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Petitioning and Responding under the Escape Clause: One Practitioner's View on How to Do It

by R. Christian Berg*

I. Introduction

The conventional wisdom distinguishes between two types of import competition: that which is "fair," and that which is "unfair."¹ The so-called "escape clause"² is the principal U.S. statute concerned with regulation of "fair" import competition. Through this statute a beleaguered industry suffering from excessive but otherwise "fair" import competition may seek a temporary respite during which it is expected to introduce reforms to improve its competitive abilities.³

The objective of this article is to outline the "how to" aspects of petitioning and responding under the escape clause. For the practitioner unfamiliar with the highly politicized environment in which trade policy decisions are formulated under the escape clause, a brief description of the underlying economic theories and the decision-making process is a useful predicate to a discussion of the practical aspects of the lawyer's role.

A. *The Underlying Economic Theory*

Prevailing economic theory holds that achievement of unfettered international trade will provide long term benefits to all participants, primarily through maximization of what economists refer to as comparative advantage.⁴ However, a corollary is that, as patterns of import competition change with the reduction of barriers to trade, in any individual

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¹ The validity of this distinction has been questioned. See *Hearings on the Trade Agreements Act of 1979 Before the Subcomm. on Int'l Trade of the Senate Comm. on Finance*, 96th Cong., 1st Sess. 703 (1979) (testimony of Noel Hemmendinger).

² Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1975) (codified in scattered sections of 5, 13, 19, 26, 28, 31 U.S.C. (1976)).

³ *Report of the Senate Committee on Finance on the Trade Reform Act of 1974*, S. REP. NO. 1298, 93d Cong., 2d Sess. 119 (1974) [hereinafter cited as *Senate Report*].

⁴ There is extensive literature on the economic theory pertaining to the effects of trade barrier reductions. A useful starting point for those wishing to gain greater understanding is Chapter 1 of J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* (1977).

economy there may be harmful (albeit temporary) dislocations among labor and capital in specific sectors. The literature refers to these dislocations as part of the "adjustment" process, and for decades there has been an unending debate among economists, politicians, and officialdom as to the ways and means through which society should allocate these transitional burdens of adjustment to the new order.⁵

United States policies on international trade issues, as reflected in the ongoing Trade Agreements Program,⁶ have explicitly sought to achieve the benefits which economic theory teaches will come from "freer" trade.⁷ Since the early 1940's, U.S. policies aimed at promoting international trade consistently have recognized the need for assistance to domestic interests adversely affected by changed patterns of import competition.⁸ Since 1951 governmental assistance in the adjustment process has been provided through statute.⁹ Notwithstanding the pro-competitive emphasis of the antitrust laws and of general trade policies, the escape clause has become the linchpin in a series of legislated exceptions to the otherwise consistent congressional efforts to promote vigorous competition.

B. The Import Relief Process Under the Escape Clause

An escape clause proceeding is commenced upon petition "by an entity . . . which is representative of an industry,"¹⁰ "[u]pon the request of the President or the United States Trade Representative, upon resolution of either the Committee on Ways and Means of the House of Representatives or the Committee on Finance of the Senate . . .", or upon the motion of the U.S. International Trade Commission (ITC).¹¹

Escape clause proceedings are conducted in two phases: an investi-

⁵ Stern, *Tariffs and Other Measures of Trade Control: A Survey of Recent Developments*, 11 J. ECON. LITERATURE 857 (1973), provides a review of arguments on the issue and affords a comprehensive, if somewhat dated, list of pertinent citations to primary sources.

⁶ See Kelly, *Antecedents of Present Commercial Policy, 1922-1934*, in STUDIES IN UNITED STATES COMMERCIAL POLICY 3-68 (W. Kelly ed. 1963).

⁷ Congressional consideration of the philosophical basis for the distinction between "free" trade and "freer" trade appears to have emerged in the 1945 congressional debates over whether the United States should become a party to the General Agreement on Tariffs and Trade (GATT); see 91 CONG. REC. 4871 (1945) (remarks of Rep. Doughton); *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the Senate Finance Comm.*, 79th Cong., 1st Sess. 84, 86, 90, 179-80, 459 (1945); *Hearings on the Extension of the Reciprocal Trade Agreements Act Before the House Comm. on Ways and Means*, 79th Cong., 1st Sess. 273 (1945).

⁸ The concept of "escaping" from trade agreements, for purposes of providing temporary assistance in overcoming problems caused by resulting changes in trade patterns, first appeared in the Reciprocal Trade Agreement with Mexico, Dec. 23, 1942, 57 Stat. 833, E.A.S. No. 311 (effective Jan. 30, 1943).

⁹ See Trade Agreements Extension Act of 1951, Pub. L. No. 82-50, 65 Stat. 72 (current version at scattered sections of 19 U.S.C. (1976)).

¹⁰ 19 U.S.C. § 2251(a)(1) (1976).

¹¹ 19 U.S.C. § 2251(b)(1) (Supp. III 1979). For a recent, detailed critical analysis of the escape clause provision, see GAO REP., CHANGES NEEDED IN ADMINISTERING RELIEF TO INDUSTRIES HURT BY OVERSEAS COMPETITION, ID-81-42 (August 5, 1981) [hereinafter cited as *GAO Report*].

gative phase to establish facts and recommend remedies; and a decision phase which is the responsibility of the President. The first phase, to be accomplished within six months of the date the petition is filed (or the date on which the request or resolution is received or the motion is adopted),¹² is conducted by the ITC acting as an independent fact finding and policy recommending arm of the Congress.¹³

The ITC is a unique institution composed of six commissioners appointed by the President with the advice and consent of the Senate.¹⁴ The Commission has at its disposal a sizable staff composed of trained commodity analysts, attorneys, accountants, statisticians, economists, and clerical personnel. In escape clause proceedings the Commission functions in an investigative capacity in determining facts, and in an advisory capacity in recommending appropriate forms of relief.¹⁵ Through its staff, the Commission distributes detailed questionnaires to producers, importers, wholesalers, and retailers, and develops a large body of information on the workings of the whole economic sector under investigation.¹⁶

The Commission also conducts public hearings where presentations are received on the record and under oath. During these hearings any interested party is free to provide the Commission with the benefit of its information and opinion. While cross-examination is allowed to all participants, neither the conventional rules of evidence and procedure, nor the Administrative Procedures Act,¹⁷ are applicable. To the novice, these hearings give the appearance of a trial, but appearances are deceiving. These hearings are *not* adversarial proceedings, and the Commission is more or less free to collect whatever information it considers relevant in whatever fashion it deems appropriate. All interested parties are free to submit prehearing briefs, and posthearing briefs based in whole or in part on the transcript of hearings whether or not they have been participants in these hearings. Such briefs may be submitted in confidence in accordance with the ITC rules.¹⁸

Upon conclusion of its investigation the Commission reaches determinations on the statutory issues, votes on the questions of injury and the forms of relief to be recommended, and publishes an extensive written report including opinions from individual Commissioners as well as detailed factual appendices prepared by the staff.

It is important to understand that the Commission has the statutory

¹² 19 U.S.C. § 2251(d)(2) (1976).

¹³ *Senate Report*, *supra* note 3, at 115.

¹⁴ 19 U.S.C. § 1330(a) (1976).

¹⁵ *Senate Report*, *supra* note 3, at 115.

¹⁶ *See GAO Report*, *supra* note 11, for a more detailed discussion of ITC procedures.

¹⁷ Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946).

¹⁸ 19 C.F.R. § 201.6 (1980). Recently the ITC has sought to impose requirements for prehearing conferences and briefs, and to limit the scope of post hearing briefs. *See Fishing Rods and Parts Thereof*, 46 Fed. Reg. 39,914 (1981).

mandate and obligation to reach a determination, but it has a broad discretion as to ways and means. For instance, it is not bound to examine a trade on the terms defined by a petitioner. It can and often has examined imports and their competitive effect on broader or narrower grounds than those urged by private parties.

Another important point is that, as an investigative body, prior findings of the Commission have little precedential value.¹⁹ Similarly, in the author's view, thorough court review is probably unattainable since ITC decisions are only advisory in nature.²⁰

The second phase of escape clause proceedings, to be accomplished within sixty days after receipt of an affirmative ITC report,²¹ is the responsibility of the President acting independently but with the counsel of Executive Branch advisors and interested public parties.²² The President is required to provide relief for an industry found to be seriously injured within the meaning of the statute "unless he determines that provision of such relief is not in the national economic interest of the United States . . .";²³ in practical fact, this language of exception allows the President broad discretion not to restrict imports if the balance of power among domestic political interests either is neutral or alliable on the side of no restrictions.

If the President refuses to impose the relief recommended by the ITC, or imposes relief in a form different from that recommended, he must report to the Congress his reasons in terms of the national economic interest.²⁴ Within ninety legislative days of the President's determination,²⁵ the Congress may force into effect the original recommendations of the ITC through adoption of a concurrent resolution of disapproval.²⁶

Parties seeking relief under the escape clause must understand from the outset several key aspects of these proceedings. First, relief is "temporary" in that protection from excessive import competition may be in

¹⁹ From time to time some Commissioners have cited opinions in past cases as establishing the meaning of certain statutory phrases and the intent of Congress. Recently, opinions in escape clause cases have shown an increasing tendency by some of the present Commissioners to cite their prior opinions as to the meaning of specific statutory phrases. See *Mushrooms*, Inv. No. TA-201-43, USITC Pub. No. 1089 (August 1980) and *Certain Motor Vehicles and Certain Chassis and Bodies Therefor*, Inv. No. TA-201-44, USITC Pub. No. 1110 (December 1980). It is problematic whether other Commissioners in the future will abide by what their predecessors have concluded in these matters.

²⁰ *Cf. Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771, 788 (E.D.N.Y. 1978), *aff'd*, 614 F.2d 1290 (2d Cir. 1979) (ITC determination of "good cause" to order a reinvestigation not reviewable except where arbitrary, capricious, or an abuse of discretion).

²¹ 19 U.S.C. § 2252(b) (1976).

²² Trade Expansion Act of 1962, Pub. L. No. 87-794, § 242, 76 Stat. 872 (codified as amended at 19 U.S.C. § 1872 (Supp. III 1979)).

²³ 19 U.S.C. § 2252(a)(1)(A) (1976).

²⁴ *Id.* § 2253 (1976 & Supp. III 1979).

²⁵ *Id.* § 2253(c)(1) (Supp. III 1979).

²⁶ *Id.* See also Tax Reform Act of 1976, Pub. L. No. 94-455, § 1801(b)(2), 90 Stat. 1520 (codified at 19 U.S.C. § 1330(d)(2) (1976)).

effect for a maximum of only eight years.²⁷ Second, at least in the past, decisions to provide relief have more often than not reflected the degree of domestic political power mustered by the petitioners. Whether this factor will change in the future is problematic; given the statutory scheme, which promotes politicization of the decision-making process, a significant change in this factor seems unlikely. Third, escape clause proceedings are complicated blends of legal and economic argument, political lobbying, and public relations campaigning. While they are necessarily expensive if properly planned and executed, these proceedings, if successful, are a sound business investment for petitioners willing to carry out the commitment to accomplish adjustment to the new competitive environment brought about by increased "fair" import competition. These three factors should guide the respondent with the caveat that a series of uncoordinated responses from interests representing diverse import sources is tantamount to being divided at the start of battle.

Escape clause proceedings present an uncommon challenge for the attorney. The practitioner in these cases is cast in a role having closer parallels in theatre than jurisprudence. The attorney is more than a mere technician and advocate; he or she is simultaneously the director of a theatrical production and a general in the heat of battle. Flexibility and pragmatism are as important as technical competency and skill in advocacy.

II. The Statutory Issues

Section 201(b)(1) of the Trade Act of 1974 requires that the ITC "determine whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."²⁸

The term "like or directly competitive article" is not defined on the face of the statute. However, the supporting legislative history states the words 'like' and 'directly competitive,' as used . . . in this bill, are not to be regarded as synonymous or explanatory of each other, but rather distinguish between 'like' articles and articles which, although not 'like' are nevertheless 'directly competitive.' In such context, 'like' articles are those which are substantially identical in inherent or intrinsic characteristics (i.e., materials from which made, appearance, quality, texture, etc.), and 'directly competitive' articles are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, *are adapted to the same uses and are essentially interchangeable* therefore.²⁹

²⁷ 19 U.S.C. § 2253(a), (h) (1976 & Supp. III 1979).

²⁸ Trade Act of 1974, *supra* note 2, § 201(b)(1) (codified as amended at 19 U.S.C. § 2251 (1976 & Supp. III 1979)).

²⁹ *Report of the House Comm. on Ways and Means on the Trade Reform Act of 1973*, H.R. REP. NO. 571, 93d Cong., 1st Sess. 45 (1973) [hereinafter cited as *House Report*]; *Senate Report*, *supra* note 3, at 121-22 (emphasis added).

Section 201(b)(4)³⁰ of the Act defines the term "substantial cause" as one "which is important and not less than any other cause." The legislative history of this section points out that this is a two part test: increased imports must be both an important cause of serious injury *and* one which is not less important than any other single cause.³¹ Further, the Act provides that the Commission, in reaching its determinations regarding import-caused serious injury, "shall take into account all economic factors which it considers relevant including . . . , with respect to substantial cause an increase in imports (either *actual* or *relative* to *domestic production*) and a decline in the proportion of the domestic market supplied by domestic producers."³²

The analysis regarding injury called for by the Act is with respect to the domestic industry producing an article like or directly competitive *with the imported article*. This is important because the definition of relevant industry and the examination of data respecting injury and causality are, in effect, determined by the definition of the imported product. Specific indicia of injury include "significant idling of productive facilities . . . the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry"³³ Specified indicia of threatened serious injury include declines in sales; higher and growing inventory; and a downward trend in production, profits, wages, employment, or increasing underemployment.³⁴ However, the existence of any or all of these indicia is not determinative of a case; injury must have been *substantially caused* by increased imports of the like or directly competitive product.

III. The ITC Determination

A. Considerations for the Petitioner's Counsel

For counsel to a domestic entity seeking import relief, the choice of statutory vehicles necessarily begins with an examination of market and business facts. As with conventional legal problems, the lawyer's preliminary objective is to apply these facts to the law in order to determine which of the several statutory routes to relief might be available. While budgetary or political considerations might dictate the ultimate choice of statutory routes, the initial responsibility of the practitioner is to determine whether a case for relief exists within the terms of the statute.³⁵

³⁰ Trade Act of 1974, *supra* note 2, § 201(b)(4) (codified at 19 U.S.C. § 2251(b)(4) (1976)).

³¹ *House Report*, *supra* note 29, at 46; *Senate Report*, *supra* note 3, at 120.

³² 19 U.S.C. § 2251(b)(2) (1976) (emphasis added).

³³ *Id.* § 2251(b)(2)(A) (1976).

³⁴ *Id.* § 2251(b)(2)(B) (1976).

³⁵ Throughout this article the author has assumed the practitioner will gain at least a passing familiarity with the terms of the statute and its supporting legislative history. An article of the sort here presented cannot adequately deal with the multitude of provisions contained in Title II of the 1974 Act, nor can it delve into every nuance of statutory construction.

If the escape clause is chosen as the appropriate vehicle, a further point to bear in mind, in preparing both the petition and the oral testimony for presentation to the Commission, is that the ITC phase of a case is ideally a careful blend of facts, law, and theatre. It has long been a matter of conjecture among practitioners experienced in these cases whether the public hearings conducted by the ITC are of much value. Most have concluded that the public hearings present an invaluable opportunity to "flesh out" the numbers collected by the ITC staff.³⁶ Often, the data alone make out a cogent case for relief. However, the introduction of testimony by business people, who for years have garnered their livelihood from the trade under examination, can throw a totally different light on the numbers. Commissioners on the ITC ordinarily prefer to question participants in the trade rather than their attorneys, and the job of prudent counsel is to carefully orchestrate a full revelation of the realities of doing business in the trade being examined. Too often in past cases counsel have allowed emotional rhetoric to supplant hard logic and facts. "Floods" of imports can be explained by "management incompetence," but counsel on both sides should bear in mind that the members of the Commission are not impressed by mere simplistic, self-serving assertions of cause and effect.

In short, the public hearings present an opportunity to personally impress individual Commissioners, as well as the influential staff, with the realities of competition in the business world. Thoroughness in preparation by counsel allows for candid presentations by knowledgeable witnesses; there is never a clear cut case under the terms of the escape clause.

Three principal statutory issues are raised under the escape clause. These are the following:

1. Whether imports of a like or directly competitive product are increasing within the meaning of the statute?
2. Whether the U.S. industry producing the competing products evidences serious injury or the threat thereof? and,
3. Whether the actual or threatened serious injury is substantially caused by the increased imports?

B. Defining the Like or Directly Competitive Imports

Hindsight has taught practitioners familiar with escape clause proceedings that product definition is perhaps the most crucial aspect of case preparation. The statute and its supporting legislative history are reasonably clear in meaning, but the outcome of several important cases has turned nonetheless on differences of opinion over this issue, especially

³⁶ On both sides of these cases, counsel are presented with an unusual opportunity. There is in each of us a certain pretense to theatrical ability which, in the relatively free environment of ITC public hearings, can lead to performances of widely varying quality. An effective presentation before the Commission should contain elements of theatre, but never of circus. Credibility and persuasiveness come from cogent and technically sound factual presentations, not from rhetoric based on conjecture or speculation as to opponents' motives or from devious manipulation of economic data.

with regard to the consequences of product definition on questions of injury and causality. In one very important case, *Non-Rubber Footwear*,³⁷ petitioners argued in effect that a shoe is a shoe and that data should be aggregated accordingly. The Commission adopted this definition despite cogent arguments from respondents that at a minimum women's footwear could not be classed as interchangeable for end use with men's footwear. The result was that a very large industry was found to be injured within the meaning of the statute even though a strong case was made that there was no injury in sectors such as the one producing men's workboots.

The issue of product definition is, therefore, one to be approached with great caution and forethought. In light of this, careful analysis of data on injury and factors of market competition should be accomplished before product definition is solidified.

C. Calculating Import Penetration

In many cases, determining import penetration levels is made virtually impossible by a paucity of data. A number of sources exist within the federal government, depending on the product sector under examination. The Department of Commerce and its Bureau of the Census are responsible for the collection of data on a wide variety of imports and domestic production. The Department of Labor collects data on employment and wages. The Departments of Agriculture and Interior and the National Oceanic and Atmospheric Administration are also valuable resources for data on specific product sectors within their jurisdictions.

Often, the staff in congressional offices representing members of the industry under examination will be helpful to the non-Washington practitioner in locating sources of data within the federal bureaucracy. An always invaluable source will be the ITC staff where commodity specialists spend their professional lives delving into the intricacies of trade in discrete sectors.

In addition, trade associations in the private sector often collect detailed data from members, but distribution is generally controlled. A further problem is that data from such entities may be incomplete, either because some producers are not reporting members, or because reports from members are unverified. Trade publications may also provide limited data, although their accuracy may become an issue. Industry experts or private consultants often are able to provide reasonably accurate approximations through a variety of estimating techniques applied to general data encompassing the products of concern.

It should be borne in mind that the ITC generally examines statistical data going back at least four years preceding the year in which the

³⁷ Inv. No. TA-201-7, USITC Pub. 758 (1976); Inv. No. TA-201-18, USITC Pub. 799 (1977).

investigation is commenced. In some cases, the ITC will examine data for five or more years.

If a search of all sources fails to develop product specific data, the practitioner should resort to reasonable estimations based on the best available information. Usually, petitioning companies will have available knowledgeable employees or consultants to assist in preparation of estimates. The ITC has both the statutory responsibility and requisite subpoena authority to obtain whatever data is necessary to reach its determinations,³⁸ and a showing of conscientious but fruitless efforts to develop data will generally be sufficient to gain acceptance of a petition based on estimations, especially if the practitioner has established close liaison with the ITC staff before filing the petition.

D. Developing Evidence of Serious Injury

Information pertinent to the issue of statutory injury will come primarily from clients if they are the producing companies. Two principal difficulties will arise in collection and analysis of these data. First, protecting the confidentiality of data from any one company raises ethical questions under the attorney/client privilege as enunciated in Canon 4 of the American Bar Association Code of Professional Responsibility.³⁹ Second, certain antitrust problems may arise for counsel especially with regard to data on prices; counsel must avoid becoming a conduit of information among competitors. The answers to the questions raised by these issues are beyond the scope of this article, but one practical solution is to have the clients collectively retain independent outside accountants to receive and collate necessary information for use by counsel.

If the client is a union representing organized labor in the industry, cooperation in providing data may be elicited from the employers under appropriate guarantees of protection for confidential information. Further, if the industry is composed primarily of publicly held companies, periodic reports and filings with the Securities and Exchange Commission in Washington or analagous state agencies may prove to be adequate sources. Once again, the ITC has the statutory responsibility to determine the facts in the course of its investigation, and little more than a *prima facie* case is required in a petition, assuming that status as a representative of the industry is established.

E. Demonstrating Requisite Causality

As pointed out above, "substantial cause" is defined in the statute as "a cause which is important and not less than any other cause."⁴⁰ This is a reasonably clear and understandable standard. The legislative history, reflecting the tension between political forces on opposite philosophical

³⁸ 19 U.S.C. § 1333(c) (Supp. III 1979).

³⁹ ABA CODE OF PROFESSIONAL RESPONSIBILITY, CANON 4 (1975).

⁴⁰ 19 U.S.C. § 2251(b)(4) (1976).

sides of the trade issue at the time of enactment, is somewhat more ambivalent.

It is ordinarily impossible to qualify the degree to which any one factor may have caused difficulties for an industry. Often, a domestic industry will assert an almost *ipso facto* case on causality based merely on the sheer volume of imports or the degree of market penetration. In the extreme case, some credence may be given to this approach. However, high import penetration by itself does not demonstrate substantial cause. It may well be, for instance, that the domestic industry producing widgets has opted to import supplementary or complementary products to market in conjunction with those produced domestically. Thus, imports of widgets will have increased. Concurrently, the market for widgets may have undergone severe contraction because a totally new substitute product, the wizbang, produced solely in the United States by other companies, has captured sales in excess of the volume lost by the widget producers. Clearly, the shift in consumer preference from widgets to wizbangs in this hypothetical case is quantifiable as a cause of greater importance than the increased imports of widgets.⁴¹

Absent data to quantify relative degrees of causality, demonstration of requisite causality is ordinarily obtained through accumulation of other indicies. While technically more relevant to dumping or subsidy cases, evidence of import caused price depression,⁴² price suppression,⁴³ and lost sales⁴⁴ can be used to demonstrate substantial cause. In the ordinary case, documentary evidence, such as price comparisons based on actual invoices or on affidavits from customers who have purchased competing imports, when coupled with a mathematically shown correlation to declining sales and profitability, can be developed into an empirical demonstration of substantial cause.⁴⁵

The keys to development of a case on substantial cause are creativity and technical precision. Ordinarily, the proof will begin with a thorough exposition on all aspects of the production and marketing of the product; industry experts in marketing, accounting, and production will provide the raw material. The available facts, developed with creativity, will de-

⁴¹ Moreover, if the petitioners are representatives of labor, a neat issue is raised whether "self-inflicted" injury to the "industry" is a proper basis for import restrictions, especially if the result would be to accelerate the demise of the producing companies. The moral of this hypothetical is that careful initial planning will identify potential opponents and likely outcome before time and money are wasted. Parenthetically, this case also demonstrates the care which must be taken in defining the "like or *directly competitive*" products, as discussed in text accompanying note 38 *supra*.

⁴² Price depression is generally understood to mean a forcing down of prices to levels, below that at which they had been set, in order to meet competition.

⁴³ Price suppression is ordinarily understood to mean a holding down of prices, despite inflation in costs.

⁴⁴ Lost sales are generally understood to mean those taken from an established supplier, usually on the basis of price disparity.

⁴⁵ A recent and curious demonstration is found in the opinions of the Commissioners in *Certain Motor Vehicles*, *supra* note 19.

termine the course taken in the proof. Adherence to sound principles of technical precision within the statutory framework will insure that the case in chief does not lose credibility through an excess of theatrics.

F. Describing The Injury

A presentation on the question of injury is generally best made with the assistance of outside accountants or economic consultants. Few lawyers possess the requisite technical skills to adequately develop raw data into demonstrations of the more intricate factors in the proof of injury such as sales/profit ratios. Similarly, few lawyers are equipped to draw the kinds of conclusions from economic data that professionals in these other fields are trained to develop.

Economists are also of great value in developing a case on threatened serious injury where the emphasis is on the likely consequences of continued unfettered import competition. Practitioners should avoid relying on the conjecture of businessmen from the industry. Self-serving cries of imminent doom carry little weight with the professional economists found both in the ITC staff and on the bench. The practitioner's goal should be to present a technically sound estimate which will ring true in the mind of a neutral professional economist.

G. Deciding on the Remedy to be Requested

Section 201(d)(1) of the Act⁴⁶ provides that

[i]f the Commission finds with respect to any article, as a result of its investigation, the serious injury or threat thereof described in subsection (b), it shall—(A) find the amount of the increase in, or imposition of, any duty or import restriction on such article which is necessary to prevent or remedy such injury or (B) if it determines that adjustment assistance under chapters 2, 3, and 4 can effectively remedy such injury, recommend the provision of such assistance, and shall include such findings or recommendation in its report to the President. The Commission shall furnish to the President a transcript of the hearings and any briefs which were submitted in connection with each investigation.

Section 201(a)(1)⁴⁷ requires that the petition "include a statement describing the specific purposes for which import relief is being sought, which may include such objectives as facilitating the orderly transfer of resources to alternative uses and other means of adjustment to new conditions of competition."

Embodied in the practice that has developed at the ITC reflecting these provisions is a requirement that petitioners specify both the form of relief they desire and the actions they intend to take to accomplish adjustment if relief is given. The choice to be made is based largely on business judgments.⁴⁸

⁴⁶ Trade Act of 1974, *supra* note 2, § 201(d)(1) (codified at 19 U.S.C. § 2251(d)(1) (1976)).

⁴⁷ *Id.* § 201(a)(1) (codified at 19 U.S.C. § 2251(a)(1) (1976)).

⁴⁸ The difficult task of counsel is to get the client to focus on the hard business facts and

Ordinarily the first impulse of clients is to ask for quantitative restrictions that will resurrect the status quo ante with respect to the market shares. However, in the presidential decision-making phase, the statute requires that

[a]ny quantitative restriction proclaimed . . . and any orderly marketing agreement negotiated . . . shall permit the importation of a quantity or value of the article which is not less than the quantity or value of such article imported into the United States during the most recent period which the President determines is representative of imports of such article.⁴⁹

As has been pointed out above, the purpose of the statute is to provide temporary relief from excessive import competition in order to facilitate adjustment. In this sense, the Act provides a form of exceptional relief from the effects expected (and desired) under a general statutory scheme, as evidenced by the antitrust laws and general trade policies, aimed at promoting freer competition. Because of these factors, the process of choosing a remedy must begin with an economic assessment of what realistically can be accomplished in the way of industry restructuring over a period of five to eight years. How much can and must the industry invest to become sufficiently competitive? What are the sources of financing? Where in the industrial process can the greatest gains in competitiveness be acquired and at what cost? What levels of protection from import competition are necessary to allow the adjustment process to take effect? What form should these restrictions take? What will be the costs to society? The answers to such questions are the ingredients of the decision-making process on choice of remedy, and the answers will differ from case to case and among business enterprises in each case.

Economic consultants can provide the analytical skills necessary to reach the business judgments. The practical question is how much to spend on their services and when? For the ITC phase of the case a presentation should be made outlining at least a preliminary proposal and its rationale. This can be accomplished internally by each company, and transmitted to the Commission in the form of confidential written submissions. Legal or economic counsel should orally present a nonconfidential summary for the industry as a whole during the hearing. As with other aspects of the proceeding, counsel should endeavor to achieve a high level of technical competence in the presentation and avoid self-serving rhetoric.

H. Considerations for the Respondents

Since escape clause proceedings involve an examination of the cumulative effect of all imports of the like or directly competitive product, the greatest difficulty for respondent's counsel is coordination of

the available courses that could reasonably be taken under varying competitive conditions ranging from a quantitative roll back of imports to a limited increase in import duties charged.

⁴⁹ 19 U.S.C. § 2253(d)(2) (1976).

presentations. Too often, individual importing companies try to proceed independently and sometimes without the benefit of experienced counsel. Especially in consumer product sectors an attempt is made by representatives of an individual company to distinguish its imports as being totally unique and therefore non-injurious. Such self-righteous and essentially vain expressions are rarely helpful to the overall case, and in any event are largely irrelevant. Moreover, the unguided novice, unfamiliar with the technicalities of the statute and the niceties of proof and rebuttal, usually will do more to prove the case *for* statutory injury than the opposite. As in most areas of the law, uninformed witnesses, motivated by naive convictions as to the meaning of truth, justice, and equity, have caused untold trouble through inadvertance.

For counsel to import interests, the first effort upon announcement of a proceeding should be to arrange for ongoing consultation on tactics and a regular exchange of intelligence among all respondents. Vanity and jealousy will be the greatest bars to cohesion.

Counsel for a respondent has an especially difficult task in preparing the case. First, the statute specifies a fixed time schedule which cannot be enlarged. Second, in order to be completely prepared, counsel must endeavor to learn the intricacies of the trade as well as a person in the business with years of experience in its day to day operation. Counsel should be wary of laymen who say they know everything there is to know, yet interview every such source in order to develop an intimate knowledge of products, companies, prices, personalities, and even rumor. The most successful cases in response are those directed and produced by attorneys who have done their homework in the two or three months between announcement of a proceeding and the holding of hearings.

Each case under the escape clause is different. The guiding principle should be to demonstrate that none of the statutory requirements is met. Accordingly, counsel should seek to demonstrate that imports are not increasing, that statutory injury does not exist, and that in any event imports are not the substantial cause. Product definition should be challenged at the outset whenever possible. Import and production data should be examined over a period of more than five years, and trends over shorter periods should be calculated. Counsel should bear in mind that the statute speaks in terms of present injury, and historical trend data only provide a framework for analysis.

Counsel for the respondent usually has his or her most difficult task on the issue of injury. Actual information submitted to the ITC is always held in confidence, and counsel must normally conduct an exhaustive search for even approximations as to the health of the complaining industry; these are often based on little more than rumors in the trade.⁵⁰ The available data on publicly held companies will generally be consoli-

⁵⁰ Obviously, rumors will not be persuasive to commissioners possessing actual data. However, one may find clues among the rumors as to how to structure a presentation so as to

dated, although filings with the Securities and Exchange Commission may provide information on relatively narrow lines of business that include the product under investigation.

A generally valuable source will be comments made by company officials in the trade press. While such expressions admittedly involve a good deal of "puffing" for the benefit of stockholders and bankers, they often can be useful resources in the hands of a skillful attorney during cross-examination of opposition witnesses.

For the most part, counsel will probably find to his chagrin that the case to be made against a finding of injury will best be developed during the course of the public hearings. While posthearing briefs afford an opportunity to clarify the case, counsel experienced in the more conventional adversarial practice of the courtroom will find little comfort in the knowledge that he may never know the economic facts upon which the Commission has based its determination. One must, in the end, rely on the integrity of the Commission and its staff as well as on the thoroughness of their efforts in collecting and analyzing data. It may be of some comfort that the ITC is generally considered to be a jealous protector of its reputation for thoroughness.⁵¹

Counsel for a respondent will generally find that the best case is made on the issue of substantial cause. Product and marketing differences may well allow for development of arguments or proofs that imports are not the substantial cause of statutory injury. Exercise of oligopolistic power by some segments of the domestic industry to the detriment of others, or simply, competition among domestic entities alone, may be the substantial cause of injury. Changes in consumer preferences, declines in other industries supplied by the complaining industry, general recessionary conditions, or introduction of substitute products are all possible causes of greater consequences than the imports against which complaint is made. Once again, thoroughness of research and creativity in the development of arguments are the keys to success.

IV. The Presidential Determination

A. Preparing for the White House Review

Once the Commission has published a finding of statutory injury, theatrics diminish in importance and hard-nosed political activity comes to the fore.

Section 202(c) of the Act⁵² requires that, in making his decision whether to provide relief,

give cause to reexamine the actual data either in a different light or under different accounting standards.

⁵¹ See *GAO Report*, *supra* note 11, for a somewhat contrary view.

⁵² Trade Act of 1974, *supra* note 2, § 202(c) (codified as amended at 19 U.S.C. § 2252(c) (1976)).

the President shall take into account, in addition to such other considerations as he may deem relevant—

- (1) information and advice from the Secretary of Labor on the extent to which workers in the industry have applied for, are receiving, or are likely to receive adjustment assistance under chapter 2 or benefits from other manpower programs;
- (2) information and advice from the Secretary of Commerce on the extent to which firms in the industry have applied for, are receiving, or are likely to receive adjustment assistance under chapters 3 and 4;
- (3) the probable effectiveness of import relief as a means to promote adjustment, the efforts being made or to be implemented by the industry concerned to adjust to import competition, and other considerations relative to the position of the industry in the Nation's economy;
- (4) the effect of import relief on consumers (including the price and availability of the imported article and the like or directly competitive article produced in the United States) and on competition in the domestic markets for such articles;
- (5) the effect of import relief on the international economic interests of the United States;
- (6) the impact on United States industries and firms as a consequence of any possible modification of duties or other import restrictions which may result from international obligations with respect to compensation;
- (7) the geographic concentration of imported products marketed in the United States;
- (8) the extent to which the United States market is the focal point for exports of such article by reason of restraints on exports of such article to, or on imports of such article into, third country markets; and
- (9) the economic and social costs which would be incurred by taxpayers, communities and workers, if import relief were or were not provided.

Under section 242 of the Trade Agreements Act of 1962,⁵³ as most recently implemented in Reorganization Plan Number 3 of 1979⁵⁴ and Executive Order Number 12188 of January 2, 1980,⁵⁵ the Congress and the President have established an interagency committee structure to advise the President in escape clause determinations. The premise underlying this interagency advisory structure is that the President should draw upon the considerable talents and knowledge of the whole federal bureaucracy in order that his decision be based upon a comprehensive consideration of all factors pertinent to "the national economic interest."

Three principal committees perform the Executive Branch advisory role.⁵⁶ The Trade Policy Committee (TPC), chaired by the United

⁵³ Trade Agreements Act of 1962, *supra* note 22, § 242.

⁵⁴ Reorg. Plan No. 3 of 1979, 3 C.F.R. 513 (1979), *reprinted in* [1979] U.S. CODE CONG. & AD. NEWS 3396 and in 93 Stat. 1381.

⁵⁵ Exec. Order No. 12,188, 3 C.F.R. 131 (1980).

⁵⁶ The GAO Report, *supra* note 11, describes the structure and operations of these committees in considerable detail.

States Trade Representative (USTR), is a cabinet level organization which, in the context of escape clause proceedings, meets only infrequently to formulate trade policy recommendations. The TPC usually becomes directly and actively involved in escape clause proceedings only when foreign and domestic political considerations have been raised to such a level that subcabinet officials or the professional trade staff bureaucracy are unable to reach a consensus.

The second committee, the Trade Policy Review Group (TPRG), is composed of subcabinet level officials who ordinarily deal with trade policy questions as a matter of day-to-day responsibility. Implicit in the interagency advisory committee structure is an assumption that the TPRG will ordinarily be able to reach a consensus on policy recommendations.

The third committee, the Trade Policy Staff Committee (TPSC), is the key group, at least in the early stages of policy formulation under the escape clause. Membership on this committee parallels that of the TPC and TPRG, and varies depending on the product (and parties) which will be affected by the President's decision. As indicated by its title, the TPSC is comprised of career staff people possessing expertise in the economic and international political sectors involved in the case. The role of the TPSC, in effect, is to reconsider the entire case including the ITC report and its supporting files of investigative materials, as well as additional submissions made directly by interested parties.

Within a week or two after an affirmative ITC escape clause decision, the USTR will publish a notice in the *Federal Register* soliciting public comment. This notice will ask that submissions concentrate on the issues raised by section 202(c) of the Act. Prudent counsel on both sides will have spent their time in the interim mustering political support on Capitol Hill and wherever else it can be garnered.

Public relations consultants will have developed a campaign and begun efforts to obtain media coverage and editorial discussion among the influential press. The role of legal counsel will be to supply data and insure accuracy in the written memoranda or fact sheets used by the public relations advisors.

Legal counsel will also plan and execute the campaign to gain political support by canvassing clients for contacts, preparing briefing papers, and arranging for meetings and sponsorship of the cause among members of the Congress, in state governments, among unions and allied industries, and through sympathetic trade associations.

The *Federal Register* notice from the USTR will establish deadlines for the filing of comments. These should be met early and be followed by briefings of cabinet and subcabinet officials holding memberships on the Trade Policy Committee and Trade Policy Review Group. Contacts with these officials are best arranged through the TPSC members assigned to the case, with some prompting from sympathetic members of the Congress to guarantee attention at the highest level.

Ongoing contact with these officials and their staffs should be maintained for purposes of both continuing the advocate's role and collecting information on the decision-making process as it develops. It cannot be overemphasized that close and continuing contact is essential if all arguments are to be presented and all pressures brought to bear. The goal is to prevail by sheer political clout.

On the respondent's side, an additional source of influence will be found in Washington embassies of supplying countries as well as among supplying companies abroad. The effort should be direct for the duration toward maximizing complaints from foreign governments directly to the USTR and the State Department. Consideration should be given to whether support can be obtained from U.S. companies in other industries which have facilities in the supplying countries or from U.S. banks which are holding debt obligations from the supplying foreign states. Every source of support, from consumer groups to longshoremens, customs brokers, and others in the distribution system should be pressured to act.

On both sides of the battle, the keys to success will be organization, close leadership control, and information; these are difficult to obtain and use when only sixty days are available. Moreover, coordination among groups actively working to head off restrictions is bound to become increasingly difficult as individual interests privately begin to advocate self-serving courses in the event restrictions are to be imposed. Some may prefer higher import duties, rather than quantitative restrictions, so that supplies will be restricted only by price elasticities. Others, usually those with the greatest potential to corner the market, will begin to push for quotas or tariff rate quotas as the preferred solution. Still others may seek to have the President negotiate orderly marketing agreements with the "real" problem makers who, not coincidentally, happen to be the suppliers in countries other than where these advocates have a stake.

While respondents at this stage most likely will be divided and conquered, they will enjoy certain advantages. Historically, the Executive Branch has been philosophically predisposed to favor "free trade" over "protectionism."⁵⁷ The Executive Branch also, as a rule, has given great weight to protestations from abroad. Nevertheless, the final presidential judgment, as pointed out earlier, will tend to be based primarily on the perceived political risks, namely the likelihood of congressional override.

B. White House Review

The most nebulous aspect of an escape clause proceeding is the White House phase. Every President has established within the Executive Offices his own procedures for internal review of interagency advice. Each has established his own sense of priorities regarding trade issues,

⁵⁷ See *id.* at 3.

and some have taken an intense personal interest in reaching the decisions called for by the statute. For counsel on both sides of these cases, the ideal would be an opportunity personally to argue his or her case at a private audience, but the ideal is rarely achieved.

The most practical approach is to adopt a strategy which maximizes public and private clamor. The goal is to get the President's ear through personal advisors at the highest level by obtaining expressions of support across the broadest possible political and economic base.

It is in the nature of things political that influential committee chairpersons in the Congress are high on the list of surrogate advocates. Expressions of support from members of the Congress will be an important element of the successful campaign, if only because the prospects of a congressional override fight will give pause. Obtaining, early on, expressions of support from organized groups representing consumers, labor, allied industries, and foreign interests will promote the cause both within the White House and among members of the Congress representing constituencies where employment may or may not be directly affected by the outcome of the case. Direct mail and telegrams from affected workers and employers to the President will be of marginal value in the ordinary case; a better result will be obtained if such correspondence is sent to elected representatives in the Congress. Paid advertisements in the print media are of questionable value.

V. Congressional Override

The Act provides that a presidential refusal to provide the import relief recommended by the ITC, or a decision to provide relief in a different form than that recommended, may be countermanded by the Congress.⁵⁸ Specifically, the Act provides that the President must proclaim the increased import restrictions recommended by the ITC if,⁵⁹ "by an affirmative vote of a majority of the members of each House present and voting . . .," there is adopted a concurrent resolution disapproving his initial decision.⁶⁰

These provisions have never been tested to their fullest, although there have been a very few cases where the congressional outcry has forced some messy and hasty compromises.⁶¹ As a practical matter, short of a complete refusal to impose or arrange for some sort of real restraints on imports, it is unlikely that the Congress would override a President's

⁵⁸ Trade Act of 1974, *supra* note 2, § 203(c) (codified as amended at 19 U.S.C. § 2253(c) (1976 & Supp. III 1979)).

⁵⁹ *Id.* § 203(c)(1) (codified at 19 U.S.C. § 2253(c)(1) (Supp. III 1979)); *see also* Tax Reform Act of 1976, note 26 *supra*.

⁶⁰ Trade Act of 1974, *supra* note 2, § 203(c)(1) (codified as amended at 19 U.S.C. § 2253(c)(1) (Supp. III 1979)).

⁶¹ There is little on the public record regarding these cases, although the recent GAO report touches on two. *See GAO Report, supra* note 11, at 30-31.

decision under the escape clause.⁶² To do so would put form ahead of substance, and raise extraordinarily thorny constitutional questions which neither the Congress nor the Executive would like to see settled in the heat of an emotional debate conducted within ninety legislative days.

The import of these considerations for counsel representing a petitioner is that political support must be garnered in sufficient volume to make real the prospect of a tough congressional override fight should the President refuse to proclaim significant import relief.

For counsel representing respondents, the objective is to acquire expressions of congressional support qualitatively and quantitatively superior to those obtained by the petitioners. Ordinarily this is a very difficult task for the simple reason that foreign suppliers do not vote in our congressional elections, whereas producers and workers in the affected U.S. industry do. Moreover, in the normal case petitioners have the easier job in forging alliances among other organized domestic interest groups. Accordingly, counsel for respondents are well advised to begin the search for political support at the outset of a proceeding. The greater the degree of cohesion among import interests early on, the higher the prospects for developing the necessary broad base of support. Conversely, there is an increased risk that early political activity by respondents may cause petitioners to exert efforts greater than would have been the case if respondents moved to gain political support later in the proceedings. The judgment to be made regarding when to initiate political activity in any case will depend on an early appraisal of relative political power, as well as a careful forecast of the likely political and economic climate at the time the President's decision will have to be made. In the latter aspect this effort is often a chancy exercise, but more than one industry has won relief based on political campaign promises.

VI. Conclusion

Obtaining relief under the escape clause from excessive, "fair" import competition requires that a solid factual case be made, within the confines of the statute. Because the decision-making process is highly politicized, even a "strong" factual case is no guarantee that relief will be obtained. Before a petition is filed, counsel must thoroughly plan the strategy to be followed over the ensuing eight to eleven months. Any such plan must allow for considerable amendment as circumstances develop. It must be clearly understood at the outset that the strategy agreed to with clients must allow for prompt and pragmatic changes in

⁶² Admittedly, this is a personal view based on experiences in a number of cases. It is the author's opinion that some form of import relief, which is not merely illusory, will pass congressional muster. Even in the most controversial cases few members of the Congress will have (or take) the time to consider every nuance of economic effect resulting from the provision of relief in one form versus another. Moreover, the power of the Executive to protect its constitutional prerogatives is considerable, and the chances of mustering sufficient congressional votes to accomplish override are slim.

direction; the plan of action should never obscure the objective of obtaining meaningful relief.

For counsel to respondents, cohesion and coordination among all groups are essential to success. However, time constraints are severe and inflexible. Nevertheless, complete preparation by counsel is a necessity, and a high degree of close client-attorney cooperation is critical if counsel is to be effective.

On both sides, costs can reach astronomical levels. Clients must make the business judgment regarding risks and benefits and what they are worth in dollars. The lawyers must gear their efforts accordingly. Both attorney and client must appreciate each other's difficulties, and consider where costs can be pared. For instance, use of costly outside consultants can be reduced substantially if in-house talent is available at corporate headquarters. The client must understand, especially in the second phase of escape clause proceedings, that enormous amounts of time are required to keep abreast of developments, to coordinate resources, and to present new arguments. The attorney must appreciate that the client does not have a bottomless pocket, and judiciously use his or her time to the greatest effect.