

# The Trade Act of 1971: A Fundamental Change in United States Foreign Trade Policy

The thrust of American trade legislation since the mid-1930s has been toward the establishment of a regulated but less-restrictive system of international trade<sup>1</sup> than had existed during the period of economic nationalism which followed the First World War.<sup>2</sup> The Trade Expansion Act of 1962<sup>3</sup> and the resultant Kennedy Round<sup>4</sup> of tariff negotiations, under the auspices of the General Agreement on Tariffs and Trade,<sup>5</sup> were significant advances toward a freer trade system. The Trade Act of 1971,<sup>6</sup> a bill now pending in Congress, is, however, the

1. OFFICE OF THE SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS, FUTURE UNITED STATES FOREIGN TRADE POLICY; REPORT TO THE PRESIDENT v, 73 (1969) [hereinafter cited as PRESIDENT'S REPORT]. See also President Nixon's report to the Congress of Feb. 25, 1971, *United States Foreign Policy for the 1970's: Building for Peace*, 7 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 305, 348-52 (March 1, 1971):

An American policy which retreated from cooperation, or which moved toward increasing the barrier to fair and equitable economic intercourse among nations, would threaten the foundations of the partnerships which are our central foreign policy objective . . . .

. . . .  
Leadership for freer trade has been a cornerstone of our foreign policy through six administrations and 19 Congresses. For 37 years we have considered a liberal trade policy to be in the U.S. national interest.

2. The response of most nations to the post-war economic crises, such as the depression of 1921, was an intensely nationalistic series of currency devaluations and increased trade restrictions on trade, with the exception of the unsuccessful World Economic Conferences second half of the decade was marked by a continued rise in tariffs and quantitative restrictions on trade, with the exception of the unsuccessful World Economic Conferences of 1920, 1922, and 1927. The passage of the Reciprocal Trade Agreement Act in 1934, amending the Smoot-Hawley Tariff of 1930, marked the beginning of the era of freer trade, with which this Note is concerned. See generally, W.A. LEWIS, *ECONOMIC SURVEY 1919-1939* (1965); A. HARRISON, *THE FRAMEWORK OF ECONOMIC ACTIVITY 30-72* (1967); W. ASHWORTH, *THE INTERNATIONAL ECONOMY SINCE 1850 218-46* (1962).

3. 76 Stat. 872 (1962), 19 U.S.C. §§ 1801-1991 (1964). See also S. REP. NO. 2059 and H.R. REP. NO. 1818, 87th Cong., 2d Sess. 6-14 (1962); Metzger, *Trade Expansion Act of 1962*, 51 GEO. L.J. 425 (1963) [hereinafter cited as Metzger, *Expansion Act*].

4. See generally GENERAL AGREEMENT ON TARIFFS AND TRADE LEGAL INSTRUMENTS EMBODYING THE RESULTS OF THE 1964-67 TRADE CONFERENCE (1967). See also S. METZGER, *TRADE AGREEMENTS AND THE KENNEDY ROUND* (1964) [hereinafter cited as S. METZGER, *TRADE AGREEMENTS*]; E. PREGG, *TRADERS AND DIPLOMATS, AN ANALYSIS OF THE KENNEDY ROUND OF NEGOTIATIONS UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE 89-56* (1970); SPECIAL REPRESENTATIVE FOR TRADE NEGOTIATIONS, *REPORT ON UNITED STATES NEGOTIATIONS, KENNEDY ROUND* (1968) [hereinafter cited as KENNEDY ROUND REPORT].

5. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. All (1947), T.I.A.S. No. 1700, [hereinafter referred to in footnotes and in text as GATT]. The Agreement has undergone several modifications since 1947. The current text is published in 4 GATT, *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* (1969).

6. H.R. 20 and S. 4, 92nd Cong., 1st Sess. (1971) [hereinafter cited as 1971 House Bill and 1971 Senate Bill, respectively]. The present bills were originally introduced as the "Trade Act of 1970," H.R. 18970, 91st Cong., 2d Sess. (1970). Acted upon favorably by the House, the bill was reported out of the Senate Finance Committee on Dec. 11, 1970, as part of the Social Security Amendment of 1970, H.R. 17550 tit. III and S. REP. NO. 1431, *REPORT OF THE COMMITTEE ON FINANCE TO ACCOMPANY H.R. 17550, THE SOCIAL SECURITY*

product of a burgeoning protectionist sentiment.<sup>7</sup> If enacted, it would represent a retreat from free trade. Particularly restrictive are the Act's provisions for tariff adjustment and adjustment assistance<sup>8</sup> and for quotas on textile and footwear articles.<sup>9</sup>

This Note will attempt to assess the potential impact of the Trade Act of 1971 on United States foreign trade policy, first by identifying the Act's deviations from the trend toward freer trade and second, by assessing the rationale for these alterations.

## I. The Evolution of American Trade Policy

### A. *The Free Trade—Protectionist Dispute*

Nations theoretically participate in international trade in order to maximize the benefits arising from the production of goods and services in an internationally specialized and competitive marketplace.<sup>10</sup> Assuming the free movement across national boundaries of the factors of production, the unhampered price mechanism operating in such a competitive international market will bring about the optimal allocation of resources among the national economic units.<sup>11</sup> Historically,

AMENDMENTS OF 1970, 91st Cong., 2d Sess. (1970) [hereinafter cited as SENATE FINANCE COMMITTEE REPORT].

It was not acted upon by the full Senate prior to adjournment in January of 1971. The bill was then introduced as the "Trade Act of 1971" in the House (H.R. 20, introduced Jan. 22, 1971) and in the Senate (S. 4, introduced Jan. 25, 1971), and is now awaiting passage.

The imposition of a supplemental duty for balance of payments purposes announced by President Nixon on August 15, 1971 provided evidence of the deterioration in the United States trade position. Passage of the bill would thus seem more likely in view of the executive recognition of the "need" for trade restrictions. See note 147 *infra*. See the comments of the Hon. Wilbur Mills, Chairman of the House Ways and Means Committee, N.Y. Times, March 9, 1971, at 47, col. 2, and President Nixon's announcement of support for the bill, N.Y. Times, March 12, 1971, at 60, col. 2. While the House and Senate versions of the bill are virtually identical in the provisions relevant to this Note, appropriate notice will be taken where differences occur.

7. In hearings before the House Ways and Means Committee, Chairman Wilbur Mills reported that 299 members of the House and twenty of the twenty-five members of the Committee had introduced quota legislation of one category or another. *Hearings on Tariff and Trade Proposals Before the House Ways and Means Committee*, 91st Cong. 2d Sess., pt. 1, at 157 (1970).

8. 1971 House and Senate Bills, *supra* note 6, at tit. I, ch. 2.

9. *Id.* at tit. II, ch. 1.

10. A. HARRISON, *supra* note 2, at 2.

11. A country wishing to maximize its national income through the efficient use of its resources must encourage its individual and corporate production units to specialize in the types of activities in which each unit is most efficient, i.e., in those activities in which each can produce at the lowest relative cost. Furthermore, the country must offer its products for exchange in a competitive market. The principle of specialization according to relative efficiencies is known as comparative advantage.

Both a nation's comparative advantage and its trade pattern are largely determined by its resource endowments in terms of natural resources, capital and labor. Given that countries differ in their resource endowments, and products differ in their factor requirements, a country will specialize in, and export, the products which it can produce at

however, the international economy has been characterized by a low mobility of the factors of production,<sup>12</sup> unintegrated price<sup>13</sup> and monetary<sup>14</sup> systems, and, owing to monopolistic and oligopolistic practices, the absence of a truly competitive market.<sup>15</sup> Political instability, in addition, has been the rule rather than the exception. In short, the theoret-

the lowest relative cost. Those commodities which would create the heaviest burdens on that nation's productive abilities can then be acquired through international trade.

Thus, although the United States may be more efficient than Peru in producing both cars and cloth, it can be shown that because of comparative, rather than absolute, advantage it will be economically more beneficial for the United States to specialize in the production of the commodities in which its relative superiority over Peru is greatest. Assume for example, that given an expenditure of  $x$  dollars, the United States can produce either 1000 yards of cloth or twenty cars and that for the same expenditure, Peru can produce either 500 yards of cloth or fifteen cars. The United States has an absolute advantage over Peru in the production of both commodities, but its advantage, comparatively, is greater in cloth (2:1) than in cars (4:3). If the United States, therefore, devoted  $x$  dollars to producing 1000 yards of cloth for export to Peru, it could exchange them for thirty cars in Peru, *i.e.* more than it could produce for itself by diverting those dollars from cloth to car production. Similarly, Peru could exchange fifteen cars for 750 yards of cloth. Both countries would gain by specialization.

Underlying this demonstration is the assumption that the goods produced can be freely exchanged internationally. It should be obvious that this mutual gain will diminish as barriers to trade in the form of tariffs and quotas add to the costs of acquiring foreign goods and inhibit international trade. Such barriers also change the price ratios of various goods, thereby introducing an obstacle to a free-market choice, which presumes that price equals "opportunity" cost. As a result, consumer preferences are distorted. The case for free trade is thus that it provides for international specialization along the lines indicated by comparative advantage, and in this way, contributes to increased productivity and higher incomes in the world economy.

While the law must be qualified by the existence of substantial international transport costs and short-term fluctuations in price ratios, it would appear that national trade policies should encourage increased international trade and seek to eliminate restrictions on imports and exports. Underlying this Note is an acceptance of the validity of this demonstration of the superiority of the free trade system, even as qualified. *See generally* B. BALASSA, *TRADE LIBERALIZATION AMONG INDUSTRIAL COUNTRIES* 44-148 (1967); J. PEN, *A PRIMER ON INTERNATIONAL TRADE* 12-20 (1967); D. RICARDO, *PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (1817); F. ROOT, R. KRAMER & M. D'ARLIN, *INTERNATIONAL TRADE AND FINANCE* 47-118 (1966) [hereinafter cited as *ROOT*]; P. SAMUELSON, *ECONOMICS* ch. 32 (7th ed. 1967); J. YOUNG, *THE INTERNATIONAL ECONOMY* 138-154 (1942). On specialization, *see* R. FINDLAY, *TRADE AND SPECIALIZATION* (1970).

12. PRESIDENT'S REPORT, *supra* note 1, at 41 (noting the greater immobility of labor as compared with the other factors of production). *See generally* H. GEORGE, *PROTECTION OR FREE TRADE: AN EXAMINATION OF THE TARIFF QUESTION, WITH ESPECIAL REGARD TO THE INTERESTS OF LABOR* (1886); P. KENEN, *INTERNATIONAL ECONOMICS* 13-22 (1964); *ROOT*, *supra* note 11, at 58 *et seq.*

13. *See* AMERICAN ECONOMIC ASSOCIATION, *READINGS IN THE THEORY OF INTERNATIONAL TRADE* 229-333 (1950); L. YEAGER & D. TUECK, *TRADE POLICY AND THE PRICE SYSTEM* (1966).

14. *See* B. TEW, *INTERNATIONAL MONETARY COOPERATION 1945-67* (1967); C. KINDLEBERGER, *INTERNATIONAL ECONOMICS* 3-79 (1953); J. YOUNG, *supra* note 11, at 321-41; P. KENEN, *supra* note 12, at 51-95; R. GARDNER, *STERLING-DOLLAR DIPLOMACY* (3d ed. 1969).

15. *See generally* STAFF OF THE SUBCOMM. ON ANTITRUST AND MONOPOLY OF THE SENATE COMM. ON THE JUDICIARY, 85TH CONG., 1ST SESS., *CONCENTRATION IN AMERICAN INDUSTRY* (Comm. Print 1957); DEPT. OF STATE, 82D CONG., 2D SESS., *FOREIGN LEGISLATION CONCERNING MONOPOLY AND CARTEL PRACTICES, REPORT TO THE SENATE SUBCOMM. ON MONOPOLY OF THE SELECT COMM. ON SMALL BUSINESS* (Comm. Print 1952); P. BARAN & P. SWEETZ, *MONOPOLY CAPITAL* (1966); C. CARR, *ALCOA, AN AMERICAN ENTERPRISE* (1952); C. EDWARDS, *CONTROL OF CARTELS AND MONOPOLIES: AN INTERNATIONAL COMPARISON* (1967); INTERNATIONAL CONFERENCE ON RESTRAINTS OF COMPETITION (Frankfurt 1960); *See also* *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

ical prerequisites of a perfect free trade system have never in fact concurrently existed.<sup>16</sup>

In consequence, movements towards free trade have had to include certain reservations and safeguards. These protective measures have been justified on three principal grounds. (1) Given the persistence of political instability in the international system, dependence upon foreign states for vital commodities may pose a threat to national security. Therefore, protection of the domestic producers of such commodities is necessary.<sup>17</sup> Such protection was provided in the defense essentiality amendment to the Reciprocal Trade Agreement Act<sup>18</sup> which curtailed

16. The only approximation of an international free trade system occurred following the signing of the Cobden-Chevalier Treaty between France and England in 1860. The parties to that agreement reduced tariffs throughout Europe by extending each reduction to all other signatories of bilateral agreements with the two principals under the "most-favored nation" clause. The desire to seal off newly-acquired colonial empires following the Congress of Berlin, however, resulted in the reimposition of high tariff barriers, as in the Meline Tariff in France in 1892 or the general tariff acts of Bismarck in Germany. See W. ASHWORTH, *supra* note 2, at 128-37; A. HARRISON, *supra* note 2, at 8; P. KENEN, *supra* note 12, at 34.

17. The complement to the protection of domestic producers of essential commodities is the imposition of restrictions on foreign investment so as to prevent foreign control "from within" of vital commodity markets. The level of governmental visibility in the market place requisite to the use of such measures generally has not been acceptable in the United States. Though employed principally by the developing nations, governmental intervention of this sort is found notably in France and Japan among the developed nations.

See generally, France: R. GILPIN, *FRANCE IN THE AGE OF THE SCIENTIFIC STATE* (1963); LAYTON, *TRANS-ATLANTIC INVESTMENTS* (1966); J. J. SERVAN-SCHREIBER, *THE AMERICAN CHALLENGE* (1968); Landon, *Franco-American Joint Ventures in France, (The Compagnie des Machines Bull—General Electric Venture)*, 7 HARV. INT. L.J. 238 (1966); Torem & Craig, *Control of Foreign Investment in France*, 66 MICH. L. REV. 669 (1963); The Franco-American Convention of Establishment with France, Aug. 29, 1960, [1960] 11 U.S.T. 2393, T.I.A.S. No. 4625.

Japan: Ariga, *Merger Regulation in Japan*, 5 TEXAS INT'L L. F. 112 (1969); Gruber, *A Guide to the Investment Climate and Regulations in the New Japan*, 12 PRICE WATERHOUSE REV. 39 (Winter 1967); Symposium, *United States-Japanese Investment Transactions*, 39 WASH. L. REV. 405 (1964).

United Kingdom: Korah, *Legal Regulation of Corporate Mergers in the United Kingdom*, 5 TEXAS INT'L L. F. 71 (1969).

United States: Note, *Government Regulation of Foreign Investment*, 47 TEXAS L. REV. 421 (1969).

See also, Goldberg & Kindleberger, *Towards a GATT for Investment: A Proposal for Supervision of the International Corporation*, 2 L. AND POL. IN INT'L BUS. 295 (1970).

In the case of developing nations, the interests to be protected by such restrictions on foreign control of domestic industry include the political sovereignty and very existence of those states, as well as the national security. The threats are as much political as economic. See U.N. DEPT. OF ECON. AND SOC. AFFAIRS, *FOREIGN INVESTMENT IN DEVELOPING COUNTRIES*, U.N. Doc. E/446 (1968); Meier, *Legal-Economic Problems of Private Foreign Investment in Developing Countries*, 33 U. CHI. L. REV. 463 (1966). On the investment policies of particular states, see M. KUST, *FOREIGN ENTERPRISE IN INDIA* (1964); C. WRIGHT, *FOREIGN ENTERPRISE IN MEXICO: LAW AND POLICY* (1970); Peselj, *Yugoslav Laws on Foreign Investment*, 2 INT'L L. 449 (1968).

18. 68 Stat. 360 (1954), amending 48 Stat. 943 (1934). See 19 U.S.C. § 1862 (1964) as amended (Supp. V, 1970) for the current provision. Substantially identical provisions were included in the GATT since it was entered into by the United States under the authority granted the President under the Reciprocal Trade Agreement Act, *infra* note 58, and

the authority of the President to reduce trade restrictions on items found by the Office of Emergency Planning<sup>19</sup> to be essential to national security.<sup>20</sup> (2) Economic stability and security generally require some diversification within the domestic economy, given the impact of price fluctuations in the world market upon national income and commodity availability.<sup>21</sup> Such diversification in a non-industrial economy requires governmental protection of "infant industries" against the full impact of foreign competition.<sup>22</sup> First enunciated in Hamilton's *Report on*

accompanying text. See GATT, Oct. 30, 1947, art. XXI, 61 Stat. A63 (1947), T.I.A.S. No. 1700 (Security Exceptions).

19. The name of the Office of Emergency Planning was changed to the Office of Emergency Preparedness. 19 U.S.C. § 1862 (Supp. V, 1970).

20. The Mandatory Oil Import Control Program is the only American restriction on imports founded solely on this provision. The Oil Import Control Program was instituted pursuant to Presidential Proclamation No. 3279, 3 C.F.R. 11 (Supp. 1963), and amended several times since, most recently by Presidential Proclamation No. 3828, 3 C.F.R. 15 (Supp. 1968) See *Hearings on the Mandatory Oil Import Control Program, Its Impact Upon the Domestic Minerals Industry and National Security, Before the Subcommittee on Mines and Mining of the House Committee on Interior or Insular Affairs, 90th Cong., 2d Sess. (1968)*; Note, *Oil Import Controls, A Critical Appraisal*, 5 TEXAS INT'L L. F. 150 (1969). On administration of the program see Berman & Garson, *United States Export Controls*, 67 COLUM. L. REV. 791 (1967). See also C. FULDA & W. SCHWARTZ, REGULATION OF INTERNATIONAL TRADE AND INVESTMENT 306-63 (1970).

A report recently submitted to the President recommended substantial changes in the program, including the replacement of existing quotas with tariffs set at different levels for different countries of origin. CABINET TASK FORCE ON OIL IMPORT CONTROL, THE OIL IMPORT QUESTION, A REPORT ON THE RELATIONSHIP OF OIL IMPORTS TO THE NATIONAL SECURITY (1970). The President deferred action on these recommendations. 6 *Weekly Compilation of Presidential Documents* 247 (Feb. 23, 1970).

Drafters of the Trade Act sought to cut off that possibility by providing that "any adjustment of imports shall not be accomplished by the imposition or increase of any duty, or of any fee or charge having the effect of a duty." 1971 House and Senate Bills, *supra* note 6, at tit. I, ch. 1, § 104(a). This would effectively limit the President to the imposition of quantitative restrictions (quotas) in an area where discretion is particularly important.

21. This phenomenon is best seen in the case of developing nations whose economies are largely dependent upon the export of a single product for the generation of foreign assets. Thus, the decline in the market index price for coffee from 127 in 1957 to 83 in 1959 severely damaged the economies of those states where coffee accounted for a significant percentage of total exports. See A. MACBEAN, EXPORT INSTABILITY AND ECONOMIC DEVELOPMENT (1966); R. GREEN & A. SEIDMAN, UNITY OR POVERTY: THE ECONOMICS OF PAN-AFRICANISM 37-51 (1968).

22. This policy is prevalent among the developing nations, which fear a non-discriminatory multilateral reduction of trade restrictions. As a result, their purchasing power and payments positions would be vulnerable to radical fluctuations as a result of price changes in the world market. Within the GATT, these states have lacked the bargaining power to obtain adequate redress, since their concessions and threats of retaliation carry little weight. The United Nations Conference on Trade and Development (UNCTAD) was founded as a forum for the enunciation of their position on an equal basis. Their persistent demands for trade preferences on manufactures suggests their desire to overcome their present lack of diversity. The response of the European Economic Community in unilaterally instituting such a preference system would seem to indicate a recognition of the validity of this deviation from the free trade regime. N.Y. Times, Mar. 31, 1971 at 1, col. 6. See the report of the Secretary-General of UNCTAD, *Towards a New Trade Policy For Development*, II PROCEEDINGS OF UNCTAD, U.N. Doc. E/CONF. 46/141 at 5 (1964), and *Final Act Adopted by the Conference, Id.*, Vol. I at 3. *Charter of Algiers*, adopted by the Ministerial Meeting of the Group of 77 on October 24, 1967, Doc. No. MM/77/1/20 in U.N. Doc. No. TD/38 (1967); *Special Problems in World Trade and Development*,

*Manufactures*<sup>23</sup> in 1791, this variety of protectionism was the underpinning of American tariff legislation from 1789 through 1860.<sup>24</sup> (3) Most importantly, comparative advantage through specialization, the *sine qua non* of the free trade argument, is a dynamic rather than a static condition. The diminution of competitive advantage over time, often reflected in an adverse movement of a nation's balance of payments,<sup>25</sup> necessitates a reallocation of resources within the national economic unit.<sup>26</sup> Heavy adjustment costs must then be borne either in the form of a decline in profits, an idling of productive facilities, and unemployment, or alternatively, in the form of retraining, relocation, and refurbishment expenses. The third rationale for protectionist safeguards, then, is the avoidance of the burdens of resource reallocation in the domestic economy. It was to this end that the peril point and the escape clause procedures in the Trade Agreements Extension Act of 1951<sup>27</sup> were directed.

The means employed to provide such protection have varied. Most common have been tariffs, which are essentially import taxes assessed as a percentage of the value of the commodity,<sup>28</sup> and quotas or quantitative restrictions, which fix an absolute limit on the quantity or value of the foreign-produced commodity permitted entry.<sup>29</sup> Both of these

V PROCEEDINGS OF UNCTAD, 2d. SESS. U.N. Doc. No. TD/97 (1963). M. CUTAJER & A. FRANKS, *THE LESS DEVELOPED COUNTRIES IN WORLD TRADE* (1967).

23. Hamilton, *Report of the Secretary of the Treasury on the Subject of Manufactures*, in *STATE PAPERS AND SPEECHES ON THE TARIFF* 1 (F. Taussig ed. 1895).

24. See F. TAUSSIG, *PROTECTION TO YOUNG INDUSTRIES AS APPLIED IN THE UNITED STATES* 7-28 (1883); C. KAISER, *HISTORY OF THE ACADEMIC PROTECTIONIST FREE TRADE CONTROVERSY IN AMERICA BEFORE 1860* (1939); E. LEWIS, *A HISTORY OF THE AMERICAN TARIFF 1789-1890* (1891).

25. Concern was expressed over American balance of payments problems by both the Executive and Congress. PRESIDENT'S REPORT, *supra* note 1, at 1-3; S. REP. NO. 91-1431, REPORT TO THE COMMITTEE ON FINANCE TO ACCOMPANY H.R. 17550, 91st Cong., 2d Sess. 2-11 (1970).

26. The deterioration of 19th century British leadership in the world production of coal provides a good case study in the shifting of competitive advantage. In recent years the government has been forced to undertake a program closing down most of the nation's coal pits, in the face of the higher labor productivity of the world's other coal exporters. *Economist*, Nov. 27, 1965, at 985. The shift in position was summarized by Lord Robens when he stated that, "I doubt if anyone outside mining is interested in protecting coal—it is simply a question of finding other jobs for ex-miners." *Economist*, Feb. 24, 1963 at 63.

27. Ch. 141, §§ 3 and 6(a), 65 Stat. 72 (1951). See p. 1428 and notes 54-55, *infra*.

28. A tariff is a classified list of customs duties, each rate applying to a particular product category. The most widely used schedule is the Brussels Tariff Nomenclature. These duties are charges on imported goods levied by the government on the importer at the point of importation. These duties may be charged on the value or on the volume of the imported goods. The former are known as *ad valorem* duties and they are usually assessed on the c.i.f. (cost, insurance, freight) value of the commodity.

29. Quotas are normally administered through a system known as import licensing whereby an importer must obtain a license from the relevant authority in order to clear his goods through customs. A quota is a restrictive limit on the volume of imports, and is enforced by limiting import licenses. Import licensing also provides a means of en-

protective tools can be employed to restrict free trade and by so doing, to guard against the vulnerabilities inherent in an imperfect free trade system.<sup>30</sup>

### B. *The Evolution of American Trade Policy—Historical Background*

In retrospect, the formulation of American trade legislation prior to the Reciprocal Trade Agreement Act of 1934 was notably unsophisticated in its method and consequently in its economic effectiveness. The highly partisan Tariff Commissions of 1882<sup>31</sup> and of 1909<sup>32</sup> failed to provide an effective vehicle for the investigation and prediction of

forcing public security, health, and moral regulations by requiring an inspection of licensed goods.

30. Other forms of trade regulation, such as anti-dumping laws and anti-trust laws, are directed towards the maintenance of certain market conditions, rather than simply the provision of protection for domestic producers. When applied non-discriminatorily, such regulations are not antithetical to a free trade system.

Dumping is the practice of selling exports at prices below those prevailing in the domestic market of the exporting country. When dumping threatens injury to actual or potential producers in an importing country, the GATT permits retaliatory measures to be taken against the dumped products, usually in the form of countervailing duties. See GATT, Oct. 30, 1947, art. VI, 61 Stat. A23 (1947), T.I.A.S. No. 1700 (Anti-Dumping and Countervailing Duties). In 1967, the contracting parties of the GATT signed the International Antidumping Code in Geneva, implementing Article VI. The Special Representative for Trade Negotiations, reporting on the Kennedy Round negotiations, KENNEDY ROUND REPORT, *supra* note 4, at 165-66, argued that this Code was consistent with the Antidumping Act of 1921, formerly ch. 14, tit. II, 42 Stat. 11 (1921), 19 U.S.C. §§ 160-171 (1964), and that therefore no implementing legislation was required. THE REPORT OF THE TARIFF COMMISSION TO THE SENATE FINANCE COMMITTEE ON CONG. RES. 38, REGARDING THE INTERNATIONAL ANTIDUMPING CODE SIGNED AT GENEVA ON JUNE 30TH, 1967, 90th Cong., 2d Sess., (1968) concluded that Congressional implementation was necessary.

Noting inconsistencies in the two codes, Congress enacted Pub. L. No. 90-634, 82 Stat. 1347 (1968) which required that conflict between the two codes be resolved by the Tariff Commission in favor of the United States Code. See Shannon & Marx, *The International Antidumping Code and United States Antidumping Law*, 7 COLUM. J. OF TRANSNAT. L. 171 (1968); Long, *United States Law and the International Antidumping Code*, 3 INT'L LAWYER 464 (1969); Note, *The Antidumping Act—Tariff or Antitrust Law?*, 74 YALE L.J. 707 (1965); Anthony, *The American Response to Dumping from Capitalist and Socialist Countries—Substantive Premises and Reconstructed Procedures After the 1967 GATT Code*, 54 CORNELL L. REV. 159 (1969).

The Trade Act of 1971 seeks to amend the Antidumping Code by limiting the determination time to four months, providing for the valuation of goods from state-controlled economies, but notably failing to deal with the question of injury, a problem raised by recent Tariff Commission action. Similar changes are effected in the countervailing duties provisions of the Tariff Act of 1930. 1971 House and Senate Bills, *supra* note 6, at tit. III, ch. 1. ("Amendments to the Antidumping and Countervailing Duty Laws").

See also Sherman and Clayton Acts, 15 U.S.C. §§ 1-7, 12-27 (1964); Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1964). Wilson Trust Act, 15 U.S.C. § 8 (1964). See generally W. FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS (1958); COMMON MARKET AND AMERICAN ANTITRUST (J. Rahl ed. 1970).

31. Ch. 145, 22 Stat. 64 (1882) (nine members). The Commission was appointed to report at the next session of Congress the changes in the tariff rates it thought desirable. It did so in REPORT OF THE TARIFF COMMISSION (1882) and then ceased to function.

32. Ch. 6, § 2, 36 Stat. 83 (1909) (empowering the President to appoint advisors as he deemed necessary). In 1911, a three-member Tariff Board was established pursuant to Congressional funding thereof to look into the tariff schedule for wool and woolsens. Ch. 285, 36 Stat. 1363 (1911). The Board lapsed in 1912 when Congress refused to fund it further.

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the economic impact of proposed tariff legislation<sup>33</sup> and were allowed to lapse in 1912. Tariff policy tended to fluctuate in response to changes in national leadership<sup>34</sup> and to short-term changes in the American business cycle.<sup>35</sup> Efforts to reconstruct the international economy following the First World War basically ended with the Depression in 1929.<sup>36</sup> In both the United States and Europe, policies were focused on stimulating the domestic economy at the cost of greater restrictions on international trade.<sup>37</sup> Congressional approval of the Smoot-Hawley Tariff in 1930<sup>38</sup> raised the average tariff level to fifty-one per cent *ad valorem*,<sup>39</sup> the highest level since the Tariff of Abominations in 1828, thereby triggering similar increases throughout Europe and reducing international trade in 1932 to one third its 1929 level.<sup>40</sup> International considerations aside, the significance of the Smoot-Hawley Act for American tariff policy was twofold. The Act improved considerably the quality and the objectivity of the Tariff Commission,<sup>41</sup> and the

33. "The make-up of the Commission was not such as to command respect for intellectual capacity or for judicial spirit." F. TAUSSIG, *TARIFF HISTORY OF THE UNITED STATES* 524 (8th ed. 1931, 1967 reprint).

34. *E.g.*, the McKinley Tariff, ch. 1244, 26 Stat. 567 (1890); the Wilson "Free Trade" Act, Ch. 349, 28 Stat. 509 (1894); the Tariff Act of 1897, ch. 11, 30 Stat. 151 (1897); and, the Tariff Act of 1913, ch. 16, 38 Stat. 114 (1913).

35. *E.g.*, the Tariff Act of 1842, ch. 270, 5 Stat. 548 (1842); the Payne-Aldrich Tariff, ch. 6, 36 Stat. 11 (1909); and, the Fordney-McCumber Tariff, ch. 356, 42 Stat. 858 (1922).

36. One exception was the World Economic Conference of June 1933 in London. *See generally* LEAGUE OF NATIONS, *THE MONETARY AND ECONOMIC CONFERENCE IN LONDON* (1933); L. PASVOLSKY, *PROBLEMS OF THE WORLD ECONOMIC CONFERENCE* (1933); D. TRAYNOR, *INTERNATIONAL MONETARY FINANCIAL CONFERENCE IN THE INTERWAR PERIOD* (1949).

37. *See* note 2 *supra*.

38. Tariff Act of 1930, ch. 497, 46 Stat. 590 (1930), *as amended* 19 U.S.C. §§ 1202-1654 (1964).

39. American tariff levels were approximately as follows when the Kennedy Round tariff cuts were negotiated:

All non-agricultural commodities	17.8% ( <i>ad valorem</i> )
Raw materials and energy	8.1%
Semi-finished goods	16.5%
Capital equipment	17.0%

40. *See* LEAGUE OF NATIONS, *THE COURSE AND PHASES OF THE WORLD ECONOMIC DEPRESSION* (1931); LEAGUE OF NATIONS, *THE NETWORK OF WORLD TRADE* (1942); P. WRIGHT, *TRADE AND TARIFFS OF CERTAIN PACIFIC COUNTRIES* (1933) (U.S. tariff schedules and rates 1921-33); F. BOUCKE, *EUROPE AND THE AMERICAN TARIFF* (1933).

41. 19 U.S.C. §§ 1330-35 (1964).

After the Republicans came into power in 1921, there was inevitably pressure for the appointment of men who would represent this or that section of the country, and "look out" for its interests. . . . President Harding . . . followed the good old ways of accommodating friends and associates. President Coolidge cannot be said to have attained, at least in this part of the government's work, to a higher level.

F. TAUSSIG, *supra* note 33, at 524.

The Tariff Act of 1930 ended the terms of those Commissioners and empowered the President to set up an entirely new body, with higher salaries so as to draw more able men. No more than three of the six members were to be of the same political party. In addition, the Commission was given the power to appoint special experts and examiners as found necessary for the performance of its duties.



tariff schedule adopted therein, though since revised, became the basic American tariff system.<sup>42</sup>

The American movement towards an internationally regulated and less-restricted system of foreign trade began with the passage in 1934 of the Reciprocal Trade Agreement Act.<sup>43</sup> Departing from the previous practice of setting a schedule of fixed tariffs,<sup>44</sup> Congress delegated to the President the authority to conclude, without Senate approval, reciprocal agreements lowering duties and other trade restrictions to make foreign markets accessible to American industry.<sup>45</sup> The President's power was limited in two respects: (a) such tariff reductions could not exceed fifty per cent of the rates existing under the Smoot-Hawley Act,<sup>46</sup> and (b) the President was required to "seek information and advice" of the Tariff Commission with respect to those reductions.<sup>47</sup>

The Reciprocal Trade Agreement Act provided the basic structure of American trade legislation from 1934 until the passage in 1962 of the Expansion Act. In addition to enlarging greatly the President's authority to negotiate reductions in trade restrictions,<sup>48</sup> the Expansion Act sought to meet the domestic costs of freer international trade. Instead of limiting the amount of trade in industries where domestic producers were injured, the Expansion Act provided various forms of assistance to such producers.<sup>49</sup> It was under the authority of the Trade Expansion Act that the United States participated in the Kennedy Round of tariff negotiations in Geneva from 1964 to 1967, which produced the most significant trade liberalization in American history.

42. 19 U.S.C. § 1202 (1964), *as amended*, 19 U.S.C. § 1202 (Supp. V, 1970).

43. Ch. 474, 48 Stat. 943 (1934). This amended the Smoot-Hawley Act by adding Part III, entitled "Promotion of Foreign Trade." See generally G. BECKETT, *THE RECIPROCAL TRADE AGREEMENTS PROGRAM* 1-115 (1941). F. SAYRE, *THE WAY FORWARD: THE AMERICAN TRADE AGREEMENTS PROGRAM* (1939); H. TASCA, *RECIPROCAL TRADE POLICY OF THE UNITED STATES* (1938); U.S. TARIFF COMMISSION, *TRADE AGREEMENT CONCESSIONS OF THE UNITED STATES* (1949).

44. The sole exception to this policy was the so-called "flexible tariff" of the Fordney-McCumber Tariff Act, ch. 356, tit. III, § 315, 42 Stat. 941-42, (1922), whereby the tariff was to be set so as to equalize the cost of production between domestic and foreign goods. *But see* J. YOUNG, *supra* note 11, at 460, suggesting that such a tariff was unworkable.

45. Ch. 474 Part III, § 350(a)(1-2), 48 Stat. 943 (1934) amending 46 Stat. 708 (1930).

46. Nor could tariffs be increased in excess of fifty per cent thereof. Ch. 474, part III, § 350(a)(2), 48 Stat. 943 (1934).

47. He was also required to consult the Departments of State, Agriculture, and Commerce, ch. 474, part III, § 4, 48 Stat. 945 (1934).

48. Aside from renewing the President's authority to reduce tariffs up to fifty per cent in 19 U.S.C. § 1821(b)(1), (1964), the Act provided that when "the United States and all countries of the European Economic Community together accounted for 80 per cent or more of the aggregated world export value" of a commodity, no limit on the amount of the reduction in duties would be imposed. 19 U.S.C. § 1831(a) (1964) (Special Provisions Concerning European Economic Community).

49. See pp. 1440-43 *infra*.

## The Trade Act of 1971

The proposed Trade Act of 1971 departs from this trend toward liberality in three important ways: (1) It would make tariff adjustment and adjustment assistance relief easier to obtain. (2) It would alter significantly the President's authority with respect to trade regulation. (3) It would fail to extend authority to further reduce trade restrictions, and would in fact increase restrictions by providing for import quotas.<sup>50</sup> These departures would represent serious blows to the movement toward free trade.

## II. The Trade Act of 1971

### A. *Tariff Adjustment and Adjustment Assistance*

#### 1. *Background to the 1971 Revisions*

The Reciprocal Trade Agreement Act was extended eleven times between 1934 and 1958,<sup>51</sup> during which time some thirty-eight bilateral agreements were negotiated. Under the negotiating authority of the Act, the GATT<sup>52</sup> was concluded and four successive multilateral nego-

50. Under the Trade Act of 1971, the President would be authorized to reduce rates of duty by as much as twenty per cent or two per cent *ad valorem* of the rates in existence on June 1, 1967. However, many of the 1967 rates have already been lowered more than twenty per cent by the Kennedy Round, so this power is of little consequence.

More importantly, the House Ways and Means Committee has stated flatly that this authority would not be used for any new tariff negotiations, but only to offer compensatory concessions to nations whose exports to the United States are adversely affected by the imposition of tariff adjustments or other trade restrictions on those products subject to existing trade agreement concessions. H.R. REP. NO. 1435, 91st Cong., 2d Sess. 21 (1970). The House bill would extend this authority until July 1, 1974, while the Senate bill would extend it until July 1, 1975. 1971 House and Senate Bills, *supra* note 6, at tit. I, ch. 1, § 101. Actual quotas are imposed in Title II of both bills. *See* p. 1445 *infra*.

51. Ch. 1174, 48 Stat. 943 (1934) (original act), as amended ch. 22, 50 Stat. 24 (1937) (three years); 54 Stat. 107 (1940) (three years); ch. 118, 57 Stat. 125 (1943) (two years); ch. 269, 59 Stat. 410 (1945) (three years); ch. 678, 62 Stat. 1053 (1948) (one year); ch. 585, 63 Stat. 698 (1949) (two years); ch. 141, 65 Stat. 72 (1951) (two years); ch. 348, 67 Stat. 472 (1953) (one year); ch. 445, 68 Stat. 360 (1954) (one year); ch. 169, 69 Stat. 162 (1955) (three years); and Pub. L. No. 85-686, 72 Stat. 673 (1958) (four years). During this period, tariff reductions of fifty per cent (1945), fifteen per cent (1955), and twenty per cent (1958) were authorized. The latter two had to be spread over specified periods of time. Ch. 169, § 3, 69 Stat. 163-64 (1955) (fifteen per cent over three years); Pub. L. No. 85-686, § 3(8), 72 Stat. 674-75 (1958) (twenty per cent or two per cent *ad valorem* over at least two years).

52. The GATT is a multilateral trade treaty concerned with the conduct, promotion, and regulation of international trade. Although the contracting parties bind themselves to accept certain contractual obligations, there is no enforcement machinery within the GATT. Consultation and negotiations are largely relied on.

Not all portions of the Agreement are fully binding on the parties at present. Part II (Articles III-XXIII) need not be applied when inconsistent with mandatory domestic legislation in force in a member country on the date of its accession to the Agreement. Part II will become binding only when the GATT is definitively brought into force by those countries accounting for eighty-five per cent of world trade. Thus, Congress has been careful to specify that trade legislation shall not be construed to "determine or indicate the approval or disapproval by the Congress of the executive agreement known as the General Agreement on Tariffs and Trade," *see, e.g.*, Trade Expansion Act, 19 U.S.C. § 1351(a)(1)(A) (1964). For background and the history leading to the GATT, *see generally*

tiating sessions were conducted.<sup>53</sup>

As safeguards against the possible domestic economic dislocation resulting from such liberalized trade, however, Congress included two measures in subsequent extensions of the 1934 Act. These were the peril point provisions<sup>54</sup> and the escape clause procedure<sup>55</sup> of the 1951 Extension Act.

Under the peril point clause, the Tariff Commission was required to conduct an independent investigation, including public hearings, regarding all items upon which tariff concessions were contemplated. The Commission was to report to the President "the limits to which" reductions might be made "without causing or threatening serious injury to domestic industry."<sup>56</sup>

The escape clause<sup>57</sup> provided that, upon application by a domestic producer, a tariff concession granted under the Act would be withdrawn if the Tariff Commission determined that a product was being imported

Bronz, *The International Trade Organization Charter*, 62 HARV. L. REV. 440 (1956); W. BROWN, *THE U.S. AND THE RESTORATION OF WORLD TRADE: AN ANALYSIS AND APPRAISAL OF THE ITO CHARTER AND THE GATT* (1950); G. CURZON, *MULTILATERAL COMMERCIAL DIPLOMACY* (1965); K. DAM, *THE GATT, LAW AND INT'L ECONOMIC ORGANIZATION* (1970); W. DIEBOLD, *THE END OF ITO* (1952); R. GARDNER, *STERLING-DOLLAR DIPLOMACY* (3d ed. 1969); J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* (1968); K. KOCH, *INT'L TRADE POLICY AND THE GATT 1947-67* (1968); C. WILCOX, *A CHARTER FOR WORLD TRADE* (1949).

53. At Annecy, France: First Protocol of Modifications to the GATT, Oct. 10, 1949, [1952] 3 U.S.T. 5368, T.I.A.S. No. 2745; At Torquay, England: Fifth Protocol of Rectifications to the GATT, April 20, 1951, [1953] 4 U.S.T. 29, T.I.A.S. No. 2764. At Geneva, Switzerland: Sixth Protocol of Supplementary Concessions to the GATT, June 8, 1956, [1955] 6 U.S.T. 5833, T.I.A.S. No. 3438 (upon accession of Japan to the Agreement). At Geneva, Switzerland: Protocol to the GATT Embodying Results of the 1960-61 Tariff Conference (The "Dillon Round"), Dec. 13, 1962, [1962] 13 U.S.T. 2889, T.I.A.S. No. 5253.

The "Kennedy Round" tariff negotiations were conducted pursuant to authority granted under the Trade Expansion Act of 1962. At Geneva, Switzerland: The Geneva Protocol to GATT, June 30, 1967, T.I.A.S. No. 6425 (1967). See note 4 *supra*.

54. Trade Agreements Extension Act of 1951, ch. 141, § 3, 65 Stat. 72. The original enactment of the Peril Point was in the Trade Agreements Extension Act of 1948, ch. 678, § 3, 62 Stat. 1053; it was repealed by the 81st Congress, ch. 585, § 2, 63 Stat. 698 (1949).

55. Trade Agreements Extension Act of 1951, ch. 141, § 6(a), 65 Stat. 73. Included therein is the defense essentiality amendment; see note 18 and pp. 1421-22 *supra*.

56. Trade Agreements Extension Act of 1951, ch. 141, § 3, 65 Stat. 72. In attempting to make such determinations as to propose concessions in the Dillon Round, *supra* note 54, the Tariff Commission took almost two years rather than the permissible six months to conclude its work. The clause was amended in 1962 to allow the Commission to provide information of a more general nature. See Surrey, *Legal Problems to be Encountered in the Operation of the Trade Expansion Act of 1962*, 41 N. CAR. L. REV. 389, 391-93 (1963). As to the determination under the 1962 Act, see 19 U.S.C. § 1841(a-b) (1964); Metzger, *Expansion Act*, *supra* note 3, at 439.

57. First used in a bilateral agreement with Mexico in 1942. Agreement With Mexico Respecting Reciprocal Trade, Dec. 23, 1942, 57 Stat. 833 (1943), E.A.S. No. 311, the escape clause was made a mandatory provision in any agreement under the Reciprocal Trade Agreement Act by Exec. Order No. 9832, 3 C.F.R. 624 (Supp. 1948). GATT, Oct. 30, 1947, art. XIX, 61 Stat. A58 (1947), T.I.A.S. No. 1700 (Emergency Action on Imports of Particular Products), was fashioned for the purpose of accommodating this American requirement.

in such quantity as to seriously injure the competitive domestic industry. Before escape clause relief was granted, two broad sets of findings had to be made by the Commission.

First, a finding was required that an increase in imports had occurred, and that this increase was a result "in whole or in part" of concessions granted under the Act. The increase in imports could be "actual or relative,"<sup>58</sup> so a showing that imports had quantitatively grown, while sufficient, was not necessary. Instead, an "increase" could be shown merely by proving that the growth rate of domestic production of a particular product was lower than the growth rate of an analogous import. Thus, an "increase" might be found even when total imports in a product line were decreasing absolutely.

Second, the Commission was required to find that the increase in imports "contributed substantially" toward causing or threatening serious economic injury to the domestic industry. The Commission was empowered to consider a wide range of factors in making this determination, such as trends in the volume of imports and domestic production, wages and employment, profits, and movement in inventories.<sup>59</sup> Moreover, the statutory definition of "domestic industry" was so broad as to allow the Commission to focus on one segment of a multi-product industry in looking for injury.<sup>60</sup>

Superimposed on these liberal causality requirements was an important presumption. If the second step, a causal connection between increased imports and domestic injury, could be shown, it was presumed that the increase was a result of tariff concessions.<sup>61</sup> Coupled with the flaccid concepts of a "relative" increase and a "substantial contribution," this presumption made escape clause relief readily available.

The problems with the escape clause as described above can be illustrated by a simple hypothetical. If one segment of a multi-product industry which is competing with foreign producers experienced a decline in sales, while the competing imports experienced a somewhat

58. Trade Agreements Extension Act of 1955, ch. 169, § 6, 69 Stat. 166, amending Trade Agreements Extension Act of 1951, ch. 141 § 7(b) 65 Stat. 72. Both these Acts were repealed in 1962. 19 U.S.C. §§ 1362-1365 (1964).

59. Trade Agreements Extension Act of 1951, ch. 141, § 7(b), 65 Stat. 74, as amended, Trade Agreements Extension Act of 1958, §§ 5(a), (b)(1), (c), 72 Stat. 676.

60. "The Commission shall distinguish or separate the operations of the production or organization involved." Trade Agreements Extension Act of 1955, ch. 169, § 6(c), 69 Stat. 162.

61. See Metzger, *The Escape Clause and Adjustment Assistance: Proposals and Assessments*, 2 L. AND POL. IN INT'L BUS. 352, 366 (1970) [hereinafter cited as Metzger, *Escape Clause*]; S. METZGER, *TRADE AGREEMENTS*, *supra* note 4, at 443; Banner, "In Major Part"—*The New Causation Problem in the Trade Agreements Program*, 44 TEXAS L. REV. 1331, 1333 (1966). See p. 1435 and note 104 *infra*.

slower decline in sales, an affirmative injury determination might result. While the differential rates at which business was lost could satisfy the requirement that imports "contribute substantially" to domestic injury, the fundamental cause of injury to *both* domestic and foreign producers might well be extraneous to international trade: for example, demand for the product might have declined. Moreover, the domestic multi-product industry, as a whole, might be flourishing because of success in other product lines. Nevertheless, under the 1951 Extension Act, escape clause relief might have been awarded.<sup>62</sup>

Under the escape clause procedure, 113 applications to the Tariff Commission for relief resulted in forty-one non-negative recommendations for relief, eight of which were based on tie votes. In twenty-six of those forty-one cases, however, the President rejected the Commission's recommendations, usually because of his disagreement with the finding of a causal connection between the imports and the injury.<sup>63</sup>

The Expansion Act was passed with the intention of making such relief even more difficult to obtain. Congressional supporters of the Act argued that escape clause relief was contrary to the American policy of reducing artificial barriers to trade. Such relief amounted to artificial price equalization, which distorted the competitive allocation of resources. In addition to forcing consumers to pay higher prices for imports, escape clause tariff relief afforded protection to an entire industry when only a few, often inefficient, producers might have been injured. Moreover, it was feared that frequent resort to such restrictions would prompt retaliation by other nations, thereby endangering American export markets and world trade generally.

The Expansion Act attempted to meet these problems by altering both the scope and occasions for escape clause relief. First, the Act required proof that the increased imports were caused "in major part"<sup>64</sup> rather than "in whole or in part"<sup>65</sup> by trade agreements concessions and that the increase caused thereby was an "actual" rather than an "actual or relative" one.

Second, rather than having "contributed substantially," such imports had to be the "major factor" in causing or threatening to cause serious injury to the domestic industry. In making the second determination,

62. ROOT, *supra* note 11, at 382-83.

63. U.S. TARIFF COMMISSION, INVESTIGATIONS UNDER THE ESCAPE CLAUSE OF TRADE AGREEMENTS, Tariff C. No. 116 (Dec. 1963).

64. Title III, Ch. 1, § 301(b)(1) 76 Stat. 884 (1962). 19 U.S.C. § 1901(b)(1) (1964).

65. Trade Agreements Extension Act of 1951, ch. 141, § 7(a), 65 Stat. 74.

the Tariff Commission was no longer to consider separate segments of an industry.<sup>66</sup>

Under the Expansion Act, therefore, it was necessary to show that (a) imports were increasing at an absolute rate, (b) the increase had resulted in *major part* from concessions granted under trade agreements, (c) serious injury had occurred or was imminent, and (d) the increased imports had been the *major factor* in causing that condition.

Given a non-negative Commission finding, the President was empowered to (a) give tariff assistance,<sup>67</sup> (b) provide that the firms or workers of that industry could request certificates of eligibility to apply for adjustment assistance from the Secretaries of Commerce or Labor, or both,<sup>68</sup> (c) provide any combination of the above,<sup>69</sup> or (d) reject the Commission finding.<sup>70</sup> Since a new form of policy response—certification for adjustment assistance—was made available to the President, foreign producers had greater assurance that tariffs would not be raised whenever the Trade Expansion Act was successful, *i.e.*, when trade expanded. When it was determined that the escape clause criteria had been met,<sup>71</sup> rather than simply imposing tariff or quota restrictions, the government could alleviate the dislocating effects of increased im-

66. In addition, the factors to be considered were altered to include the "idling of productive facilities, an inability to operate at a reasonable level of profit, and unemployment or under-employment." 19 U.S.C. § 1901(b)(2) (1964), *amending Trade Agreements Extension Act of 1951*, ch. 141, § 7, 65 Stat. 74.

67. See 19 U.S.C. § 1902(a)(1) (1964) pursuant to 19 U.S.C. § 1981 (1964) ("[I]ncrease in, or imposition of, any duty or other import restriction . . . as he determines to be necessary to prevent or remedy serious injury . . .") or 19 U.S.C. § 1982 (1964) ("[I]n lieu of exercising the authority contained in 19 U.S.C. § 1981(a)(1) (1964) . . . negotiate international agreements with foreign countries limiting the export from such countries and the import into the United States of the article causing . . . serious injury . . .").

68. 19 U.S.C. § 1902(a)(2)-(3) (industry petition); 19 U.S.C. § 1902(c) (1964) (firm or worker petitions). The determinations to be made by the Secretaries of Commerce and Labor are set out in 19 U.S.C. 1902(b) and the procedures to be followed in so doing at 15 C.F.R. §§ 610.20-610.21 (1971) (Commerce) and 29 C.F.R. §§ 91.3-91.5 (1971) (Labor).

69. 19 U.S.C. § 1902(a)(4) (1964).

70. Should the President reject the recommendations, he is required to submit a report to Congress stating his reasons, and his decision may be overridden by a majority vote in both houses. 19 U.S.C. § 1981(a) (2-3) (1964). Under the previous act, a two-thirds majority had been required, Act of August 20, 1958, Pub. L. No. 85-686, § 7, 72 Stat. 673 (1958).

71. There has been much dispute as to whether or not the criteria for escape clause relief and adjustment assistance relief are identical. The case against identical treatment was set out most clearly by Chairman Metzger's supplementary opinion in Barber Chairs, Tariff C. No. 228, Jan. 22, (1968), and restated in his article, Metzger, *Escape Clause*, *supra* note 61, at 382-385. The weight of authority, however, goes against him. PRESIDENT'S REPORT, *supra* note 1, at 42 ("The causal criteria . . . are the same in the case of adjustment assistance to firms and of escape clause relief to industries.") Cotton Sheetting Workers, T.C. Pub. No. 100, 28 Fed. Reg. 7534 (1963) ("Statute allows no room for any different interpretation or application" of the two criteria). For the impact of the Trade Act of 1971 on this debate see pp. 1440-41 *infra*.

ports by providing firms with technical,<sup>72</sup> tax,<sup>73</sup> or financial<sup>74</sup> assistance, and by providing workers with adjustment,<sup>75</sup> retraining,<sup>76</sup> and relocation allowances.<sup>77</sup> By granting the President such remedial latitude, the statute avoided the perplexing choice between providing blanket protection to an industry at the expense of the consumer and allowing a few genuinely injured firms and workers to go unaided.

The Trade Expansion Act evidenced a congressional recognition of the incompatibility of tariff adjustment relief under the escape clause with the goal of freer international trade. The possibility of compensation requirements and retaliatory concessions withdrawals by other nations under Article XIX of the GATT<sup>78</sup> required that the use of tariff adjustment be curtailed in the interests of American producers and world trade generally.

Under the provisions of the Trade Expansion Act, there were from 1962 to 1969 no affirmative determinations of eligibility for tariff adjustment or adjustment assistance in all of the twenty-eight applications submitted.<sup>79</sup> This stemmed principally from the Tariff Commission's interpretation of the causation standard. In most cases the Commission found that there had been a failure to link the increase in imports with concessions granted under the trade agreement.<sup>80</sup> The questions of injury and injury causation were not often reached.<sup>81</sup>

72. 19 U.S.C. § 1913 (1964).

73. 19 U.S.C. § 1917 (1964); 26 U.S.C. §§ 172(b), 6501(h), 6511(a)(2)(A) (1964).

74. 19 U.S.C. §§ 1914.16 (1964). A summary of these provisions appears in Metzger, *Escape Clause*, *supra* note 61, at 389-97.

75. 19 U.S.C. §§ 1941-43 (1964).

76. 19 U.S.C. §§ 1951-52 (1964).

77. 19 U.S.C. §§ 1961-63 (1964).

78. *See* pp. 1450-52 *infra*.

79. Of these twenty-eight petitions, seven were filed by workers, thirteen by industries, and eight by firms. OFFICE OF THE SECRETARY, U.S. TARIFF COMMISSION, SUMMARY OF INVESTIGATIONS UNDER SECTION 301 OF THE TRADE EXPANSION ACT OF 1962 (1971) [hereinafter cited as U.S. TARIFF COMMISSION SUMMARY].

80. A discussion of the decisions, case by case, is undertaken in Banner, *supra* note 61, the author concluding that most cases should have turned on the injury causation requirement rather than the concession-import increase causation requirement. *See* pp. 1433-36 *infra*.

81. In November and December of 1969, the Tariff Commission, having undergone changes in personnel, returned the first affirmative decisions under 19 U.S.C. § 1901 (1964). Buttweid Pipe and Tubing, Tariff C. No. 297 (Nov. 3, 1969); Transmission Towers, Tariff C. No. 298 (Nov. 3, 1969); and, Pianos and Parts, Tariff C. No. 309 (Dec. 23, 1969). *See generally* Note, *Adjustment Assistance Under the Trade Expansion Act: A Critique of Recent Tariff Commission Decisions*, 6 TEXAS INT'L L. F. 67, 68 (1970) [hereinafter cited as *Adjustment Assistance*]. The significance of the Commission's abandonment of the preponderance test in those cases was greatly diminished by the subsequent decisions in Men's and Boys' Dress Shoes, Tariff C. No. 324 (June 1, 1970), Women's and Misses' Dress Shoes, Tariff C. No. 323 (June 1, 1970), and Women's and Misses' Footwear, Tariff C. No. 361 (Feb. 8, 1971).

## The Trade Act of 1971

### 2. *The Provisions of the Trade Act of 1971*

The proposed Trade Act attempts to change the substantive and procedural standards employed in the determination of eligibility for tariff adjustment and adjustment assistance, so as to make such relief more readily obtainable.<sup>82</sup> In addition, the Act seeks to limit the President's discretion with respect to affirmative determinations by the Tariff Commission.

To make relief more readily available, the drafters of the Act relaxed the causation requirements imposed by the Tariff Commission in investigations under the Expansion Act. The changes effected can best be understood by examining the four tests to be applied under the escape clause procedure.<sup>83</sup>

(a) *An increase in imports.* When the Expansion Act deleted the phrase "actual or relative" in describing the requisite increase in imports,<sup>84</sup> there was some dispute as to the interpretation to be given that omission.<sup>85</sup> The Commission's decision in *Ceramic Mosaic Tile-workers*<sup>86</sup> settled the dispute by holding that an absolute increase in imports was required. A number of petitions were rejected on the ground that no such increase in imports had been shown.<sup>87</sup> The Trade Act of 1971 would reverse this decision by reinserting the provision that the increase in imports may be "either actual or relative."<sup>88</sup> Thus, it would be possible once again that relief could be granted whenever imports declined more slowly than domestic sales.

(b) *The increased import—trade concession causation requirement.* Under the Trade Expansion Act, the Tariff Commission was required to find that "as a result in *major part* of concessions granted under trade agreements, an article is being imported into the United

82. See SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 252. Since the 1970 and 1971 Trade Acts are the same bills, the Hearings on the earlier bill will be referred to in discussing the later bills.

83. See pp. 1430-31 *supra*. See also *Adjustment Assistance*, *supra* note 81.

84. 19 U.S.C. § 1901(b)(1) and (c) (1-2) (1964), deleting phrase from Trade Agreements Extension Act of 1955, ch. 169, § 6(a), 69 Stat. 166, amending Trade Agreements Extension Act of 1951, ch. 141, § 7(b), 65 Stat. 74.

85. See Metzger, *Expansion Act*, *supra* note 3, at 444 (arguing the increase can no longer be relative, but see Comment, *Adjustment Assistance Under the Trade Expansion Act of 1962: A Will-o'-The-Wisp*, 33 GEO. WASH. L. REV. 1088, 1094 (1965) (arguing that the Tariff Commission does not require such a finding).

86. *Ceramic Mosaic Tile Workers*, Tariff C. No. 115 (Nov. 25, 1963).

87. *Watches, Watch Movements, and Parts of Watch Movements*, Tariff C. No. 142 (Oct. 30, 1964); *Industrial Biochemicals, Inc.* Tariff C. No. 101 (July 23, 1963); *Iron Ore Mine Workers*, Tariff C. No. 96 (June 28, 1963); *Zinc Workers*, Tariff C. No. 81 (March 11, 1963).

88. 1971 House and Senate Bills, *supra* note 6, at § 111 [proposed § 301(b)(1)] (*amending* 19 U.S.C. § 1901 (1964)).



States in such increased quantities."<sup>89</sup> In explaining its decision to reinstate the requirement that such increases need result only "in whole or in part" from such concessions, the Senate Finance Committee stated:

The committee agreed that this "major part" test is too rigid, and adopted the same causal relationship between increased imports and tariff concessions which existed between 1951 and 1962 under section 7 of the Reciprocal Trade Agreement Act as amended . . . .

The words "in whole or in part of the duty or other customs treatment reflecting such concessions" which the committee adopted, have not in the past been construed by the Tariff Commission as a reason not to proceed to determine whether increased imports have "contributed substantially" toward causing or threatening serious injury to an industry. The committee strongly believes that the Tariff Commission will not close out any case on an article subject to a tariff concession because of the causal link between increased imports and a tariff concession . . . .<sup>90</sup>

In thus stipulating, Congress sought to overrule a line of Tariff Commission decisions which had begun in 1963 with *Softwood Lumber*.<sup>91</sup> The causality test, most cogently formulated in the opinion of Commissioner Culliton in the *National Tile* case,<sup>92</sup> was interpreted to require that trade concessions had contributed more to the increase in imports than the aggregate of all other factors.<sup>93</sup> Under Commission practice, a wide variety of competing factors were taken into consideration, including disparities in operating costs between domestic and foreign producers,<sup>94</sup> lethargic domestic industries,<sup>95</sup> fashion changes,<sup>96</sup>

89. 19 U.S.C. § 1901(b)(1) (1964) (emphasis added).

90. SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 253-54.

91. *Softwood Lumber*, Tariff C. No. 79 (Feb. 14, 1963).

92. *Nat'l Tile & Manufacturing Co.*, Tariff C. No. 145 (Dec. 21, 1964) (views of Comm'r Culliton).

93. Former Commissioner Metzger, *Escape Clause*, *supra* note 61, at 369 n. 73, argues that the "preponderance" or "aggregate" test was used only in early Commission decisions, then abandoned. Most writers and several members of the Commission, however, maintain that this test was used throughout the 1960's. See, e.g., Banner, *supra* note 61, at 1333; *Adjustment Assistance*, *supra* note 82, at 71. Most significantly, perhaps, the PRESIDENT'S REPORT, *supra* note 1, at 42, refers to the 1962 Act's requirements as "the major cause—that is, the cause greater than all other causes combined . . . ." See Barber Chairs, Tariff C. No. 228 (Jan. 22, 1968) (dissent of Comm'r Clubb).

94. *Cotton Sheeting Workers*, TC Pub. No. 100 (July 19, 1963).

95. Barber Chairs, Tariff C. No. 228 (Jan. 22, 1968); Ice Skates and Parts, Tariff C. No. 149 (Feb. 19, 1965); *Nat'l Tile & Mfr. Co.*, Tariff C. No. 145 (Dec. 21, 1964); *Iron Ore Mine Workers*, Tariff C. No. 96 (June 28, 1963); *Softwood Lumber*, Tariff C. No. 79 (Feb. 14, 1963).

96. *Umbrellas and Parts of Umbrellas*, Tariff C. No. 136 (Sept. 1, 1964); *Earthenware Table and Kitchen Articles*, Tariff C. No. 86 (April 11, 1963).

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technological changes,<sup>97</sup> inflation,<sup>98</sup> and other factors affecting price and therefore demand.<sup>99</sup> Moreover, evidence was required that an increase in imports followed soon<sup>100</sup> after Expansion Act concessions,<sup>101</sup> on the theory that the maximum stimulation of imports attributable to a reduction in duty generally occurs soon after the reduced rates have come into effect.<sup>102</sup> Given these requirements under Tariff Commission interpretation, most of the negative determinations of the Commission had resulted from the petitioners' inability to connect causally the trade concessions and subsequent import increases.<sup>103</sup>

The Trade Act would moot the entire debate as to competing causes, the time span after concessions, and the degree of causation required, by dropping the import increase—concession causation requirement altogether.<sup>104</sup> As stated in the Senate Finance Committee's Report,

The words "in part" mean *any* part, *not* the major part, a significant part, or any other qualification on the degree of relationship between increased imports and a tariff concession.<sup>105</sup>

97. Hatters' Furs, Tariff C. No. 82 (March 13, 1963).

98. Danaho Refining Co., Tariff C. No. 134 (Aug. 21, 1964).

99. American Ceramic Products, Tariff C. No. 85 (April 9, 1963), (imports sold on basis of prestige with price only a secondary consideration); Whiskey (Except Irish, Irish Type, Scotch, and Scotch Type), Tariff C. No. 89 (April 26, 1963).

100. Umbrellas and Parts of Umbrellas, Tariff C. No. 136 (Sept. 1, 1964); Mushrooms Prepared or Preserved, Tariff C. No. 148 (Jan. 27, 1965); Ice Skates and Parts Thereof, Tariff C. No. 149 (Feb. 19, 1965). *And see* Banner, *supra* note 61, at 1341-2 for a discussion of these cases. *See also* Transistor Radio Workers, Tariff C. No. 91 (May 17, 1963); Zinc Workers, Tariff C. No. 81 (March 11, 1963).

101. "Insofar as the tariff-cutting authority is concerned, such adjustment assistance provisions were not and could not have been retroactive to previously authorized cuts." Comm'r Culliton in Broomcorn, Tariff C. No. 238 (March 25, 1963) (concessions in 1941). *See Adjustment Assistance, supra* note 81, at 71.

102. *See* Softwood Lumber, Tariff C. No. 79 (Feb. 14, 1963). *Contra*, Note, *Adjustment Assistance: A New Proposal For Eligibility*, 55 CORNELL L. REV. 1049, 1051 (1970) (arguing that this interpretation runs counter to Congressional intent).

103. *See* Metzger, *Escape Clause, supra* note 61, at 367. *See generally* for discussion and criticism of these findings, Banner, *supra* note 61.

104. Thus the tariff adjustment test still includes an "in whole or in part" connection between imports and concessions, while no mention of any connection at all is made in the adjustment assistance test. It must be recalled, however, that the "in whole or in part" test was presumed to have been met when the injury determination was affirmative. *See* note 61 and p. 1429 *supra*, as well as the administration's interpretation of that test, note 106 *infra*. In essence, there is no linkage required, as is made clear by the SENATE FINANCE COMMITTEE REPORT, *supra* note 6 and p. 1434 *supra*.

105. SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 254. This interpretation was also urged by the administration.

This experience under the two escape clause tests strongly suggests that, if a viable program of adjustment assistance to workers and firms—as well as relief for industries—is to be established, there is little point in retaining any statutory requirement that increased imports be causally linked to past tariff concessions. PRESIDENT'S REPORT, *supra* note 1, at 42.

Supporters of the Trade Act have argued that this change would facilitate the granting of adjustment assistance, which, unlike tariff relief, involves no disturbance of international trade agreements.<sup>106</sup> The Trade Act, however, makes no such distinction, and applies the new causation standard in both cases.<sup>107</sup>

(c) *The serious injury requirement.* In order to determine whether serious injury has occurred, it is necessary to delineate the scope of the "domestic industry producing an article which is like or directly competitive with the imported article."<sup>108</sup>

The Trade Act further defines this provision of the Expansion Act to mean "that portion or subdivision of the producing organizations manufacturing, assembling, processing, extracting, growing, or otherwise producing like or directly competitive articles in commercial quantities."<sup>109</sup> This provision, referred to as the "segmentation principle," requires that the Tariff Commission distinguish between the operations of the producing organizations involving like or directly competitive articles and the other operations of such organizations. Whereas under the Trade Expansion Act profits in one segment of a multi-operation organization were regarded as setting off losses in another, the Trade Act of 1971 provides for an independent injury and relief determination with respect to each segment of the industrial unit. It can be expected that under the new Act, as under the 1951 provisions from which these standards were taken,<sup>110</sup> applicants for relief would argue for the narrowest possible definition of the domestic industry in an effort to make the importers' share of the market seem large, and the segmentation principle would virtually assure their success.<sup>111</sup>

106. SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 260. *But see* pp. 1451-52 *infra*.

107. "The criteria in the Trade Expansion Act of 1962 for escape clause relief for industries should be amended to eliminate the requirement that increased imports be causally linked to past tariff concessions." PRESIDENT'S REPORT, *supra* note 1, at 45.

108. 19 U.S.C. § 1901(b)(2) and (c) (1964). The determination is not unlike that of defining the product market of effective competition in antitrust litigation. *See Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320, 330 (1961); *Standard Oil v. United States*, 337 U.S. 293, 299 (1949).

109. 1971 House and Senate Bills, *supra* note 6, at § 111 [proposed § 301(b)(3)] (*amending* 19 U.S.C. § 1901(b)(3) (1964)) (emphasis supplied).

110. For examples of the unusual determinations made under this requirement in the 1951 Act, *see* Bronz, *The Tariff Commission as a Regulatory Agency*, 61 COLUM. L. REV. 463, 472-75 (1961) discussing Lamb, Mutton, Sheep, and Lambs, Tariff C. No. 7-83 (June 1, 1960) and Cotton Typewriter Ribbon Cloth, Tariff C. No. 7-85 (June 30, 1960).

111. *But see* SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 257, where it is argued that reinstatement of the segmentation principle is now more important because of the growth and proliferation of mergers and conglomerate-type industrial enterprises.

In 1963, just after the passage of the Trade Expansion Act it was argued in Metzger, *Expansion Act*, *supra* note 3, at 445, that the principle of segmentation had been re-

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While a determination that serious injury has occurred is made more likely by the Trade Act, the statute does not attempt to define such an injury. The Tariff Commission has met the issue only in the most general terms, defining serious injury as an "important, crippling, or mortal injury; one having permanent or lasting consequences."<sup>112</sup> Though the Trade Act elaborates the factors to be considered,<sup>113</sup> it is apparent that no precise formula can be applied to more than a few cases. Notably absent among these factors is any mention of the requirements and interests of freer world trade, and of the interests of foreign producers and nations generally.

(d) *The imports-injury causation requirement.* In actions under Section 301(b)(1) (the escape clause), the Trade Act of 1971 would require the Tariff Commission to find that imports are being

imported into the United States in such increased quantities, either actual or relative as to contribute substantially (whether or not such increased imports are the major factor or the primary factor) toward causing or threatening to cause serious injury to the domestic industry producing articles like or directly competitive with the imported article.<sup>114</sup>

In reviving the "contributed substantially" test, the Trade Act would reject both the Expansion Act<sup>115</sup> standard and an intermediate Administration proposal.<sup>116</sup> The latter, entitled the "primary cause

tained in the 1962 Act in modified form. The issue was not, however, raised in Tariff Commission decisions from 1962-68. It has been argued, for example, that the principle was not applied in *Pianos and Parts*, Tariff C. No. 309 (Dec. 23, 1969), where it should have been. See *Adjustment Assistance*, *supra* note 81, at 77.

112. *Pianos and Parts*, Tariff C. No. 309 (Dec. 23, 1969). See also *Barber Chairs*, Tariff C. No. 228 (Jan. 22, 1968) (dissent of Comm'r Clubb).

The failure of the Commission to arrive at a definition of serious injury before 1969 can perhaps be traced to the economic tenor of the 1962-68 period:

[T]he 1962-68 period had witnessed great growth in the domestic economy, the highest wages in American history, a steadily lower rate of unemployment, and great gains in corporate profits . . . . It would have been surprising indeed to find industries, firms, or workers making out credible cases of injury due to imports, almost no matter what the form of words used.

Metzger, *Escape Clause*, *supra* note 61, at 384.

113. A downward trend of production, prices, profits, or wages in the domestic industry concerned, a decline in sales, an increase in unemployment or underemployment, an increase in imports, either actual or relative to domestic production, a higher or growing inventory, and a decline in the proportion of the domestic market supplied by domestic producers.

1971 House and Senate Bills, *supra* note 6, at § 111 [proposed § 301(b)(2)] (*amending* 19 U.S.C. § 1901 (1964)).

114. 1971 House and Senate Bills, *supra* note 6, at § 111 [proposed § 301(b)(1)] (*amending* 19 U.S.C. § 1901 (1964)).

115. 19 U.S.C. §§ 1901(b)(1), (c)(1)-(2) (1964).

116. See SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 255:

The parenthetical language was inserted to contrast the proposed criteria with the existing concept of "the major factor" and the concept of "the primary factor"

test," did not require that increased imports be the major cause of serious injury, but only that the increase be greater than any other single significant cause.<sup>117</sup> The major factor test, under the Expansion Act, was essentially an aggregate one. For increased imports to be considered a "major factor," they had to be a cause of serious injury greater than all other causes combined. As stated by Commissioners Dorfman and Sutton in the *National Tile* case:

The major factor in any given series of factors would not only be the one exerting the greatest influence, but the one that dominates the overall result. A factor that was merely the most important in a series would not necessarily exert more than minor influence.<sup>118</sup>

The rejection of the "major factor" standard, combined with the explicit reference to the Administration proposal, would render clear the intention of Congress to return to pre-Expansion Act standards and thus facilitate the granting of escape clause relief.<sup>119</sup>

### 3. *Procedures for Awarding Relief to Injured Industries*

In order to fully comprehend the impact of the proposed changes in the criteria to be applied by the Tariff Commission, it is necessary to view them in conjunction with the changes made in the procedures by which escape clause relief would be awarded. Following an affirmative determination by the Commission, a predictably more frequent occurrence under the Trade Act, two new procedural requirements are proposed.<sup>120</sup>

First, only the Commissioners who voted affirmatively for relief would be permitted to determine the amount of the increase in, or imposition of, any duty or other import restriction. That determination would be treated as the remedy determination of the Commission as a whole.

Following that determination, a completely new "additional injury determination" would be made. Again, only those who voted affirmatively would decide whether imports were increasing in such quantities as to "acutely or severely" injure the domestic industry.<sup>121</sup> The real

proposed by the administration and to show that these latter concepts were not in any sense controlling in the interpretation of the concept adopted by the committee.

117. PRESIDENT'S REPORT *supra* note 1, at 45. The "primary cause" test is presently used in The Automotive Products Trade Act, 19 U.S.C. §§ 2001-33 (Supp. V, 1970). See p. 1449 *infra*. It was embodied in a trade bill submitted to the Congress by President Nixon in 1969. H.R. 14870, 91st Cong., 1st Sess., § 301(d), (1969).

118. Nat'l Tile & Mfr. Co., Tariff C. No. 145 (Dec. 21, 1964).

119. See note 82 and p. 1433 *supra*.

120. 1971 House and Senate Bills, *supra* note 6, at § 111 [proposed §§ 301(b)(4) and (5)] (amending 19 U.S.C. § 1901 (1964)).

121. The committee intends that acute or severe injury is to be construed as a high level of injury well above the threshold of serious injury required for an affirmative

consequence of this additional determination lies in the fact that once so affirmed, the President would be required to accept the precise remedy set by those Commissioners who voted affirmatively. Thus, for the first time, the Tariff Commission alone would have the power to impose quotas and tariffs.<sup>122</sup>

One danger in the new procedure lies in the elimination of the moderating influence of the dissenters in both these determinations. Under the Trade Act, it would be possible for as few as three Commissioners to set and impose a remedy, since a majority of a majority, in effect, would be treated as having acted for the Commission. Former Tariff Commission Chairman Stanley Metzger argues that the entire procedure was designed "to set the stage for Tariff Commission quota determinations . . ."<sup>123</sup> Ambassador Carl Gilbert confirmed this view when he referred to the "basic slant toward quotas inherent in this proposal. . ."<sup>124</sup> Given the seriousness of such determinations, the full Commission should be permitted to determine the particular relief afforded, as is the present procedure. Under the proposed procedure, dissident Commissioners would be under great pressure in what they perceived to be borderline cases to vote for relief in order to have some role in the relief determination. More generally, however, given the difficulties in arriving at any precise prediction as to the remedial effectiveness of particular measures, the widest possible hearing within the Commission should be held before a relief formula is declared.

A second important consequence of the proposed procedure is the limitation it would place upon presidential power. The President's discretion would be altered in three significant respects affecting: (1) his role in the event of a divided decision by the Tariff Commission, (2) his role in the determination of adjustment assistance cases, and (3) his discretion with respect to Tariff Commission decisions on tariff adjustment cases.

First, presidential discretion to accept or reject the Tariff Commission's recommendations in the event of an equally-divided vote by the six-member Commission would be eliminated by the addition of a

injury determination under paragraph (1) of section 301(b). . . . The word "acute" is taken generally to mean "seriously demanding urgent attention," "intensification of need," "sharp or pointed," "constituting a crisis."

SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 255-56.

122. See pp. 1443-44 *infra*.

123. Metzger, *Escape Clause*, *supra* note 61, at 377.

124. Testimony of the Hon. Carl J. Gilbert, *Hearings Before the Senate Finance Committee on Amendments to Incorporate the Text of the Trade Act of 1970*, 91st Cong., 2d Sess., pt. 1, at 5 (Oct. 9, 1970). [hereinafter cited as *Senate Hearings*].

seventh member in the House version of the Trade Act.<sup>125</sup> The clear intent of this version of the Trade Act is to limit the President's discretion in dealing with Tariff Commission recommendations, and to thereby avoid the type of "interference" which has resulted under current procedures.<sup>126</sup>

The second and much more significant change would affect the President's role in the disposition of adjustment assistance petitions. During the past several years, the argument that adjustment assistance should be made more easily obtainable than tariff assistance has won considerable support. Chairman Metzger's supplementary opinion in the petition of *Barber Chairs*<sup>127</sup> most succinctly presents the argument for different treatment, contending that unlike tariff adjustment, adjustment assistance does not involve foreign affairs complications. After some initial reluctance,<sup>128</sup> the Tariff Commission finally adopted this argument in the *Buttweld Pipe* case.<sup>129</sup>

If enacted, the Trade Act of 1971 would clearly express a Congressional intention that applications for the two types of relief should be handled differently. The Tariff Commission's role as a decision-maker in the determination of adjustment assistance petitions would be eliminated. With respect to adjustment assistance, the President alone would decide whether an article is being imported in such quantities as to "contribute substantially (whether or not such increased imports are the major factor or the primary factor) toward causing or threatening to cause serious injury."<sup>130</sup> The Tariff Commission would serve only in an advisory or investigatory capacity, its report containing no

125. Here the two versions of the Trade Act of 1971 differ significantly. Title III, ch. 2 of the 1971 House Bill, *supra* note 6, at § 311 amends 19 U.S.C. § 1330 by adding a seventh member to the Commission, thereby ending the split-decision provision under 19 U.S.C. § 1330(d) whereby the President had freedom to decide the matter in that event. Title III, ch. 2, § 311 of the 1971 Senate Bill, *supra* note 6, would amend the existing provision by adding the stipulation that "[t]he Commission shall be a Federal agency independent of the Executive departments and agencies." The intent of both is to lessen the President's power to influence or determine Tariff Commission recommendations. See SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 283.

126. See p. 1430 *supra*.

127. See *Barber Chairs*, Tariff C. No. 228 (Jan. 22, 1965) (Supplementary opinion of Chairman Metzger). See also Metzger, *Escape Clause*, *supra* note 61, at 381-85.

128. See *Cotton Sheeting Workers*, Tariff C. No. 100 (July 19, 1963): "Statute allows no room for any different interpretation or application." See also *Banner*, *supra* note 61, at 1354.

129. *Buttweld Pipe and Tubing*, Tariff C. No. 297 (Nov. 3, 1969). See also charge that the Commission has used this method to "relegislate the adjustment assistance provisions." *Wall Street Journal*, Nov. 5, 1969, at 8, col. 2.

130. 1971 House and Senate Bills, *supra* note 6, at § 111 [proposed §§ 301(c)(1) and (c)(2)] (*amending* 19 U.S.C. § 1901 (1964)).

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“conclusions, opinions, or judgments which are tantamount to the determinations.”<sup>131</sup>

The differential treatment of tariffs and adjustment assistance would be also manifested in several other ways. In those cases where the President vetoes tariff assistance on “national interest” grounds, he would be *required*<sup>132</sup> to certify firms and workers in the affected industry as eligible for adjustment assistance.<sup>133</sup> Moreover, even in those instances where the Commission denies an application for tariff assistance, the President would be empowered, on his own initiative, to decide upon the eligibility of the firm or workers for adjustment assistance.

The rationale behind the new provisions was made explicit in the *Senate Finance Committee Report*:

This amendment eliminates completely the former causal link between the increased imports and a trade agreement concession insofar as adjustment assistance cases are concerned. These cases are substantially different from the tariff adjustment industry-wide escape clause cases in that adjustment assistance involves no potential alteration of trade agreement concessions and therefore should not be related at all to such concessions.<sup>134</sup>

Combined with the adoption of the “substantially contributed” injury test,<sup>135</sup> the new provisions would make it likely that adjustment assistance would increase both in value and in importance under the Trade Act.

131. SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 261.

132. *See id.* at 262-63.

We are persuaded that provision for adjustment assistance should not be continued as a discretionary alternative action for the President in place of tariff adjustment action where the Tariff Commission has made an affirmative injury and remedy determination after an injury investigation.

133. Under § 302(a) a firm or group of workers is not automatically certified as eligible to apply for adjustment assistance. Following Presidential action upon request by a firm [group of workers] in the industry found to be seriously injured, or threatened with such injury, the Secretary of Commerce [Labor], in effect, must conclude whether the increased imports found by the Tariff Commission to have caused or threatened to cause serious injury to the industry as a whole have also caused serious injury [unemployment or underemployment] to the individual firm [workers] in question.

*Id.* at 262.

134. *Id.* at 260. The identical proposal was put forth by the Administration. PRESIDENT'S REPORT, *supra* note 1, at 41-46.

135. The proposed formula is: whether an article like or directly competitive with an article produced by the [workers] firm, or an appropriate subdivision thereof, is being imported into the United States in such increased quantities, either actual or relative, as to contribute substantially (whether or not such increased imports are the major factor or the primary factor) toward causing or threatening to cause serious injury. 1971 House and Senate Bills, *supra* note 6, at § 111 [proposed §§ 301(c)(1) and (c)(2)] (amending 19 U.S.C. §§ 1901(c)(1) and (2) (1964)). *See pp.* 1437-38 *supra*.



These provisions derive in large part from the experience under the Trade Expansion Act and the United States-Canadian Automotive Products Agreement of 1964.<sup>136</sup> Under the Trade Expansion Act, prior to 1969, all fourteen adjustment assistance cases<sup>137</sup> resulted in negative decisions, largely because of the failure to show a causal link between trade concessions and increased imports. The Automotive Products Trade Act of 1965,<sup>138</sup> on the other hand, enacted pursuant to the signing of an Agreement with Canada, completely eliminated the requirement of such a connection. Under that Act it is required only that a decline in United States production of a given automotive part be found in conjunction with either increased imports of that part from, or decreased exports to, Canada.<sup>139</sup> The presumption that these changes were caused by the operation of the Agreement can be overcome only by the President's finding that the Agreement was not the "primary factor" in causing the dislocation.<sup>140</sup> Relief has been granted in more than fifty per cent of the petitions under this Act.<sup>141</sup> Not surprisingly, therefore, the President's proposals recommending changes in the Trade Expansion Act noted, "The successful administration of the special adjustment assistance program under the Automotive Products Trade Act of 1965 indicates that this would be an effective mechanism."<sup>142</sup>

Leaving the question of social desirability aside, Congressional approval of the Trade Act of 1971 would create a basic contradiction in the provision of adjustment assistance. The original rationale for providing such assistance was that since increases in imports were attributable in part to United States trade policy, principally the granting of

136. Agreement Concerning Automotive Products with Canada, Jan. 16, 1965, [1966] 17 U.S.T. 1372, T.I.A.S. No. 6093 (1966). See also Metzger, *The U.S.-Canadian Automotive Products Agreement of 1965*, J. WORLD TRADE L. 103 (1967).

137. U.S. TARIFF COMMISSION, *supra* note 79.

138. 19 U.S.C. §§ 2001-33 (Supp. V, 1970).

139. 19 U.S.C. § 2022(b) (Supp. V, 1970).

140. 19 U.S.C. § 2022(c), (d), (g)(2) (Supp. V, 1970). Presidential authority to review petitions under § 2022 was delegated to the Automotive Agreement Adjustment Assistance Board, consisting of the Secretaries of the Treasury, Labor, and Commerce. Exec. Order No. 11254, 3 C.F.R. 354 (Supp. 1965). Regulations adopted by the Board define the "primary factor" as "a factor which is greater in importance than any other single factor present in a given case, but which does not have to be greater than any combination of other factors." 48 C.F.R. 501.2(j) (1971). "Dislocation" for purposes of the statute is also defined. *But see* the provision in the proposed Trade Act of 1971 which would change the test from "the primary factor" to a "substantial factor" test. 1971 House Bill at § 341(c) and 1971 Senate Bill at § 331(c), *supra* note 6. Reflected therein is Congress' impatience with the failure of Canada to reduce the duties on American-exported automobiles presently levied under the Agreement. See SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 287.

141. Fourteen of twenty-one applications were accepted. Metzger, *Escape Clause, supra* note 61, at 387. See Manley, *Adjustment Assistance Under the Automotive Products Trade Act of 1965*, 10 HARV. INT'L L.J. 294 (1969).

142. PRESIDENT'S REPORT, *supra* note 1, at 42-43.

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concessions, it was appropriate that the government assume an obligation to render assistance when such imports caused economic injury.<sup>143</sup> In removing the requirement of a causal link between increased imports and trade concessions, the Trade Act would obliterate the economic rationale for adjustment assistance.<sup>144</sup> Subject only to the "contributed substantially" injury test, the President would have virtually unlimited power to aid industries beset by foreign competitors, even when such competition was not the product of trade concessions.

The third and final limitation of presidential discretion would be a curtailment of the President's freedom to react to Tariff Commission recommendations for tariff adjustment. Following an affirmative determination of tariff assistance eligibility by the Commission, the Commissioners who voted for relief would determine: (a) the type of relief needed to remedy the injury, and (b) whether that injury may be termed "acute or severe."<sup>145</sup> If the latter determination is also affirmative, the Act provides that

the President shall proclaim the increase in or imposition of any duty or other import restriction on the article concerned determined and reported by the Tariff Commission pursuant to § 301(b).<sup>146</sup>

The President's role in this event would be largely ministerial and thus, according to Ambassador Gilbert, contrary to the best interests of a flexible trade policy.

Most decisions the President must make on foreign trade matters involve a complex of national interest considerations. The provision would force him to make a "yes" or "no" decision on sensitive and difficult issues . . . If existing flexibility were retained, the Presi-

143. Cf. p. 1449 and note 168 *infra*.

144. It is argued by Metzger, among others, that adjustment assistance is preferable to tariff assistance since it will be less offensive to our trading partners. This is not a rationale for assistance but rather an explanation of why one form of assistance is preferable to another. Lacking in such an argument is any justification for the provision of assistance in the first place. Cf. p. 1450 and note 171 *infra*.

145. 1971 House and Senate Bills, *supra* note 6, at § 111 [proposed § 301(b)(4)] (remedy determination) and [proposed § 301(b)(5)] (additional injury determination) (*amending* 19 U.S.C. §§ 1901(b)(4) and (5) (1964)). For an interpretation of "acute or severe" injury, see note 121 *supra*. The House Bill, however, attempts to set out an objective test for this additional determination based on three economic calculations. The subjectivity in these determinations (when added to the fact that the determination is made only by those Commissioners who voted affirmatively on the original injury determination) would appear to leave far too much discretion to the Commission, particularly when an affirmative decision will be binding upon the President, see p. 1443 and note 146 *infra*. The Senate specifically rejected this approach because of its complexity and its impreciseness in certain areas. SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 257.

146. 1971 House and Senate Bills, *supra* note 6, at § 113(a) [proposed § 351(a)(1)(B)] (*amending* 19 U.S.C. § 1981 (a)(1) (1964)).

dent would be able to work out a solution accommodating both the needs of the injured industry and the national interest . . . . This, in our judgment, is an unwise and unnecessary impairment of the President's existing flexibility.<sup>147</sup>

If, however, the additional injury determination is not made, presidential discretion would remain. The Act then provides that "the President shall proclaim such increase in, or imposition of, any duty or other import restriction on the article concerned as he determines to be necessary to prevent or remedy serious injury to the industry."<sup>148</sup>

Even in cases where "acute or severe" injury is found, the President would retain the power to reject the recommendations of the Tariff Commission, if "he determines that such action would not be in the national interest."<sup>149</sup> This power, however, is likely to be used sparingly. The President's role under the "national interest" clause is of an "all or nothing" nature. He must either reject the Commission's findings out of hand, or accept them in full.

In short, the intention of the Trade Act is to limit presidential discretion with respect to affirmative tariff adjustment determinations by the Tariff Commission. This intent is made clear in the *Senate Finance Committee Report*:

[I]t is the Committee's intention that in cases where the injury is acute or severe, the remedy is more urgent than in cases where only serious injury has been found, although in the latter cases, it is expected that the President will also weigh heavily the Tariff Commission's recommendation for relief in his decision to impose whatever restrictive action he deems necessary to provide relief.<sup>150</sup>

These limitations upon presidential discretion are in large part the result of the unhappy experience of the protectionists under the 1934

147. *Senate Hearings, supra* note 124, at 6. Evidence of the magnitude and the flexibility of the President's power under existing trade legislation was recently provided by the President's imposition of a supplemental ten per cent *ad valorem* duty on all imports.

On August 15, 1971, President Nixon issued a proclamation modifying all existing trade agreements to the extent required to assess the ten per cent surcharge. Presidential Proclamation No. 4074, 36 Fed. Reg. 15724 (Aug. 17, 1971). These actions were carried out under the broad powers granted the President under the Tariff Act of 1930 and the Trade Expansion Act of 1962, 19 U.S.C. § 1351 (1964). The Trade Act of 1971 would not agreements to the extent required to assess the ten per cent surcharge. Presidential Proclamation modify these Presidential powers, but a bill recently approved by the Senate Finance Committee would grant the President broad authority to impose quotas and to increase the surcharge to fifteen per cent under certain conditions. Revenue Act of 1971, H.R. 10947, 92d Cong., 1st Sess. (1971). See N.Y. Times, Nov. 5, 1971, at 1, col. 1 (city ed.).

148. 1971 House and Senate Bills, *supra* note 6, at § 113(a) [proposed § 351(a)(1)(A)] (amending 19 U.S.C. § 1981 (a)(1) (1964)).

149. *Id.* at § 113(a) [proposed § 351(a)(1)(A) and (B)] (amending 19 U.S.C. § 1981(a)(1) (1964)).

150. SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 257.

Act as amended, under which the President rejected twenty-six of the Commission's forty-one recommendations for relief. In effect, the Trade Act of 1971 would reverse the presumption underlying the provisions of the Trade Expansion Act that:

These determinations, affecting as they do the network of American economic alliances, must be subject to strong Presidential discretion since the impact of such decisions on the national interest may outweigh the benefit to a particular industry.<sup>151</sup>

By making the national interest determination the exception and the enforcement of Tariff Commission recommendations the rule, the Trade Act says in effect that the national interest in aiding a particular industry should outweigh all but the most serious competing interests. This protectionist position fundamentally alters the direction and development of American trade policy over the past thirty-six years.

### B. *Quotas on Certain Textile and Footwear Articles*

The provisions of the Trade Act of 1971 which have generated the most concern both in and out of Congress<sup>152</sup> are those of Title II, establishing quotas on certain textile and footwear articles. Under the Act, annual quotas would be imposed, based on imports during the period 1967-69, by category of articles and by foreign country of production for all categories of textile and footwear articles<sup>153</sup> imported into the United States after December 31, 1971.<sup>154</sup> The initial annual quota for each category could then be increased by up to five per cent for the following year if the President finds such an increase to be consistent with the purposes of Section 201.<sup>155</sup>

The President would be provided, however, with three mechanisms by which he could exclude textile and footwear articles from the quotas imposed. He would be authorized to do so (a) when he determines that such articles, as produced in a particular country, are

151. H.R. REP. No. 1761, 85th Cong., 2d Sess. 11 (1958).

152. The textile quotas, aimed principally at Japanese goods, have been the subject of a series of negotiations for over eighteen months. It had been thought that were an agreement reached, the quota provision of the Act would be made unnecessary. Negotiations broke down in March 1971 and the Administration announced its support for the present provisions. See the announcement of voluntary restraints by the Japanese and favorable comments thereupon by Chairman Mills, N.Y. Times, Mar. 9, 1971, at 47, col. 2. President Nixon, however, rejected those limitations as inadequate and stated that "Consequently, I will strongly support the textile quota provisions of the legislation now pending before Congress, H.R. 20, . . ." N.Y. Times, Mar. 12, 1971, at 60, col. 2. On October 15, 1971, under a threat of non-legislative quotas, Japan and other exporters signed a "Memorandum of Understanding," accepting the Administration's limits. See N.Y. Times, Oct. 16, 1971, at 1, col. 5 (city ed.).

153. 1971 House and Senate Bills, *supra* note 6, at § 206(1) and (2).

154. *Id.* at § 201(a).

155. *Id.* at § 201(b)(2)(A).

neither contributing to, causing nor threatening to cause market disruption in the United States,<sup>156</sup> (b) when he determines that such an exception would be "in the national interest,"<sup>157</sup> and (c) when he finds that the total supply of those articles from domestic and foreign producers subject to the quotas will be inadequate to meet demand at reasonable prices.<sup>158</sup>

The Act would also authorize the negotiation of agreements with foreign countries which would result in the regulation of imports into the United States of textile and footwear articles and would supersede the statutory quotas provided for such articles.<sup>159</sup> While no specific limitations need be established in such an agreement, the Senate Finance Committee and the House Ways and Means Committee were both clear in stating that

[t]he basic thrust of the agreements must be to provide for a limitation of quantities of goods entering the domestic market, recognizing, however, that not all categories of goods from all countries are causing or threatening disruption of the domestic market, and recognizing that the pattern of disruptive trade changes.<sup>160</sup>

The purpose of the provisions of Title II was most simply stated in the Senate Finance Committee Report to be "to restrict imports and avoid the threat of serious injury to the textile and footwear industries and further deterioration in the domestic market for textiles and apparel in nonrubber footwear."<sup>161</sup>

156. 1971 House and Senate Bills, *supra* note 6, at § 201(d)(1). The President, in making the determination of market disruption, is instructed to use the tests set down in Annex C of the Long-Term Arrangement Regarding International Trade in Cotton Textiles, 1971 House and Senate Bills, *supra* note 6, at § 201(d)(1). These factors are set out in note 164 *infra*. On the Long-Term Arrangement, see note 165 *infra*.

157. 1971 House and Senate Bills, *supra* note 6, at § 201(d)(2). It was the intention of both the House Ways and Means Committee and the Senate Finance Committee that the President have freedom in this regard and . . . that he is not expected to indicate what particular reasons may have motivated his determination to act on the basis of the national interest criteria.

SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 270.

158. 1971 House and Senate Bills, *supra* note 6, at § 203. Under this provision the President is actually authorized merely to provide for additional imports in excess of established quotas.

159. 1971 House and Senate Bills, *supra* note 6, at § 202(a). In negotiating, the President is instructed to "take into account conditions in the United States, the need to avoid disruption of that market, and other such factors as he deems appropriate in the national interest."

160. 1971 House and Senate Bills, *supra* note 6, at § 202(a). SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 273. "This is little more than a crass attempt to coerce other countries to enter into such agreements and thus legalize the restrictions. For their failure to do so only assures the operation of the quotas." Rehm, *Proposed Trade Act of 1970: What Direction U.S. Foreign Trade Policy?*, 2 J. MARITIME L. AND COMMERCE 289, 307 (1971).

161. SENATE FINANCE COMMITTEE REPORT, *supra* note 6, at 267.

### III. Conclusion: Problems Raised by the Trade Act Proposals

The practical effect of the tariff adjustment and adjustment assistance provisions of the Trade Act of 1971 would be to make both forms of relief much more readily available to industries, workers, and firms. Similarly, the quota provisions will afford the affected industries greater protection. While the alleviation, through such relief, of the economic dislocation caused by freer trade and increased imports is both politically, and, to a degree, economically desirable, relief under the Trade Act would raise certain problems. These problems are of three sorts: (a) those of international economic efficiency, (b) those of the stability of international trade, and (c) those of United States legal obligations under the General Agreement on Tariffs and Trade.

#### A. *Tariff Adjustment and Adjustment Assistance*

##### 1. *International Economic Efficiency*

From the perspective of world trade, it is certain that when the barriers to trade are reduced, increased trade and imports will result.<sup>162</sup> To the extent that these imports displace domestic production, there will be economic dislocation in the form of idled production facilities and workers. Classical economic theory argues that those so displaced would shift into productive sectors of greater competitive advantage. Given the barriers to entry and the viscosity of the factors of production, however, such transitions are particularly difficult since few are willing or able to bear the costs inherent in such a shift. Prior to 1962, the notion that increased imports were merely the necessary evil accompanying the beneficial rise in American exports underlay American trade policy. Tariff adjustment was thus seen as the most direct method of avoiding the unpleasant costs of domestic conversion.

That view failed to recognize that while the benefits of greater trade were more diffuse than its costs, (since the former took the form of lower prices and a greater variety of goods available to consumers throughout the nation, while the latter took the form of highly concentrated dislocation among a politically vocal segment of the population) benefits often exceeded costs. The Expansion Act demonstrated congressional recognition of this fact and was an attempt to maximize the benefits of greater trade while alleviating its disruptive effects. Thus, the requirements for tariff adjustment were greatly tightened

162. C. KINDLEBERGER, *supra* note 14, at 87-120, 310-32.

while a new form of relief, adjustment assistance, was made available.<sup>163</sup> In effect, this was a decision that the domestic costs of freer trade should be borne, but that the government would bear those concentrated burdens of dislocation resulting from government-negotiated trade concessions.

In relaxing the requirements for both forms of assistance, the Trade Act of 1971 implies: (a) that when dislocation occurs, trade should be curtailed relatively more often through the imposition of greater trade restrictions, and (b) that insofar as adjustment is to occur, the government and not the particular industry or firm, much more often than has been the case under the Trade Expansion Act, should bear the costs by providing adjustment assistance.

In their distaste for tariff adjustment because of its impact on international trade, the free trade advocates have naively embraced adjustment assistance as a cost-free non-protectionist alternative. Overlooked has been the fact that, from the perspective of international trade, both forms of assistance are protectionist insofar as they bring about results that would not accrue in the free market. In the case of tariff adjustment, this interference consists of direct limitations on the free movement of the factors of production internationally. In the case of adjustment assistance, market interference takes the form of subsidization of the injured firms, workers, and industries. World trade is damaged by both forms of assistance.

Nonetheless, adjustment relief is not always unjustified. In many respects the conditions generated by an imperfect market economy are undesirable, and therefore government intervention may be called for to improve upon those results. Thus, where because of the viscosity of the factors of production relocation does not readily occur, the provision of short-term adjustment assistance aid may be seen as an attempt to simulate the results which would obtain in a perfect market. The strongest case for assistance occurs when there has been a rapid increase in imports over a short period of time, commonly referred to as "market disruption,"<sup>164</sup> causing sudden displacement of many firms and workers. Attempts to deal with this problem in the GATT have

163. See notes 72-77 *supra*.

164. The characteristics generally termed "market disruption" include: (1) a sharp increase in the imports of a particular product from a particular source, (2) the offering of those products at prices substantially below those of the domestically-produced equivalent, (3) the infliction or threat of serious damage to domestic producers, and (4) the price differentials which do not involve government subsidization of the exporter or dumping. J. JACKSON, *supra* note 52, at 571 n.13.

repeatedly bogged down.<sup>165</sup> In such situations, adjustment assistance is justified insofar as it alleviates short-term dislocation and lowers the entry barriers and transition costs of entering a new field of production.

Adjustment assistance is therefore justifiable to the extent it facilitates the transition of firms into new forms of more genuinely competitive production, and to the extent it meets the short-term needs of workers through unemployment, relocation, and retraining benefits. The assistance provisions of the Trade Act, however, are not so narrowly focused. Under the Act, adjustment assistance is designed not only as "conversion aid," but also as a general subsidy to industries beset by foreign competitors.<sup>166</sup> An industry successfully petitioning for adjustment assistance is relieved of the pressure to move out of a particular product line in which it has lost its competitive advantage relative to those foreign producers. This result is antithetical to free trade, since it serves to maintain present production patterns and resource allocations by making it economically feasible for producers to continue their activity despite the lack of a true competitive advantage.

The second argument for the greater availability of trade assistance is an essentially political one. Any increase in imports, it may be argued, is in part attributable to the trade policy of the government. It is therefore appropriate that the government assume an obligation to render assistance when those imports cause economic injury.<sup>167</sup> Those injured have invested and operated in reliance upon governmental protection, given the differences in the nature of competition, productive conditions, and regulations faced by the domestic, as opposed to the foreign, producer.<sup>168</sup>

This argument is considerably weakened under the Trade Act of

165. In June of 1960, the Contracting Parties of the GATT appointed a Working Party to study the matter, GATT Doc. SR.16/2 (1960). Facilities for consultation were provided in the event such disputes arose. However, further study of the underlying factors, Jackson reports, were never concluded because of the cost of acquiring the necessary data. J. JACKSON, *supra* note 52, at 572. See Long-Term Arrangements Regarding International Trade in Cotton Textiles, Sept. 26, 1962 [1962] 13 U.S.T. 2673, T.I.A.S. No. 5420.

166. Mr. R. B. Alexander, president of Nat'l Tile & Mfr. Co., testified before the Tariff Commission on Dec. 1, 1964, as follows: "I am looking for relief that perhaps may enable me to build a new factory based on my new process and therefore keep my plant and my employees operating, keep supplying the tile in the market place competitive with Japanese tile at a reasonable profit." Transcript of hearing pp. 183-85, as quoted in Nat'l Tile & Mfr. Co., Tariff C. No. 145, at 10, n.1 (Dec. 21, 1964).

167. "Since any increase in imports is attributable in part to the trade policy of the U.S. Government, it is appropriate that the U.S. Government assume an obligation to render assistance when increased imports cause economic injury." PRESIDENT'S REPORT, *supra* note 1, at 42.

168. These include, for example, differences in taxation, labor and capital costs, governmental assistance, and general commercial regulation including antitrust laws.



1971, since causal connections between governmental action, trade concessions, and increased imports would be severed.<sup>169</sup> In effect, the economic injury would not be necessarily linked to trade concessions in order to obtain relief. Alternatively, it is argued that all imports are the product of government trade policy, even if that policy is simply the decision not to act in a particular product area. Accepting this argument of passive causation would entail acceptance of the notion of initial governmental responsibility to regulate all trade—a notion that runs counter to the most basic tenets of the American free market economic system.<sup>170</sup>

Other arguments for assistance, such as the contention that the greater “visibility” of adjustment assistance benefits will result in greater vigilance and earlier dismantlement than would tariff assistance,<sup>171</sup> go only to the desirability of one form of assistance over another, never meeting the fundamental economic objections to granting relief in any form.

As drafted, one must conclude that the Trade Act of 1971 would go beyond the few valid arguments for providing economic assistance to domestic producers, and would to an economically harmful extent relieve much of the pressure upon those producers to adjust to changes in international competitive conditions. It is in this respect that the Trade Act moves fundamentally against both international economic efficiency and the free trade thrust of American trade policy.

## 2. *The Stability of International Trade*

In terms of American trade relations, the greater availability of tariff adjustment relief under the Act will impair the security and the stability of present and future negotiated trade concessions, particularly those extended to the European Economic Community under the Trade Expansion Act.<sup>172</sup> The threat of unilateral revocation of

169. See p. 1435 and note 104 *supra*.

170. Inherent in this proposition is the notion that somehow the industry has a right to the maintenance of certain trade restrictions. While an argument might be made on the basis of reliance, it is a weak one. It can instead be argued that the whole question of assistance turns on one's view of governmental versus industry responsibility.

“The question as to whether any part of the problem of meeting import competition lies in the industry's hands or whether it stems from governmental policies is given insufficient emphasis.” Public Advisory Committee on Trade Policy Member R. Heath Larry commenting in PRESIDENT'S REPORT, *supra* note 1, at 53 n.11.

171. One could argue conversely that the greater international outcry likely to be raised by tariff adjustment as opposed to the conventionally accepted adjustment assistance will lead to greater vigilance in the surveillance and the dismantling of the former.

172. 19 U.S.C. § 1831 (1964). (Special Provisions Concerning European Economic Community). See also H.R. REP. NO. 1818, 87th Cong., 2d Sess., at 6-14 (1962).

those concessions will undoubtedly hamper the commencement and the conduct of any future negotiations aimed at liberalizing trade.

### 3. *Legal Obligations Under the GATT*

Finally, the Trade Act of 1971 raises several questions concerning United States obligations under international law. Under Article XIX of the GATT, an escape clause procedure was included largely upon American insistence.<sup>173</sup> A contracting party is free, under that procedure, to suspend, modify or withdraw a trade concession only

[i]f, 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 . . . .<sup>174</sup>

The GATT escape clause is triggered by "unforeseen developments," the Trade Act's escape clause by bilateral concessions. Thus, to the extent that the Tariff Commission might adjust tariffs and quotas based on the Trade Act standard, it might contravene the United States' obligations under the GATT, and invite challenge by the nations affected.<sup>175</sup>

Even if United States action under Article XIX of the GATT went uncontested, the remedial consequences provided could do much to harm world trade. Having given notice and consultation rights to any

173. See p. 1428 and note 57 *supra*.

174. GATT, Oct. 30, 1937, art. XIX, 61 Stat. A58 (1947), T.I.A.S. No. 1700 (Emergency Action on Imports of Particular Products).

175. "The new escape clause must be regarded as inconsistent with Article XIX of the GATT." Rehm, *supra* note 160, at 304. Cf. the discussion of American escape clause action and Article XIX, focusing on the different interpretations given the various tests to be applied in Note, *United States Participation in the GATT*, 61 COLUM. L. REV. 505, 533-43 (1961).

While over forty escape clause actions have been undertaken within the GATT's lifetime, only in the case of *Women's Fur Felt Hats and Hat Bodies*, GATT, REPORT ON THE WITHDRAWAL BY THE UNITED STATES OF A TARIFF CONCESSION UNDER ARTICLE XIX OF THE GATT, (Sales No. GATT 1951-3), was the dispute pressed to a formal decision by the Working Party. In that case, the United States had withdrawn a concession on hats, over Czechoslovak protest. The United States escaped condemnation only upon an unusual interpretation given Article XIX by the Working Party, whereby, it was found that, "the Czechoslovak delegation has failed to establish that no serious injury has been sustained or threatened." *Id.* at 23 (referring to injury in the United States economy, which would justify the concession withdrawal). In other words, when a nation withdrew a concession, it was to be assumed that serious injury had occurred, and the protesting delegation then had the burden of disproving this, a presumption contrary to all existing practice including that of the United States' own escape clause. It is unlikely that this unusual interpretation would again obtain, given the present economic strengths of the other contracting parties.

party having "a substantial interest as exporters of the product concerned,"<sup>176</sup> it is expected that the United States and those so concerned would reach an accord on compensatory concessions equal in value to those withdrawn by the United States.<sup>177</sup> Where agreement is not, however, reached, the exporting country is empowered under Article XIX, paragraph 3 to respond in kind by making retaliatory reductions in, or nullifications of, existing concessions.<sup>178</sup> While this procedure might have little relevance in a period of international economic prosperity, in times of economic decline the possibilities become more serious. As each nation attempted to shift the burden of declining markets onto foreign commodities the retaliation and counter-response engendered thereby could accelerate a decline in international trade and economic conditions generally, as was seen in the inter-war period.<sup>179</sup>

It is possible that under Article XVI of the GATT, adjustment assistance might be objected to as a subsidy "which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into,"<sup>180</sup> the territory of a contracting party. Given the prevalence of agricultural support schemes and other subsidy arrangements, there is little likelihood of formal GATT action, under

176. GATT, Oct. 30, 1947, art. XIX, para. 2, 61 Stat. A59 (1947), T.I.A.S. No. 1700 (Emergency Action on Imports of Particular Products).

177. It can be argued that under the language of Article XIX, only the extension of notice and consultation rights is required, and that even where accord on compensatory concessions is not reached, a party remains free to initiate or continue its course of action. It should be noted, however, that both Congress and the Executive view the extension of such compensatory concessions as required:

Under Article XIX of the GATT escape-clause action by the United States requires it to pay compensation in the form of reduced tariffs on other imports or to accept retaliation by the imposition of increased barriers to its exports.

PRESIDENT'S REPORT, *supra* note 1, at 45.

Furthermore, the granting of tariff adjustment in particular cases necessarily has an impact on our total economic policy. It necessitates the granting of tariff compensation to our trading partners on other products in order to counterbalance whatever United States tariffs are raised under the escape clause.

H.R. REP. No. 1818, 87th Cong., 2d Sess. 13 (1962). Noteworthy too is the fact that the only tariff reduction authority granted the President in the 1971 Trade Act is to be used to grant such compensation. *See* note 50 *supra*.

178. GATT, Oct. 30, 1947, art. XIX, para. 3(a), 61 Stat. A60 (1947), T.I.A.S. No. 1700 (Emergency Action on Imports of Particular Products). The seriousness of tariff assistance in the minds of the United States' trading partners is demonstrated by their use of this GATT provision:

The sensitivity of other countries to U.S. escape-clause actions is well-known. For example, when the escape-clause actions were taken in 1962 on sheet glass and certain carpets and rugs, the European Economic Community took the unusual steps, permissible under Article XIX, of not awaiting compensatory offers from the United States, but of imposing a retaliatory increase in duties on certain U.S. exports.

Rehm, *supra* note 160 at 304, n.41.

179. *See* note 2 *supra*. *See* note 192 *infra* on the European response to recent American foreign trade restrictions.

180. GATT, Oct. 30, 1947, art. XVI, 61 Stat. A51 (1947), T.I.A.S. No. 1700 (Subsidies).

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Article XVI, though the possibilities are being explored in the Trade and Development Committee by the developing nations.

The tariff adjustment and adjustment assistance provisions of the Trade Act of 1971 therefore would not only undercut the justification for what might be termed the legitimate goals of such a relief program, but in making such relief more readily available, they would pose a genuine threat to the present conduct of international trade.

### B. *Quota Provisions*

The imposition of quotas on textiles and footwear articles by the Trade Act of 1971 can be objected to on both substantive and procedural grounds.

Substantively, it can be argued simply that neither industry requires or merits the protection afforded by these measures. In the case of footwear, the President's interagency taskforce on non-rubber footwear itself "reported that the facts and information available to it did not demonstrate a case of overall import injury."<sup>181</sup> When the Tariff Commission, after a full investigation, reached a divided decision,<sup>182</sup> the President himself deferred any action under the escape clause pending discussions with the Common Market.<sup>183</sup> At present, therefore, there remains no affirmative determination of serious injury to the domestic footwear industry due to increased imports.

In the case of textiles, no objective determination of import injury has been undertaken formally, since the industry has never petitioned for escape clause relief. Support for the Bill appears to stem largely from political motivations in both the Administration and the Congress.<sup>184</sup>

Even giving the claimant industries the benefit of the doubt on the

181. 6 WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS 812 (June 29, 1970).

182. Nonrubber Footwear, Tariff C. No. 359 (Jan. 15, 1971). Divided decisions were also returned in Women's and Misses' Footwear, Tariff C. No. 361 (Feb. 8, 1971) and Certain Nonrubber Footwear, Tariff C. No. 369 (March 8, 1971), though six of the eight petitioners in the latter case were denied relief by the Commission, the divided decision being entered only as to two of them.

183. The President, acknowledging the adverse reaction to the imposition of quotas on the part of the European Economic Community, and thus the adverse impact such measures could have on world trade relations generally, postponed his decision on relief until then—Secretary of the Treasury David Kennedy had met with the Community. No such meeting has occurred to date. N.Y. Times, April 9, 1971, at 1, col. 2.

184. President Nixon's support for the bill stemmed from a promise made during the campaign that if elected, he would reduce textile imports. Daily News Record, Aug. 22, 1968, p. 1, col. 4. In support of the President's position, however, it should be noted that the first textile industry workers' petition brought before the Tariff Commission recently resulted in an affirmative finding. Textiles, Tariff C. No. 371 (March 15, 1971). This was followed however, by a unanimously negative decision in Cotton Yarns and Plain Woven Fabrics, Tariff C. No. not announced (March 21, 1971).

substantive question of injury, one must seriously question the procedural decision to provide relief through quotas rather than some other form of aid. It is here that the change in American trade policy can be most clearly seen, for at the end of the Second World War, it was upon the insistence of the United States,<sup>185</sup> against the urgings of most of the rest of the world, that the GATT incorporated a general ban on the use of quantitative restrictions. As argued by the United States, for the reasons elaborated below, "Of all the forms of restrictionism ever devised by the mind of man Quantitative Restriction is the worst."<sup>186</sup> Yet 1971 finds the United States on the verge of enacting quotas in one of the most controversial areas of international trade relations.

Quotas, it can be argued, are undesirable for the following reasons.<sup>187</sup> Economically, quotas insulate domestic industries against foreign competition, thereby shielding prices, quality and production from the effects of the free market system and competition generally. Once the quota has been reached, no degree of increased efficiency in exporting countries or decreased efficiency in importing countries can lead to greater trade or shifts in production. The efficiency-maximizing function of international trade thus is frustrated.

In addition, quotas lend themselves readily to subtle discrimination among nations, an evil which the GATT negotiations and subsequent activities sought to ban.<sup>188</sup> This possibility is presented by the quota provisions of the Act, in that the President could provide exemptions from those quotas for particular countries if he determined that those countries were not responsible for such market disruption as was occurring or when it appeared in the national interest to do so.<sup>189</sup>

Finally, quotas deny international trade the natural regulatory mechanism of the market, and replace it with political negotiation. Given the clumsiness of that tool, the absence of market discipline could prove disastrous for international trade. Quotas, for all these reasons, are an unwise means of assisting the injured industries, even if relief in some form is justified.

185. See generally J. JACKSON, *supra* note 52, at ch. 13; K. DAM, *supra* note 52, at ch. 9.

186. U.N. Doc. EPCT/A/PV.22, at 16 (1947).

187. See generally G. CURZON, *supra* note 52, at 127 *et. seq.*; C. KINDELBERGER, *supra* note 14, at 246 *et seq.*; K. DAM, *supra* note 52, at ch. 9.

188. See Article XIII of the GATT, Oct. 30, 1947, 61 Stat. A40 T.I.A.S. No. 1700 (Non-discriminatory Administration of Quantitative Restrictions).

189. 1971 House and Senate Bills, *supra* note 6, at § 201(d). Both the non-market-disruption and the national interest exemptions allow the President to discriminate as to specific countries. A bill recently approved by the Senate Finance Committee would

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Because of their pernicious effects on international trade and because tariffs do not suffer from all of the same infirmities, the General Agreement on Tariffs and Trade enacted Article XI,<sup>100</sup> which bars the use of any quantitative restrictions except those which fit within the narrow exceptions of Articles XI and XII.<sup>101</sup> It thus appears that the United States, were it to enact the quota provisions of the Trade Act of 1971, would clearly violate Article XI of the GATT, and thereby open the possibility of widespread international retaliation.<sup>102</sup>

allow the President to impose quotas, discriminating as to both products and countries. See note 147 *supra*.

190. GATT, Oct. 30, 1947, art. XI, para. 1, 61 Stat. A32, (1947), T.I.A.S. No. 1700 (General Elimination of Quantitative Restrictions).

No prohibitions or restrictions other than duties, taxes, or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party . . . .

191. Within Article XI itself, exceptions are provided in the case of agricultural or fisheries products, and quotas needed to prevent critical shortages of foodstuffs or other essential products or needed to classify, grade, or market commodities. Article XII provides an exception "in order to safeguard its external financial position and balance of payments." GATT, Oct. 30, 1947, art. XII, para. 1, 61 Stat. A34, (1947), T.I.A.S. No. 1700 (Restrictions to Safeguard the Balance of Payments). No claim has been, and arguably none could be, made that the quota provisions of the Act fall within any of these exceptions. Neither export plays the required role in the United States trade pattern. The only remaining exception would be an Article XIX escape clause action, see note 174 *supra* and p. 1451. The results of such attempts were noted above, in the case of footwear, *supra* note 182, and in the case of textiles, *supra* note 184.

192. Threats of such retaliation have been heard throughout the debate on the quota provisions, coming most notably from the Common Market nations. Wall St. Journal, Oct. 14, 1970, at 1, col. 1.

The spectre of an international trade war has loomed large over the past six months. Of particular significance have been the consequences of, and the responses to, the imposition by the United States of the ten per cent surcharge on all imports. See note 147 *supra*; See also N.Y. Times, Oct. 17, 1971, at 8, col. 1 (city ed.) (Remarks of Prime Minister Heath).

A full-scale economic recession ensued in Japan in the weeks following President Nixon's announcement. In addition, it is estimated that the quotas on Japanese textiles to which the United States and Japan recently "agreed," will result in the loss of some 300,000 jobs in Japan and a thirty-three per cent decline in Japanese textile exports. N.Y. Times, Oct. 16, 1971, at 1, col. 5 (city ed.).

The economic recession has spread to Europe as well, and with it, growing fears of an international trade war. On October 20, 1971, Denmark enacted a ten per cent surcharge on all imports in response to the American action, pleading balance-of-payments difficulties. France, it was reported, has asked the European Economic Community to adopt a fifteen per cent surcharge on all United States goods. N.Y. Times, Oct. 20, 1971, at 1, col. 2 (city ed.).

High unemployment and a balance-of-payments deficit continue to plague the American economy, increasing protectionist sentiment in Congress. The Senate Finance Committee has recently approved a bill empowering the President to impose quotas and to raise to fifteen per cent the present surcharge. See note 147 *supra*. See also S.37, S.68, and S.834, 92d Cong., 1st Sess. (1971).