Even though this is a very long section of the spreadsheet, most of the provisions are on the House bill. There are only five provisions on the Senate bill, and in two of those cases, or really three of them, the Administration asked us last night if they could think about these things and come back to you with some ideas in a day or two.

So it might be most efficient if we just describe very briefly the two provisions on the Senate bill on which the Administration has some serious reservations, and then go on to something else. That might be something we could do very quickly.

The Chairman. If there is no objection, we will do that.

All right.

Mr. Lang. Let me just say by way of trying to kind of

demystify this dumping and countervail area, there are two very basic things about it. The first is that the determination of whether there is an unfair practice -- that is either dumping or subsidy -- occurs in the Commerce Department. And therefore, Mr. Kaplan is sitting here, who is the Deputy Assistant Secretary who administers the program in the Commerce Department.

Second, in almost all circumstances it is also required under U.S. law that the government determine that a domestic industry has been materially injured in order for a dumping duty or a countervailing duty to be put into place. And that injury determination is made in all cases by the International Trade Commission. So it is a two-part, two-agency proceeding, and the case bounces back and forth between the two of them on a statutory schedule.

The second important thing to keep in mind as we talk about these two provisions is that the remedy in these cases is a duty that offsets the effect on price of the foreign practice. So, if there is dumping, the duty doesn't retroactively collect damages or prospectively collect damages; it just offsets the price advantage that the product has by being unfair.

A final general point I want to make is that this is a nondiscretionary practice. No dumping or countervailing decision is subject to Presidential discretion; they are all

subject to an elaborate system of court review in the Court of International Trade and then in the Court of Appeals for the Federal Circuit.

So, unlike section 201 and section 301 which we have dealt with before, dumping and countervail are basically a nondiscretionary technical area of the law.

I just wanted to make those three points -- probably unnecessary, but it will help me explain these provisions.

Now, the first provision deals with dumping by nonmarket economy countries. The problem presented here is when basically Communist countries are thought to be dumping a product. "Dumping" is selling below the price at which you sell the product in your home market; or, if you don't sell it there, the cost of producing the product. The problems with respect to nonmarket economies are therefore obvious: prices are almost meaningless, and what happens the government tries to find under current law a surrogate, another country with similar standards of living and costs, and so on, to serve as a replacement for the nonmarket economy country in figuring out what these costs of production are.

I think this is thought by everybody -- the Administration has a proposal on this, and there is a proposal in S. 490 -- this is thought by everybody to be an unsatisfactory situation, because it is so highly theoretical

and undermines the credibility of the law, which is the reason we are allowed internationally to put this additional duty on. We convince the world that this system is credible.

The alternative proposed in S. 490, and for that matter in the Administration bill, is simply to set up an arbitrary benchmark for the foreign market value. And the debate over this provision comes with what the benchmark should be.

Under S. 490, the benchmark would be the price at which the product is sold in the market of the highest-volume exporter to the United States.

Under the Administration's proposal, the price would be the lowest averaged undumped import price to the United States.

The Chairman. That could be just a minimal amount of products going across the border?

Mr. Lang. Yes. The problem with all of these arbitrary things is that they aren't fair, in some respect; but, yes, the Administration's proposal would be a lower price, I think it is fair to say. Well, maybe I shouldn't speak for Mr. Kaplan.

Mr. Kaplan. Well, I think it could be either the same as the largest-volume export or, in some instances, it would be a lower price. Yes.

The Chairman. Well, I understand, Mr. Kaplan; but we try to make the worst case on each of these to see what our

problems would be, if that happened to be the case. And that is why I was asking.

Mr. Kaplan. I am sorry. I am not sure I understood the question.

The Chairman. Well, the point I was making is, could it be someone that had just a minute amount of products being sold into our country.

Mr. Lang. I am sorry, Mr. Chairman, I misinterpreted the question.

Mr. Kaplan. Under S. 490 --

The Chairman. I am talking about the Administration's proposal.

Mr. Kaplan. Under the Administration's proposal we would have discretion where there was no appropriate fair market value from an importing country, or where the lowest average was too small a volume of trade, to reject that and go to another importing country.

The Chairman. Oh, you would? Okay.

Mr. Kaplan. And S. 490 has the same provision.

The Chairman. Well, that is the out. Okay.

Senator Heinz. Might I just inquire: Would there not be greater ease of administration with the committee bill?

Mr. Kaplan. Yes, I think that would be easier to administer.

Senator Heinz. And has not current law just been nearly

if not impossible just extraordinarily difficult to administer?

Mr. Kaplan. Yes, very difficult.

Senator Heinz. Thank you, Mr. Chairman.

Senator Baucus. Where is the highest volume in the spreadsheet? Where does it say that?

Senator Heinz. At the top of page 72 with the "largest Volume of Sales in the U.S." in the first paragraph up there.

Mr. Lang. Thank you, Senator.

Senator Baucus. Why is it "the largest volume"? It seems to me the largest volume might be the highest price, it might be the lowest price. I am just curious as to why "the largest volume."

Senator Heinz. Since it tracks my bill, I think I might have a line in explaining that.

There is an assumption that, if there is always a consideration and trade-off between price and quality, and you are trying somehow to get the fairest measure of where price and quality are matched, it is reasonable to assume -- not always accurate, admittedly, but reasonablt to assume -- that the person who is doing the best job of selling in your market has the lowest price for the quality that they are selling at. And if you posit, as the Administration does, a simple low-priced standard, you may not be picking up what may appear to be either negligible but nonetheless significant

quality differences.

That issue becomes most apparent, I think, when you look at fungible commodities where there is no quality difference, and where the committee print proposes a constructed-value method of getting at the issue.

Senator Baucus. I don't know enough about this, but it just strikes me as odd that this is the "highest volume."

Senator Heinz. Yes. That is because they have a reasonable price and a reasonable product -- you know, they are succeeding.

Mr. Lang. Now, the second subject.

The Chairman. Let me interrupt just a moment. We are going to have, supposedly, a scheduled vote at 11:00. Senator Baucus has gone to vote, and we will try to continue on without interruption.

Mr. Lang. On page 74 is the next fairly major difficult issue in S. 490, called "Input Dumping" or "Diversionary Dumping." Let me try to describe the fact situation without getting into the technicalities of the spreadsheet until you need me to.

The problem here is indirect dumping. What happens is, a product is dumped in the United States, and a determination is made that it is being dumped, and an offsetting duty is put into place. The product is usually a component of some other product. So, the foreign country ships that dumped

product at a dumped price to a third country, where it is incorporated in a finished product, and the finished product is exported to the United States, taking advantage of the dumping to lower its price and become more competitive than it otherwise would be with the domestically-produced product.

Now, the problem with the situation is to figure out what the amount of the dumping there is. I take it from years of discussion with the Administration about this that they don't contest the fact that the product imported from the third country has been dumped; the problem is figuring out by how much, since the remedy under the law is a precise numerical remedy -- that is, a special duty to offset the amount of the dumping.

Under S. 490, the basic solution is to subject this practice to dumping duties and require the Administration to determine the amount of dumping, inferring the dumping from the margins set on the directly-dumped product.

It is a very difficult problem. Now, the Administration has proposed an idea to deal in part with the problem, and essentially the idea is that, where a minor change occurs in a product in order to evade U.S. dumping duties, then they will go after the product that circumvents the dumping duty.

For example, if a radio is imported as a completed radio, and it is subjected to a dumping duty, under the Administration bill -- even if it is broken down into a few

basic components and they are imported at dumped rates as a package and then assembled somewhere in the United States, that is close enough to the original product that the Administration would go after that.

But this large variation in the kind of product you are dealing with, they find it more difficult to address under current law, and that is the basic problem presented to the committee in the S. 490 provision on diversionary dumping.

The Chairman. Mr. Kaplan, would you care to comment on that?

Mr. Kaplan. Yes.

Just briefly, Senator, we have, as Mr. Lang said, major problems with both administrability and fairness of this provision -- administrability, in the sense that we do not feel it will be possible to determine accurately the degree of so-called "input dumping," and the credibility of the non-discretionary and not-subject-to-retaliation dumping process will be very seriously undermined if we start having to use bogus numbers in the whole process.

We also have a major problem with the GATT-legality of the provision. The GATT is quite clear in our minds in saying that a case must be done on a like product to that which the petitioner manufactures and not on an input product. We see that as a rather overwhelming difficulty, and we think we would lose a GATT case brought based on this provision.

The Chairman. Do you have a further comment on that, Mr. Lang?

Mr. Lang. No.

Senator Heinz. Mr. Chairman, I have a question about the Administration proposal.

Would the Administration only deal with or effect transactions between related parties?

Mr. Kaplan. Yes, that is correct.

Senator Heinz. What proportion of transactions would that be?

Mr. Kaplan. Well, in looking where this kind of --

Senator Heinz. Would it be a very large or a very small proportion?

Mr. Kaplan. I would say it would be somewhat in the middle. In looking at where this problem arises, we have seen a lot of problems in efforts to divert where people move part of a production to an offshore country or to the United States to a related party. Some of the electronics cases are very good examples of those, where subsidiaries have been set up in Singapore or Korea for the Japanese companies, or even in the United States, and this would cover that kind of situation.

Senator Heinz. Mr. Chairman, I would like to get more information on the extent to which it does cover the waterfront.

Mr. Kaplan. Sure. I would be happy to get that to you.

Senator Heinz. Thank you.

The Chairman. Good.

Mr. Lang. Mr. Chairman, I think what you were asking me was two questions. First, with regard to the problem of measuring the level of the duty, essentially what S. 490 provides is that the Administration is to use the best available evidence, and what would happen is that it would be hoped that the pressure of having such a provision in the law would encourage the parties involved to give you the actual data; but, failing that, you would use evidence such as the dumping margin for the product that is directly dumped, and so on.

With regard to the GATT question, there is a lively debate about this problem, having to do with the question of whether the GATT can apply to an indirectly-dumped product.

The argument that it is within GATT obligations depends on the premise that the United States is simply acting against the product that is being dumped in both cases. Whether the component is indirectly dumped or not doesn't change the fact that the cost of production of the product imported, the finished product imported from the third country, has costs of production that include a dumping.

So, that is the debate there. The Administration thinks the provision -- well, I'm not sure; I shouldn't speak for

them. But the proponents of the diversionary dumping provision argue that it is well within the scope of the dumping and subsidies code.

I might add that the GATT provision we are dealing with here is not the GATT itself but one of the Tokyo Round agreements that was negotiated in 1979 -- that is, the Anti-Dumping Code.

Senator Heinz. Mr. Chairman?

The Chairman. Yes.

Senator Heinz. May I just ask the Administration an issue of philosophy or principle here? Does the Administration have a conceptual or philosophical problem with the notion that, if a product that is being dumped in a third market is transformed and resold here, a product that is therefore being basically sold here probably only because of the fact that it was dumped in the first place into a third market, that we should not combat that? Do we have any intellectual disagreement here on whether we want to stop that kind of thing? Or are we just hung up on how hard it is to do it?

Mr. Kaplan. I think to answer that, Senator Heinz, we have to look a little bit broadly at the entire dumping program and the dumping law.

The dumping law permits us to act relatively expeditiously without being subject to retaliation by our trading partners

and on a unilateral basis and on a nondiscretionary basis. In other words, unlike the other trade remedies, we don't have to go into lengthy negotiations, and we don't have to fear ultimate retaliation.

So, when we design a dumping remedy to fit within the dumpinglaw, it has to be something which will sustain those criteria and make the dumping law continue to be effective and credible internationally.

In terms of so-called "input dumping" or third-country dumping, as you know, on the Semiconductor Agreement, which was just taken to retaliation, we looked at third-country dumping. There may be occasions when that is appropriate, but to do it on a regular basis in the context of a nondiscretionary, mandatory statute I think does not make sense.

The Chairman. Let me call attention to the fact that we have a vote on the floor of the Senate, and we have Senators who have already gone to vote. We will try to continue the process here without interruption.

Senator Heinz. So, the Administration view -- and maybe the fact -- is that the Anti-dumping Code is not aimed at input dumping?

Mr. Kaplan. That is correct.

Senator Heinz. And therefore, it is a "good" -- in quotes -- and therefore probably a significant loophole in

the Dumping Code?

Mr. Kaplan. It is something which is not permitted, in our view, under the Dumping Code. It is a question of whether --

Senator Heinz. Oh, input dumping isn't permitted under the Dumping Code?

Mr. Kaplan. An action in input dumping is not permitted.

Senator Heinz. Oh, an action is not permitted.

Mr. Kaplan. It is not. Yes.

Senator Heinz. And so, input dumping, in a sense, while not encouraged, is permitted.

Mr. Kaplan. It is not prohibited.

Senator Heinz. It is "not prohibited." Thank you.

The Chairman. Are there further questions on this?

(No response)

The Chairman. Mr. Lang?

Mr. Lang. Yes, sir.

Now, that completes the dumping provisions in S. 490 other than the ones we are waiting for some word from the Administration on. The rest of the provisions listed through page 93 are just provisions in the House bill.

So, if there are no further questions on those, I would propose to go to the Intellectual Property provisions on page 94 of the spreadsheet.

The Chairman. If there are no objections, we will do

that.

(Continued on next page.)

Mr. Lang. The provisions are an amendment to Section 337 of the Tariff Act of 1930. Section 337 is a broadly worded statute, used in a fairly narrow context.

The wording suggests that it is a violation of law, unlike dumping and countervailing. This is a violation of U.S. law to engage in any unfair trade practice in the importation of a product into the United States.

It is almost exactly the language of Section 5 of the Federal Trade Commission Act applied to imports. There is a requirement for injury, and the determination of both the existence of the unfair act and injury is made now by the U.S. International Trade Commission in accordance with the Administrative Procedures Act.

However, the Commission's decision in these unfair trade practice cases constitutes only a recommendation to the President, and he has a period of 60 days after the Commission finishes to decide that he doesn't want to put the relief into effect.

What has developed over the last 40 or 50 years is that the provision is used mainly to remedy the importation of a product that infringes a valid U.S. patent or other intellectual property right.

Now, since a patent is a right to a monopoly, the question arises whether it should be required for the domestic industry to meet the injury requirement because

any importation, even if it isn't injurious in the ususal sense, deregates from the right to the governmental monopoly under the patent; and so, the issue has arisen whether that injury requirement should remain in current law.

S. 490 contains a provision which I believe is identical to the Administration provision, except for technical differences, that eliminates the requirement to show injury but does not eliminate the requirement under current law that there be an industry in the United States.

In other words, you have to show the industry is there; you just don't have to show that it is injured. The punpose of the distinction is to assure --

The Chairman. Now, wait a minute. They have to show what?

Mr. Lang. That there is an industry in the United States using the patent.

The Chairman. Yes.

Mr. Lang. In other words, you don't want a situation in which someone owns a patent and keeps out competition but then goes abroad and exploits his patent imports into the United States.

The Chairman. Now, is that in the House bill and is that in S. 490?

Mr. Lang. Essentially, the same provision, isn't it, Alan?

Mr. Holmer. Right.

Mr. Lang. Essentially the same provision in the House bill and the Administration bill.

As for the possibility of technical problems, I don't believe this is a controversial provision.

The Chairman. No, I wouldn't think so. No.

Senator Chafee. Where is that provision you were just discussing?

Mr. Lang. That provision, Senator Chafee, starts on page 94 of the spreadsheet, and you can see the industry requirement there in the right-hand column, under the column called "S. 490."

Senator Chafee. Yes.

Mr. Lang. And then, most of this is actually described in the Current Law column, I guess.

Senator Chafee. All right.

Mr. Lang. There are a few other changes to Section 337 designed to increase the effectiveness of the law with regard to these unfair trade practices. The civil penalty is increased from $10,000 to $100,000, and there is also a provision in S. 490 allowing the ITC to order the seizure or forfeiture of an article that is subject to an exclusion order, if it gets into the United States.

There are also some provisions in S. 490 relating to technology transfers, reflecting a bill that Senator Chafee

introduced last year, a requirement that the National Trade Estimate include an annual report on transfers of technology between the United States and foreign governments.

Senator Baucus. Where is that, Jeff?

Mr. Lang. I am sorry. It is on the top of page 97 in the S. 490 column.

The requirement is that the U.S. Trade Representative, in conjunction with the National Science Foundation, monitor the transfer of technology between the United States and foreign countries.

And there is also a provision requiring the Secretary of Commerce to set up a system for monitoring foreign intellectual property systems to determine the protection that these systems would provide to U.S. exporters of products that have a large component of intellectual property in them.

The protection these foreign systems would provide for the intellectual property and those products -- Alan?

Mr. Holmer. Senator Baucus, in both the intellectual property and the access to technology areas, for the most part, we just have technical changes that we would like to have a chance to work out with staff before we proceed to the markup.

One area that might be a little bit more than technical --and I guess I apologize to Senator Chafee for doing this

in his absence because this was his provision--but it is on page 98 of the spreadsheet, and it is items (b) and (d), which appear to us to require that the U.S. Government fund LDC research and development.

And that is an issue that we would like to work on between now and Tuesday with the staff and also with Senator Chafee and/or his staff to see if there is a way to accommodate the Administration's concerns.

Senator Baucus. Those are (b) and which other one?

Mr. Holmer. (b) and (d).

Senator Baucus. All right.

Mr. Holmer. Which, as we read them, would require U.S. funding of LDC research and development.

Mr. Lang. On page 99 is another provision of Senator Chafee's bill providing for a U.S. Intellectual Property Training Institute. This would be an organization of U.S. agencies and U.S. corporations to train individuals in developing countries in skills necessary to run an intellectual property protection system.

The thought is that such laws are highly technical and require sophisticated filing systems and so on; and the institute would help in training people from developing countries in these things, and it would be funded through private contributions.

On page 100 of the spreadsheet are some additional

provisions of Senator Chafee's bill with regard to technology transfer.

There is a defense needs--oh, I beg your pardon.

Page 100 begins a new subject.

Senator Baucus. Right.

Mr. Lang. Which are the amendments proposed in S. 490 to Section 232 of current law. Just as an overview, current law provides that the President may take action to restrict imports in order to prevent the importation of a product that threatens to impair the national security.

He gets a report from the Commerce Department, and then he makes a decision on what should be done about the problem.

The provision has been used rarely, and with respect to only two products that I am aware of. One is oil, and the other is most recently, in the current Administration, machine tools.

And while the provisions deal with a number of different subjects, the main problem has been whether there should be a time limit and what it should be on the President's decision once he receives the recommendations of the Secretary of Commerce, the theory being that if it is threatening to affect the national security, the President ought to have to do something about it in short order.

Now, on the spreadsheet, on page 100, under current law the Secretary of Commerce makes his recommendations within

one year after he begins such an investigation.

Under S. 490, this period would be reduced to six months.

Also under S. 490, there is a provision to get the Department of Defense involved in the process. It is item 2 on page 100, and it is a requirement that the Secretary of Defense make a separate defense needs assessment with respect to the article that is the subject of the investigation.

And that is to be given to the Secretary of Commerce within three months so that he can take account of it in the course of his one year, or in the S. 490 case six months, investigation.

And it is explicitly required that the report include a written statement by the Secretary of Defense expressing concurrence or disagreement with the Commerce finding or recommendations at the end of the process.

The technical provision at the bottom allows the Commerce Secretary's report to be classified if it contains sensitive defense information.

The time limit on Presidential action under S. 490 is shown at the top of page 101; it would be 90 days. The limitation on the President's time period under current law is, of course, no time limit. The House bill is 90 days.

There is nothing in the Administration bill on this

subject.

The second provision, numbered 5 on page 101, relates to the requirement that the President submit a report to Congress within 60 days after he takes any action on what action he took and what his reasons for it are.

S. 490 adds a requirement that the President make a written statement of the reasons as to why he has decided to take action and include it in the report made by the Secretary of Commerce.

At the bottom of S. 490 is a provision which has no counterpart--on page 101 of the spreadsheet--in S. 490; it was added in the House, authorizing the Secretary of Commerce to ask the Secretary of the Treasury to take whatever actions are necessary or appropriate to obtain the objectives of the current Administration's order with regard to machine tools.

This has happened in other cases where an Administration has negotiated voluntary restraint agreements and the problem is how to enforce the agreements.

For example, with respect to steel, when the President announced a voluntary restraint program for steel in the summer of 1984, he had no statutory authority to require that certificates be demanded by the U.S. Customs Service showing that the product had been legitimately exported from a foreign country in adcordance with the voluntary

restraint agreement as a condition of entry into the United States.

There is no general authority for requiring such certificates in the United States; and so, special authority was enacted for the steel arrangement.

A somewhat similar kind of authority has been requested by the Administration to enforce an international arrangement with regard to coffee where the problem is that there are restrictions on the exports of coffee in order to maintain the international price of coffee within certain price limitations.

And every few years, the Administration needs the authority to require certificates of foreign governments that they have abided by the agreement as a condition of entry of coffee into the United States.

So, the machine tool provision, I would think, is in that same family of laws. I don't know if the Administration has a position on this or not.

Mr. Kaplan. We don't have any objection to it.

Mr. Lang. You have no objections.

Now, that completes the national security provisions of S. 490.

Beginning on page 102 of the spreadsheet are a series of provisions included in S. 490 relating to the formulation of U.S. trade policy.

Each of the separate sections of the spreadsheet were introduced separately as separate bills, and two of those bills were referred to other committees.

One of them was the agricultural title, which went to the Agriculture Committee; the other was this title which went to the Governmental Affairs Committee.

We are in close contact with the staff and the chairman is in close contact with Senator Glenn about these provisions.

Now, most of these provisions would fall within Title 19 of the U.S. Code, that is the section relating to trade. And so, in our opinion, it is within the committee's jurisdiction to report legislation in this area. It has reported legislation in this area in the past.

Therefore, I think it would be appropriate to run through the provisions, even though the committee might want to coordinate with the Governmental Affairs Committee when it actually begins to mark up the provisions.

Senator Baucus. What are those two that are referred to?

Mr. Lang. One is the agriculture title.

Senator Baucus. Is that in here in the spreadsheet?

Mr. Lang. No, that is not reflected on the spreadsheet.

Senator Baucus. What is the other one?

Mr. Lang. The other one is this title, "Formulation of Trade Policy and Agency Functions."

Senator Baucus. All right. Thank you. Why don't you go ahead?

Mr. Lang. All right. On page 102, the first provision of these national trade policy formulation subjects is the requirement for trade impact statements.

This is a requirement that the head of each Federal department or agency, before taking a major action that may affect international trade, study the potential impact on the action or that legislation would have on international trade, and the ability of U.S. firms to compete in foreign markets and prepare a detailed statement as a study.

The statement with regard to the effect of an agency action is to be made available to the public, and then there are some exceptions listed on page 102.

Senator Rockefeller. Mr. Lang, how is "major action" defined?

Mr. Lang. "Major" would be defined in the same way it is for environmental impact statements. I forget exactly what the definition is. I will have to get that information for you.

Senator Rockefeller. Does the Administration find objection to that?

Mr. Kaplan. We are concerned about the budgetary and paperwork implications of it. Obviously from a trade policy perspective, we are not so concerned about the policy

provisions of it as we are the added burden of paperwork and the budgets of the agencies that might be doing it.

Senator Rockefeller. But from the point of view of emphasizing or synthesizing trade policy, there is not objection?

Mr. Kaplan. We would like to be able to think about that.

Mr. Lang. The second provision of this area of the spreadsheet has to do with the interagency trade organization established under current law.

Just to give you some background, I might describe the current situation.

The 1962 Act created the current interagency trade organization, which consists of a trade policy committee created by Executive Order, of which the U.S. Trade Representative is the chairman and a number of agencies specified by the President in his Executive Order participate in this interagency trade organization.

And the organization also consists of subgroups, that is the Trade Policy Committee is supposed to be at the Cabinet level; below that is, I think, a Trade Policy Review Group, which is at Subcabinet level; and below that is a Trade Policy Staff Committee.

The reason for concern in the area has to do with where the trade policy decisions or rather recommendations to the President are made within the Administration.

A lot of Senators who are concerned that many of these decisions are not made in the Trade Policy Committee but in another interagency committee created by President Reagan, called the Economic Policy Council, which is not chaired by the Trade Representative but by the Secretary of the Treasury; and the Trade Representative is a member of the group but not the chairman of the group.

Now, the effect of these provisions is to move the Trade Policy Committee structure from Executive Order into a statutory framework, and it does it in this way.

It repeals the law that authorizes the current Trade Policy Committee and establishes in the Executive Office of the President a National Trade Council and specifies the membership of the Trade Council. That is the President, the Vice President, and the Secretaries of State, Treasury, Defense, Agriculture, Commerce, Labor, as well as the U.S. Trade Representative.

Then, it makes the President the chairman of the Council or, in his absence, the USTR, the presiding officer. This provision is derived from an event early in the Reagan Administration, even before the Economic Policy Council was established when there was a Cabinet Council on Commerce and Trade--I think it was--and the Finance Committee became concerned about the relationship between the role of the Cabinet Council on Commerce and Trade and the Trade Policy

Committee because it was changing the committee's understanding of USTR's role in helping the President to frame trade policy.

The resulting temporary compromise or action by the Administration was to say that the Chairman of the Cabinet Council on Commerce and Trade was the President; and then, in his absence, I think it was the Secretary of Commerce who would chair those meetings.

And there was no negotiation about this. It was responding to Finance Committee members' concerns--I think it is fair to say--as well as other people's concerns, but it didn't satisfy a number of Finance Committee members.

This is intended to satisfy by creating this National Trade Council, which the President would be the chairman and then the USTR would preside over the Council's meetings in his absence.

The Council's functions, which are laid out on page 103 of the spreadsheet, are generally what you would expect: advising the President with regard to trade policy matters and that sort of thing.

And there is also a special requirement for the members of the Council to consult with the private sector advisory committees, which we discussed on Tuesday, which is an important part of a policy formulation process in the United States.

Mr. Kaplan. If I can say, of course this provision is not going to have much effect on the Reagan Administration, given the period of time the President has left in office.

But I think we should point out that any President is going to want to organize his Cabinet arrangements in different ways that suit his personal management style and so forth.

And I guess I would just suggest that they might want to think about the benefits of that happening that way, as opposed to imposing a specific legislative structure on it.

For this President, the EPC system works well. The system that supports the EPC on trade matters is the Trade Policy Staff Committee and the Trade Policy Review Group; and the EPC then works as if it were the TPC but with a different chairman and virtually the same membership.

The other thing that I would indicate is that if the intention of the provisions here were to mirror the Trade Policy Committee, actually it cuts back on the authority of the Trade Policy Committee as it is contained in the Executive Order.

So, this is obviously not a major issue, but I would caution people that I think it is worthwhile to give the future Presidents as much flexibility as possible in how they organize their immediate advisory responsibilities of their staff.

Senator Baucus. As a practical matter, how much would this restrict any President's flexibility to organize in the way a President might want?

Mr. Kaplan. I think it probably depends on how you write the legislative language.

Senator Baucus. I mean, as you read the language here, the President can still have the flexibility to organize the way he wants primarily--basically, he can, under this legislation.

Mr. Holmer. Senator Baucus, I think what is likely to happen under this system as opposed to what we have with the EPC now--the way it works now is that Ambassador Yeutter goes to the EPC and virtually all of his recommendations--I can only think of one in the last two years--virtually all of his recommendations are agreed to.

And the NSC and OMB and the Council of Economic Advisors are all there, and they all have their cut. The problem is that the way it is structured here, it seems to me, is that what will happen is: You may have a recommendation that comes across from the National Trade Council, and then it comes to the White House and it gets staffed out; and on top of Ambassador Yeutter's memo goes a memorandum from the OMB Director and the Chairman of the Council of Economic Advisors and the National Security Advisor.

So, there is not the kind of coherence to the process and

not the kind of control that Ambassador Yeutter and the USTR are presently able to exercise over it.

Therefore, we think it may very well be counterproductive to what it is that I think this amendment seeks to achieve.

Mr. Lang. The final provision in this national trade policy making part of the spreadsheet begins on page 104 of the spreadsheet; and it refers to the creation of a national trade data bank.

Under this provision, there would be a national trade data committee, consisting of the U.S. Trade Representative, Commissioner of the U.S. International Trade Commission, Secretaries of various departments, the Director of the CIA.

All these are agencies which collect or use data in the Federal Government.

The purpose of the provision is to try to coordinate better the activities of the Federal Government in collecting data that relate to trade and to make recommendations to the Congress for improvements in the collection of these data.

So, at the bottom of page 104, are listed the kinds of information that the data bank might include, and it is a very long list, some of which is already collected by the Federal Government.

Some of it is not collected, or it is greatly delayed. For example, I am trying to find something that will give the committee an idea of what kinds of improvements might

be appropriate.

You will note item (s) on page 106 is national input and output tables. The United States maintains these tables which show the source of all the components of products made and the destinations of all those products throughout the economy.

It is understandably a very complex document. It is now, I think, about nine or ten years out of date; and the committee received information in 1986 that the corresponding table in Japan was, at that point, about two years out of date.

The significance of this kind of information is thought to be that, if the U.S. Government knew more about what was going on both in the world and in its own economy, it could make better informed trade policy decisions than it will by simply proceeding with the problems that come up in the daily, routine operations of the Federal Government.

The Governmental Affairs Committee has also held some hearings this year on this matter, and a number of groups have expressed interest in the subject.

There is a reporting requirement on page 107.

Mr. Kaplan. If I may, on this subject?

Mr. Lang. Please.

Mr. Kaplan. First of all, I should mention that the Administration, in its proposal, does propose the

establishment within the Department of Commerce of a computerized data bank keyed toward export expansion--export promotion activities. It is not as fullsome in respect to collecting other countries' activities as this is, but we do have provisions for doing some things that are not now done, and we think that they are appropriate.

The other point I would make about this is that I think it is a question--and I don't want to seem chirpy here--I think it is a question of whether or not it makes sense for the chairman of an independent chair to chair a committee which is basically all Executive Branch agencies, which might have a more appropriate chairman.

I don't have a view on who the chairman ought to be, but I would just raise that issue; unless of course, you had planned to have the International Trade Commission become the collector, which I think is probably not a very practical alternative.

Mr. Lang. I might mention that the origin of that provision is derived simply from a provision in current law which creates an interagency committee to keep the tariff schedules up to date; and the International Trade Commission, which is the agency that actually makes mechanically the changes in the tariff schedule as the President proclaims or as Congress enacts changes in current law, is the chairman of that committee; and this provision simply came from there.

Now, Mr. Chairman, that completes the description of S. 490 in the spreadsheet. The remaining pages of the spreadsheet relate exclusively to provisions that are in the House bill or the Administration bill.

Therefore, unless members want to raise questions about these issues, or on issues on the remainder of the spreadsheets, or other issues we can help them with, I would not suggest walking through the rest of the spreadsheets.

Senator Rockefeller. It is my understanding that it is not the chairman's wish to go through the rest of this unless there is some question.

Senator Chafee. I have a question.

Mr. Lang. Yes, sir?

Senator Chafee. Starting on page 108, the House bill. What does it do that is different now? It is the series of authorizations to the USTR. Isn't that what he is doing now: serving as the principal advisor to the President? Number (b) there, for example? What are all these things.

Mr. Lang. Mr. Woods and Mr. Holmer were closer to the House process than I was. Perhaps they could help us out.

Mr. Kaplan. Our frank view of the House language is probably not very helpful to you in that we don't like it very much, except to say that it looks to us as if it actually cuts back on the authority of the U.S. Trade Representative

relative to his advisory role at present.

That has been our feeling about it, and that is what we have told the House as they move forward with their bill.

Senator Chafee. I am sure that wasn't their intention; at least I can't believe it was. Let's look at the result; never mind the intention. It seems to be it is sort of boilerplate here, isn't it? Where does it cut back on his powers?

Mr. Kaplan. For the most part, that is true. What isn't there is that there are some flexibilities that I believe are reasonably limited in the Executive Order that aren't existent in the H.R. 3. They are not large issues, Senator.

Senator Chafee. Currently, we have it in current law, and that is the sum total of USTR's authorities--right there. Is there more?

Mr. Kaplan. I think the Reorganization Act--it is Plan Number 3, and I am not sure we have a copy here--is a little more explicit on the USTR's authority than is contained in this relatively brief explanation.

Senator Chafee. I don't want to take the committee's time if they want to do other things. I am just curious as to where you see limitations in the House bill.

Mr. Kaplan. I am sorry, Senator?

Senator Chafee. Why are you skeptical of the provisions

in the House bill? Why do you view them as limited?

Mr. Kaplan. Senator, we have found a copy of Reorganization Plan Number 3, which I think delineates more fullsomely the USTR's responsibilities, and Mr. Holmer can address that.

Mr. Holmer. We can provide it for you, Senator Chafee. I think this is a relatively technical issue that we ought to be able to address with staff, to the extent that you want to take the language that is in H.R. 3 or that which is proposed in S. 490 and be able to indicate those specific items.

Senator Chafee. Now, wait. Slow down one second.

S. 490 just keeps the same law, Mr. Holmer.

Mr. Holmer. Well --

Senator Chafee. Well, that is the way I read it. Am I mistaken?

Mr. Holmer. My impression, Mr. Lang, is that the earlier provision that you described to the committee, while Senator Chafee was voting, does delineate with some specificity what the role of the U.S. Trade Representative is to be. Am I mistaken?

Mr. Lang. You mean the provision on the National Trade Council?

Mr. Holmer. Yes.

Mr. Lang. It has some provisions about his [illegible]

responsibilities, but it isn't intended to overrule the Reorganization Plan you are talking about.

What happened in this area, Senator Chafee, was: When the 1979 Act was passed, Senator Ribicoff and others were concerned about the organization of the Federal trade bureaucracy; and as part of the discussions with Ambassador Strauss, it was agreed that there would be some reorganization of the Federal trade bureaucracy.

Dumping and countervail was transferred to the Commerce Department, and some other changes came about, including a list of responsibilities of the Trade Representative that are set out in the Reorganization Plan that President Carter submitted as a result of that.

So, the Executive Branch has been operating under that Reorganization Plan, I think, ever since.

I don't think S. 490 is intended to impair that Reorganization Plan or the responsibilities of the USTR. What it is intended to do is make sure that it is the chairman of the interagency organization that advises the President on trade policy matters.

That is the purpose of the S. 490 provisions. Now, if there is something that inadvertently restricts the Trade Representative's office, I would be glad to work it out with Mr. Holmer and report back to you; but I am not aware of it.

Senator Chafee. I just wanted to understand. Mr. Holmer, I believe, and Mr. Woods raised the point that H.R. 3 they felt they are opposed to because they felt it inhibited the STR, and I just couldn't see where it did.

Mr. Kaplan. I am sorry; I may have misled you. It is not that we are opposed to it, but we have some concerns about aspects of it, that we think it does limit beyond current law the USTR's authority.

It is not, as I indicated later, a major item.

Senator Chafee. All right, fine. Thank you.

Mr. Lang. Mr. Chairman?

The Chairman. Yes, Mr. Lang?

Mr. Lang. The situation is that we have completed all of the S. 490 provisions on the spreadsheet. The remaining pages of the spreadsheet describe House provisions. So, I would suggest that if there are no further comments on those, that we are finished.

The Chairman. Yes. I think it has been a productive morning, and I don't see any reason to further pursue those. unless people have individual questions about them.

The staff will be available for that. For those who were not here earlier, staff met until 11:00 the night before last and until 11:30 last night; and we have had what has appeared to be a very productive set of sessions.

And the staffs of all Senators involved, I think, we have

moved forward and tried to deal with some of the rough spots of S. 490, questions that have been brought about by the Administration and by others, to try to make it work more effectively.

And we will have presented to us on Section 201 some changes for consideration, and they will be given to each member.

We will go back into session at 10:00 a.m. on Tuesday, with the idea that we will work on this Tuesday, Wednesday, Thursday, and Friday.

When I stated that we would have a maximum of two weeks beyond this week, I want that understood as a maximum. We have this window; we are trying to complete the consideration of this bill and have it ready for staff to work on a report.

I would hope we don't go that far. I would hope that we can resolve it before that time, and we will try to work toward that end. And we may change the meeting time to an earlier time as we go along and work later to try to get through this.

Are there any other questions? Senator Chafee?

Senator Chafee. Mr. Chairman, it would by your understanding that next week, starting Tuesday, we will meet and actually take votes?

The Chairman. That is correct.

Senator Chafee. In other words, do a markup?

The Chairman. That is correct. Are there further questions?

(No response)

The Chairman. And we would like to start right on Tuesday doing that.

All right. We will stand in recess then. Thank you very much.

(Whereupon, at 11:48 a.m., the meeting was recessed, to be reconvened on Tuesday, April 28, 1987, at 10:00 a.m.)

C E R T I F I C A T E

This is to certify that the foregoing proceedings of an Executive Session of the Committee on Finance, held on April 24, 1987, were held as appears herein and that this is the original transcript thereof.

William J. Moffitt

WILLIAM J. MOFFITT
Official Court Reporter

My Commission expires April 14, 1989.