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PROBLEMS OF INTERNATIONAL TRADE REGULATION:
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by R. A. Cornell*

Introduction

Few issues have endured the changes of economic history so well as the controversy between Protectionism and Free Trade. The debate seems beyond resolution. It has recurred with every major change in the U. S. economic posture toward foreigners since our earliest days as a nation. One may say, fairly, that the periodic swings of U. S. commercial policy from one pole to the other (or to points in between) never have produced agreement or settlement of basic questions; instead, they have been unstable "victories" by one side or the other, followed by uneasy peace (usually brief) and the re-emergence of debate as passionate as that which went before.[1]

Like all labels, the tags "Protectionist" and "Free Trader" have become almost too loaded with emotional doctrinal overtones to be serviceable as descriptors. Yet to understand them rightly, especially in their more moderate, reasonable, and realistic expressions, is to understand at once both their strengths and their incompatibilities.

The "Free Trader" argues for the general interest as opposed to specific interests. Armed with elegant and valid theoretical proofs, he can demonstrate without difficulty that, in a competitive world with no trade barriers, a nation can have the highest possible standard of living, given its endowment of human and physical resources. It reaches this standard by exporting what it must to pay for imports of what it wants. This is fundamentally an argument about consumption—consumption pushed to maximum of quantity and quality through the abandonment of national economic self-sufficiency and the concentration of resources in making those tradeable products which can compete successfully as exportables. The passage, intellectually, from these theoretical postulates to the "real" world where trade barriers, multinational firms, and cartels do exist is an easy one: the argument now simply states a presumption in favor of lowering trade barriers and removing impediments to free markets wherever such barriers or impediments exist. The presumption will admit of exceptions—"infant industry" protection or national defense requirements, for example—but it is the presumption rather than the exceptions which top the list of policy priorities for the Free Trader.

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[1] As history, the debate is fascinating. Readers so inclined will find a few evenings delightfully spent in consulting, for example, Frank Taussig's classic TARIFF HISTORY OF THE UNITED STATES (8th ed. 1931) or, for an update on Taussig's work, P. KENEN, GIANT AMONG NATIONS: PROBLEMS IN UNITED STATES FOREIGN ECONOMIC POLICY (1964).

The "Protectionist" argues not so much contrariwise as from a different perspective. His perceptions are focussed on an imperfect world where trade barriers do exist, both at home and abroad. Erected in the past, their effect has been to create, in the present, domestic industries that would not be viable in a barrier-less world. Hence, he perceives rightly that to lower barriers might injure, perhaps destroy these industries. He is the champion of these specific interests, which he tends on various grounds to value more highly, or to identify with more closely, than the general interest espoused by the Free Trader. He asks the body politic to compromise with the general interest in particular cases by considering and assisting the welfare of the specific interests—which may be large groups of people who would otherwise be thrown out of work or forced into other employment, at great transitional cost. In modern democracies, his position, clearly, is a respectable one, a position not to be considered lightly.

Modern economic life is dynamic. Change, rather than some immutable steady state, characterizes both domestic economies and their international commercial relationships. Moreover, some of the change is itself induced by governments, for to have a commercial policy which follows any principle other than complete *laissez-faire* (there are no *laissez-faire* commercial policies in the world today), is to set in motion a string of changes leading toward specified national economic and political objectives. The objectives could be served by more relaxed or more restricted trade flows, as the case may be. The key point is that, in either case, policies to pursue them cause change. In economic life, change rarely is neutral; it rewards some and punishes others as it nudges an economy in new directions. Therefore, it affects not only the general interest but specific interests as well—not all of them in the same way or even the same direction. These effects, the constant changes and their repercussions, create without respite the causes of new controversies over the objectives which a nation's commercial policy should follow. Equally, they generate the same kinds of tensions among nations. The stage thus is set for recurrent, almost dialectical debates on the degree of freedom which "ought" to be applied to international commercial intercourse. In other words, the world never holds still long enough for the Free Traders and the Protectionists to settle their differences once and for all. No sooner is one "solution" reached—and legislated—than the seeds of a new debate are sown by the effects of the "solution" itself.

The Trade Act of 1974, the United States' newest piece of comprehensive commercial policy legislation, which became law in the early days of 1975, reflects the kinds of historical trends and conflicts described above. It is a major law developed as a culmination of several years effort. In this writer's view, it responds rather accurately to the economic changes and pressures generated by three postwar decades of more or less unchanged U.S. commercial policy objectives. It is the latest truce in the never-ending

battle between the proponents of freer trade and those preferring higher levels of trade restriction. Parts of the law are novel, others are traditional, and some make strange bedfellows. Most importantly, the ultimate effects of the new law must remain a matter of conjecture, as they depend in large measure on the manner in which the law is interpreted and administered in the future. At several points, the law leaves key issues for future definitive determination by the Congress, the Executive, and other arms of government.

The purpose of this paper is to explore some facets of the Trade Act of 1974 with a view towards the concerns of practitioners in international commerce—the traders, the investors, affected domestic industries, and those who represent all three. No attempt is made to review the Act comprehensively as such reviews are readily available in print.[2] The choice of which facets to discuss is deliberately highly individualistic, and the treatment is topical rather than sequential.

Background On the Current State of Play In International Commerce

The international commercial policy of the United States last took a major change in direction and philosophy forty years ago, with passage of Cordell Hull's Trade Agreements Act of 1934. This Act authorized the Executive to conclude bilateral, "reciprocal" trade agreements involving tariff-cutting with other nations (many, if not most of the tariff cuts were later generalized to other countries via the granting of Most Favored Nation (MFN) treatment[3]). The 1934 legislation marked a hesitant but nevertheless significant turnabout from the high water mark of restrictionism represented by the (Smoot-Hawley) Tariff Act of 1930. About the latter, Professor Taussig had the following to say: "Regarded as a whole, the act of 1930 must be characterized as futile . . . ."[4] However this law remains relevant because it still governs the "statutory" rates in Column Two of the *Tariff Schedules of the United States* (TSUS) which, in contrast to the generally applied Column One (MFN) rates, now apply only to a handful of Eastern European and other Communist countries which do not enjoy the benefits of tariff concessions extended to most nations on an MFN basis.

[2] The Act itself is Pub. L. No. 93-618, 88 Stat. 1978 (codified in scattered sections of 5, 19, 26, 31 U.S.C.), signed into law on January 3, 1975. The best summaries and discussions of its provisions are the relatively short TRADE ACT OF 1974; SUMMARY OF THE PROVISIONS OF H.R. 10710, prepared by the staffs of the Committee on Finance of the U.S. Senate and the Committee on Ways and Means of the U.S. House of Representatives, 93d Cong., 2d Sess., (1974) [hereinafter cited as SUMMARY]; and the longer REPORT OF THE COMMITTEE ON FINANCE, UNITED STATES SENATE; TOGETHER WITH ADDITIONAL VIEWS ON H.R. 10710, S. REP. No. 93-1298, 93d Cong., 2d Sess. (1974) [hereinafter cited as SENATE REPORT].

[3] "Most Favored Nation" treatment involves extending to other countries the lowest tariff levied against the products of any single country which, by dint of concessions made to it, become "most favored." Such treatment can be extended with respect to concessions other than tariff concessions.

[4] F. TAUSSIG, *supra* note 1, at 519.

In 1937, on several occasions in the 1940's and 1950's, and finally in the Trade Expansion Act of 1962, basic principles and authorities similar to those of the 1934 Act were extended and expanded. Periodic trade negotiations with other countries proceeded apace. Although none of these extensions made any major change in the basic national outlook toward commercial policy, there was a significant alteration in negotiating style during the postwar period. Dealing with other nations on a multilateral rather than a bilateral basis became the accepted modality, bolstered by application of the MFN principle virtually without exception throughout the non-Communist world. The postwar period also saw the creation of GATT, the General Agreement on Tariffs and Trade, which not only attempted an international "standstill" agreement on the rules of commercial regulation which would be acceptable to the international community, but also provided the principal forum in which trade negotiations have taken place and in which nations could complain to one another, before applying sanctions or looking the other way, about alleged violations of the GATT rules. There is much disagreement on the extent to which the GATT has fulfilled its purposes or served the U.S. national interest. It is not necessary to take a position on this issue here, except to note that, whatever its merits or accomplishments, the GATT has become the key institution on the international commercial policy scene.[5]

As was noted in the Introduction to this paper, shifts in commercial policy law produce economic change. The years since 1934 have seen a drastic reduction in tariff levels worldwide and certainly in the United States. At present, median nominal U.S. MFN tariffs are in the neighborhood of only nine percent *ad valorem*, with trade-weighted average rates on farm products at under 5%. Trade-weighted levies on various classes of industrial goods range from 3.5% (on photographic and cinematographic supplies) to 25% (on textiles).[6] Numerous key products are duty-free. Many observers (this writer included) would say that, in general, tariffs in the principal trading countries now are so low that they hardly matter as instruments of trade regulation or distortion. Our recent experience with other kinds of international relative price changes—exchange rate movements, most notably—has shown that, save for movements of 5% or even 10%, the effects on trade flows are negligible because small price changes tend to be absorbed somewhere along the marketing chain before they reach consumers, the source of final market demand. Thus, while there probably remain enough tariffs to make ad-

[5] Paradoxically, the GATT, 55 U.N.T.S. 308 (1950), never received Senate approval in the United States. It is an executive agreement, concluded in 1947 under the then applicable legislation extending negotiating authority to the President under the Trade Agreements Program—in this case, the Trade Agreements Extension Act of 1945, ch. 269, 59 Stat. 410.

[6] For more details on tariffs in the United States and other major trading countries, or blocs, *see generally* SENATE REPORT 71-73.

ditional tariff-cutting negotiations worthwhile, few profound results can any longer be expected from such exercises.

Coincident with, and probably at least partly as a result of trade liberalization, the postwar world has witnessed phenomenal growth (except for very recently) in both the volume and the value of international trade. U.S. policy and leadership played a major role not only in this growth but also in the rapid development of U.S. traders' principal competitor economies, chiefly those of the European Communities (EC) and Japan. It should have been seen as inevitable that U.S. dominance of the world economy would have to recede from the early postwar peak, as other nations reconstructed and developed with a momentum all their own. Yet many in the United States were unprepared for the magnitude of the slide; by one set of numbers, the U.S. share of world exports dropped from almost 24% in 1948 (when the total was $53.3 billion) to under 13% in 1974 (when world exports had climbed to a staggering $779.0 billion).

The international economic system began to send out a series of unsettling signals by about the mid-1960's. U.S. trade balances lost their strength over the years, passed from surplus through equilibrium, and showed increasing amounts of red ink. By the early 1970's, a severe overvaluation of the dollar was painfully evident. A new institutional change, the startling emergence of the multinational firm (usually U.S.-owned) on the international economic scene gave further evidence that the world was indeed a different one from that of 1945. It is not necessary to inquire too deeply into the causes of these various events and developments to point out that many people raised serious questions about the adequacy of the internationally-agreed rules that governed the system, especially from the point of view of U.S. interests. Why? Because, with growing severity, specific interests inside the United States were finding that changes in the world at large were hurting. Imports had begun to make serious inroads into a few industries and some attention to these kinds of problems was demanded of the policymakers. A small but glaringly obvious proportion of outbound U.S. direct investment flows could be identified with "runaway" firms that seemed only too willing to leave their domestic workforces high, dry, unemployed, and replaced by "cheap labor" abroad.

The problems which emerged from these kinds of developments have been serious in both human and economic terms. It has been in vain for supporters of traditional free trade policies to point out that by far the greater portion of the economy benefited from trade and that the "runaway" firms represented only a miniscule proportion of the direct investors in capital plant overseas. Once again,the time had emerged for the defenders of the specific interests to be heard. At the same time, the ranks of the free traders were seriously dented by the defection to a strongly protectionist stance on the part of the AFL-CIO,

a powerful specific-interest group which formerly had backed the liberal trade policies of the past. Business interests, on the other hand, showed a curious shift in strategy. Defense of the multinational firm had become the principal business of their spokesmen, and while the defense of free trade remained a part of this overall objective, it subtly drifted into a subordinate slot. Most recently, almost as if to punctuate these longer-term trends, the twin shocks of (1) the whole petroleum imbroglio which began in 1973, and (2) the deep recession of 1974-75 pushed all the troubles and all the complaints into sharp relief.

Readers doubtlessly will recognize the foregoing as a sketchy and highly impressionistic account of postwar economic history. But it is sufficient to support and explain the point that, perhaps for the first time since World War II, events have culminated in recent years to stimulate a major re-examination of the old free-trade philosophy. This is not to say that the Trade Act itself necessarily represents a change in philosophy or a reversion to less liberal objectives; indeed, this paper will not pronounce on that question but will leave it to the reader's decision after he has seen what the Act attempts to do. It is to say, however, that the legislation emerged (in this writer's opinion) from a more fundamental questioning of basic premises than has characterized any such law in the postwar period.

One final note before moving on. It should not be thought that these trends, this recognition that the world has changed in basic ways, is limited to thinking on trade and commercial policy in the United States. There have been developments abroad, too. Both developed and developing countries have shown decided tendencies, as tariffs have come down over the years, to substitute so-called "non-tariff barriers" for customs levies as devices for controlling trade to their national ends. Among the less-developed countries (LDC's), Brazil presents a good example of the heavy and successful use of commercial controls (many of them novel) to serve the objectives of both developmental and macroeconomic policies. The trade-distorting effects of the EC's highly protective Common Agricultural Policy (CAP) are a thorn in every agricultural exporter's side. The creation of trading blocs and common markets, however such groupings may promote growth and development in numerous regions of the world, does raise serious questions about distortions of trade.

Hence, disputes, short tempers, and doomsayers abound. EC Commissioner Finn Gundelach recently (in November 1975) told the National Foreign Trade Convention in New York that ". . . in America at present the road that leads from the exercise of pressure to the implementation of protectionist measures is dangerously open," thus revealing how he and some of his colleagues who run the world's foremost trading bloc regard what they see as the "restrictionist thrust" of the 1974 Trade Act. A recent British announcement of possible import controls to

bolster that nation's dangerously shaky economy met with a storm of criticism from other EC members. And, to consider one last example, Sweden in late 1975 imposed selective import controls (on footwear, clothing, and textile items) specifically to keep out low-cost Asian goods on "national security" grounds. Alarmed at the loopholes that this might open in the already seriously breached GATT rules, the EC (which has not been above breaches itself) decided to hit the Swedes where it hurts: despite the provisions of a preferential agreement (itself trade-distorting) governing trade between Sweden and the EC, it reinstated the full EC Common External Tariff (CXT) against paper products which are a key Swedish export. In brief, the commercial policy world of the mid-1970's is tense, unsettled, and suspicious.

Such is the context in which the Trade Act of 1974 was passed and in which it has begun to take on life through interpretation and administration. Let us move on now to have a look at what it says and does.

Negotiating and Reforming Authorities

Scattered throughout the Act are at least five key portions which give to the President authority to pursue greater or freer trade or to seek reforms in internationally agreed commercial policy rules. In several of these cases, the authorities are not granted without qualification, inasmuch as Congressional approval in one fashion or another is required before agreements can become effective. In brief, the five are: (1) section 101, the basic tariff-cutting and trade agreements authority; (2) section 102, which adds a specific mandate to negotiate reduction or harmonization of non-tariff barriers to trade; (3) section 121, which directs the President to seek and negotiate reform of the GATT in a number of fields; (4) sections 404 and 405, which provide authority to enter into commercial agreements involving non-discriminatory (MFN) treatment for countries (i.e. the state-trading nations) which do not now receive such treatment; and (5) all of Title V (especially section 501), which gives the green light for the extension, within certain limitations, of a generalized system of tariff preferences to the LDC's.

Before separate consideration of each of these provisions, some comments are in order for all of them viewed as a whole. Probably most important, there is a certain comprehensiveness and unity in the list. Clearly, the Congress had in mind something other than a piecemeal approach to revision of the world trading order and the U.S. position within that order. The Act has a tone of eclecticism. For example, certain brief sections of Title I, which outlines most of the basic negotiating authorities, cover specific points which the Congress obviously did not choose to leave unmentioned or implied: authority to conclude bilateral trade agreements (section 105); negotiation on access to supplies (section 108); and trade agreements with LDC's (section 106). Towards the

end of the Act, section 612 discusses and permits detailed negotiations with Canada and, using the words "free trade area," permits the President to start talking with the Canadians (if they so choose), subject to Congressional approval of any implementing legislation that might ultimately result. Thus, seen in a body, the negotiating authorities provisions of the Act add up to a virtually complete coverage of the outstanding international trade issues.[7]

We now have a broad view of what the United States will seek to negotiate *about* in coming years. What will it be negotiating *for*? In addition to the objectives obvious from some of the negotiating authorities themselves (*e.g.* access agreements with supplier countries, or GATT reform), sections 103, 104, and to some extent section 126 are relevant here. The first of these sections sets forth the overall negotiating objective in fairly standard terms, "to obtain more open and equitable market access and the harmonization, reduction or elimination of devices which distort trade or commerce," with additional language to the effect that, to the extent possible, these objectives be attained equally and concurrently for agricultural and industrial products. Section 104 states the secondary objective. In negotiations with the developed countries, concessions should be traded in such manner as to balance them among countries within the separate sectors of agriculture and manufacturing, *i.e.*, so that within a given sector, the concessions obtained achieve market access for U.S. goods equivalent to that granted to foreigners within the U.S. market.[8] Section 126, however, carries the "equal access" concept well beyond the sectoral level. It insists upon a principle described as "Reciprocal Nondiscriminatory Treatment" and effectively provides for the opportunity for U.S. withdrawal of concessions *on a non-MFN basis* after Presidential determination at the completion of negotiations that any one or more of the major industrial countries has tried to ride "piggyback" on the benefits of MFN treatment without substantially making concessions of its own at least equal to those made by the United States.[9]

Section 126 represents one of several points at which the Act appears to pull the United States back from a thirty-year-old policy of multilateralism and unconditional MFN treatment in the negotiation and granting of trade concessions. Other examples include section 105, which specifically authorizes bilateral agreements if it is determined that they would serve the national interest, and paragraph (f) of section 102, which provides a possibility for discriminatory application of agreements on non-tariff barriers to trade. Controversy could develop over these provisions. Puristic

[7] There is one exception: the Act hardly takes note of the multi-national firm and its role in international trade. This problem is commented upon further in the concluding section of this paper.

[8] For further explanation and discussion of the sector negotiating concept, *see generally* SUMMARY 2-3 and SENATE REPORT 78-79.

[9] *See* SENATE REPORT 94-95.

free-traders could see them as a retreat to the generally ineffective bilateralism of the 1930's, as an opening for the United States to associate itself with trading blocs which would behave in a discriminatory way toward the outside world, and as an excuse for the United States to raise trade barriers against particularly troublesome competitors behind a smokescreen of appearing to liberalize trade with others who are not so troublesome. These are possibilities, but the Act itself does not dictate them; to have them occur would necessitate specific acts of negotiation, administration, and Congressional approval which are not now in the United States' lexicon of stated commercial policy objectives.

Furthermore, there are counter-arguments. It is a fair question whether some of the major trading countries may not require the threat of possible withdrawal of concessions to keep them honest in the negotiations; our competitors are, after all, not angels. Moreover, the recent experience with OPEC has alerted the industrial nations to the possibility of similar supplier cartels among other countries for commodities other than oil. Section 108 (authorizing supply-access agreements) is in the Act for precisely this reason. As a matter of negotiating strategy—and, for that matter, standard economic analysis of bargaining situations under the conditions of oligopoly or quasi-monopoly that such cartels represent—the use of bilateralism, or the weaning away of potential or actual colluders, represents a sensible way to proceed in breaking up or preventing the formation of a cartel. In the absence of evidence to the contrary, evidence which in any case could emerge only after the proceedings authorized under the Act have had a chance to work themselves out, there seems to be little reason to inter-ret the bilateralist-non-MFN provisions which appear in the Act as necessarily leading to a future regimen of less-free trade or as necessarily signaling a U.S. commitment in that direction. We turn now to consideration of each of the main negotiating authorities separately.

The tariff authority of section 101, with its associated authorization to enter into trade agreements, is neither novel nor unusual. It is the same kind of authority granted to the President in the Trade Expansion Act of 1962 and prior legislation which provided the Executive with the necessary mandates for participation in the Kennedy Round and previous trade talks under the auspices of GATT. But it is not, for all that, "ho-hum," because it commits the United States to participation in the first really important session of trade negotiations in a decade. It is a session which promises to rank equally with the Kennedy Round, for good or ill as one may care to interpret the results when they come forth.

Under this authority, besides the mandate to enter into trade agreements, the President may, incidentally to the negotiations, reduce existing U.S. duties without limit if they are 5% *ad valorem* or less, and up to 60% of their existing level if they currently exceed 5% *ad valorem*. There also is a tariff-raising authority, which is necessary to permit the United States to participate fully in tariff harmonization exercises with other

countries, i.e., to move toward the objective of harmonizing or equalizing so-called "tariff disparities" in addition to the other objective of lowering tariffs overall.[10] Under this authority, the President may, as part of negotiated trade agreements, either increase or impose duties by up to 50% above the statutory (Column Two) rate of January 1, 1975, or by up to 20% *ad valorem* above the existing MFN (Column One) rate on the same date, whichever is higher.

Section 109 also provides for the usual kinds of staging requirements so that any large duty reductions which result from the negotiations will not be inflicted upon the economy, especially on import-competing industries, with sudden and massive effect. Hence, any reductions which exceed ten percent of the now-existing rate would be applied only in small annual increments. The Act specifies that these increments may not exceed 3% *ad valorem* or one-tenth of the total negotiated reduction, whichever is greater. It is worth noting here that section 109 "stages" contemplated tariff cuts over a considerably longer period than the five years provided for cuts made during the Kennedy Round under authorities of the Trade Expansion Act of 1962. The intent, of course, is to ease the blow for any potentially affected import-competing industries and to give them time to adjust to changed conditions of competition. Under the Act's provisions, very deep cuts could be staged over as much as ten years from the time that negotiated trade agreements go into effect. This means, in practical terms, that the full effects would not be felt competitively until the later years of the 1980's.

The new Presidential authority to negotiate agreements reducing and/or harmonizing *non-tariff barriers to trade* (NTB's) represents a major departure from past practice. This is the first postwar instance in which such negotiations will take a central place in international commercial policy talks. NTB's cover an extremely broad range of policies used by nations to limit or distort trade flows and the United States is by no means a laggard among the practitioners of the NTB game. An NTB is any import-limiting or export-promoting policy other than a tariff. NTB's can include quotas (actual quantitative limitations) on imports; landing restrictions on other nations' aircraft (*e.g.* the Concorde); export subsidies (including those intended ostensibly to stimulate production in depressed areas); health and safety standards as well as product standards in general; discriminatory procurement policies (such as official "Buy American" directives and their counterparts in other countries); supply restrictions and price-fixing (such as the oil export policies of OPEC); and a whole host of distortions (border taxes are an example) which spring from discontinuities and anomalies in different national (non-tariff) taxation regimes.

Today's trading world has become much exercised by the NTB question. The steady decline of tariffs as protective devices in the postwar

[10] *Id.* at 73.

period has not only thrown the problem into sharper relief but also led to the actual substitution of NTB's for tariffs in order to achieve protection while seeming to adhere to the letter, if not the spirit, of the GATT rules. In recent years, most commercial policy disputes in which the United States has become involved—*e.g.* issues concerning foreign export subsidies, border tax adjustments, market cartelization by suppliers, and official procurement policies—have involved NTB's rather than tariffs. In general, they also have proved intractable.

In section 102 of the Trade Act, the President is provided with a green light to negotiate trade agreements, which may or may not be bilateral and may or may not be applied on an MFN basis, to harmonize, reduce, or eliminate NTB's that effect U.S. trade and the U.S. economy adversely. Actually, his signal on this score is more amber than green. The delegation of authority is extensively hedged with requirements for close consultations with Congress and, ultimately, two-house Congressional approval of any agreements that come forth. The Act recognizes that such approval could be cumbersome if not self-defeatingly difficult to obtain procedurally. It specifically provides for special rules under which implementing legislation would be hurried through Congress along a "fast track."

The foregoing is but one example of several very considerable oversight and approvål functions which the Congress has retained for itself in the Trade Act in contrast to its freer delegations of authority to the Executive in past trade legislation. On this important issue of NTB's, where the scope for new departures in commercial policy is perhaps greater than anywhere else given the variety and prevalence of NTB's worldwide, the Congressional retention of final decision-making authority is so iron-clad and complete that a judgment on section 102's real meaning for U.S. commercial policy is impossible now. The observer must wait and watch, first for negotiated agreements to come forth, and second for Congress to bestow its blessing or veto upon them.

Some exquisitely difficult questions could emerge from the decision-making process. For example, suppose that it would prove possible to strike a deal with one or more EC countries in which they would forego certain subsidies on depressed area exports to the United States in return for a selective relaxation of certain U.S. "Buy American" official procurement policies. Suppose also that no progress could be made on two far more basic issues—the rules of the CAP and the border tax question.[11] In the first place, will the Congress be able or willing to put aside the more vexatious issues in favor of some slight progress on the less crucial questions?

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[11] "Border taxes" are an important issue. Many nations—the EC countries in particular—rely mainly on so-called "indirect taxes" as their chief source of revenue. They employ the Value Added Tax (VAT), which is a kind of sales tax. A characteristic of such tax systems, entirely consistent with and even necessary for their equitable collection from an internal, national point of view (especially within a common market context) is that the tax is collected on imports and rebated on exports because the imports are sold

Or will an "all or nothing" philosophy develop, perhaps in the context of less thoroughgoing negotiation achievements than the Congress intended when it passed the Act? Alternatively, suppose that Congress approves the agreement. The deal might then be open to the criticism that the United States and its partner(s) to the agreement will not really have liberalized world trade at all but merely will have done a bit of dealing among themselves with the net effect of expanding their bilateral trade at the expense of other countries.

Such questions cannot be answered in advance of either the negotiations or the final decisions. They may not even turn out to be the real questions which emerge. But this portion of the Act, like several others, must remain devoid of permanent implication until it produces some action, both abroad and in the United States. Is it "protectionist"? Is it "free trade"? History, a few years hence, will provide the answer.

Several other features of the Act's new delegation of NTB negotiating authority deserve some highlighting. The Congressional mandate intentionally covers much substantive ground. As has already been pointed out in a definitional sense, the operational concept of the NTB which is to be carried forward into negotiations embraces far more than narrowly conceived non-tariff import restrictions.[12] It specifically includes foreign export restrictions, under the mandate to negotiate "Fair and equitable access to supplies." Obviously, OPEC and its potential imitators were in the legislative mind when this was inserted. As the timeliness of the OPEC issue recedes, this provision could turn out to have unintended meaning. Agreements related to it could range all the way from U.S. participation in broad international commodity agreements (*e.g.*, the International Tin Agreement) to tight little bilaterals that cozy up to key supplier countries; possibly at the expense of other industrial nations needing the supplies. The latter possibility is, of course, remote in the context of present U.S. policies, but it could be relevant in the dim future should international conditions and the U.S. policy response to them change.

That new NTB agreements could be bilateral, that they might "harmonize" rather than eliminate NTB's, and that they might not involve MFN application all have logical grounds. It is in the nature of an NTB as a protective device that, unlike a tariff which is a tax pure and simple, it can be tailor-made to a given protective purpose. Hence, NTB's can differ among

in home markets and exports are not. By contrast, the United States tax system is based chiefly on a "direct tax." The income tax has no such border adjustment features and cannot have them except at considerable inconvenience and cost. Hence, there is an anomaly in which U.S. imports are not taxed (except out of the profits of the importer, not the foreign producer), while U.S. exports are effectively double-taxed through the manufacturer's profits tax (unless he ships under the provisions of the DISC) and at the border of destination country. The anomaly produces a distortion of trade that is highly resistant to removal because remedial action must spill over into problems of basic fiscal legislation.

[12] *See* SENATE REPORT 22, 74.

countries even if they belong to some given generic class. It makes sense, in this light, to consider negotiating them away one by one or somehow equalizing their economic impact without necessarily removing them, rather than trying to swing a blunt and inaccurate ax worldwide. It also makes sense to deny third countries the benefits of NTB agreements as an incentive for them to come forth with analogous, economically equivalent concessions on their own (possibly different) NTB's. On the other hand, it is equally true that both bilaterals and non-MFN regimes are potentially susceptible to the escalation rather than the relaxation of trade discrimination. To put the matter bluntly, two or a few countries creating a network of bilateral agreements among themselves, without MFN application of concessions to the rest of the world, could become, in effect, a discriminatory trade bloc. In such a case, movement toward the Act's objective of an "open and nondiscriminatory" world trading system is not a foregone conclusion.

The Act also includes, as a negotiating objective for the United States, the acquisition of international safeguard techniques "designed to permit the use of temporary measures to ease the adjustment to change brought about by the effect of such negotiations upon the growth of international trade."[13] In other words, an "escape clause" for NTB's is sought. The escape clause is a well-known and now internationally respectable interference with freer trade. It is a mechanism by which, should domestic interests be affected too adversely or rapidly by the consequences of a trade agreement via increased imports, specified temporary off-setting and restrictive steps may be taken to ease the strain. The escape clause is a settled technique for dealing with seriously adverse consequences of tariff reduction, inserted into the GATT rules early in the postwar period at the insistence of the United States. Doubtlessly, if serious and widespread reduction of NTB's in a multilateral context is to become a major field for trade liberalization in the next decade or two, internationally agreed-upon escape mechanisms related specifically to NTB's are essential. In past tariff negotiations, the escape clause has been an invaluable tool for securing (and giving) greater concessions. Nations have known that they can, if need be, hedge their commitment at least temporarily in order to both placate and assist the adjustment to new economic forces by specific domestic interests that can be hurt badly, or perceive themselves to be so hurt, by the removal of protection.

The authority granted to the President by section 121 to negotiate a reform of the GATT really covers the waterfront in terms of substantive issues that the Executive is asked to resolve.[14] Ideally, the GATT or an organization of its type, serves as: (1) an embodiment of as large a body of international commercial policy practice as its signatories can agree upon; (2) a mediating, consultative body to which commercial policy issues and

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[13] *Id.* at 23.

[14] *See* SUMMARY 3-4 and SENATE REPORT 23-24, 83-87.

disputes can be brought (it would be too much in the present worldwide climate of rampant nationalism to expect or even hope more than feebly for a truly adjudicative role); and (3) an umbrella and forum for the negotiation of new commercial policy regimes in as multilateral a context as possible. Section 121 pinpoints twelve specific fields in which the Congress feels that the GATT, in 25 years of operating with basically unchanged rules, has failed to adapt to changing circumstances under some or all of these heads. The President is asked to redress these problems. If he cannot do so within the existing framework of GATT, he is authorized to move ahead with any agreements that can be made with a smaller group of more like-minded nations. Any agreements that emerge from talks under this section must, like any NTB agreements under section 102, receive legislative approval.

The twelve major negotiating areas specified in section 121 are quite important. They embrace most of the issues, Congressional discontents, and overall objectives that run like threads through much of the rest of the Trade Act. Consequently, each of them deserves at least a brief paragraph of outlining and comment.

At the head of the list comes the somewhat eliptically phrased objective of "the revision of decision-making procedures . . . to more nearly reflect the balance of economic interests."[15] In translation, this is an expression of dissatisfaction with the current extent of U.S. muscle in the GATT. Over the years, the number of GATT contracting parties expanded mightily, from 19 in 1947 to 87 in 1974. In the GATT Council, moreover, the Articles specify a "one-country-one-vote" rule so that the expansion of membership over the years has led to a dilution of influence that the United States can exercise over GATT decisions. More than that, the overwhelming majority of the new members have been less-developed countries so that the erosion of influence of the big industrial nations which account for the bulk of world trade has been disproportionate to the expansion of membership. Thus, in this part of the negotiations, the Act calls for revision of the GATT Articles to mandate weighted voting with the larger and more actively trading economies obtaining voting power proportional to their economic influence. There is plenty of precedent for such arrangements. For example, weighted voting has been basic to the IMF's Articles of Agreement from their inception.

The Act's second call is for a full revision of GATT Article XIX, the Escape Clause or "safeguards" article. Although the United States is chiefly responsible for Article XIX's presence in the General Agreement, Washington now is spearheading the expression of discontent with the rule as it now stands. In particular, the feeling is that a worldwide proliferation of techniques—mostly ingeniously contrived NTB's—for taking escape clause action to protect domestic interests adjudged injured by imports

[15] Trade Act of 1974, 19 U.S.C.A.§ 2131(a)(1).

has, over the years, far outrun the specific measures technically allowable under Article XIX as it was originally framed and presently exists. Accomplishing revision will be no easy thing because any nation coming into the talks will bring with it a set of conflicting objectives. On the one hand, it should have an interest in endowing any revised pact with tight, rigid definitions of allowable escape clause actions in order to prevent other countries from having excessive freedom to discriminate against its exports. On the other hand, its own interest in maintaining an adequate arsenal of internationally acceptable measures to protect its own domestic industries could easily lead, when multiplied by the multitude of nations which would operate under the same rules, to what the *Senate Report* (p. 85) artfully describes as "insufficient discipline." Moreover, it is well-recognized that the LDC's probably ought to be allowed more latitude than the industrial nations, because of the greater fragility and vulnerability of their economies to external sector developments. But the developed nations will not care to be so generous as to expose their own domestic industries to excessive competition while at the same time permitting the LDC's to close or restrict at will their markets for developed-country exports.

Objective Number Three is another vaguely stated mandate with a specific underlying meaning. It seeks "the extension of GATT articles to conditions of trade not presently covered in order to move toward more fair trade practices."[16] The *Senate Report* (p. 84) spells out clearly what is in mind here, namely a number of NTB-type distortions of trade which were not of much concern 25 years ago but which have become widespread in recent years, especially with the proliferation of common markets and trade blocs which use such distortions as standard elements of their coordinated commercial policies. To quote this source: "Many agricultural practices, such as export subsidies, and variable protection at the borders, are not adequately or specifically covered by GATT provisions. Existing GATT provisions are also inadequate or non-existent with respect to government procurement procedures and rules for applying product standards." Such language draws a bead on some key trade policy practices of the European Communities.

Reform Objective Four concerns fair labor standards. Apparently, international agreement on such matters as wages, hours, and the employment environment is to be sought with some kind of guarantee of the rights of private persons to present grievances before the GATT. This objective could be interpreted as either: (1) an aim inspired by genuine, if somewhat utopian, social concern; or, (2) a pragmatically-oriented attempt, perhaps improbable of success, to get some kind of international agreement on standards which would close the competitive gap between rich nations with high wages and poor nations with relatively low wages but increasingly efficient labor in certain product lines. Any such set of internationally

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[16] *Id.* (a)(3).

adopted standards, to be equitable, would have to account for international differences in productivity. While one can admit of distortions and anomalies in comparative international wages, for example, it remains axiomatic that high wages stem ultimately from high productivity and low wages stem from low productivity, not the other way around.

The fifth attempt at GATT reform will go to the border tax issue (previously explained in another context). Present GATT provisions allow border tax adjustments (*i.e.*, taxation of imports and rebates of taxes on exports) relating to indirect but not to direct domestic taxes. The contemplated revisions would find some way to make border tax adjustments "trade-neutral", that is, not discriminatory by nature against countries which rely mainly on direct taxes (and hence do not have border adjustment schemes) for their fiscal revenues.

Since roughly the mid-1960's, balance of payments disequilibria and resultant upheavals in the foreign exchange markets have become, if not endemic in the international economic order, at least far more frequent and intractable than in the past when the Bretton Woods system still functioned with some modicum of efficiency. More frequently, national responses to balance of payments problems have involved all kinds of import-restricting measures, including a proliferation of NTB's in the form of quantitative restrictions on inbound shipments. The sixth reform objective would amend the GATT rules to sanction import surcharges (i.e., uniform, across-the-board tariff increases on all products) as the preferred means of taking action to correct deficit situations. While such measures do restrict market access for foreign exporters, they operate in a uniform way that probably is the least disruptive of world trade of all the possible actions that could be taken. From a national point of view, however, a greater balance of payments effect, as well as the least possible disruption of domestic economic activity, might be achieved at the expense of foreign exporters in general and specific suppliers of heavily imported but not "essential" goods in particular by the use of selective (and therefore discriminatory) quantitative restrictions or other NTB-type devices.

It was inevitable that a major piece of foreign trade legislation framed in the United States in 1974 would address itself in important part to the new issue of "access to supplies" which was exacerbated by the appearance of OPEC as a major force in international trade of an important commodity. GATT reform dicta numbers seven and eight go together on this issue. Both express the desire, or at least the hope, that export restrictions, supplier cartels, and other manifestations of what economists call "imperfect competition" in world trade can be brought under the aegis of the General Agreement. This is a departure from past concepts because, in the main, the GATT has been concerned chiefly with the problems of and standards for import rather than export policies. The proposals required by the Act first would seek to strengthen GATT's basic rules on just what sorts of controls on exports (and hence supply access for other countries)

of food, fuels, raw materials, and manufactured goods will be allowable internationally. Second, the limits of national action having been defined, the logical next step would be implementation through a search for acceptable sanctions which could be applied multilaterally against offending countries or alliances that would attempt to restrict or interfere with supply access.

Although they are slightly separated in the language of the Act, the ninth and twelfth objectives for GATT reform also are related in substance. At a time when the GATT has seemed often to degenerate into a mere debating society when complaints about contracting parties' commercial policy transgressions have been brought before the forum, the Act makes a clear call for the establishment and strengthening of GATT procedures for both international consultation and adjudication of commercial policy disputes among countries or between them and groups such as the EC. It also goes farther by prescribing that, consistent with policy dicta relating to safeguard (escape clause) provisions, an attempt should be made to establish arrangements regarding specific products (footwear is specifically mentioned). Such arrangements would embrace dispute-settlement machinery as well as data-gathering and surveillance staffs. The multilateral arrangement on textile trade (and its predecessors on cotton textile trade) are precedent for such arrangements.

The tenth objective for GATT reform both attacks a major current problem in international trade and contains a possible enigma. It seeks "any revisions necessary to apply the principles of reciprocity and nondiscrimination, including the elimination of special preferences and reverse preferences, to all aspects of international trade."[17] The issue of preferences is a current and a sticky one. It began well over a decade ago when the EC commenced negotiating "association agreements," first with its members' former colonies and later with neighbor countries, especially those around the Mediterranean basin. The practice later spread to developed countries, most notably the members of the European Free Trade Association (EFTA) which chose not to follow the U.K., Ireland, and Denmark into the expanded EC but nevertheless wished to offset the practical abolition of EFTA by some kind of "special arrangement" with the enlarged Community. Either "special preferences" or "reverse preferences" (or both) characterized virtually all of these agreements. Special preferences are discriminatory exchanges of concessions on products of special interest to the signatory countries. Reverse preferences were characteristic mainly of EC agreements with the LDC's; they involved the LDC's granting of favorable entry conditions to products of the industrial countries in return for the EC's concession of preferential access to the Community for the LDC's products.

The U.S. policy reaction to the accelerating spread of these essential-

[17] *Id.* (a)(10).

ly discriminatory kinds of agreements was to push for a system of multilateral, *general* preferences which would be granted to the LDC's *en bloc* by the industrial nations, without reciprocity—*i.e.* without reverse preferences. At the same time, preferential arrangements among developed nations were opposed as contravening the basic intentions of GATT. Both initiatives have received some international acceptance. In the end, the United States turned out to be a bit of a laggard in adopting its own system of generalized preferences but this has now been codified in the Trade Act (and is discussed briefly in a later section of this paper). At any rate, having pushed the international debate on this aspect of commercial policy to its present point, the United States, in the Trade Act, now seeks to have some basic rules on preferential agreements adopted in the GATT articles.

This portion of the Act is clear enough on the issue of preferences. However, regarding its broader aim ("any revisions necessary to apply the principles of reciprocity and nondiscrimination . . ."), one could infer a question. The Senate Committee on Finance, in its explanation of the provision, says in part: "The most-favored-nation (MFN) principle is the foundation for regulation of international trade and the Committee is concerned with the erosion of this principle that has taken place since the GATT was established."[18] Such language rings true as a solid affirmation of the MFN principle. But there is some indeterminacy in the extent to which it fits in context with other portions of the Act (already discussed several pages previously in this paper) which appear to sanction both bilateralism and non-MFN treatment by the United States for the purposes of certain kinds of trade agreements contemplated under the Act.

The final GATT reform sought covers an extremely fertile field for progress. In the past decade or two, the subsidy has come into high fashion as a means of promoting all manner of final economic results. Many nations grant outright subsidies to exporters, notably those dealing in products whose export governments especially favor on economic policy or "prestige" grounds. Others grant production subsidies to farmers or manufacturers whose wares may then come upon the world market at prices reduced in some measure up to the extent of the subvention. Additionally, there is a large and complex field of investment incentives many of which have subsidy elements. Nations seek foreign investment in general or wish to make the placement of capital in certain economic sectors attractive to foreigners or domestic businessmen alike. The incentive or subsidy technique also is used by national or local authorities, or both, to attract capital to depressed areas and other localized regions within a country. Many states and communities within the United States, not to mention the Com-

[18] SENATE REPORT 85.

monwealth of Puerto Rico, maintain development offices and administer incentive schemes of this type.

The proliferation of subsidy arrangements could lead to a kind of international competition among governments with nations offering ever-greater incentives to domestic producers or foreign investors, only to find them offset by new attractions dangled forth by still other countries seeking the same capital or wishing to promote the same kinds of exports. The problem could be especially acute for the LDC's, which can find the maintenance of increasingly more generous incentive schemes becoming excessively costly in both the short and the long run. The "home" countries of capitalists who respond to externally offered incentives also have grounds for dissatisfaction because, in a world not distorted by subsidy devices, it can be argued that some of the capital placed abroad would be invested domestically to provide employment for domestic labor. For all countries, imports subsidized in the producing nations compete unfairly with efficiently operated domestic industries. In this kind of competitive "offer more than thy neighbor" atmosphere, there may be considerable room for the kind of reform that the Act calls for—the establishment, within the GATT, of a set of internationally agreed-upon rules which would define both the types and the extent of subsidies of all kinds that would be considered consistent with openness, fairness, and the absence of discrimination among nations. At the very least, a "standstill" agreement to halt the proliferation of subsidy schemes, perhaps with a caveat allowing the very poorest countries to employ them at will, would represent substantial progress.

The provisions of sections 404 and 405 of the Act, which cover Presidential authority to negotiate *commercial agreements with the non-market (communist) countries,* form the centerpiece of Title IV which is concerned with U.S. economic relations with these countries in general. With the exception of Poland, Yugoslavia, and Romania[19], this group of countries is synonymous with the list of nations not presently eligible for MFN treatment under U.S. law. Title IV could strike its readers as having an aura of complexity; its several provisions serve in the main as a tight, very carefully defined, and thorough Congressional attempt to attach caveats, restrictions, safeguards, and oversight provisions to the liberalizing or negotiating authorities of sections 404 and 405. The essentials, however, are simple enough. Section 404 recognizes MFN treatment for access to its markets as the chief concession which the United States has within its power to grant to the non-market economies. Section 405 proceeds to authorize the negotiation—subject, once again, to Congressional approval—of 3-year bilateral trade agreements with individual countries, grant-

[19] Subsequent to the passage of The Trade Act, Romania was made eligible for MFN Treatment by Presidential proclamation on April 28, 1975, Proc. No. 4369, 40 Fed. Reg. 18,389, 19 U.S.C.A.§ 2434.

ing nondiscriminatory (MFN) treatment to them if the agreements serve the national interest and the purposes of the Act. Much of the rest of Title IV consists of "bells and whistles" attached to these basics of sections 404 and 405.

The key caveat, as those who followed the bill's original passage through the Congress will remember, involves the tight linkage of any new agreement, including any granting of MFN treatment or any extension of official U.S. credits, credit guarantees, or investment guarantees, to the President's obtaining, and assuring the Congress by formal report, of a definitive determination that the Communist party to the agreement practices freedom of emigration. Some critics of the Act argue that this restriction represents the insertion of a non-commercial element into what is basically a commercial policy matter. But it is now a legislative fact that the Congress has chosen to amplify the provisions of Title IV with what it considers to be a broad foreign policy objective. Subsection 402(c) (1) modifies the basic freedom-of-emigration provision slightly, permitting waivers (subject to Congressional veto) if the President decides and informs the Congress both that the waivers will "substantially promote the objectives . . ." of section 402 and that "he has received assurances that the emigration practices of that country will henceforth lead substantially to the achievement of the objectives of this section."

Other provisions of Title IV further constrain Presidential negotiating authority. They preclude multilateral approaches in dealing with the state-trading countries. The expansion of U.S. trade and other economic relations with these economies is limited to bilateral relationships throughout. Moreover, any bilateral agreements concluded under section 405 must obtain two-house Congressional approval. They cannot enter into effect (or be continued if already in effect) with respect to the key concession of MFN treatment if the Communist party involved is in arrears on its lend-lease payments to the United States. Finally, all these bilaterals must include several specific types of provisions; five of these are most notable: (1) provisions for suspension or termination on national security grounds; (2) guarantees protecting U.S. patent and other property rights if the Communist country does not adhere to international agreements such as the Paris Convention for the Protection of Industrial Property; (3) safeguard provisions—*i.e.* escape clause mechanisms which the United States can invoke if necessary; (4) specified machinery for the settlement of commercial disputes; and (5) detailed arrangements for future consultations between the parties on the operation of agreements once they are in force.

As readers who are involved in East-West commercial dealings are well aware, the overall effect of the provisions of Title IV has been to slow considerably the expansion of such commercial intercourse as compared with the momentum that had been building up through 1972 and 1973. In January 1975, the USSR renounced the much-touted US-USSR Commercial Agreement of 1972, on two main grounds: (1) that the emigration-

policy provisions of section 402 of the Trade Act constituted an interference in internal policy matters that was unacceptable to the Soviets; and (2) that the provision of the Act relating to lend-lease payments had created an impasse inasmuch as the 1972 agreement had made the resumption of Soviet lend-lease payments conditional upon the granting of MFN treatment to the USSR by the United States, whereas the Act establishes conditions that run precisely the other way around. As regards U.S. commercial policy relations with other Communist countries, there also has been little progress since the passage of the Act except for the approval by the Congress in 1975 of an MFN agreement with Romania.

In contrast to the various provisions of the Act discussed so far, all of which basically are extensions of negotiating authorities aiming towards trade policy liberalization in the future, the provisions of Title V[20] which institute the U.S. Generalized System of Preferences (GSP) to be extended to the LCD's, move directly toward a regime of freer trade. Stripped to the basics, the system is a ten-year program to provide duty-free treatment on "eligible products" of specifically designated "beneficiary developing countries." The products involved must have at least 35% local content (value added in the exporting country) or 50% in the case of products originating in two or more countries that constitute a free trade area. There is a per-country limit of $25 million (or 50% of total U.S. imports) for duty-free importation of any given product except that the limit is waived if the United States makes no competitive article. It is automatically raised over time by the percentage increase in the U.S. GNP over the base year, 1974.

The "beneficiary developing countries" include, in general, all nations commonly thought of as LDC's. There are, however, some significant exceptions to this generality. All Communist countries are excluded, except for those which receive MFN treatment, belong to the GATT and the IMF, and are officially designated as "not dominated by international Communism." Similar exclusion applies to all members of OPEC[21] or similar cartels; countries which have expropriated U.S. property without fair compensation and/or which do not recognize arbitral awards to U.S. citizens by bodies to which disputes have been submitted by all parties; countries which fail to cooperate with the United States in controlling the international narcotics trade; and countries which, after January 1, 1976, maintain (or fail to modify substantially) any reverse preferences vis-a-vis third countries.

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[20] *See also* SUMMARY 21-23 and SENATE REPORT 41-43, 219-227.

[21] After Presidential announcement of the list of eligible countries on March 26, 1975, Exec. Order No. 11,844, 40 Fed. Reg. 13,295, 19 U.S.C.A.§ 2462, a diplomatic furor, which continues, developed when certain OPEC members discovered themselves excluded. These nations included Iran, Ecuador, Venezuela, and Nigeria, all of which adhere to OPEC pricing policies, but none of which participated in the oil embargo of 1973-74. Having continued to supply the United States with petroleum during the embargo, albeit at OPEC prices, these countries judged themselves more deserving of GSP treatment.

Products eligible for GSP treatment also are subject to exclusions. Thus, articles currently subject to import relief measures (*e.g.* escape clause relief) or import restrictions applied on national security grounds would be ineligible. There are safeguards against GSP imports of products made in U.S. insular possessions or the Commonwealth of Puerto Rico. In addition, certain especially import-sensitive items are categorically excluded: (1) textile and apparel products covered by international agreements in force; (2) watches; (3) certain electronic articles; (4) certain steel products; (5) a large list of footwear items; (6) certain glass products; and, (7) any goods which might later be officially designated by the Executive as "import sensitive."

Since the passage of the Trade Act, implementation of the GSP scheme has proceeded. Following the administrative provisions of Title V, Executive Order 11888, of November 24, 1975, published the formal list of both beneficiary countries and eligible products thus paving the way for the system to come into actual operation on January 1, 1976.

Provisions for Controlling Foreign Competition and Its Domestic Effects[22]

We come now to a whole class of provisions in the Trade Act that may have more immediate interest for practitioners in international commerce than the negotiating or reforming authorities already discussed. Whereas the latter are, for the most part, concerned with intentions, objectives, and guidelines for long and difficult negotiations which may or may not bear fruit, the portions of the Act that we are now about to discuss are essentially directives for action in the present and the immediate future—action which it is fully within the power of the United States to take and enforce unilaterally which could immediately affect U.S. trading and domestic producing interests alike.

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[22] This section will hop about, considering diverse portions of the Trade Act as they affect the general topic under discussion. For clarity, it may be well to present the appropriate references here, in a body, rather than to scatter them through numerous footnotes. The following tabulation will serve this end efficiently.

Topic		References in:	
	The Trade Act	Summary	Senate Report
Escape Clause relief	Title II, Ch. 1 Title IV, §406	pp. 7-8, 19	pp. 27, 119-129, 210-213
Adjustment assistance	Title II, Ch. 2 (workers), Ch. 3 (firms), Ch. 4 (communities).	pp. 8-9	pp. 27-29, 131-160
Unfair Competition:			
Retaliation	Title III, Ch. 1	p. 11	pp. 31, 163-168
Dumping	Title III, Ch. 2	p. 12	pp. 32-33, 169-181
Countervail	Title III, Ch. 3	p. 13	pp. 33-34, 183-191
Unfair import practices	Title III, Ch. 4	pp. 14-15	pp. 34-35, 193-200

The United States, like nearly all countries, maintains in its arsenal of commercial policy weapons a range of measures designed to deal with two different sorts of effects on the domestic economy that are generated by competition stemming from international trade. These cover various sorts of "injury" to domestic interests that could arise from competition *per se* even though it may be perfectly "fair" and involve no cut-throat or questionable tactics on the part of the foreigner or his government. Secondly, there is a whole class of "unfair" acts (dumping, patent violations, subsidies, and other interferences with free market forces) which also could be injurious to domestic interests. Concerning both kinds of possible injury, it is fairly safe to say that considerable international agreement exists as to how injury should be assessed and what may be done unilaterally to counter it. To be sure, this is a fruitful field for international disagreement; findings of "injury" and determinations of its causes in fair or unfair competition depend, to a high degree, on whose ox is being gored. There is no easier way for a government to find itself labelled "protectionist" or "restrictionist" in foreign trade matters than for it to administer its statutes governing import-injury even a little more vigorously than the degree to which the rest of the world has become accustomed. Nevertheless, underlying all the charges and countercharges, there is a regime of settled practice in which most if not all of the major trading nations stick to certain common rules even though they may try to stretch them on occasion.

U.S. techniques for dealing with injurious import competition have been embedded in past trade policy legislation.[23] Therefore, the portions of the Trade Act of 1974 now under review make few new conceptual thrusts. Rather, they alter, extend, and re-interpret legislation already in effect for many years. Recall the distinction in the commentary in the Introduction to this paper between the Free Traders—who represent what may be termed the general (consumer) interest, and the Protectionists—who represent more specifically defined producer interests. This distinction may help us get rid of the perjorative overtones in the terms "Free Trader" and "Protectionist," so that we can concentrate on the important point without having it misunderstood—the point that the portions of the Act now to be considered concern the Act's overtures to safeguard specific interests from inordinate damage as a result of the broad, general-interest policies set forth elsewhere in the Act.

There is an economic argument that has some relevance here and

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[23] The Antidumping Act of 1921, ch. 14, tit. II, 42 Stat. 11 (codified in scattered sections of 5, 19, 26, 28, 31, 33 U.S.C.) covers basic legislation on dealing with dumping by foreign exporters in U.S. markets. The Tariff Act of 1930, ch. 497, 46 Stat. 590 (codified in scattered sections of 6, 19, 22, 31, 46 U.S.C.) contains much of the basic law for dealing with unfair competitive acts in import trade. The Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, embodies the pre-Trade Act versions of both the escape-clause-type safeguards and the adjustment assistance program.

which can serve further to protect the analyst from reaching facile conclusions about whether or not these parts of the Act are "restrictionist." The argument says that there is no necessary inconsistency between an overall policy of liberalizing international trade and a set of more narrowly focussed policies that authorize constraints on the overall thrust in favor of protecting small groups or countering unfair competition in particular cases. The broad policy can be defended as serving the interests of society as a whole by giving it maximum access to the material joys of consuming all the imports it wants and can afford. However, if pursuit of the overall, liberal policy should work real hardship on small groups which cannot compete against foreign exporters, or which are exposed to outright foreign interference with free markets, then the society as a whole, in the very name of its gains from freer trade, ought to be willing to compensate the injured through the ministrations of government.

Few would contest the justice of such an argument on equity grounds. The real difficulties arise, however, when the issue moves to deciding what kinds of compensation to provide. The traditional, most easily applied remedy is the import restriction—a higher tariff or a quantitative limit on inbound shipments to take the heat off the injured group. Such a remedy is most justifiable in cases where the offending imports enter under such palpably unfair circumstances as predatory dumping or violation of domestic patents. But in cases where, other things equal, domestic producers are simply less cost-efficient than their foreign competitors, the import restriction's ease of administration may be offset by two potential problems: (1) the long-term economic cost of merely protecting rather than improving an inefficient domestic industry; and (2) the cries of "injustice" almost certain to arise abroad as otherwise honorably competitive foreign exporters pressure their governments to "do something" about the new "protectionism" they face as a result of the remedy. "Doing something" may mean retaliation which moves everybody still farther from an optimum solution. In such cases, the appropriate remedy may be the more difficult one (and possibly the more costly one in the short but not the long run) of eschewing import restrictions in favor of adjustment assistance or other programs which would render the people, capital, and resources of the injured industry more viable in the world and domestic marketplace. In any event, the law (the Trade Act is no exception) usually specifies in cases like these that import-restricting remedies should be temporary, reviewable, and aimed as far as possible at facilitating the economic revitalization of the protected interests.

It should be obvious that legislative provisions of the types we are now considering involve complex sequences of fact-finding, analysis, adjudication. They require considerable administrative effort and interpretation. Hence, their thrust and effect depend in large measure on the

pace and diligence with which they are enforced as subject to Congressional intent. In this light, it is necessary once again to come up with a "time will tell" conclusion about the meaning of these parts of the Act. The real tip-offs as to exactly how U.S. commercial policy is or is not tilting on the relevant issues can come only after a body of administrative decisions and guidelines provided by ongoing Congressional oversight has developed. At this writing, barely a year has passed since the Act became law and that body of practice has not yet emerged clearly.

The foregoing having been said, however, one still can state as well that in many respects the Act eschews vagueness or indecision. Its provisions for controlling both the conditions and the effects of competition from imports take three main approaches. First, they strengthen the Executive's retaliatory powers in cases of egregious foreign tampering with free markets for internationally traded goods. Secondly, they liberalize in important ways the criteria under which injury of specific domestic interests can be found. Therefore, relief steps (import restrictions or adjustment assistance) can be taken. Third, they tighten administrative guidelines to produce more timely decisions and to increase the definitiveness of the law's operation. Hence, two implications pop out starkly for those who are involved in international commerce or those who represent persons so involved: (1) domestic interests which feel themselves hurt by important competition now have significant new opportunities to petition the Government for relief; and (2) the importing interests on the other side are faced with a heightened need to defend themselves and their economic role with skill and sophistication. To nail these points down, let us now proceed to discussion of the important specifics.

One of the hallmarks of the Trade Act is its major, thoroughing overhaul of the basic escape clause mechanisms for providing relief to industries from import competition. The revisions work in the direction of making such relief easier to seek and to get for domestic industries that feel themselves hard-pressed in the face of rising imports. There are two principal changes. First, the Act abandons the virtually unworkable provision of the Trade Expansion Act of 1962 which required the finding of a link between alleged injury from imports and past trade agreement concessions. Except in very rare cases, it proved analytically difficult, if not impossible, to segregate concession-related imports from imports in general and to assess the relevance of the concession-induced imports to injury—even in cases where injury as a result of some cause or another was evident. Under the new guidelines provided by the Act, imports may be looked at *in toto* for a given product, with judgments being based simply on whether they have increased either absolutely or relative to some benchmark such as production or consumption in the domestic market. Secondly, if actual or potential injury is found, the criterion for finding causality on the part of the offending

imports is relaxed. Imports need no longer be a "major" cause of injury; the link is established if they can be seen analytically as simply a "substantial" cause (i.e. both important and at least coequal with any other causes that may be present). For the Federal agency which must perform the investigatory work in these industry relief cases, the U.S. International Trade Commission (USITC), these changes produce a great clearing of the analytical air. For many potential petitioners for relief among import-impacted domestic industries, they open up decidely optimistic possibilities that injury, or the threat of it, can be found and remedies adopted.[24]

The Act retains the traditional separation of functions in escape clause cases between the USITC—which receives petitions, investigates, and reports affirmatively or negatively to the President regarding injury, with recommendations for relief measures in affirmatively decided cases—and the White House, which makes final decisions regarding the relief to be provided. In affirmatively decided cases, the President is required to institute relief measures (any sort of import restriction, an orderly marketing arrangement with suppliers, adjustment assistance if the USITC recommends it, or a combination of measures), except when he decides that matters of overriding national interest preclude relief. He has latitude to accept, reject, or modify the recommendations of the USITC except when a subsequent two-house Congressional resolution directly imposes the USITC recommendations to override his decision.

Many critics of the Act see in the liberalized escape clause criteria a decided tilt towards greater protectionism. However, easy conclusions of this sort are confounded by other important provisions of Title II, which alter, expand, and greatly improve U.S. programs of adjustment assistance. Adjustments assistance is not in the least protectionist because it involves no import restrictions. Furthermore, it is thoroughly consistent with totally free trade because it gets to the very heart of what is supposed to occur in an economy moving in trade-liberalizing directions, namely, the revitalization of import-impacted industries and shifts of productive resources into internationally competitive occupations where labor is more productive and better remunerated, capital is more profitably employed, and greater output is obtained at less cost in terms of resource inputs.

The adjustment assistance program of the United States was hesitant and ineffective as part of the Trade Expansion Act of 1962. It was flawed and it flopped. The Trade Act of 1974 corrects many of the initial

[24] Section 406 of the Act establishes basically similar safeguard procedures with respect to East-West trade. Here, however, the criterion for relief is a simple "market-disruption" test: whether the entry of an article from a Communist country is in quantities increasing sufficiently fast to be a cause of significant injury, or threat thereof, to a domestic industry. Pub. L. No. 93-618, §406 (Jan. 3, 1975).

failings. It expands the program considerably, making generous amounts of funds and other federal help available to workers, firms, and whole communities whose economic woes can be traced importantly (but not necessarily even substantially) to rising imports. Determinations of eligibility to receive adjustment assistance have been made far easier to achieve; elaborate investigative and fact-finding requirements more appropriate to escape clause proceedings have been dropped, and responsibility for the entire program has been shifted to the Departments of Labor and Commerce, where it has become far more a matter of administration than of investigation and analysis. In the single year that the new program has been in operation, its beneficiaries have grown to number more than those served over the entire history of the prior program legislated in 1962.

The existence of an effectively functioning adjustment assistance program is vital for a modern nation attempting to move itself in the direction of freer trade. In this respect, the United States is truly innovative. In the first place, as noted above, such a program moves to achieve desired economic results at a faster pace—and with a good deal less human hardship—than would occur if the free markets for labor, capital, and resources were left alone. But, at the same time, the outcome which is desired from the free operation of the market is not subverted. Secondly, the very existence of a viable, active adjustment assistance program should relieve pressures to implement other, more trade-restrictionist import-relief measures. To put the matter simply, every successful petitioner for adjustment assistance is a petitioner who has been persuaded by the attractions of the program not to seek escape clause, countervailing duty, or other forms of relief that restrict the opportunity for society as a whole to enjoy all the imports that it wants. In the long run, this aspect of the adjustment assistance program cannot be over-emphasized. At the moment, the various import-relief provisions of the Trade Act all are being heavily exercised; but this activity, in the present writer's view, represents more a temporary bulge of public requests reflecting the pent-up pressures for relief generated by a decade of unusual economic events than a permanent phenomenon. As the effects of the new adjustment assistance programs begin to pervade the economy—with the result that fewer industries, over the years, will in fact require relief of any sort—these pressures can be expected to subside and perhaps come close to abatement, even as the nation moves decisively into an era of greater trade liberalization.

Prior to passage of the Trade Act, existing legislation on dealing with unacceptable foreign competitive acts covered four general areas: (1) Presidential authority to retaliate against the foreigner by interfering with his access to U.S. markets in sufficient degree to offset some transgression against U.S. foreign trade; (2) the handling of dump-

ing cases;[25] (3) the imposition of "countervailing" duties, designed to offset the effects of a foreign export subsidy; and (4) procedures for countering several sorts of unfair foreign methods of competition (including the violation of U.S. patents by imported goods). Title III of the Trade Act amends prior law with respect to each of these areas of action.

The retaliatory authority of the Executive is strengthened. It applies to a broad range of foreign hindrances to U.S. trade in goods and services, among which are foreign import restrictions or export subsidies or the interruption or interdiction of supplies by exporters of goods imported by the United States. Problems of this sort may be brought to the attention of the Government by complaint through the U.S. Special Representative for Trade Negotiations (STR). Generally, the Congressional intent is that difficulties of this type should be handled by selective, discriminatory retaliation against the offending countries rather than on an MFN basis.

Several amendments are made to the Antidumping Act of 1921 but two of them are most important. First, the Trade Act provides for equal hearing rights during the proceedings for affected domestic interests as well as the importing interests. Secondly, the time limits for dumping investigations are tightened. Generally, the Treasury Department is limited to 60 days in which to find evidence of dumping. The prior time limit of 90 days for the USITC to ascertain whether the dumping has caused injury to domestic interests is retained from past legislation.

The imposition of time limits also constitutes the principal change made in the countervailing duty laws. Under the Act, the Treasury Department is given 60 days in which to make its preliminary determination of whether an imported product enjoys a foreign subsidy; an additional three months then is allowed for the problem to be negotiated away. Failing such resolution, countervailing duties are imposed. The Executive is provided, beyond this point, with some latitude to suspend the countervail under certain conditions where further talks with the offending nation are thought likely to bear fruit but the suspension is subject to Congressional (one-house) veto.

Under the heading of "unfair competitive acts," a field largely within the bailiwick of the USITC, amendments to prior law also usually include the imposition of a one year time limit for the disposition of cases. A second important change involves the granting of power to the USITC to issue exclusion orders against the foreign product on the

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[25] "Dumping" exists technically whenever an exporter sells his wares in a foreign market at prices below those at which he sells in his own home market. The difference between the two prices is termed the "margin" of dumping. The laws of most countries require an "injury test" to be satisfied before dumping duties are assessed on the grounds that there is little reason to be concerned about dumping unless it causes injury to a competitive domestic industry.

Commission's own initiative. Under previous practice, this was left to Presidential discretion following receipt of reports from the USITC.

Conclusion

The Introduction to this paper attempted to set the framework for the entire discussion which has followed in terms of the perennial—and lively—debate between so-called "Protectionists" and "Free Traders" which has permeated the entire history of U.S. commercial policy. It is to be hoped that the manner of explanation of this debate, as well as the way in which the debate was linked to the discussion of the Trade Act and the circumstances surrounding its passage and initial implementation, will have served in some measure to remove at least the worst of the perjorative connotations popularly attached to the labels "Free Trader" and "Protectionist."

We come now to the hard question. Does the Trade Act tip U.S. commercial policy in the direction of either of the two poles of the debate? The reader should by now have sufficient information about the Act to answer this question for himself, according to his own way of looking at the world. It is the present writer's view, however, that no definitive conclusion on the question is possible yet. Major portions of the Act serve less to set policy than to establish broad objectives and guidelines for a series of incredibly difficult international negotiations, out of which—in the future—new statements of policy, both in the United States and abroad, will emerge. The same general view applies to those parts of the Act which cover the range of unilateral options available to the United States in dealing with the conditions and effects of international competition. Some of those parts would doubtlessly make the imposition of restrictive measures easier than in the past. Others move decisively to position the U.S. economy for a major thrust in the direction of freer trade. All of them have yet to take on the kind of life—based on a sufficiently large and representative collection of cases—that will reveal what policies they ultimately will represent. Viewing the Act as a whole, there are good grounds for concluding that it does indeed strive more effectively than much trade legislation of the postwar period to achieve a more viable balance between policy dictates serving the broad, general interest of the U.S. economy and those which would protect narrower, specific interests from egregious harm in the name of progress.

There is one important, perhaps crucial, respect in which the Trade Act of 1974 may obsolesce considerably more quickly than its framers intended. That is, the Act fails almost completely to take sufficient account of the arrival of the multinational corporation (MNC) on the international trading scene as a major institutional and economic force.[26]

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[26] The Act mentions MNC's in only two places. Section 321, in part, amends the Anti-dumping Act of 1921, *supra* note 23, 19 U.S.C. §164 (1970), to attempt to cover situa-

MNC's account for ever-increasing proportions of the world's trade. In fact, many observers already believe that trade policies which do not specifically take account of the MNC's are not quite relevant to the real issues. It certainly is true that the problems created by the trade which the MNC's conduct within and among themselves, and with unrelated parties, raise questions of policy which cannot be embraced by the traditional policy tools. In a world where the MNC is a reality, it may no longer be a certainty that "free trade" policies, as they are traditionally defined, will lead to the economic outcomes predicted by their proponents because many of the MNC's are large and powerful enough to interfere with free market mechanisms on their own (for good or evil purposes as the case may be) just as very large and powerful firms can interfere with them within domestic economics. Moreover, it is equally uncertain that the traditional "protective" mechanisms—which the Trade Act perhaps strengthens but by no means creates in any fundamental way—can be effective in shielding specific domestic interests from serious, unwarranted harm, or in helping them to adapt to changed international economic circumstances. If, as both the friends and the enemies of the MNC as an economic institution foresee, the activities of the MNC's lead to new sets of conflicts—conflicts between governments and firms as well as among nations themselves—then we may indeed find that the policy tools set forth in the Trade Act will, ultimately, prove unable to cope with these new issues.

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tions where an MNC operating in several countries supports shipments to the United States at low prices from one or more subsidiaries by charging high prices, in any market, for similar products made in third-country affiliates. Section 283 is a mild—almost meek—statement of certain steps that U.S. firms "should" take before moving any of their productive facilities to a foreign country.