BYU Law Review

Volume 1989 | Issue 2 Article 3

5-1-1989

The Evolution of the Escape Clause-Section 201 of the Trade Act of 1974 as Amended by the Omnibus Trade and Competitiveness Act of 1988

Warren Maruyama

The Evolution of the Escape Clause—Section 201 of the Trade Act of 1974 as Amended by the Omnibus Trade and Competitiveness Act of 1988

Warren Maruyama *

I. Introduction

This paper is an effort to describe the changes made by the Omnibus Trade and Competitiveness Act of 1988 (1988 Omnibus Trade Act or 1988 Act)[1] to section 201 of the Trade Act of 1974,[2] also known as the "escape clause." Section 201 is a major United States trade remedy statute. Its aim is to give U.S. industries temporary breathing space to adjust to increased import competition. The paper will focus on the 1988 Omnibus Trade Act amendments and their implications for future adjustment policy in the U.S. and the General Agreement on Tariffs and Trade (GATT).[3] The 1988 Omnibus Trade Act is significant in at least three respects. First, the bill made important improvements in section 201. It focused the section 201 process on adjustment and increased the pressure on firms and workers to take concrete actions to help the industry regain its competitiveness. Second, the Act is significant in what it does not do. The House-Senate conferees rejected proposals to strip the President of discretion in escape clause cases, thus leaving the basic section 201 process intact. Third, the 1988 Omnibus Trade Act left open the question of international safeguards and adjustment policy in GATT and specifically in the GATT Uruguay Round of Multilateral Trade Negotiations. This is a key issue and will

* Associate General Counsel, Office of the U.S. Trade Representative. This paper offers the personal views of the author and does not necessarily reflect the positions of the U.S. Government.

1. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988) [hereinafter 1988 Trade Act].

2. 19 U.S.C. § 2251-53 (1982).

3. Opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948). For a general explanation of GATT see *infra* note 26 and accompanying text.

shape future section 201 and adjustment policy in the United States.

The international trade system needs effective adjustment mechanisms for cushioning the impact of shifting trade flows. Progress toward increased trade liberalization is much easier to sustain politically if trade law mechanisms allow firms and workers to adjust smoothly to increased import competition. The GATT recognizes this fact in Article XIX, which permits a contracting party to temporarily apply quotas or tariffs to allow an industry to adjust. U.S. law recognizes this fact in section 201, which implements U.S. rights under GATT Article XIX.

Nevertheless, for reasons outside the control of U.S. lawmakers, the international adjustment process as contemplated by Article XIX has become increasingly brittle. This has significantly weakened GATT's ability to adjust to rapid economic change and promote increased trade liberalization by developed countries. At the same time, for a variety of reasons, the U.S. has run a series of large trade deficits. Thus, sharp increases in import volumes and low import prices have put extreme pressure on U.S. industry, particularly labor-intensive U.S. manufacturing industries. These industries began pushing Congress and the Executive Branch for changes in U.S. macroeconomic and trade policies and specific trade actions to reduce import competition.

It was in this context that in 1986 Congress and the Executive Branch began a comprehensive reexamination of U.S. trade law and policy. This paper is an attempt to describe the outcome of that process.

II. Section 201 of the Trade Act of 1974

Section 201 authorizes the President to provide comprehensive tariff or quota relief to an injured industry. It is the only U.S. trade remedy that directs the President to grant import relief on a "most favored nation" (MFN) basis.[4] In other words,

4. Section 126(a) of the Trade Act of 1974, 19 U.S.C. § 2136(a) (1982), directs the President to apply "any duty or other import restriction" under authority granted in the Act on an MFN basis to "products of all countries." Under section 204(e), 19 U.S.C. § 2254(e) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a), the President can disregard section 126(a) for purposes of section 201, but "only after consideration of the relation of such actions to the international obligations of the United States." Under GATT Articles I and XIII, quota, tariff, and tariff rate quota relief must be applied on an MFN basis to imports from any contracting party.

the President can, if he chooses, impose quotas or higher tariffs on all imports, regardless of their country of origin. Because tariff or quota relief can be applied across-the-board, section 201 investigations can involve huge amounts of trade. The U.S. International Trade Commission (ITC or Commission) estimated, for example, that the amount of total imports potentially subject to quotas or increased tariffs amounted to $13.780 billion in *Certain Motor Vehicles and Chassis* and $4.651 billion in *Non-Rubber Footwear*.[5]

Section 201 is also unusual because it authorizes import relief on "fairly traded" goods. Many U.S. trade remedy statutes are targeted at various "unfair trade practices" by foreign companies or governments.[6] In contrast, the only issue in a section 201 investigation is whether imports are a "substantial cause of serious injury" to an industry in the United States.[7] Consequently, an industry can receive section 201 relief if it is uncompetitive; it need not establish that dumping, subsidization, or infringement of an intellectual property right led to the injury.

Section 201's focus on the condition of the U.S. industry, rather than on unfair trade, is consistent with its role as a safety valve. In the process of trade liberalization, as tariff and nontariff barriers are lowered, there are inevitably industries that are squeezed out by imports. Section 201 was intended to give these industries a chance to seek temporary quota or tariff relief in order to retool or shift into other lines of production.

The other aim of section 201 is to de-politicize the import relief process. By setting criteria for evaluating requests for import protection and putting the procedure in the hands of an independent fact-finder (the ITC), Congress reduces the pressure to deal directly with requests for import protection through industry-specific trade legislation. The aim is to screen such requests objectively, by requiring a finding of serious injury, rather than politically. This offers a way of deflecting constituent pressure for tariff or quota bills.[8]

---

5. Certain Motor Vehicles and Certain Chassis and Bodies Therefor, USITC Pub. 1110, Inv. No. TA-201-44 (1980); Certain Non-Rubber Footwear, USITC Pub. No. 1717, Inv. No. TA-201-55 (1985).

6. *See e.g.*, 19 U.S.C. §§ 1337, 1671, 1673, 2411 (1982).

7. 19 U.S.C. §§ 2251-53 (1982).

8. This objective is reflected in the position of Senator Danforth, a leading proponent of section 201 reform. During the trade bill debate, he argued that section 201 relief is so difficult to obtain that it forces Congress to deal directly with protection for trade-damaged industries. *See* CONG. REC. S9324-25 (daily ed. July 7, 1987).

Section 201 investigations involve a two-stage process. In the first stage, an industry typically files a petition with the ITC.[9] The Commission is a quasi-judicial independent agency of the U.S. Government and is charged with administering a number of U.S. trade statutes.[10] It reviews the petition and, if it finds that the petition meets statutory requirements, it initiates a section 201 investigation.

The Commission must finish a section 201 investigation and report to the President within 180 days of the petition's filing.[11] During its investigation, the Commission sends comprehensive questionnaires to the U.S. industry, importers, and other sources of relevant information. It holds public hearings to obtain the views of the petitioner and other members of the U.S. industry, foreign respondents, U.S. consumers, and interested members of the public. On the basis of the information obtained in the investigation or submitted by interested parties, the Commission's staff prepares what is known as the "staff report." The report, the briefs, and papers submitted by petitioner and respondent and the hearing transcript, form the "administrative record" on which the commissioners make their decisions and vote.

The issue before the Commission is a narrow one. The Commission must determine whether "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."[12] Thus, the questions arising in the Commission's investigation typically relate to the definition of the industry producing a "like or directly competitive product,"[13] "substantial cause,"[14] and "serious injury" or threat

9. The President also has authority to self-initiate section 201 investigations. This authority has been used only twice in *Specialty Steel* and *Apples*.

10. 19 U.S.C. § 1330 (1982).

11. The deadline under the 1974 Act was six months. This was changed to 180 days in section 202(f)(1) of the 1988 Omnibus Trade Act. 19 U.S.C. § 2252(f)(1) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

12. 19 U.S.C. § 2251(a) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

13. The industry is normally defined as all U.S. producers of a like or directly competitive products. In certain circumstances, the ITC is authorized to consider a regional industry. This is defined as one or more domestic producers "in a major geographic area of the United States and whose production facilities in such area for such article constitute a substantial portion of the domestic industry in the United States and primarily serve the market in such area, and where the imports are concentrated in such area . . ." 19 U.S.C. § 2251(b)(3)(C) (1982).

thereof to the U.S. industry.[15] The resolution of these issues shapes the outcome of the investigation.[16]

If the Commission finds that increased imports are a substantial cause of serious injury or threat thereof, it makes an affirmative injury determination. If the finding is negative, the investigation ends with the Commission's report of its negative finding to the President.[17]

If it finds in the affirmative, however, the Commission must find the appropriate remedy for the injury found. Here, again, the Commission's task is narrow. It must calculate the type and amount of import relief that would remedy the serious injury.

Prior to the 1988 Act, the Commission selected from four remedy options — a tariff increase, quota, tariff rate quota, or adjustment assistance. It determined which remedy would best address the injury caused by imports and the amount of relief necessary. It then reported its "findings" to the President in a report submitted under section 201(d)(1).

In contrast to the Commission's process, which is legalistic and fact-oriented, the second phase of the section 201 process is policy-oriented and much more political. This is because the Commission's remedy recommendation is not binding. Instead, prior to the 1988 Omnibus Trade Act, sections 202 and 203 of the Trade Act of 1974 authorized the President to deny import relief if he found that it was not in the "national economic interest."[18] Section 202(c) directed the President to consider such policy factors as "the probable effectiveness of import relief as a means to promote adjustment,"[19] the "effect of import relief on

14. The term "substantial cause" is defined in section 201(b)(4) as a "cause which is important and not less than any other cause." 19 U.S.C. § 2251(b)(4) (1982).

15. The Commission has a body of administrative precedents concerning injury and industry definitional issues. In addition, section 201(b)(2) directs the Commission to consider certain enumerated factors in assessing serious injury and threat, including the "significant idling of productive facilities," the inability of a significant number of firms to operate at a reasonable level of profit, a "downward trend in production, profits, wages, or employment (or increasing underemployment) in the domestic industry concerned," etc. 19 U.S.C. § 2251(b)(2) (1982).

16. The inclusion or exclusion of certain weak or prosperous firms in the industry can strengthen or weaken the case for an affirmative finding of serious injury. The respondents typically try to argue that other causes, unrelated to imports, were more important factors in any decline in the industry's position.

17. The President has no authority to act unless the Commission has made affirmative finding of material injury.

18. 19 U.S.C. §§ 2252-53 (1982).

19. 19 U.S.C. § 2252(c)(3) (1982).

consumers,"[20] the "effect of import relief on the international economic interests of the United States,"[21] and "the economic and social costs which would be incurred by taxpayers, communities, and workers if import relief were or were not provided."[22] Accordingly, the President had broad discretion to accept or reject the Commission's remedy recommendation for policy reasons.[23] He could accept the recommendation without change, as was done in *Certain Heavyweight Motorcycles*.[24] He could alter the type and amount of relief. For example, the President could decide to negotiate "orderly marketing agreements" (OMA) with foreign governments instead of unilaterally imposing a quota. And, in some cases, the President has denied import relief altogether on the grounds that relief was not in the "national economic interest."

III. GATT Article XIX

To understand the 1988 Omnibus Trade Act, it is important to view section 201 in the broader context of the international rights and obligations of the United States. While section 201 is a U.S. statute, it implements U.S. rights under Article XIX of the General Agreement on Tariffs and Trade (GATT),[25] an international agreement to which the United States and ninety-two other nations belong. The GATT permits the United States to impose trade restrictions under Article XIX that would otherwise be foreclosed by GATT rules prohibiting increases in a bound tariff and the use of quantitative restrictions against another GATT contracting party.[26] Article XIX actions are com-

---

20. *Id.* § 2252(c)(4).

21. *Id.* § 2252(c)(5).

22. *Id.* § 2252(c)(9).

23. The President's rejection of a Commission finding should not be interpreted as a criticism of the Commission's reasoning. Under section 201, the Commission does not consider the policy implications of import relief. Indeed, it has no legal authority to do so. Its inquiry is a narrow factual one, focused solely on whether imports were causing serious injury and the amount of import relief necessary to remedy that injury. The policy implications of quotas, higher tariffs, or other forms of relief are left to the President. Consequently, presidential review is the first opportunity for the U.S. Government to examine the policy consequences of protecting the industry from imports.

24. Proclamation 5050 of Apr. 15, 1983, 3 C.F.R. 41 (1983 Comp.).

25. *See supra* note 3.

26. The GATT is basically a contract between nations who accede to the agreement and are referred to as "contracting parties." It consists of tariff concessions negotiated by each contracting party under Article II. These concessions consist of "bindings" that lock in a tariff at a specified rate. Under the "most-favored-nation" obligation of Article I,

monly referred to as "safeguard" or "escape clause" actions. Any safeguard action must conform to the criteria that is spelled out in Article XIX. Hence, while GATT Article XIX authorizes the United States to use section 201, it also constrains U.S. actions by specifying certain criteria that must be met.

Article XIX provides in pertinent part:

> 1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect to such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.

Although Article XIX permits the United States and other contracting parties to take safeguards actions, it imposes a price. If Article XIX rights were free, contracting parties might be tempted to invoke Article XIX at every opportunity. The result would be a proliferation of Article XIX actions that would swallow up the gains of trade liberalization. Accordingly, GATT requires a contracting party taking an escape clause action to "compensate" its trading partners for lost trade. Paragraph 3(a) of Article XIX provides in pertinent part that if a contracting party takes an escape clause action:

> [T]he affected contracting parties shall then be free, not later than ninety days after such action is taken, *to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the Contracting Parties, the application to the trade of the contracting party taking such action . . . such substantially equivalent concessions or other obligations under this Agreement the suspension of which the Contracting Parties do not disapprove.*[27]

---

this rate must be applied to goods of all contracting parties and assures them of access at the lowest or "most-favored" rate. The GATT also contains a set of rules or obligations designed to preserve the value of tariff concessions. These include, for example, the prohibition on quantitative restrictions in Article XI, the "national treatment" or non-discrimination obligation of Article III, and restrictions on excessive or burdensome customs fees and formalities in Article XVIII.

27. GATT Article XIX:3(a) (emphasis added).

The rights of "affected parties" under GATT are "compensation and retaliation" rights. In practice, they put pressure on the contracting party taking an escape clause action to attempt to reach an agreement with affected trading partners on compensation. This compensation typically takes the form of tariff cuts on other products, so that from the "affected contracting parties'" standpoint the losses resulting from trade in the product subject to Article XIX restrictions are offset by increased exports of other products.[28]

If the contracting party imposing the restrictions cannot or does not provide acceptable compensation, it risks retaliation against its exports. Under Paragraph 3(a) affected contracting parties have a right to raise their tariffs on exports of the party imposing the restrictions if they are not satisfied with the compensation offer. In 1983, for example, the United States restricted imports of specialty steel under section 201.[29] The European Economic Community retaliated by raising its tariffs on U.S. exports of chemicals, sporting goods, and burglar alarms. Similarly, in 1986, the United States increased its tariff on imports of red cedar shakes and shingles pursuant to section 201. While the U.S. action involved an unbound tariff concession, Canada retaliated by raising its tariffs on a number of unbound items imported from the United States, including computer print, Christmas trees, books, and magazines. The cost of compensation and the threat of foreign retaliation can be major disincentives to use Article XIX rights, particularly where large amounts of trade are involved and the bill is high.

IV. Development of the U.S. Escape Clause

The 1988 Omnibus Trade Act was another episode in the ongoing evolution of the U.S. escape clause. It is unlikely to be the last.

The "escape clause" was first proclaimed by President Truman in Executive Order No. 9832 as part of an agreement with the congressional leadership to obtain renewed authority for the Reciprocal Trade Agreements program.[30] To allay congressional

28. While compensation is the best way of resolving an Article XIX issue, it involves trade-offs and cross-cutting political pressures. Industries which will be exposed to increased import competition because of compensatory tariff reductions generally are not happy to be paying for another industry's protection.

29. 3 C.F.R. § 236 (1983).

30. 15 Fed. Reg. 1963 (Feb. 25, 1947).

concern about the impact of U.S. tariff cuts on U.S. industries and workers, the President agreed to set up a procedural mechanism to allow U.S. industries to apply for escape clause relief. At this time, the basic premise of the Reciprocal Trade Agreements program was that any U.S. tariff cuts negotiated with foreign governments would not cause "serious injury" to U.S. industries. The escape clause thus allowed the United States to pull back if the U.S. negotiators overshot and excessively reduced the tariff on a product.

Over Administration objections, Congress codified the escape clause in section seven of the Trade Agreements Extension Act of 1951. Section seven authorized the President to raise tariffs if "any product, upon which a concession has been granted under a trade agreement is, as a result in whole or in part, of the duty or other customs treatment reflecting such concession, being imported into the United States in such increased quantities, either actual or relative, as to cause or threaten serious injury to the domestic industry producing like or directly competitive products."[31]

During the 1950's, section seven was the primary import relief mechanism in U.S. trade law. From 1951-1962, the Tariff Commission conducted over 134 escape clause investigations.[32] It found serious injury in thirty-three and the President granted import relief, generally in the form of increased tariffs, in fifteen.[33]

---

31. For an excellent history of the escape clause during the 1950's see LEDDY & NORWOOD, *The Escape Clause and Peril Points Under the Trade Agreements Program*, STUDIES IN UNITED STATES COMMERCIAL POLICY (Kelly ed. 1966).

32. Because of its prominence as a source of import relief, the escape clause was the focus of numerous proposed amendments by congressional opponents of trade liberalization. These efforts led to the codification of the escape clause in 1951. In 1958, Congress added a legislative veto that allowed it to override the President's denial of escape clause relief. The legislative veto took effect by a two-thirds vote on a concurrent resolution. In addition, in 1958, by a vote of 206-199, the Administration barely beat back an attempt in the House of Representatives to restrict the President's authority to deny escape clause relief to situations involving a threat to national security.

33. LEDDY & NORWOOD, *supra* note 31, at 146. During this period, Congress repeatedly amended the escape clause. In the Trade Agreements Extension Act of 1953, the time period for investigations was shortened from one year to nine months. In the Trade Agreements Extension Act of 1955, Pub. L. No. 84-86, 69 Stat. 162 (codified as amended in scattered sections of 19 U.S.C.), Congress resolved an ongoing controversy over the definition of the domestic industry by stating the industry consisted of the "portion or subdivision" producing the like product. LEDDY & NORWOOD, *supra* note 31, at 132, 154-58. (A direct descendant of this provision can be found in section 202(c)(4)(B) of the current law.). This increased the likelihood of affirmative injury findings by eliminating the possibility that injury in one product line would be washed out by profits from sales

With a few exceptions, the section seven investigations during the 1950's involved small industries. During this period, the United States was far and away the world's preeminent economic power and most U.S. industries were highly competitive, since their competition in Europe and Asia was still recovering from the war. The exceptions tended to be smaller industries producing highly specialized products. The section seven investigations involved products like Hatter's Fur, Knit Gloves and Mittens, Safety Pins, Spring Clothespins, Coconuts, and Narcissus Bulbs.

A. *The Trade Expansion Act of 1962*

The Trade Expansion Act of 1962 (1962 Act)[34] sharply cut back the escape clause. As part of its efforts to gain broad tariff negotiating authority for talks with the European Economic Community, the Kennedy Administration set out to tighten escape clause standards to address foreign complaints that the large number of U.S. Article XIX actions was creating uncertainty and undercutting the value of U.S. tariff concessions.[35] Thus, section 301(b)(1) of the 1962 Act required an industry to demonstrate that "as a result *in major part* of concessions granted under trade agreements, an article is being imported into the United States, in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry . . ."[36] In addition, section 301(c)(4) required the Commission to find that "increased imports have been the major factor in causing, or threatening to cause, such injury or unemployment or underemployment." As the President's proposal made clear, escape clause relief was to be an "extraordinary" measure.[37]

---

of other unrelated products. The 1955 Act also changed the causation standard from "primary cause" to "contributed substantially," also enhancing the likelihood of affirmative findings, and required the Tariff Commission to make its report public at the same time it was submitted to the President. A legislative veto was added in the Trade Agreements Extension Act of 1958, Pub. L. No. 85-686, 72 Stat. 673 (codified as amended in scattered sections of 19 U.S.C.).

34. Pub. L. No. 87-794, 76 Stat. 872 (codified as amended at 19 U.S.C. §§ 1801-82 (1982)).

35. EVANS, THE KENNEDY ROUND IN AMERICAN TRADE POLICY 142 (1971).

36. S. REP. No. 1298, 93d Cong., 2d Sess., 272 (1974).

37. *Trade Expansion Act of 1962: Hearings Before the House Comm. on Ways and Means*, 87th Cong., 2d Sess., Pt. 1, 49-50 (1962).

To offset the toughened escape clause standards, the President proposed a new "trade adjustment assistance" program. This program was adopted in Title III of the 1962 Act. It authorized the President to provide financial assistance "to facilitate adjustment of United States firms and workers to conditions that may result from action taken by the President in carrying out trade agreements. . . ."[38] The President's message stated:

> Authority to grant temporary tariff relief will remain available to assist industries injured by a sudden influx of goods under revised tariffs. But the accent is on "adjustment" more than "assistance." Through trade adjustment, prompt and effective help can be given to those suffering genuine hardship in adjusting to import competition, moving men and resources out of uneconomic production into efficient production and competitive positions, and in the process preserving the employment relationships between firms and workers, wherever possible. Unlike tariff relief, this [financial] relief can be tailored to their individual needs without disrupting other policies.[39]

Thus, Trade Adjustment Assistance (TAA) provided an alternative to trade restrictions and represented the *quid pro quo* for tighter injury criteria.

Under the toughened standards of the 1962 Act, the escape clause withered. From 1962-1973, the Tariff Commission conducted twelve escape clause investigations. In each investigation, it found that the industry had not met the high standards of section 301. This had two consequences. First, the Administration negotiated a number of so-called "voluntary restraint agreements" to take care of import problems, since direct authority for quotas or tariffs was not available under the 1962 Act's "escape clause." Second, the focus of efforts by import-sensitive industries to obtain relief shifted to the Antidumping Act of 1921.

B. *The Trade Act of 1974*

The Trade Act of 1974 (1974 Act)[40] enacted section 201 and reinvigorated the "escape clause" to a degree. It changed the "major part" standard to "substantial cause" and dropped the

---

38. Section 301 of Trade Expansion Act of 1962, 19 U.S.C. § 1801 (1982).

39. *Trade Expansion Act of 1962: Hearings Before the House Comm. on Ways and Means*, 87th Cong., 2d Sess., Pt. 1, 8 (1962).

40. Pub. L. No. 93-618, 88 Stat. 1978 (codified at 19 U.S.C. §§ 2101-2487 (1982)).

requirement that the increased imports be shown to result directly from U.S. trade agreement concessions.[41] It also clarified the criteria to be employed by the Tariff Commission, now renamed the "U.S. International Trade Commission," in assessing serious injury.

The 1974 Act also modified the presidential review process. It added authority for the President to negotiate "orderly marketing agreements" as an escape clause remedy.[42] It also directed the President to implement the relief recommended by the Commission "unless he determined that provision of such relief is not in the national economic interest of the United States." Accordingly, in contrast to the 1962 Act, which gave the President total discretion, the 1974 Act sought to limit the President's authority to consider economic factors.[43] This limitation reflected the congressional view that relief should not be denied for "foreign policy" reasons.[44]

The 1974 amendments revitalized the escape clause to a degree. From 1974-88, the Commission conducted sixty-one section 201 investigations. While section 201 activity paled in comparison to activity in the antidumping and countervailing duty area, the number of escape clause investigations increased sharply over levels under the 1962 Act. The Commission made an affirmative finding of injury in thirty-four investigations. The President granted some form of import relief in nineteen.[45]

V. Omnibus Trade and Competitiveness Act of 1988

In 1986 and 1987, the House and Senate leadership set as a goal the enactment of comprehensive trade legislation. This re-

---

41. Because the U.S. had acceded to GATT in 1947, it had become increasingly difficult to establish any link between U.S. tariff reductions in GATT, increased imports, and serious injury.

42. OMAs are "voluntary" undertakings by foreign governments to restrain their exports to the U.S. and are a form of quota.

43. Section 351 of the 1962 Act simply stated that the President "may" proclaim import relief.

44. S. Rep. No. 1298 93d Cong., 2d Sess., 124 (1974).

45. In this respect, President Reagan's record on escape clause relief was quite strong. Import relief was granted in four of the six cases under his Administration. This figure includes *Carbon and Alloy Steel Products*, where President Reagan rejected the Commission's quota recommendation, but instead directed the USTR to negotiate a series of "voluntary restraint agreements" with foreign governments under the Steel Stabilization Program. 49 Fed. Reg. 36813. While technically a denial of import relief under section 201, the decision resulted in comprehensive VRA relief under the President's steel program and was clearly an offshoot of the 201 case.

sulted in the passage of House Resolution (H.R.) 4800 in 1986 by the House of Representatives. While H.R. 4800 died in the Senate Finance Committee in the closing days of the 99th Congress, it was immediately reintroduced on January 6, 1987 as H.R. 3. By this time, it was apparent that trade legislation would be a high priority for the 100th Congress and that any reasonable bill would have strong bipartisan support. At this point, the Administration came forward with its own bill, H.R. 1155, the Trade, Employment, and Productivity Act of 1987. While the bill essentially proposed to maintain the trade law status quo, and thus played a minor role in the ensuing trade bill process, it demonstrated that the Administration was prepared to deal in appropriate circumstances.[46]

The trade provisions of H.R. 3, including the section 201 amendments, were substantially revised during mark-up by the House Ways and Means Committee, based on a Chairman's draft developed by Committee Chairman Dan Rostenkowski and Congressman Sam M. Gibbons. The revised H.R. 3 passed the House in April, 1987. The action then shifted to the Senate Finance Committee which marked up Senate Resolution (S.) 1420, also known as the Bentsen-Danforth bill after Committee Chairman Lloyd Bentsen and Senator John Danforth. S. 1420, by now renamed H.R. 3, passed the Senate on June 21, 1987.[47] Because the House and Senate versions of the bill differed significantly, a House-Senate Conference was convened to work out the differences. The conferees reached agreement on a conference report on April 20, 1988. The conference version of H.R. 3 passed the House and Senate, but was vetoed by President Reagan, primarily over the plant closings issue. After plant closings was enacted in a separate piece of legislation, the other provisions of H.R. 3 were introduced in the House and Senate as H.R. 4848, which passed the House on July 13, the Senate on August 3, and was signed into law by the President on August 23, 1988.

The section 201 trade bill issues can be roughly grouped into five categories: (1) Injury and Causation, (2) Provisional Im-

46. The Administration's bill focused on changes to regulatory standards, educational policies, the National Science Foundation, worker readjustment program, and other broad policy measures designed to improve U.S. competitiveness. The trade law amendments were relatively limited and were contained in the last Chapter of the bill.

47. Under article I, § 7 of the U.S. Constitution, all revenue-raising bills (including tariff bills) must originate in the House of Representatives. Thus, the Senate version of a trade bill must take the form of an amendment to a House bill.

port Relief, (3) Positive Adjustment, (4) Presidential Discretion, and (5) Industry-Specific Concerns. From a political standpoint, the most difficult issues were positive adjustment policy and its relation to presidential discretion. The other issues were more technical, but can have practical implications for the outcome of a case and the relief available.

A. *Injury and Causation*

The ITC's injury determination is one obvious pressure point of section 201. In this respect, there were several proposals to amend section 201 to enhance the likelihood of affirmative ITC findings.

The most sweeping proposal was suggested by the House Energy and Commerce Committee, which in 1986 considered H.R. 3777. The bill sought to change the "substantial cause" standard of section 201 to "a cause." This amendment would have eliminated the statutory requirement that increased imports be an "important factor and not less than any other factor." The change would have drastically weakened the section 201 causation standard, since some causal linkage, however minimal, can be shown between imports and injury in most trade situations. Nevertheless, from a policy standpoint, the utility of imposing import restrictions in circumstances where imports play a trivial or insignificant role in an industry's decline is unclear. The imposition of trade restrictions is unlikely to have much effect, since the real source of the industry's problems lies elsewhere. The amendment was not adopted.

The 1988 Act, however, adopted an Administration proposal with respect to the causation standard to be applied by the ITC in assessing injury during a recession.[48] In a 1980 escape clause investigation of *Certain Motor Vehicles and Certain Chassis and Bodies Therefor*, the ITC found that imports of cars and light trucks were not a substantial cause of serious injury to the U.S. automobile industry.[49] The decision was controversial be-

48. The recession amendment was supported by several major business groups. The Emergency Coalition for American Trade (ECAT) testified in 1986 in favor of the "establishment of a lesser standard that would only be operative during periods of domestic economic recession." *Proposals to Reform the Escape Clause: Hearings Before the Senate Comm. on Finance*, 99th Cong., 2d Sess., 76 (1986) (testimony of Edmund T. Pratt, chairman of the Emergency Committee for American Trade).

49. Certain Motor Vehicles and Certain Chassis and Bodies Therefor, USITC Pub. No. 1110, Inv. No. TA-201-44 (1980).

cause the Commission majority — Chairman Alberger, Vice Chairman Calhoun, and Commissioner Stern, — appeared to find that declining demand resulting from a recession outweighed imports as a cause. Thus, the Chairman's opinion stated: "I have found the decline in demand for new automobiles and light trucks owing to general recessionary conditions in the United States economy to be a far greater cause of the domestic industry's plight than the increase in imports."[50] The Chairman rejected arguments that the Commission should not aggregate the various causes of declining demand during the recession, noting that:

> Among the separate and identifiable causes mentioned in this case are inflation, unemployment, rising interest rates, and higher energy costs. Undoubtedly, all of these factors played a part in bringing about the present recession in new vehicle sales. Supporters of the petition contend that none of these factors alone played as great a role in bringing about the injury as increasing imports.[51]

He found, however, that these factors really constituted a single factor. "All of these contentions seek to isolate and weight separately the various components of a general economic downturn. In reality, most of the factors mentioned above have worked in unison to bring about what is commonly termed a recession."[52]

In their dissenting views, Vice-Chairman Bedell and Commissioner Moore took a different tack. They treated the various elements of declining demand as discrete causes, noting that: "If we were to do otherwise—that is, to aggregate the negative economic factors in comparing them with increased imports—there would be few, if any, Commission determinations favorable to a domestic industry in section 201 cases in times of recession or economic downturn."[53] Instead, they treated the recession as part of the general backdrop of economic conditions, stating:

---

50. *Id.* at 21.

51. *Id.* at 27

52. This view was shared by Vice Chairman Calhoun, *id.* at 83 ("In this connection, I associate myself with the views of Chairman Alberger."). While Commissioner Stern's analysis is less clear on this point, she appeared to treat a "general decline in demand" as an alternative cause. *Id.* at 134-40. In subsequent section 201 decisions, Commissioner Stern clearly shifted away from use of declining demand in the aggregate as an alternative cause. Carbon and Alloy Steel Products, USITC Pub. No. 1553, Inv. No. TA-201-51 (1985).

53. Certain Motor Vehicles and Certain Chassis and Bodies Therefor, USITC Pub. 1110, Inv. No. TA-201-44, 173 (1980).

> [W]e believe that Congress intended the Commission to examine imports and their impact on the domestic industry over the course of the business cycle—during both good and bad years—in order to ascertain whether import penetration is increasing and, if so, whether the increasing penetration is seriously injuring the domestic industry.[54]

Chairman Alberger's analysis has a point. If an industry's real problem is a recession, an economic recovery will restore the industry to health without any intervention by the government. On the other hand, as Commissioner Bedell and Moore noted, the interpretation makes it exceedingly difficult for an industry to obtain section 201 relief during a recession, often precisely the time that an industry gets into serious trouble. During a recession, an industry's financial indicators are forced down by a general economic decline. In this situation, even if rising imports are creating a major problem, the industry can be foreclosed from import relief and denied a necessary opportunity to adjust. The Administration's proposal provided:

> For purposes of determining whether an increase in imports (either actual or relative to domestic consumption) is a substantial cause of serious injury to a domestic industry or a threat thereof, the Commission should consider the condition of the domestic industry over the course of the relevant business cycle and shall not aggregate the causes of declining demand associated with a recession or economic downturn into a single cause of serious injury.

This proposal, with minor redrafting, was incorporated in the 1988 Act.

The aim of the recessionary provision is to allow the Commission to continue to consider the elements of a recessionary downturn in demand, but without the aggregation or massing of factors that precluded an affirmative finding in *Automobiles*. The President's Message explains that: "The bill would not preclude the Commission from considering the effects of a recession, but instead would direct the Commission to treat a recession as a set of distinct causal factors, rather than a single factor." The House Ways and Means Committee report further clarifies how injury should be assessed over the course of the business cycle:

---

54. *Id.* at 174.

> The Commission would also consider the effects of a recession as part of its analysis of the condition of an industry over the full course of its business cycle. For example, if the industry is experiencing a normal decline in output and demand over the course of its business cycle, this would be evidence that imports are not the substantial cause of injury and that an economic recovery will restore the industry to health. If, on the other hand, the decline is much more pronounced than would normally occur in a cyclical downturn, the industry may be suffering serious injury as a result of imports.[55]

Thus, the effects of a recession go to the Commission's analysis of *injury* during the business cycle, rather than causation. If declines in the industry's financial indicators are consistent with normal shifts in the business cycle, the ITC can find that the industry is not seriously injured. If the injury goes beyond what would normally be expected in the business cycle and appears to result from increased imports, relief is available.

While the ITC had been backing away from the *Automobiles* decision for some time, the 1988 Omnibus Trade Act makes the change permanent. The amendment will affect the outcome of cases filed during recessions and could generate a significantly larger number of affirmative findings during such periods.

B. *Provisional Measures*

Several industry coalitions representing import-sensitive industries, including the Labor-Industry Coalition for International Trade (LICIT) and the Trade Reform Action Coalition (TRAC), sought amendments to section 201 to authorize provisional import relief. Their argument relied on an analogy to the antidumping and countervailing duty laws, where liquidation of customs entries is suspended after preliminary affirmative findings of dumping or subsidization and material injury.[56] Accordingly, the first House draft of H.R. 3 provided for "suspension of liquidation" during section 201 investigations. In practical

---

55. H.R. Doc. No. 33, 100th Cong., 1st Sess. (1987).

56. Under sections 703 and 733 of the Tariff Act of 1930, 19 U.S.C. §§ 1671, 1673(c) (1982), liquidation of customs entries is held in abeyance or "suspended" after preliminary affirmative findings of dumping or subsidization and material injury. This means that the importer must post a bond in the amount of the estimated antidumping or countervailing duty. If the final determinations on dumping or subsidization and injury are affirmative, the importer becomes liable for antidumping or countervailing duties, as the case may be, on goods entered during the period of suspension of liquidation.

terms, this meant that collection of customs duties would be held in abeyance during an investigation and that the importer would become liable for duties if import relief were eventually granted.

The primary provisional measures issue was the Administration's objection that the amendment would violate GATT. Unlike the GATT Antidumping and Subsidies Codes, which specifically authorize provisional measures, Article XIX requires a final affirmative finding that imports are causing "serious injury" before import relief can be put into effect.[57] Accordingly, the provision was significantly modified during the House Ways and Means Committee mark-up to make it GATT-consistent. The Ways and Means version, with a few minor changes, was incorporated in the final bill.[58]

As redrafted, the Ways and Means amendment directs the ITC to vote on injury no later than 120 days after the filing of a petition. If the petitioner makes an allegation of "critical circumstances," the amendment directs the ITC to make a second determination as to "critical circumstances" on the 120th day as long as the allegation was included in the petition or alleged on or before the ninetieth day of the investigation. If the allegation of critical circumstances is made after the ninetieth day and before the 150th day, the ITC must make a determination on critical circumstances by the time it sends its final report to the President, no later than the 180th day after the filing of the petition.[59]

The redrafted provision meets GATT requirements because it comes into play only after a final affirmative finding by the ITC. Hence, provisional relief is contingent on a prior finding of serious injury by the ITC and thus meets the requirements of paragraph one of Article XIX.

---

57. While Article XIX:2 authorizes a contracting party to act provisionally "in critical circumstances, where delay would cause damage which it would be difficult to repair," this paragraph only provides an exception to the prior consultation requirement. It does not authorize provisional relief prior to an affirmative finding under Article XIX:1.

58. In Conference, the only significant change was an amendment to cap the level of provisional tariff relief at the *lower* of the provisional or final duty rate. *See* 19 U.S.C. § 2252(d)(4)(D) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a). This addressed concerns by U.S. importers that they would be faced with uncertainty as to their potential liability for duties. Such uncertainty can be highly trade-restrictive.

59. 19 U.S.C § 2252(b)(3)(A) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

If the ITC finds critical circumstances and recommends provisional import relief, the President then has seven days to decide whether to proclaim such provisional relief as he or she considers appropriate.[60] Such relief would normally take the form of a tariff increase or "suspension of liquidation," so that if the President eventually decides to deny import relief at the end of the sixty-day review period, the duties paid can be rebated.[61]

Section 202(b)(3)(B) defines "critical circumstances" as follows:

> For purposes of this paragraph and subsection (d)(2), critical circumstances exist if a substantial increase in imports (either actual or relative to domestic production) over a relatively short period of time has led to circumstances in which a delay in taking action under this chapter would cause harm that would significantly impair the overall effectiveness of such action.[62]

The "critical circumstances" provision is aimed at two situations. First, the provision provides a means for the President to preserve the status quo during consideration of various import relief options if an industry is on the verge of collapse. As the House Ways and Means Committee report explains:

> In adopting this new provision, the Committee recognizes that in certain situations the injury caused by increased import competition may be so severe or so pervasive that not providing any relief until the end of the import relief proceeding (seven or eight months after the filing of the petition) may impair the effectiveness of the import relief in remedying the serious injury.[63]

Second, the new provisional relief authority can be used to discourage import surges during the Commission's fact-finding investigation and the Presidential review period. In past section 201 proceedings, importers have sometimes sought to inject large quantities of merchandise into the United States during the investigation in order to avoid potential liability for increased tar-

---

60. 19 U.S.C. § 2252(d)(2)(B) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

61. H.R. Rep. No. 40, 100th Cong., 1st Sess., 92-93 (1987).

62. 19 U.S.C. § 2252(b)(3)(B) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

63. H.R. Rep. No. 40, 100th Cong., 1st Sess., pt.1, 92 (1987).

iffs or amass a stockpile in the event of quota relief. Thus, the House report states:

> Critical circumstances may also occur when there are surges of imports, as foreign exporters and U.S. importers attempt to rush as many imports as possible into the United States before import relief is made effective. In their efforts to "beat" imposition of relief, they can seriously aggravate the injury which has already occurred.

The provisional relief standard, however, is quite high. The definition of "critical circumstances" requires a "substantial increase" in imports. The House report also suggests that the "difficult to repair" standard of the bill is roughly analogous to the "irreparable harm" standard used by the courts in evaluating requests for preliminary injunctions and aims to "preserve the status quo while the ITC and the USTR are considering remedy issues."[64] Consequently, provisional relief is likely to be an extraordinary action.

C. *Positive Adjustment*

The public and political debate over section 201 centered on positive adjustment policy and the closely related issue of presidential discretion. These issues were linked through the so-called "adjustment *quid pro quo.*"

This proposal involved a trade-off. Section 201 would be tightened by forcing industries to take real steps to achieve a "positive adjustment" as a condition of receiving import relief. In return, the President's "national economic interest" discretion would be cut back to create a greater likelihood that industries would receive meaningful section 201 relief and generate an incentive for industries and workers to take real steps to adjust. This view has enjoyed long and strong bipartisan support in the Senate.[65] As early as 1986, the Finance Committee held detailed hearings on "Reform of the Escape Clause." The committee heard detailed testimony on proposals to compel industries to take steps to achieve a positive adjustment as a condition of receiving import relief. In return, under the draft bill considered by the Committee, the President was required to follow the ITC's relief, unless Congress passed a joint resolution authoriz-

64. *Id.* at 93.

65. *See Proposals to Reform the Escape Clause: Hearings Before the Senate Comm. on Finance*, 99th Cong., 2d Sess. (1986).

ing him to provide "substantially less" relief. The enactment of a joint resolution is a difficult task and meant that the President was essentially bound by the ITC remedy finding. This approach had strong support among influential Democrats and Republicans on the Committee.[66]

The use of section 201 to promote positive adjustment is not new. As described above, the U.S. escape clause has had as its avowed purpose the promotion of positive adjustment by injured industries since the Trade Expansion Act of 1962. This focus was maintained in section 203 of the 1974 Act, which authorized the President to provide import relief "to prevent or remedy the serious injury or the threat thereof to the industry in question *and to facilitate the orderly adjustment to new competitive conditions by the industry in question.*"[67] In addition, the 1974 Act specifically authorized the President to consider "the efforts being made or to be implemented by the industry concerned to adjust to import competition" in determining whether to grant relief.[68]

It is nearly impossible to dispute that the best outcome of a section 201 case is a revitalized, competitive industry that can compete in world markets without government aid. The difference between Congress, labor, and the Administration was how best to achieve that goal. Here, the dispute centered on underlying differences of economic philosophy. Many congressional and labor proponents of section 201 reform believed that the statute should adopt an "industrial policy" approach. They placed great emphasis on increasing the prospects for industry adjustment through long-term industrial planning, cooperation by industry and labor, and coordinated government assistance.[69] To this end, the proposals required petitioners to submit draft adjustment

---

66. It should be noted that, if anything, the "adjustment *quid pro quo*" would have imposed stiffer requirements on industries seeking import relief by forcing them to make firm commitments to new investments and reductions in their costs. In some versions, the *quid pro quo* would have required industries to demonstrate that they had real prospects for adjustment.

67. 19 U.S.C. § 2253(a) (1982) (emphasis added).

68. 19 U.S.C. § 2252(c)(3) (1982). The Finance Committee stated: "The escape clause is not intended to protect industries which fail to help themselves become competitive through reasonable research and development efforts, steps to increase productivity and other measures that competitive industries must continually undertake." S. REP. No. 1298, 93d Cong., 2d Sess., 122 (1974).

69. *See e.g.*, R. REICH, THE NEXT AMERICAN FRONTIER (1983). The above description is necessarily oversimplified, since different approaches to an "industrial policy" have been proposed.

plans, followed by tripartite industry-labor-government review of the "adjustment plan," and agreement on commitments by firms, labor, and the government. They also gave a major role to the federal government in structuring and supervising the adjustment process and extracting "commitments" from firms and workers to take steps to increase capital investment, reduce wage costs, increase research and development, etc.[70]

Accordingly, the initial House draft of H.R. 3 emphasized the use of mandatory "adjustment plans."[71] After a request by the petitioner, the United States Trade Representative (USTR) was required to establish an "Industry Adjustment Plan Advisory Group," (IAPAG) consisting of representatives of workers, firms, small business firms, communities, consumers, and government. The Group was required to prepare and submit an "industry adjustment plan." Based on this plan, the USTR was to seek information regarding "how workers and firms intend to act upon the objectives and steps in the plan" and "any other actions the workers or firms, or both intend to take which will foster such objectives." Section 205(a)(2) authorized the USTR to "condition the provision of import relief on compliance by workers or firms, or both, in the industry with such elements of the plan as he considers appropriate." These provisions, however, were significantly diluted by the Ways and Means Committee during mark-up; the mandatory aspects of the plan were dropped along with the IAPAG.

The Senate version of H.R. 3, however, retained a strong emphasis on the adjustment *quid pro quo*. To this end, it gave a prominent role to adjustment plans and cooperative action as a means for structure during the industry adjustment process. The

---

70. The *quid pro quo* idea had a precursor in the Trade and Tariff Act of 1984, where Congress inserted a requirement that in return for import relief under the Steel Stabilization program, the President was required to find that the industry had:

(i) committed substantially all of their net cash flow from steel product operations for purposes of reinvestment in, and modernization of, that industry through investment in modern plant and equipment, research and development, and other appropriate projects, such as working capital for steel operations and programs for retraining workers.

19 U.S.C. § 2252 note. The idea was to expand the steel provision and apply it to all cases.

71. The Administration did not participate in the drafting of the bill, but instead limited itself to objecting to certain amendments during the Ways and Means Committee mark-up. The result was that there was no effective counterweight to protectionist amendments. When trade legislation was considered by the Senate Finance Committee, there was no consensus on the provisions and no commitment by Chairman Packwood to move a bill.

bill required petitioners to submit "a plan to promote positive adjustment to import competition." It authorized firms, unions, local communities, and trade associations to submit "commitments regarding their individual efforts to promote the positive adjustment in the domestic industry to import competition." Finally, it also directed the Commission to seek to obtain commitments from firms and workers "regarding actions such persons and entities intend to take to promote a positive adjustment in the domestic industry to import competition." As the Finance Committee report explained:

> The Committee envisions both the development and consideration of the plan and commitments from the industry as a dynamic and ongoing process, throughout the import relief proceeding. The Committee expects the petitioner to consult with appropriate Government officials, including representatives of the ITC and USTR and other interested members, including workers, in the domestic industry over the course of the import relief processing regarding efforts to promote positive adjustment. . . . These consultations will provide the opportunity for an interactive process to consider the adequacy of the proposed industry adjustment measures in the context of any relief that is provided. While the petitioner is required to submit a plan at the time of filing a petition, the Committee recognizes that the plan initially submitted may change over the course of the proceeding, reflecting the consultative process.

Thus, the plan and commitments would be developed through a process of consensus-building, until an agreed scheme for restructuring the industry had been created.

S. 1420 also sought to reshape the remedy phase to focus more closely on adjustment. In place of the "prevent or remedy serious injury" standard of the 1974 Act, S. 1420 directed the Commission to recommend actions "that are likely to assist the domestic industry in making a positive adjustment to import competition." It broadened the Commission's remedy options to include exemptions from federal regulatory standards and antitrust relief, if these actions would help the industry regain its competitiveness. Finally, the Finance Committee report indicated that if the ITC found that an industry could not adjust, it should not recommend relief. It stated: "[I]f the ITC finds, in light of the plan, commitments or other information, that import relief is not likely to assist positive adjustment, the Committee anticipates that the ITC will not recommend it."[72]

These provisions were an anathema to the Reagan Administration.[73] The Administration's economic program was built on the free market concept and reduced government regulation of the economy. While the Administration's bill was not a major factor in the House and Senate process, it shows the fundamental differences of approach. Like the House and Senate bills, the Administration also sought to amend section 201 to promote "positive adjustment" and "competitiveness." Instead of using adjustment plans, however, the Administration's bill proposed to preclude the ITC from recommending import relief unless it made a finding that an industry would be competitive at the end of the relief period. Thus, section 5006 of the Administration's bill directed the ITC to make a "Competitiveness Assessment" to determine "whether import relief could reasonably be expected to lead to a domestic industry (or segment thereof) that would be competitive without further import relief, if such relief were to be granted for a period not to exceed five years."[74] The bill, however, took a hands-off approach with respect to how that transformation would occur. Consistent with the Administration's economic views, it omitted adjustment plans, commitments and other forms of overt government involvement, leaving these issues to the industry and workers to work out for themselves. From the Administration's standpoint, the federal government could legitimately review an industry's prospects for adjustment but could not become directly engaged in planning or supervising the process.

Given the difficulty of blending incompatible economic philosophies, the "adjustment plan" provisions of the 1988 Act are often somewhat muddled. To reach agreement, the conferees basically fudged the "industrial policy" issue. They dropped the mandatory adjustment plan provision of the Senate bill, but kept a House provision authorizing industries to submit "volun-

---

72. S. REP. No. 71, 100th Cong., 1st Sess., 54 (1987).

73. It should be noted, however, that the adjustment plan issue, like section 201 generally, did not break cleanly on party lines. Mandatory adjustment plans were strongly supported by influential Senate Republicans, like Senator Danforth, Heinz, and Chafee. In 1986, Senator Heinz argued that the adjustment plans were unfairly being characterized as an industrial policy, but in fact had nothing to do with "picking winners and losers." *Proposals to Reform the Escape Clause: Hearings Before the Senate Comm. on Finance*, 99th Cong., 2d Sess., 10 (1986).

74. H.R. Doc. No. 33, 100th Cong., 1st Sess. 247 (1987).

tary" plans. While the plans are optional, the conference report emphasizes that the "conferees believe that it is important for firms and workers in the petitioning industry to demonstrate to the ITC and the President what steps they will be taking to make a positive adjustment to import competition."[75]

The conferees also dropped the Senate provision requiring the ITC to seek binding "commitments" from firms and workers in the industry, in favor of a House provision directing the ITC to request "information" on planned adjustment measures planned. However, the Senate concept was preserved to a degree in a provision permitting firms, unions, communities, and trade associations to submit "commitments" voluntarily to the ITC. Since the ITC is an independent agency outside Executive Branch control and it is the President, not the ITC, who ultimately decides whether to grant import relief, it is unclear what role these commitments will play in the decision-making process.

Section 202(a)(5) of the 1988 Omnibus Trade Act also established a process for a petitioner, prior to submitting a plan, to consult with the USTR and other affected agencies.

The practical significance of the adjustment plan provisions will depend on the political and economic views of future Presidents. If an Administration wants to pursue an active "industrial policy" approach to section 201, it has the legal tools to do so. For example, an Administration could indicate that import relief will not be granted unless an adjustment plan is submitted, in which petitioners, will as a practical matter, be compelled to submit plans. On the other hand, an Administration that favors a hands-off approach to adjustment and opposes direct government involvement in planning and supervising the industrial adjustment process is not compelled to engage in direct industrial policymaking. It must consider any plans submitted and provide an opportunity for consultations and review under section 202, but need not seek a direct *quid pro quo* from the industry or specific commitments with respect to implementation of a cooperative industry restructuring plan.

The 1988 Act, however, made other subtle but important changes in the remedy standard and process that will put pressure on industry and labor to take real steps to adjust. These changes reflect the fact that there were certain points of agree-

75. H.R. REP. No. 576, 100th Cong., 2d Sess. 663 (1988).

ment between Congress and the Administration—(1) on desirability of the overall goal of positive adjustment, however that end might be achieved, and (2) the need for incentives (or disincentives) to prevent industries from using 201 relief as a free ride and ducking the long-term steps to improve their competitive position. This agreement reflected frustration with repeated efforts by some industries to obtain section 201 relief and concern that some industries had used quotas or voluntary restraint agreements (VRAs) as an excuse to reap high profits.

The changes start with a new remedy standard, drawn from S. 490, which directs the ITC to recommend and the President to provide the type and level of import relief that will facilitate positive adjustment. Section 201(b) defines positive adjustment as occurring when:

> (A) the domestic industry—
> (i) is able to compete successfully with imports after actions taken under section 204 terminate, or
> (ii) the domestic industry experiences an orderly transfer of resources to other productive pursuits; and
>
> (B) dislocated workers in the industry experience an orderly transition to productive pursuits.[76]

The Act creates an important practical incentive for adjustment in the form of stringent monitoring provisions contained in section 204. Section 204(a)(1) directs the Commission to "monitor developments with respect to the domestic industry, including the progress and specific efforts by workers and firms in the domestic industry to make a positive adjustment to import competition."[77] Section 204(b) could be used as a club because it authorizes the President to terminate the relief if the industry has not made "adequate efforts to make a positive adjustment to import competition."[78] This will increase the pressure on industry to take concrete steps to address its problems.

The 1988 Act contains a second practical incentive to adjust. If an industry receives import relief in the form of a tariff increase, tariff-rate quota, quota, or orderly marketing agree-

---

76. 19 U.S.C § 2251(b)(1)(A), (B) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

77. 19 U.S.C. § 2254(a)(1) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

78. 19 U.S.C. § 2254(b)(1)(A)(i) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

ments, the 1988 Act prohibits the industry from submitting a new section 201 petition for a period "equal in duration to the period during which such action [tariff increase, tariff-rate quota, quota, or OMA] was in effect."[79] The provision was drawn from the Senate bill and is intended to prevent industries from repeatedly seeking section 201 relief. By precluding actions under section 201, the amendment sharply increases the pressure on an industry benefiting from relief to fix its problems once and for all. This amendment is very tough and will indirectly force an adjustment *quid pro quo* in cases where traditional forms of import relief are granted.

D. *Presidential Discretion*

The most contentious section 201 issue was Presidential discretion. As noted above, the positive adjustment and presidential discretion issues were linked through the "adjustment *quid pro quo.*"

The Administration strongly opposed an adjustment *quid pro quo*. First, as described above, the Administration had little sympathy for proposals to reform the escape clause to give it an industrial policy slant. Second, from a purely practical point of view, the Executive Branch, which works for the President, never likes to see the President's powers reduced, particularly when the President's power is reduced in the name of an economic philosophy it vehemently disagrees with.

When the Omnibus Trade bill emerged from the Senate Finance Committee, however, it made a frontal attack on presidential discretion. Under the bill, the President was required to implement the recommendation of the ITC with certain narrow exceptions. It stated that the President:

> (A) shall take—
> (i) the actions recommended by the Commission under section 203(b)(1)(A), or
> (ii) other actions authorized under subsection (d)(1) which are substantially to the actions recommended by the Commission under section 203(b)(1)(A) . . . .

It created two narrow exceptions, as follows:

79. 19 U.S.C. § 2252(h)(2) (1982).

> The President shall not be required to take any action under paragraph (1) which the President determines—
> (A) would endanger the national security of the United States, or
>
> (B) would be a substantial cause of serious injury to an industry in the United States that consumes any product of the domestic industry that is the subject of the order . . . .

Any decision not to provide relief pursuant to the two exceptions was subject to a congressional override through enactment of a joint resolution.

The Administration's case focused on the fact that, in cutting back presidential discretion, the bill deleted the "national economic interest" standard of the Trade Act of 1974. By requiring the President to implement the ITC's recommendation with only two narrow exceptions, the bill eliminated any review of the broader policy implications of import relief for consumers, competition, U.S. competitiveness, and U.S. exporters. Hence, while the 1974 Act permits the President to reject import relief if it would have excessive costs for consumers or would trigger foreign retaliation against U.S. exports pursuant to the compensation and retaliation provisions of Article XIX, the Finance Committee bill eliminated any consideration of these factors.

The effect was that the broad policy implications of relief could not be considered at any point in the section 201 process. The ITC performs a rather narrow technical function in section 201 cases of determining whether there is serious injury and calculating the level of relief required to remedy that injury. It does not examine the policy implications of the recommended relief.[80] The bill would have stripped the President of his authority to consider such factors. This would have benefited industries seeking section 201 relief, since the President would have been essentially locked into whatever relief was recommended by the ITC. Thus, the sole focus of the relief process would have been fixing the injury. The authority for efforts to balance the adverse consequences of relief would have been precluded.

For this reason, the Administration contended that the bill would have a number of undesirable consequences. First, it argued that section 201 cases can involve massive amounts of

---

80. As an independent administrative agency without any policymaking functions, it would be outside the ITC's usual role to become involved in weighing, for example, the effect of relief on national security, consumer welfare, etc.

trade and could drive up consumer prices. A Federal Reserve Board paper, for example, estimated that the automobile VRA with Japan cost U.S. consumers $4.5 billion in 1984 and that the steel VRAs cost consumers $2 billion annually.[81] Second, the Administration argued that mandating relief to import-sensitive industries would lead to foreign retaliation against U.S. exports because of GATT Article XIX compensation and retaliation rights. The effect would be to trade-off the most competitive U.S. industries—world-class exporters—to protect the import-sensitive elements of the U.S. manufacturing sector. Third, the Administration emphasized that import restrictions can have major implications for the U.S. economy and competitiveness. Higher import prices for key products, for example, can generate inflation. In short, by mandating relief under section 201, the bill arguably put the interests of petitioning import-sensitive over the broader national considerations encompassed in the President's "national economic interest" review.

An amendment by Senator Packwood to restore the "national economic interest" standard was defeated on the Senate floor by a vote of 55-41.[82] There followed, however, a surprising development, in which the Senate accepted by voice vote amendments to authorize the President to deny import relief if it would "disproportionately burden United States agriculture, result in a loss of United States jobs greater than the number of jobs preserved, or disproportionately burden the poor." The amendments by Senators Bradley and Gramm partly restored the President's discretion, although not enough to restore the broad flexibility of the "national economic interest" standard. Thus, when the Trade Bill went to conference, the Administration and the Senate were sharply divided on the discretion issue.

The House-passed bill also reduced presidential discretion, but in a different and more limited way. The House bill adopted a procedural approach by transferring the authority to review ITC recommendations under section 201 from the President to the USTR. This reflected an assumption that the USTR would be more likely to grant relief. Presidential decisions typically

81. *The Consumer Cost of U.S. Trade Restraints*, 10 Fed. Reserve Board of N.Y.Q. Rev. 1 (1985).

82. It is interesting that the Packwood amendment would have required the President to grant adjustment assistance if quota or tariff was denied. Thus, the amendment went significantly beyond the final version of the 1988 Act, which gave the President authority to provide no relief at all.

rely on inter-agency recommendations which reflect input from the State Department, which is concerned about the foreign policy implications of relief, and economic agencies like the Office of Management and Budget and Council of Economic Advisers, which are typically pro free trade. By cutting (in theory) these agencies out of the process, the House bill sought to increase the chances for relief.

The House bill dropped the "national economic interest" standard, but adopted in its place a new standard that preserved broad Executive Branch flexibility. The bill directed the USTR to take action to prevent injury and facilitate adjustment or:

> (B) not to provide import relief because—
>
> (i) the provision of import relief would threaten the national security of the United States; or
>
> (ii) the economic costs of providing any import relief are so great they outweigh the economic and social benefits of providing import relief.

While the cost/benefit provision altered the 1974 Act standard, it left an equivalent amount of flexibility, since a calculation of the "national economic interest" generally involves an analysis of pros and cons that is closely analogous to a cost-benefit calculation. Thus, the primary change in the House-passed bill was to shift decision-making from the President to the USTR.

During the Trade Bill Conference, both the House and Senate-passed bills were substantially modified. The House provision delegating section 201 authority to the USTR was dropped, so that the ultimate decision to provide relief stayed with the President. In addition, the conferees, with slight modifications, adopted the House-passed cost-benefit standard. Accordingly, the President retained broad discretion to grant or deny import relief. The factors listed for consideration in the 1974 Act remain in effect, with a few additions and modifications. Hence, the President can still consider the effect of import restrictions on consumers, exporters, the economy, and competition. Although relegated to a distant subparagraph, the "national economic interest" standard was retained through a catchall reference to "other factors related to the national economic interest of the United States."[83]

---

83. 19 U.S.C. § 2253(a)(2)(F) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a). The 1988 Act makes one change by prohibiting the President from reducing,

Surprisingly, the 1988 Act broadens Presidential discretion in certain respects. Section 203(a)(3) expands the President's remedy options to include: (1) the initiation of international negotiations to address the underlying cause of the increase in imports,[84] (2) the submission of legislative proposals to Congress,[85] and (3) "any other action which may be taken by the President under authority of law. . . ."[86] This amendment increases the President's ability to proclaim some form of relief without actually restricting imports. While the amendment is useful in that it authorizes new remedy approaches, it could also invite token actions characterized as "import relief," thus weakening section 201's credibility.

However, these gains are offset by section 204(b), which prevents the President from terminating or modifying import relief for a period of two years after it goes into effect.[87] Thus, while the President retains flexibility under the new cost-benefit standard, he cannot go back on his decision for the first two years. The amendment thus reduces the President's ability to address changed circumstances, *e.g.* shortages arising from an excessive tariff increase. Drawing from the adjustment *quid pro quo*, the amendment's purpose is to give the industry firm assurance that it has at least two years to get its program into place in situations where relief is granted.

In sum, while the 1988 Act made a number of changes, it generally preserved Presidential discretion. Although the cost-benefit standard is a change from the "national economic interest" standard of the 1974 Act, the President retains authority to reject import relief if he concludes that it would have adverse effects on U.S. exports, consumers, competition, or the economy. The effect of the other changes made by the 1988 Act is more difficult to calculate. Section 203 gives the President additional

---

modifying, or terminating the import relief for two years after it has been proclaimed. The Administration unsuccessfully opposed this provision, which is designed to give an industry some assurance that relief will remain in effect while it implements its adjustment program.

84. 19 U.S.C. § 2253(a)(3)(G) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

85. 19 U.S.C. § 2253(a)(3)(H) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

86. 19 U.S.C. § 2253(a)(3)(I) (1982), *as amended by* 1988 trade Act, *supra* note 1, § 1401(a).

87. 19 U.S.C. § 2254(b)(1) (1982), *as amended by* 1988 Trade Act, *supra* note 1, § 1401(a).

remedy options, so that relief can be proclaimed without actually restricting imports or granting adjustment assistance as required by the 1974 Act. At the same time, section 204 restricts the President's ability to modify or terminate relief in light of changed circumstances. On the whole, presidential discretion under the 1988 Act appears roughly equivalent to discretion under the 1974 Act.

E. *Industry-Specific Amendments*

No trade bill would be complete without industry-specific amendments. The 1988 Act created a new fast-track import relief procedure for U.S. producers of perishable agricultural products. These producers have complained that the six month period required for a normal section 201 investigation takes too long to provide effective relief.

In addition, reflecting an ongoing controversy arising out of a 1984 escape clause investigation of *Footwear*,[88] the conferees adopted amendments clarifying the definition of the domestic industry in situations where the industry both imports and manufactures domestically. Case-specific amendments of geographically isolated imports and protection for U.S. producers of seasonal agricultural commodities were dropped in conference.

VI. Implications for Future Adjustment Policy

While the 1988 Omnibus Trade Act made important improvements to section 201, the prospects for a return of section 201's heyday of the 1950's lie largely outside the control of U.S. law. This is because the escape clause's revitalization (or further decline) depends to a significant extent on the outcome of the Uruguay Round Safeguards negotiations, which requires agreement between the U.S. and its GATT trading partners.

Ironically, a key factor in the recent decline of the U.S. escape clause has been the highly successful post-war reduction in tariffs in successive rounds of GATT negotiations. These tariff reductions, with their implications for use of GATT Article XIX, have significantly reduced the ability of developed countries to address temporary adjustment problems through escape clause actions.

In 1947, when the U.S. and seven other governments, agreed

88. Non-Rubber Footwear, USITC Pub. No. 1545, Inv. No. TA-201-50 (1984).

to provisionally apply GATT, tariff levels were quite high, particularly for imports which competed with a domestically manufactured product. At the same time, trade flows were small and in many cases focused on items where no domestic production existed. Thus, during the 1950's, the U.S. could invoke the escape clause with relative ease—the products involved relatively small amounts of trade and compensation could be provided easily through reductions in other (high) U.S. tariffs.

Through successive rounds of multilateral trade negotiations, the GATT Contracting Parties have sharply reduced tariffs, at least in industrialized nations.[89] This has sharply increased trade flows. In addition, the developing countries, particularly the newly industrializing countries (NICs) in Asia and South America, have become major producers of manufactured products. This is particularly true for labor-intensive manufactures, like steel and textiles, which coincidentally by virtue of their high labor component also represent a potent political force in most developed countries. In short, over the last forty years: trade has grown; the number of players has increased; and the nature of trade itself has changed, as imports pose a threat to established domestic production.

Yet, during this same period, the primary GATT adjustment mechanism, the Article XIX escape clause, has become increasingly difficult to use. Rising trade flows have increased the Article XIX compensation/retaliation cost. Reduced tariff levels have made it difficult to provide compensation in the form of tariff reductions on other products of interest to affected trading partners. While some high tariffs remain, these often reflect powerful domestic industries who have successfully fought off trade liberalization for their sector. In short, at a time when trade is rising and key industries are under pressure, the compensation/retaliation requirement of Article XIX makes escape clause actions difficult to implement and extremely costly in large cases where the political pressure to act is most acute. This has forced governments to resort to so-called "grey area measures," like orderly marketing agreements and voluntary restraint agreements, which involve an implicit waiver of Article XIX compensation rights.

While many political and policy factors determined the outcome of the section 201 debate, the significance of GATT com-

89. Developing country tariffs are another story.

pensation/retaliation rights should not be underestimated. In the end, the idea of trading off competitive U.S. export industries to protect import-sensitive U.S. manufacturers under the adjustment *quid pro quo* was simply unattractive to the Administration, many members of Congress, and the U.S. export sector. Because section 201 cases involve direct sectoral interest trade-offs, the Administration was able to persuade Congress and the business community that continuation of existing Presidential policy discretion was essential. Thus, despite deep concern over the adjustment issue, the basic status quo with respect to restrictions on fairly traded goods was maintained, albeit with significant process refinements. In contrast, in section 301, which involves unfair trade practices and where there was broad business community support for aggressive efforts to open foreign markets, Senator Bentsen and Congressman Rostenkowski took a much tougher line. They were able to force on the Administration a sharp reductions in discretion and a delegation of Presidential authority.

It is doubtful, however, that the 1988 Omnibus Trade Act is the final word on the U.S. escape clause or U.S. adjustment policy. While the low dollar has reduced the pressure on U.S. manufacturing and strengthened U.S. export competitiveness, adjustment problems will continue to arise in a world with massive trade flows, rapid changes in technology, and floating exchange rates that can cause major shifts in price competitiveness. As then-USTR William E. Brock put it in 1984:

> As we look a little further down the road, the key trade policy issue we will face together with other industrial nations is the adjustment of our economies to long-term economic change. Such changes include the expansion of automation in industry, the world-wide overproduction of agricultural products, the new growth potential of our economy in high technology goods and services, and the expansion of exports from the newly industrializing countries, the so-called NICs, like Brazil, Korea and Singapore. The key question is how the necessary adjustments can be brought about without imposing unacceptable human costs on the workers who are displaced from their current jobs.[90]

These shifts in trade and competitiveness will continue to con-

90. Statement by the Honorable William E. Brock, United States Trade Representative, before the Joint Economic Committee (Jan. 31, 1984) (speech on file with author).

front governments with the adjustment problems and political pressures.

Unless and until the Uruguay Round negotiations result in significant revisions of GATT Article XIX, the decline of traditional forms of quota and tariff relief contemplated by GATT Article XIX will continue. While Article XIX can be used for small cases, the traditional MFN quota or tariff relief cost is often too high in cases involving large trade volumes, unless a government wants to take its chances on foreign retaliation.

While it is possible that governments will take a purist stance and reject any and all restrictions in the name of free trade, such an outcome would be a surprise. The situation is much more likely to generate pressures for alternatives, at least in the short-term. This implies continued use of VRAs to avoid the Article XIX compensation requirement.

In addition, governments will find themselves under increasing pressure to provide financial assistance to industries and displaced workers, where quota or tariff relief is not available. As described above, the use of such programs started in the U.S. with the Trade Adjustment Assistance (TAA) provisions of the Trade Expansion Act of 1962. TAA has since grown into a large and entrenched program with significant labor and congressional support. The 1988 Omnibus Trade Act continued the trend toward expanded assistance with enactment of the Reagan Administration's Worker Readjustment Program (WRAP) to provide assistance and counseling to displaced workers. The 1988 Act also contains a new TAA worker retraining program developed by Congressman Don Pease, a leading Congressional trade expert and a strong advocate of new approaches to adjustment. The constraint on future growth of such programs is their cost and questions about their effectiveness.

Finally, in the United States, industries will continue to find antidumping (AD) and countervailing duty (CVD) actions an attractive trade remedy option, since these statutes provide no Executive Branch discretion (and no compensation is required by GATT). This will provide additional encouragement for massive AD/CVD cases, *e.g.* carbon steel, that blend unfair trade cases against a large number of countries into something that vaguely resembles an MFN escape clause action. The difficulty is that AD/CVD actions focus on unfair trade practices, not adjustment. As a result, the adjustment issue is either dealt with indirectly or not at all.

VII. Conclusion

While the Omnibus Trade and Competitiveness Act of 1988 made significant amendments to the section 201, it did not alter the basic principle of presidential discretion, nor will it generate a large increase in escape clause cases. The amendments are largely process-oriented; they alter the ITC injury standard and the relief available in significant respects. The amendments will also focus the section 201 process much more closely on adjustment and will sharply increase the pressure on firms and workers to take steps to restore the industry's competitiveness. Because the 1988 Act did not involve drastic changes to the section 201 status quo or the basic distribution of authority between the President and the ITC, it was acceptable to the Reagan Administration.

The section 201 outcome reflects a number of factors. Congress, particularly the House, placed a higher priority on tightening up section 301 to force a more aggressive U.S. stance toward foreign barriers to U.S. exports than on section 201 reform, which would have involved increased restrictions on fairly traded goods.[91] In the end, the Senate and House conferees led by Senator Bentsen and Congressman Rostenkowski were able to force major changes in section 301. Major business groups, particularly those representing U.S. multinationals, also placed a much higher priority on opening up foreign markets than on gaining increased protection under section 201. Finally, the provisions of GATT Article XIX, particularly the compensation requirement, imposed a major external constraint on U.S. lawmakers.

The 1988 Act, however, is unlikely to be the final word on section 201. The international trade system needs effective mechanisms for cushioning the impact of shifting trade flows. While Article XIX was originally conceived as the primary GATT adjustment mechanism, the compensation requirement is now a major disincentive to use section 201. As a result, the adjustment policies of the United States and other governments rely heavily on alternatives, including AD/CVD, VRAs, and adjustment assistance.

Therefore, the long-term prospects for the escape clause de-

91. In part, this reflected the view of Chairman Gibbons of the Ways and Means Trade Subcommittee, who, while a strong supporter of tough action against unfair trade, has always sought a balanced approach to section 201.

pend on the Uruguay Round. Any major section 201 reforms, particularly those designed to promote increased use of quotas or tariffs to facilitate adjustment, will likely require corresponding changes in GATT Article XIX as well.

At this stage, the prospects for the GATT talks are unclear. The European Community is seeking to open up Article XIX through "unilateral selectivity," *i.e.* GATT authorization to selectively apply tariffs or quotas to the trade of a single or small group of countries, rather than on an MFN basis as required by current rules.[92] This would reduce the compensation costs of Article XIX actions by allowing quotas or tariffs on one supplier and make the escape clause a more attractive policy option. However, the developing countries fear that unilateral selectivity would make it too easy to use Article XIX to restrict their trade. Instead, they support pure MFN—all escape clause actions must be taken on an MFN basis, thus eliminating the use of VRAs and OMAs.

The lesser developed countries (LDCs) can afford to take an aggressive stance on Article XIX, since most are entitled to impose across-the-board quantitative restrictions on imports for balance-of-payments reasons under GATT Article XVIII:B. Accordingly, while many LDCs have highly protected markets, they are able to accomplish such protection under the relatively lax review procedures of Article XVIII:B, which does not have a compensation requirement.

While the LDC approach is laudable for its faith in basic GATT principles,[93] one wonders whether it would work in the real world. In adopting Article XIX, the drafters of GATT appear to have concluded in 1947 that the lack of effective adjustment mechanisms can stiffen domestic resistance to trade liberalization, a conclusion that may be equally valid today.

---

92. The "selectivity" issue is discussed in Wolff, *Need for New GATT Rules to Govern Safeguard Actions*, TRADE POLICY IN THE 1980's (W. Cline ed. 1983).

93. Oddly, while very critical of protectionism in developed countries, many LDCs pursue highly trade restrictive policies in their own markets.