BYU Law Review

Volume 1989 | Issue 2 Article 4

5-1-1989

The "Escape Clause" and the Safeguards Wrangle

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I. INTRODUCTION

It is the object of this paper to consider the "escape clause"[1] in the context of the so-called "safeguards" problem. Preparation of a comprehensive international "safeguards code" is among the unfinished items on the Uruguay Round agenda. Judging from the final Montreal communique, that project remains stalled on one or two highly divisive issues.[2] Here, however, we are only tangentially concerned with that enterprise. The principal focus of this paper lies instead with the overall pattern of "safeguard" legislation in the United States. Safeguard legislation is designed to protect domestic industries that are perceived to be, in one way or another, threatened by import competition. The purpose of this paper is to locate the "escape clause" in that larger statutory pattern and then, admittedly with a strong free-trade bias, to suggest why that clause has a critical role to play in the battle against the rising tide of protectionism in this country. It is primarily a political role; or, put more precisely, it is the political ramifications of the "escape clause," far more than its technical economic function of helping domestic industries adjust to changing international market conditions, that render it such a vital part of contemporary American trade legislation. In short, politics provides the principal argument for the "escape clause."

Against the background of this political argument, this paper explores several interpretative questions raised by the 1988 amendments to the "escape clause" and suggests lines along which those questions should be resolved in light of that argu-

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1. Trade Act of 1974, 19 U.S.C. §§ 2251-2253 (1982 & Supp. IV 1986), *as amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1401, 102 Stat. 1107, 1225 (1988).

2. *See* Trade Negotiations Committee Meeting at Ministerial Level, GATT Doc. MTN.TNC/7 at 17 (Dec. 9, 1988).

ment. First, however, it is necessary to take a brief excursion into some of the causes of the rising protectionist tide. If the "escape clause" is to be of any help in *cabining* that tide, its interpretation must, of necessity, take account of the forces to which the new protectionism is a response.

II. Causes of Protectionism

To a notable extent the rise of protectionist sentiment and the "safeguards" problem here and abroad, is a tribute to the trade liberalization achieved since World War II and to the growing interdependence that has followed. But it is far more than just a product of past success. Several developments in the general macro-economic climate of the 1970s and 1980s, contrasted with the more favorable climate of the 1950s and 1960s, have contributed significantly to the rising demand that domestic firms be protected against import competition. The period from the early 1950s through 1973 was characterized by steady and sustained real growth in the Gross Domestic Product (GDP) of all the Organization for Economic Cooperation and Development (OECD) states. This was, in turn, accompanied by an increase in imports at average annual rates nearly double the rate of GDP growth. In contrast, the period following the first OPEC oil embargo has been one of severe fluctuations evidenced by, (i) the first oil shock in and the consequent recession of 1974-1975, (ii) the short recovery thereafter (in which the rates of GDP and import growth never matched the pre-1973 average), (iii) the second oil embargo, (iv) the "stagflation" of 1977-1979; the recession of 1980-1981 in which there was a net decline in OECD imports, and (v) the slow recovery in the years since.[3]

While it might be thought that periods of maximum import growth would *augur* a period of maximum protectionist pressure, those pressures tend to be blunted when import growth is accompanied by internal economic expansion, as was generally the case in the 1950s and 1960s. In such a setting, even firms

3. From 1952 to 1966, the real rate of growth in the GDP of the OECD states averaged nearly 5.5%, accompanied, in turn, by an average real rate of growth in imports in excess of 12%. From 1967 to 1973, the average annual rate of real growth in GDP was nearly 5% and imports grew at almost 11% annually. Then, during the recession of 1974-1975 the GDP growth rate declined to less than 1% and the value of imports declined at an average annual rate of nearly 5%. From 1976 to 1979, the average annual rate of increase in imports averaged nearly 8.7%. Bergsten & Cline, *Trade Policy in the 1980's: An Overview*, in Trade Policy for the 1980's 76-78 (W. Cline ed. 1983).

experiencing a loss of market share find the protectionist argument difficult to sustain in the face of their own rising levels of output, profits and employment.[4]

In contrast, in 1974 the industrialized nations entered into a period of sluggish growth interspersed by sharp and sometimes severe cyclical downturns, and import penetration was joined with shrinking markets to accelerate plant closings, worker layoffs, and declining profits[5]—precisely the conditions upon which the protectionist impulse feeds. Moreover, during virtually the entire period of 1974-1986, the United States dollar remained seriously over-valued. This not only exacerbated the import penetration problem, but it cut severely into American exports and the political support for trade liberalization that could otherwise be expected from export oriented industries. Under these conditions, firms in trouble could more readily advance protectionism upon a claim of fairness: unless given protection, they alone would be compelled to bear the costs of generating for others the welfare gains from free trade.

Beyond these macro-economic factors, protectionist sentiment has been fed by certain fundamental cultural and political differences that have come to occupy an increasingly decisive place in trade relations between the major industrialized nations of the world. The reduction of the more transparent border bar-

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4. It is notable that this period of sustained economic growth coincided with a high point in the American commitment to free-trade and the nation's sense of "big power" responsibility for the liberal trading order which it had so assiduously fostered in the immediate postwar years. It saw the enactment of the Trade Expansion Act of 1962, the successful completion, in spite of disappointments, of the Kennedy Round, and a paucity of successful "escape clause" actions. There were no successful petitions in the period of 1963-1969, while over the longer period of 1963-1974, only eight out of forty petitions before the International Trade Commission (ITC) were successful, and in only two of these cases did the President award relief. Even if a few import impacted industries had the political muscle to gain some protection during this period—textiles, petroleum (with its special tie to national security), sugar, beef and, in the late 1960s, steel—these were all special cases. *See generally* I. DESTLER, AMERICAN TRADE POLITICS: SYSTEM UNDER STRESS 22 (1986).

5. For the first time, the ITC was compelled, in responding to petitions for "escape clause" relief, to decide which factor—general economic conditions or import competition—was the principal cause of these losses. Politically, this proved to be treacherous ground. Protectionist sentiment fed by news of rising imports, trade and payments deficits, declining domestic sales and longer unemployment lines was not easily assuaged by an announcement from Washington that recession, not imports, was the chief culprit. *See* U.S. Int'l Trade Commission, Report to the President on Certain Motor Vehicles and Certain Chassis and Bodies Therefor (1980). In spite of the ITC's conclusion, the President ordered the negotiation of Voluntary Restraint Agreements with both Japan and the EEC.

riers to trade, *i.e.* tariffs and quantitative restrictions, has had the effect of uncovering a whole sub-stratum of more subtle, at times invisible, trade barriers rooted in the economic culture of a nation. The complex interactions—the "diffuse reciprocity" as one author labels it—among Japanese firms is only one example of the subtle and deep-set patterns of national-cultural autarchy with which the forces of international trade liberalization have now become engaged.[6]

For the United States, these barriers pose a special problem. The greater reliance that we tend to place on competitive markets to direct corporate action and our emphasis on transparency in governmental action make it harder for American firms to sustain the subtle and less visible modes of protectionism that other nations find so congenial. Naturally, when we encounter those modes they evoke in us a sense of having been dealt with in bad faith. In this atmosphere the most blatantly protectionist proposals can too easily be cloaked in self-righteous rhetoric; the issue becomes not "free-trade" but "fair trade" and the "reciprocity" principle gets turned on its head.

Historically, "reciprocity" in trade negotiations has reflected the element of bargain in the liberalizing process. It was part of the cement which held trade liberalizing commitments in place. In the hands of the "fair traders," however, "reciprocity" is now used to justify erecting new trade barriers. Under the new usage, one nation—usually the United States—claiming that it already maintains a trade regime more liberal than that of others, threatens retaliation against the latter if they fail to lower barriers against its exports. The threat of retaliation, the "fair traders" argue, is designed merely to advance the cause of "reciprocity" in world trade. Understandably, this line of argument may appeal to American politicians and trade bureaucrats who are increasingly frustrated with the more subtle barriers that successive trade liberalizing rounds have now brought to center stage. But precisely because of the intractable nature of those barriers, the claim that "fair trade" is a liberalizing move is highly suspect.[7] Indeed, under the normative cloak of a distorted reciproc-

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6. *See generally* Krasner, *Trade Conflicts and the Common Defense: The United States and Japan*, 101 POL. SCI. Q. 787 (1986).

7. It is highly doubtful that "risk adverse" foreign statesmen will, when threatened with retaliation, unilaterally dismantle trade barriers so deeply rooted in their business or political culture without receiving any concessions in return.

ity, the "fair trade" argument is precisely the stuff of which trade wars are made.

Equally as dangerous as this assault on the historical understanding of reciprocity, is the threat that the new protectionism poses to the multilateral structure of international trade relations, a structure indispensable to the entire post-war experience of trade liberalization. The keystone to that structure lies in the non-discrimination principle of Article I of the General Agreement on Tariffs and Trade (GATT). Consistent with that principle, Article XIX, the GATT "escape clause," has traditionally been interpreted to require the non-discriminatory application of "escape clause" relief. Nevertheless, virtually from the beginning, GATT members have found ways to discriminate when they safeguard their domestic industries. This practice is a propensity that has accelerated dramatically in the last decade.

The devices used are many,[8] but perhaps the biggest threat to the multilateral trading system is the increasing use by GATT members of Orderly Marketing Agreements (OMAs), Voluntary Restraint Agreements (VRAs), and other bilateral arrangements which up to now have fallen completely outside the GATT system and are effectively free of all multilateral surveillance. Exact statistics are hard to come by; nevertheless, it has been estimated that the use of these extra-GATT arrangements exceeds the number of "escape clause" actions under Article XIX by a factor of four or more, with no signs of abating.[9]

There are a host of reasons for the increasing resort to these bilateral devices.[10] Whatever the reasons, however, they stand as

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8. Japanese accession to the GATT spawned a host of reservations. Even when purporting to apply article XIX on a non-discriminatory basis, GATT members discriminated against particular countries through such devices as discretionary licensing systems, tariff-quotas, and linking the level of duties to the price of the imported product. For an interesting discussion of the "de facto" discrimination practiced under the purportedly non-discriminatory strictures of article XIX, see M. BRONCKERS, SELECTIVE SAFEGUARD MEASURES IN MULTILATERAL TRADE RELATIONS 20 (1985).

9. Wolff, *Need for New GATT Rules to Govern Safeguard Actions*, in TRADE POLICY IN THE 1980's 390 (W. Cline ed. 1983).

10. Some of the reasons are to be found in the purported shortcomings of article XIX, especially the practice developed under article XIX, §§ (2) and (3), of giving compensation or undergoing retaliation. There are also political considerations: the desire not to undermine traditional trading patterns as might otherwise occur with restraints imposed on an MFN basis; the desire not to aggravate relations with countries whose producers are not the principal threat to a domestic industry; and the propensity, especially on the part of the Europeans, to foster special economic relationships with exporting countries in certain regions of the world. Also, the very absence of accountability to any multilateral body and the lack of transparency are qualities that appeal to the bu-

the quintessential expression of the new protectionism. They enable politicians and bureaucrats to cater to protectionist pleas without having to bear the costs that multilateral surveillance that the rule of non-discrimination would otherwise exact from them. They make protectionist policies cheap.

III. Safeguards in the United States

This then brings us, more specifically, to the situation in the United States. We start with a catalogue of ways by which the American government has, within the broad scheme of the Constitution, established measures to "safeguard" domestic industries from import competition. A list of these basic techniques helps in formulating the boundaries and probing the nature of the safeguards problem within the confines of American trade law.

A. General Framework Legislation

First, Congress has periodically responded to protectionist pleas by fashioning general framework legislation vesting in the executive discretion to protect broad areas of the national economy. There is section 204 of the Agriculture Act of 1956,[11] used principally to protect the textile and apparel industries. There is the notable, if not notorious, section 22 of the Agriculture Adjustment Act of 1933.[12] Section 22 is the fountainhead of agricultural protection in the United States and has proven to be a major inspiration to agricultural protectionists abroad of whom the American variety so self-righteously complain. If any event marks the start of the unfolding tragedy that now confronts the entire world in the matter of agricultural trade, it is the waiver of the "GATT—busting" provisions of section 22 that the United States bullied out of the Contracting Parties in 1955.[13] Another example is section 232 of the Trade Expansion Act of 1962[14] which empowers the President to protect industries deemed essential to national security. The President's section 232 authority was used for a time to restrict petroleum imports.

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11. 7 U.S.C. § 1854 (1982 & Supp. IV 1986).

12. 7 U.S.C. § 624 (1982 & Supp. IV 1986).

13. GATT, Basic Instruments and Selected Documents 32 (3d Supp. 1955).

14. 19 U.S.C. § 1862 (1982), *as amended by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1501, 102 Stat. 1107, 1257 (1988).

B. Product Specific Legislation

Second, Congress has from time to time enacted product specific protectionist legislation; the Meat Act,[15] the Jones Act,[16] and the Magnuson Fisheries Act[17] are some examples. More notable, however, is the fact that while attempts at such legislation have abounded, especially in recent years, the American statute books still remain remarkably free of such restrictions. How long this will continue is uncertain. The list grows longer if one adds those specific products that have been largely exempt from GATT tariff reductions and have remained ensconced behind the protective shields of *Smoot-Hawley* and its precursors.

C. Protectionist Measures Taken Under a Claim of Independent Presidential Power

The third category of protectionist measures are those taken by the Executive under a claim of independent Presidential power over foreign relations. Upon this claim rest the VRAs (sometimes called Voluntary Export Restraints (VERs)). As already observed, these and like measures employed by virtually every other major trading nation pose a threat to the multilateral trading order greater than any since the inception of GATT. Aptly, they are said to lie in a "grey-area" of that order. Whether and how they can be brought under GATT surveillance remains unresolved. Closer to home, they raise serious questions concerning their long-term effect on the constitutional allocation of authority over American trade policy. They stand as a sad but fitting tribute to the prescience of the late Judge Leventhal's dissent in *Kissinger v. Consumers' Union.*[18]

D. The "Escape Clause"

The fourth category employed by the United States to protect its domestic industries is the "escape clause" embodied in the Trade Act of 1974, as amended by the 1988 Act.[19]

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15. Meat Import Act of 1979, 19 U.S.C. § 2253 (Supp. IV 1987).

16. Merchant Marine Act of 1920, Pub. L. No. 66-261, 41 Stat. 988 (codified in scattered sections of 46 U.S.C.). *See, e.g.*, 46 U.S.C. § 883.

17. Magnuson Fishery and Conservation Act of 1976, Pub. L. 94-265, 90 Stat 331 (codified in scattered sections of 16 U.S.C.). *See, e.g.*, 16 U.S.C. § 1825.

18. 506 F.2d 136, 146 (D.C. Cir. 1974) (Leventhal, J., dissenting).

19. *See supra* note 1. It should be noted that under any one of these four ways of establishing protective measures for American industry, the precise form of protection may be a tariff, a tariff-quota, some manner of unilaterally imposed quantitative restric-

E. Anti-Dumping Statutes

One other development of more recent vintage should be added to the list of devices used by the United States to protect its domestic industries. American industry has increasingly turned to countervailing duty and anti-dumping proceedings as a device to elicit—coerce—from other nations "voluntary" restrictions on exports to this country as the price for "settling" a dumping or subsidy charge. This blatant back-door protectionist device carries with it the potential for a serious distortion of trade patterns. The subsidy problem is by itself a critical matter facing the international community. It is, however, a matter that must be resolved on its own merits and not employed as a tool for imposing restrictions where they are not merited. As for our anti-dumping statutes, they are perhaps the single most irrational element in all of American trade law.

IV. Characteristics of U.S. Safeguards

With this catalogue of techniques in hand, a number of the more salient characteristics of each should be noted. This will set the stage for a better understanding of the place that the "escape clause" now occupies in the broader context of protectionist politics and the prospects for its development.

Compared with the other categories of safeguards mentioned above, only "escape clause" protection is time-limited, digressive, requires proof that the domestic industry is being injured by increased imports, and is conditioned (potentially at least) upon the industry taking measures to meet the new competition. In other words, only the "escape clause" is, by its own terms, intended to offer temporary relief as a means of facilitating domestic adjustment to changing conditions of free trade. Not surprisingly, there is growing evidence that industries benefiting only from "escape clause" relief have done far better in

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tion, or some form of an "agreed" limit on goods or services sold in the American market —either a VRA or an OMA (Orderly Marketing Agreement). The latter is an unequivocal bilateral or multilateral executive agreement undergirt by statutory authority. Tariffs and unilaterally imposed quantitative restrictions, of course, fall directly within GATT cognizance. It is only the VRAs and OMAs that fall into the "grey area," possibly because no third-party member of GATT (e.g. a party who might claim injury because the agreement caused goods to be diverted into its market) has seen fit to challenge these arrangements. However, on this point one may be permitted to wonder whether the possibilities for the creative use of article XXIII "nullification or impairment" have been adequately explored.

making that adjustment than industries shielded by the other more impermeable modes of protection in our catalogue. At least in the case of the automobile industry, there is evidence that the industry adjustment efforts already underway before protection was forthcoming were curtailed or abandoned once the VRAs raised the prospect of a more permanent insulation against the rigors of international competition.[20]

In spite of this, we must clearly recognize the problematic quality of the contribution that protective measures in any form, whether "escape clause" or otherwise, can make to the adjustment process. This is not to suggest that it is foolish or wasteful to condition a grant of protection on industry efforts to adjust. It is, however, to offer a word of caution: There is no assurance whatsoever that a discriminating dose of governmental protection will foster the desired adjustment. Too often the economic context confronting a troubled industry is marked by forces so fundamental and complex that the chance of any combination of industry and governmental action succeeding is highly speculative.

Examples of this abound. The success of the bicycle industry in adjusting to new import competition owed as much to growth in consumer demand and to the oil-crunch as to "escape clause" relief or the admittedly imaginative changes in product quality engineered by domestic producers. On the other hand, fundamental differences in the cost of producing high carbon ferrochromium put recovery beyond the reach of any technological innovations that were realistically available to the domestic industry. The remarkable progress made by the textile industry, in contrast to the lack of progress in the equally well protected apparel industry, is eloquent testimony to the impact that basic differences in the labor intensity of production can have. Even when success can be claimed, the ultimate configuration of the industry and the human and other costs associated with the adjustment, may leave the thoughtful observer less than sanguine. For example, after some disastrous managerial decisions, the color TV industry has made a comeback, but only by putting production off-shore and suffering a 27.5% decline in U.S. employment, cutting research and development costs while relying

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20. Crandall, *Import Quotas and the Automobile Industry: The Costs of Protection*, BROOKINGS REV. 8, Summer 1984 at 8.

more on foreign innovations, and by turning twelve of the seventeen firms in the domestic industry over to foreign ownership.

Assuming that protection—even temporary "escape clause" type protection—is problematic as a pure economic means of facilitating domestic adjustment to foreign competition in the face of the often fundamental and complex economic forces that surround a troubled industry, the political ramifications rather than economic efficacy become central to assessing the wisdom of any action the government might take. Here the evidence all points in one direction: Anytime the government extends protection to an industry with no definite time limit, no necessary showing of a link between imports and the industry's current problems, and no overt commitment to adjustment, that action too often takes on a political life of its own. It becomes a tacit, if not explicit, commitment to the complete and possibly indefinite insulation of the industry from the fundamental and pervasive forces which are at the root of its troubles.

Of course, such commitments may not actually help an industry solve its problems; industries with a strong instinct for survival do sometimes make important adjustments in spite of the pervasive protection accorded them (*i.e.* the textiles industry). Yet, the fact remains that any measure that is not time-limited and digressive and does not rest upon a demonstrated causal linkage between imports and the industry's troubles tends, as a practical matter, to become a commitment to the industry's survival at all costs—the grant of an exemption from any serious effort by labor or management to come to grips with the competitive realities of the international market place. As such, government action also tends to become something of a self-fulfilling prophesy: it fosters expectations that themselves become part of the political calculus.

Hufbauer's study of thirty-one cases of protection covering trade in excess of $100 million since World War II dramatically demonstrates this point.[21] In eight of the cases studied, protection was based on Executive action under "general framework legislation."[22] In all but one case—petroleum—that protection has been continuously in effect for periods ranging from twenty-three to fifty-four years. Three cases involved "product specific

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21. G. HUFBAUER & H. ROSEN, TRADE POLICY FOR TROUBLED INDUSTRIES (1986). For a more detailed study of the thirty-one cases, see G. HUFBAUER, D. BERLINER & K. ELLIOTT, TRADE PROTECTION IN THE UNITED STATES: 31 CASES (1986).

22. *See supra* § III A, (category one).

legislation."[23] In all three, protection is continues even now; in two cases that protection dates back to the 19th century; and in the third case, the protection has been in effect for eleven years. Seven of the cases studied by Hufbauer involved "high tariffs" dating back fifty-five to sixty-six years.[24] All but one are still in place. In four cases, all involving steel or automobiles, the President acted on his independent authority.[25] Carbon steel has been protected for twenty-one years, with a short four year hiatus during 1974-78, and automobiles have been protected for the eight years since 1981, with no end in sight. In contrast, in the nine cases in Hufbauer's study where protection was extended under the "escape clause," the average length of protection was only about five years.

For anyone interested in preserving the liberal trading order against the rising tide of protectionism, this doleful picture is a matter of grave concern. Even more concern is justified if one also takes into account the other characteristics that tend to set the "escape clause" off from the other more illiberal forms of protection in our catalogue. For example, the more indefinite and potentially long-term the commitment to protect an industry, the greater the pressure to grant protection on a discriminatory basis. Indeed, the desire to discriminate is one factor responsible for the increasing popularity of VRA's and OMA's.

Consider also the fact that the amount of product specific and framework legislation on the statute books of the United States is quite limited when compared with the plethora of proposals for that type of legislation that have surfaced in recent years. The explanation for this lies largely in the systemic barriers that the legislative process puts in the way of such proposals. But if this is so, it also means that any industry with the political clout to overcome those barriers is more than likely to have the power to successfully resist any curtailment of its privileged position.

In addition, restraints imposed under framework legislation or upon the President's independent authority tend to exhibit characteristics that render them more attractive to Executive Branch officials than relief under the "escape clause." They almost always accord the Executive greater flexibility in determin-

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23. *See supra* § III B, (category two).
24. *See supra*, § III B, (also category two).
25. *See supra* § III C. (category three).

ing the appropriateness, the precise timing, and the content of the relief to be given. They generally take the form of quantitative restraints, whereas "escape clause" relief is more often in the form of a tariff. Since the costs of a tariff are far more transparent than the costs imposed by a quantitative restriction, the latter can be very tempting to Congressmen and Executive Branch officials alike. Unlike tariffs, quantitative restrictions confer on foreign exporters part of the economic rent derived from the higher price to consumers. They provide, in other words, an implicit pay-off to the foreign interests whose trade is being curtailed, and this pay-off can be quite useful to the Executive in quieting foreign governmental objections to protectionist initiatives.

This discussion, quite obviously, is intended not merely to identify the uniqueness of the "escape clause" in the overall structure of American trade law. It is intended to underscore how far the purely economic function of that clause (*i.e.* its all too problematic use as a tool to assist troubled industries) is overshadowed by its place in the politics of protection. Without the "escape clause," the free trade argument would lose its single most effective response to protectionist demands for additional product specific or framework legislation or for more vigorous use of the President's independent powers. Moreover, without the "escape clause," the forces of trade liberalization would simply have nothing to offer in place of the product specific and framework legislation now on the books, and there would be little to deflect protectionist pressures on the President.

Surely the *Automobile Case* bears this out. As an honest attempt by independent-minded technocrats to decide according to the law and the evidence, the decision in that case is commendable and was certainly courageous. But courage spawned the VRAs on automobile imports. In short, it is eloquent testimony to how readily a denial of "escape clause" relief can, in the context of the present protectionism climate, trigger resort to the other more illiberal forms of protectionist action available to the United States Government. Indeed, one may question how many of these exercises in bureaucratic rectitude we can afford. This is not to say, however, that we should ignore the law. Our law must recognize that virtually every significant "escape clause" case is likely to involve certain very basic tensions that are not easily reconciled. More importantly, it should be empha-

sized that our interpretation of the law must take into account the larger political role that the "escape clause" must play in the fight against the new protectionism. This is not to say that the "escape clause" option can now, or in the future, forestall all framework or product specific protectionist legislation or deter all use of the President's independent authority. Its role is more modest; it is to control the propensity.

Unhappily, the current trend is to the contrary. There is a tendency to down-play the significance of the "escape clause"—to view it as an instrument of limited utility. That may, of course, be its ultimate fate, especially if the Uruguay Round fails to produce a "safeguards code" firmly grounded on the principles of Article XIX of the GATT and supported by all the major trading nations of the world. But for the moment, the enterprise is too vital to the future of world trade to be written off so readily.

V. Application of the Escape Clause

If the enterprise is to succeed, and if the "escape clause" is to be truly useful in the effort to save free trade, it must be interpreted so as to be generally perceived as a viable, albeit second best, option by any industry that feels victimized by increased import competition. With this in mind, there are a number of issues raised by the provisions of the 1988 Act that should be addressed.

First, under the Act, if the International Trade Commission (ITC) finds that a domestic industry is suffering injury, it may recommend "escape clause" relief only if it also finds that increased imports are a cause of the injury that is at least as important as any other cause. The test is an invitation to identify all the factors that might have contributed to an industry's plight and to weigh their relative importance. In section 202(c)(2)(A) of the Act, Congress responded to the ITC decision in the *Automobile Case*, and added a further instruction. In assessing whether factors other than imports caused the injury, the Commission may "consider" the condition of an industry over the "relevant business cycle." However, it may not, according to the new instruction, aggregate the causes for a recessionary decline in demand into a single cause and then array that single cause against the impact that increased imports may have had. Plainly, if protectionist claims tend to become more insistent in periods of recession, the way the ITC interprets this new

instruction could be critical to the success of the "escape clause" in the broader political context posited here.

Read literally, Congress has assigned the ITC a virtually impossible undertaking. The task of quantifying each of the multiple forces giving rise to a recession and assaying the contribution that each may have made to a decline in product demand is enough to intimidate even the most intrepid econometrician.

There is also the problem of determining the level at which disaggregation is to occur. Consider the situation confronting the automobile industry in the 1980-81 recession. That downturn could be attributed, in significant part, to the tight money policies adopted by the Federal Reserve Board in response to the inflation of the late 1970s, and to the second oil embargo. Tight money yielded high interest rates; interest rates contributed to a strong dollar; a strong dollar and high interest rates then combined with inflation to produce an industrial slow-down; the slow-down increased unemployment and hence decreased the spendable income available for the purchase of automobiles. At the same time the general inflation together with the oil-embargo, large industry wage settlements, high interest rates, and new governmental regulations drove up the price of purchasing and maintaining an automobile.

At what level does the ITC disaggregate? Does it quantify separately the impact on demand of general inflation, wage settlements, government regulation, oil prices, rising interest rates, and the strong dollar and then compare each with the adverse impact that imports may have had on the industry? Alternatively, does the ITC aggregate separately first, the factors that contributed to rising automobile purchase and maintenance costs, and second, the factors that led to declining spendable income, and then compare each of these partial aggregates with the impact of imports on the industry? If so, why not aggregate at the level of Federal Reserve policy? Moreover, it is doubtful that these difficulties can be avoided by factoring out some "normal" cyclical decline in demand based on past experience, ascribing any excess decline over the "norm" to increased imports and then comparing the two. The potential distortions lurking in this formulation are legion.

To by-pass these problems a wholly different perspective on the matter would appear necessary. Congress was clearly expressing its disapproval of the type of analysis employed by the Commission in the *Automobile Case*. Under the Commission's

approach, the percentage decline in the domestic industry's market share (*i.e.* decline due to import penetration) had to be at least as great as the aggregate decline in domestic demand (domestic sales plus imports). Under this formula it would be virtually impossible for a domestic industry to obtain "escape clause" relief during a period of declining aggregate demand unless, prior to the recession, imports already commanded over fifty percent of the domestic market, or there was an *absolute* increase in imports. Persistence in such an approach would have seriously undermined the political efficacy of the "escape clause," and this was what Congress was attempting to avoid.

It would be entirely consistent with this intent for the ITC to conclude that any industry suffering injuries rationally linked to an increase in imports (whether absolute or relative) would *presumptively* be entitled to "escape clause" relief during any period of declining aggregate demand if it could show a non-trivial loss of market share. That presumption would then be subject to rebuttal by a showing that one or a combination of other factors unrelated to either imports or the general recession were, in the aggregate, responsible for the industry's plight, such as cost-busting labor settlements, government regulations, or defaults of management (the latter subject to a qualification noted below).

Analytically there is a good defense for this test. To state that defense, however, it is first necessary to say something about the causality issue more generally. Some have proposed dispensing altogether with the required showing of a causal link between injury to the domestic industry and increased imports. They have suggested, for example, that "escape clause" relief be granted anytime imports captured more than some predetermined market share. This, however, would seem ill-advised. It would appear to cross over the line between legitimate adjustment assistance and pure protectionism, and could unduly risk industry responses with long term trade distorting effects.

On the other hand, so long as the causal link requirement is preserved, it would seem appropriate, in the context of a recession, to conclude that the link was adequately established if no factor exogenous to the general recession was plainly at fault and that imports, facing the same recessionary conditions as domestic production, had significantly displaced domestic sales (*i.e.* the domestic industry had suffered a non-trivial loss of market share). Such a showing would represent a strong enough

working indication that, in the context of the recession, micro-economic factors were at least as important a part of the domestic industry's problem as macro-economic conditions. Micro-economic factors are precisely the factors, the only factors, that can be addressed through industry initiated adjustment efforts. Therefore, whenever there is such strong indication that those factors are an important part of the problem, it would seem entirely appropriate to grant "escape clause" relief. Certainly, in the larger political context, the risk of this test understating the impact of general recessionary forces is worth taking. This is especially so since any danger that the adjustment effort will produce long term trade distorting effects can be guarded against in the planning process.

This then introduces the problem of management failures. Rationally, if it appears that an industry's troubles are primarily the result of egregious management mistakes, the mere fact that there was coincident increase in imports should not justify "escape clause" relief. However, in the broader context of the purposes of that clause (especially its political function), an exception to this rule would seem appropriate. The exception would be in connection with the adjustment planning, when the Trade Representative, the ITC, or both, were satisfied that the industry was fully committed to rectifying its mistakes and offered a realistic plan for doing so.

Complicating all of this, whether in the context of declining demand or not, is the case where the industry's troubles are closely tied to a shift in consumer preferences. Analytically, any injury resulting from such a shift, if it is also overwhelmingly a shift toward the imported product, can be rationally linked to imports. In other words, such a shift should not be viewed as a cause of injury *per se* separate from imports. If this is so, such a shift would seem to be an appropriate occasion for "escape clause" relief unless the injury would not have occurred but for the industry's failure to respond, knowing that the shift was likely to occur, or unless it responded with a patently inferior product. Here, of course, an exception for management failures would not be appropriate because the damage is done and no adjustment plan for the future can change that.

This then introduces yet another feature of the 1988 Act. In that Act Congress has (i) sought to encourage submission of industry adjustment plans as part of the "escape clause" proceed-

ing;[26] (ii) instructed the ITC to seek commitments regarding specific adjustment measures from firms, unions and others in the industry;[27] (iii) required the Commission and the President to take these plans and commitments into account in making their decisions;[28] and (iv) authorized the termination of relief if an industry is not making adequate efforts to adjust to import competition.[29]

It would be sheer folly for the Trade Representative or the ITC to read these provisions as a mandate to develop a definitive "industrial policy" for every industry filing an "escape clause" petition—to become an American version of MITI. Such a move is likely to drive industries away from seeking "escape clause" relief unless they are looking to cover-up tacit collusion. That would certainly defeat the basic purpose of the clause. Moreover, on the merits there is no reason to believe that bureaucrats have greater knowledge, insight or prescience than managers who must live with the consequences of their mistakes. Even MITI has committed some notable "goofs."

This said, however, Congress' initiative could have a salutary effect if it is used to encourage, indeed compel, careful planning and closer cooperation (especially between labor and management) in an industry that is otherwise unlikely to plan, or in an industry where labor costs lie at the heart of its problems. However, the initiative will have a salutary effect only if it also does not impose unacceptable costs on an industry or disadvantage an industry characterized by a large number of smaller firms that cannot easily be consulted or readily coordinated.

Lastly, a word about the international safeguards code. One hesitates to say anything on this subject simply because, as an outsider, it is difficult to get information as to precisely where matters now stand. Nevertheless, it would seem appropriate to make one comment precipitated by the text of the Ministers' Statement at the conclusion of the Montreal meetings.[30] It is unclear from that statement whether the Ministers have actually agreed that safeguard relief should be applied in a non-discrimi-

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26. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 202(a)(4), (5), 102 Stat. 1107 (1988).

27. § 202(a)(6)(A). In addition, § 202(a)(6)(B) authorizes interested parties to submit voluntarily such commitments if the ITC makes an affirmative determination.

28. As to Commission recommendations, see § 202(e)(5)(B)(ii) & (iii). As to Presidential decisions, see § 203(a)(2)(C).

29. § 204(1)(b)(A)(i).

30. *See supra* note 2.

natory fashion, or whether the code would proscribe grey-area measures which result in "selective application." If, as is probable, these issues remain open, everything that has been suggested here points to the utter necessity of bringing these grey-area measures within GATT discipline. If to achieve that purpose some flexibility has to be written into the rule of non-discrimination, that would seem a compromise deserving very careful consideration by the United States.

VI. Conclusion

Again, the central point of this paper bears repeating. The structures undergirding the altogether remarkable post-war growth of international trade are threatened as never before by a reinvigorated protectionism. The triumph of that protectionism would be a tragedy for all mankind. If that tragedy is to be avoided, our law must be crafted and applied in ways that will drive the forces of protectionism into channels through which their destructive power can be contained and the basic structures of a liberal trading order can be preserved essentially intact. One such channel is the "escape clause," provided we have the political wisdom—the comprehensive sense of things—to understand and exploit its potential.