TOWARDS INTEGRATED MANAGEMENT OF INTERNATIONAL TRADE—THE U.S. TRADE ACT OF 1974

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I. CROSS CURRENTS

(a) 1934 and 1974 Acts: Parallels and Analogies

In a number of respects, the efforts made under the 1934 Trade Agreements Act and the 1974 Trade Act to expand American trade were similarly motivated, their basic purpose being to counteract the economic slump in the United States by promoting international trade. These legislative initiatives followed a soul-searching debate which found fault with the policy of economic isolationism into which the United States and the world at large were drifting. However, while the general plan of action and the expected results suggest a similarity of purpose at both periods, the international situation in 1974 differed profoundly from that of 1934.

In 1934 Trade Agreements Act sought to extricate the U.S. economy from the consequences of the Smoot-Hawley Act¹ by mutually agreed tariff concessions. Bilateral negotiations were then the only approach and technique available. Today, the main role in efforts to expand and liberalise trade belongs to multilateral negotiations involving tariffs and non-tariff barriers whose object is to determine the conditions of international trade within the world economic system of which the General Agreement on Tariffs and Trade (GATT) is a part.² The 1974 Act takes note of the fact that GATT is an informal international organisation supported by a number of international economic institutions such as the International Monetary Fund, the International Bank, the Program of Assistance to Less Developed Countries.³

In certain respects, the 1974 Act is a continuation of the 1934 legislation. The basic technique of the 1934 Act by which trade expansion is to be achieved has remained the same. New trade opportunities must be gained by the offer of reciprocity to foreign experts.

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¹ P.L. 361 (1934), 46 Stat. 590.

² Cf. *infra*, text related to n. 70.

³ S. 121 (a).

The President whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly . . . restricting the foreign trade of the United States . . . is authorized from time to time (1) to enter into foreign trade agreements . . . (2) to proclaim such modifications of existing duties and other import restrictions . . . as are required . . . to carry out foreign trade agreements. . . .⁴

This authority was first limited to a three-year period, but was subsequently periodically extended until 1962, when the Congress passed the Trade Expansion Act, and is now again extended by the 1974 Trade Act.

The original (1934) authorised tariff reduction was 50 per cent. of the rates in force in 1934; it was followed by another authorisation of a reduction in tariff of an additional 50 per cent. of the rates in force in 1945⁵ under the 1945 Trade Agreements Extension Act. Since 1945 tariff reduction authorisations have been much more modest—15 per cent. under the 1955 Act⁶ and 20 per cent. under the 1958⁷ Extension of the Trade Agreements Act, a reaction to the formation of the European Common Market with its programme for eliminating tariffs and custom duties among the then six member nations.

In 1962⁸ Congress renewed the President's negotiating authority for an additional period of five years. It expired in 1967, leaving the President with no authority to negotiate reciprocal tariff reductions until the 1974 Trade Act was enacted. This lapse of authority and Congressional resistance to further concessions reflect the often declared reluctance to continue the policy of trade liberalisation. In this climate, a new approach had to be worked out, and a new balance between conflicting interests established. There was an unsuccessful effort to enact an interim measure (Trade Act of 1970)⁹ which was intended to give the President the power to make minor adjustments in order to compensate a foreign country when it became necessary to raise the duty on a specific article, as the result of "escape clause" action. When the 1974 Trade Act became law, the Administration had been for more than seven years without authority to negotiate, although already, in 1973, members of the GATT were gearing themselves for a new round of negotiations—the Tokyo Round—with a view to taking another step towards the liberalisation of foreign trade.

The 1974 Act and the Tokyo Round (of which more is said later) were a continuation of the policies initiated in 1934, but they were also a move in a new direction. They both raised novel issues: to reform the GATT and to remove, or at least to regulate, non-tariff barriers to trade which had demonstrated convincingly the inadequacy of the then existing arrangements.

⁴ 48 Stat. 360.

⁵ 59 Stat. 460.

⁶ 69 Stat. 160.

⁸ 76 Stat. 872.

⁷ 72 Stat. 676.

⁹ H.R. 1897, 91st Cong. 2nd Sess. (1970).

(b) *The Political Climate*

The Trade Act of 1974¹⁰ was the capstone on vigorously competing views about United States trade policy—views which became increasingly strident during the years following the enactment of the 1962 Trade Expansion Act:

From 1934 until 1962, beginning with the reciprocal Trade Agreements Act and culminating in the "Kennedy" round of tariff reductions (negotiated under the Trade Expansion Act of 1962), United States tariff protection was consistently reduced. The Kennedy round, however, marked the end of an era. During the past ten years there has developed a growing disillusionment with the overall trade policy embodied in the series of tariff reductions produced under the reciprocal trade agreements program. A number of reasons have been given for this trend: increasingly serious balance of payments problems after 1958, intensified competition at home and abroad from the growth of the European Economic Community (EEC) and Japan, disenchantment with the success of economic aid to the lesser developed countries, the increased use by foreign competitors of nontariff protective devices (particularly by the EEC and by Japan), the growth of multinational corporations, and the rapid increase in the level of domestic unemployment since 1970.¹¹

The consequent change in the tenor of Congressional debate during this period is conveniently mirrored by the avowed purposes sought to be achieved through enactment of diverse trade Bills.¹² Thus, the Trade Expansion Act of 1962 purported:

(1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of United States agriculture, industry, mining and commerce; (2) to strengthen economic relations with foreign countries through the development of open and nondiscriminatory trading in the free world; and (3) to prevent Communist economic penetration.¹³

A decade later, however, the trade reform bills introduced in Congress no longer emphasised "the benefits which might accrue domestically as a consequence of increased international trade levels and trade liberalisation, and [no longer] viewed free trade as an independently valuable gain."¹⁴

The already mentioned Trade Act of 1970 (also known as the "Mills Bill"), as reported out of the House Committee,¹⁵ was a synthesis of the original Administration proposal¹⁶ and the largely

¹⁰ Trade Act of 1974, s. 101 (a) (1). Public Law 93-618, 88 Stat. 1978 (1975).

¹¹ *American Enterprise Institute for Public Policy Research: The Burke Hartke Foreign Trade and Investment Proposal* (1973).

¹² See Ohly, *The Kennedy Round: Estimated Effects and Empirical Evidence Hearings on H.R. 6767 Before the House Comm. on Ways and Means*, 93rd Cong., 1st Sess., Pts. 1-15, at 159 (1973) (hereinafter cited as *House Trade Hearings*).

¹³ 19 U.S.C., s. 1801 (1962).

¹⁴ Ohly, *supra* n. 12.

¹⁵ H.R. 18970. The most incisive discussion of the "Mills Bill" is contained in Metzger, "The Mills Bill," 5 *J. World Trade L.* 235 (1971).

¹⁶ H.R. 14870, 91st Cong., 1st Sess. (1969). H.R. 14870 largely paralleled the provisions contained in the short-lived H.R. 17551, 90th Cong., 2nd Sess. (1968), introduced by Wilbur Mills at the request of the Johnson Administration.

protectionist¹⁷ measures propounded by Chairman Mills.¹⁸ Due to measures introduced through the latter Bill, the Trade Act of 1970 adopted a regressive omnibus approach to trade reform by providing for a variety of changes in then existing U.S. trade laws which, "both in number and in consequence, [were] intended to restrain, and [would] result in the reduction of international trade."¹⁹ The Act proposed absolute import quotas²⁰ on selected textiles and footwear products,²¹ and a significant relaxation of the causation and injury prerequisite to the imposition of import restrictions.²² Additionally, Executive authority was sharply circumscribed²³:

[F]or the first time since the escape clause was originated in 1947, [the Bill] sharply curtailed the President's discretion to accept or reject Tariff Commission findings and recommendations in escape clause cases.²⁴

Furthermore, amendments²⁵ to the Anti-dumping Act of 1921²⁶ would have required abbreviated inspection and verification procedures on the part of the Treasury Department, thereby effectively serving to promote the premature levying of anti-dumping duties.²⁷ Finally, the Bill²⁸ would have liberalised the implementation of the countervailing duty provisions of the Trade Act of 1930.²⁹

¹⁷ H.R. 16920, unlike H.R. 14870 (*supra*), did not call for the repeal of the American Selling Price system of valuation.

¹⁸ See Note, "Trade Bill of 1970," 3 *Law & Policy in Int. Bus.* 625 (1971; Rehm, "Proposed Trade Act of 1970: What Direction U.S. Foreign Trade Policy?" 2 *J.Mar.L. & Com.* 289 (1971).

¹⁹ Metzger, *supra* n. 13 at p. 235.

²⁰ "An absolute quota imposes an absolute ceiling on imports beyond which no more imports may enter. A tariff quota, on the other hand, provides that imports may exceed a given ceiling but only by paying a higher duty." Rehm, *supra* n. 16 at p. 305, n. 43. See, generally, Note, "Protectionism and the 90th Congress—A Case Study of Steel and Textile Industries," 2 *N.Y.U.J.Int. Law & Politics* 64 (1969).

²¹ s. 321.

²² s. 311.

²³ s. 313.

²⁴ Metzger, *supra* n. 15 at p. 243.

²⁵ s. 341.

²⁶ 19 U.S.C., ss. 160 *et seq.* (1970). The Anti-Dumping Act of 1921, as amended, provides that when a foreign company dumps merchandise in the United States, the Treasury Department shall levy anti-dumping duties equivalent to the dumping margins. Two requirements are essential for a dumping finding under the U.S. legislation: (i) a Treasury Department "determination of sales at less than fair value," and (ii) a determination of injury by the Tariff Commission. "[S]ales at less than fair value normally takes place when merchandise is sold for less in the United States than in the home market." 1 Commission on International Trade and Investment Policy, Papers 395, in *American Enterprise Institute for Public Policy Research*, *supra* n. 8 at pp. 31-32.

²⁷ See Metzger, *supra* n. 15 at pp 255-260; Rehm, *supra* n. 16 at p. 309.

²⁸ s. 302.

²⁹ 19 U.S.C., s. 1303. The Countervailing Duty Law was enacted in substantially its present form in 1897. It requires the Secretary of the Treasury to assess a special duty on imported dutiable merchandise, benefiting from the payment or bestowal of a "bounty or grant." The special duty is always equivalent to the "bounty or grant," the purpose of the law being to nullify such benefits. 1 Commission on International Trade and Investment Policy, Papers 409, in *American Enterprise Institute for Public Policy Research*, *supra* n. 8 at p. 33.

The Mills Bill, though passed in the House, was effectively blocked in the Senate.³⁰ On January 21, 1971, it was re-introduced by Chairman Mills in the Second Session of Congress as the Trade Act of 1971.³¹ It failed to draw Administration support, however, and was ultimately not reported out of either the House or Senate Committees.

Comparable to the Mills Bill was the Foreign Trade and Investment Act of 1972,³² otherwise known as the "Burke-Hartke Bill."³³ Introduced in both Houses, the Bill had as its avowed purpose to "discourage American business investment abroad and [to] limit the flow of imports into this country."³⁴ Impetus for this legislation was concededly grounded on fears generated by the United States balance of payments problems and on the concern of organised labour that domestic jobs were being lost through increased production abroad by United States corporations.³⁵ According to one of its sponsors:

[w]ithout it [the Bill] the heavy export of jobs, technology and capital by companies based in this country will continue unabated . . . [T]he technology produced by American genius will be better supervised and controlled, so that American workers are more fully benefitted by these advances.³⁶

The Burke-Hartke amendments accordingly proposed to roll back imports through a panoply of measures, including mandatory quotas,³⁷ the curtailing of certain preferential tariff treatment,³⁸ reform of the antidumping³⁹ and countervailing duty⁴⁰ laws, and amendments to the "escape clause" provisions of the Trade Expansion Act.⁴¹

³⁰ "In the face of divided Administration counsel and no leadership from the White House, bi-partisan group of 22 determined Senators . . . blocked this protectionist legislation," *ibid.* at p. 235. The Senate Committee on Finance, however, did approve in executive session the basic provisions of the House Bill as an amendment to the Social Security Bill, H.R. 17550, s. 301-378, 91st Cong., 2nd Sess. (1970). See S. Rep. No. 1431, 91st Cong., 2nd Sess., at p. 238 (1970).

³¹ H.R. 20, S. 4, 92nd Cong., 1st Sess. (1971). See 117 Cong. Rec. 171; Note, "The Trade Act of 1971: A Fundamental Change in United States Foreign Trade Policy," 81 *Yale L.J.* 1418 (1971).

³² S. 2592, 92nd Cong., 1st Sess. (1971); H.R. 10914, 92nd Cong., 1st Sess. (1971). On January 3, 1973, the Bill was reintroduced in the 93rd Congress, First Session, as S. 151 and H.R. 62. Additionally, on January 18, 1973, Senator Hartke segregated the Bill into eight major parts and introduced each as separate Bills—S. 430, S. 434, S. 435, S. 439, S. 441, S. 442, S. 443 and S. 447.

³³ For its sponsors, Representative James A. Burke (D-Mass.) and Senator Vance Hartke (D-Ind.).

³⁴ 117 Cong. Rec. 33584 (remarks of Senator Hartke).

³⁵ See *American Enterprise Institute*, *supra* n. 8, at 5.

³⁶ 117 Cong. Rec. 33583 (remarks of Senator Hartke).

³⁷ s. 301.

³⁸ s. 703.

³⁹ s. 401.

⁴⁰ s. 402.

⁴¹ ss. 501 and 502. For many years, the Congress has required that an "escape clause" be included in each trade agreement. The rationale for the "escape clause" has been, and remains, that as barriers to international trade are lowered, some industries and workers inevitably face serious injury, dislocation and perhaps economic extinction. The "escape clause" is aimed at providing temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition. . . . By reason of the Congressional requirement, the trade agreements to which the United States is a party contain an escape clause or equivalent provision. Typical and of most general effect is art. XIX.L (a) of the General Agreement on Tariffs and Trade: "If, as a

Exports, for their part, would be curtailed by means of increased taxation of multinational corporate activity⁴² and by direct control of exported capital and technology.⁴³

In sum, pressures in Congress for protectionist trade legislation such as that contained in the Mills and Burke-Hartke Bills have faithfully reflected changes in the domestic economic situation, as well as changes in the country's relations with the rest of the trading world.

(c) *The Administration's Proposal*

It was against such a background that President Nixon issued his April 10, 1973 message, at the same time as the proposed Trade Reform Act of 1973 was transmitted to Congress:

[W]hile trade should be more open, it should also be more fair. [This] means that the benefits of trade should be fairly distributed among American workers, farmers, businessmen and consumers alike and that trade should create no undue burdens for any of these groups.⁴⁴

result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession." S.Rep. No. 93-1298, in *U.S. Code Cong. & Admin. News*, 7263, 93rd Cong. 2nd Sess.

⁴² ss. 102 and 103. The result of the present tax provisions is that the American people and the U.S. Treasury pay the bill for economic losses to the U.S. economy due to the expansion of multinational corporations abroad. Because of these tax provisions, American tax-payers will continue to help subsidise the treasuries of foreign countries and the expansion of U.S.-based firms abroad. Despite the fact that U.S. government agencies have now demonstrated the tax advantages of producing abroad instead of in the United States, the new bill fails to recognise this problem: U.S. multinationals paid about 5 per cent. in taxes in 1970; the U.S. corporate tax rate is 48 per cent. Taxes paid to countries whose embargo on oil and threatened stoppages of other needed supplies are credited against the U.S. Treasury—a subsidy to those who jeopardise the American economy by withholding supplies, who add to U.S. inflation by hiking prices, and who provide walls behind which any firm can expand and export to the United States and abroad—so that a corporation would gain no net advantage by operating in foreign countries. S. Rep. No. 93-1298 (remarks of Senator Hartke) in 4 U.S. Code Cong. & Admin. News 7366-67, 93rd Cong. 2nd Sess. (1974).

⁴³ ss. 601 and 602. For selective treatment of the control of technology transfer, see Mirabito, "The Control of Technology Transfer: The Burke-Hartke Legislation and the Andean Foreign Investment Code; the MNE Faces the Nation," 9 *Int. Law* 215 (1975). Cf. Evans, "New Directions in the U.S. Trade Policy," 5 *Law & Policy in Int. Bus.* 1 (1973).

"[T]he bill would deny the nation's consumers freedom of choice in the purchase of goods and boost price levels at least \$10 to \$15 billion. . . . American workers would be net losers, both as workers and consumers. . . . [M]ore U.S. jobs and higher paying jobs at that, would be lost in the reduction of our exports than will be gained as domestic production substituted for exports. . . . Domestic price rises pressured by the legislation would substantially erode the international competitiveness of the U.S. . . . Foreign nations would retaliate, economically and politically." Statement of Secretary of Commerce, Peter G. Peterson to the American Retail Federation, reported in *Commerce Today*, May 15, 1972, cited in *American Enterprise Institute for Public Policy Research*, *supra* n. 8, at p. 11.

⁴⁴ 9 Weekly Compilation of Presidential Documents, No. 9, at p. 343 (April 16, 1973); H.R. Doc. No. 93-80, 93rd Cong., 1st Sess. (1973).

Summarised in its transmittal message, the Administration's proposals contemplated four basic provisions: (i) it would increase Presidential negotiating and executive authority within the context of new international trade agreements; (ii) it would liberalise those standards necessary to the application of import restrictions and implementation of adjustment assistance; (iii) it would afford the President's authority to grant Most Favoured Nation (MFN) treatment to communist countries; (iv) it would allow for preferential tariff treatment for developing countries.⁴⁵

(d) *Debate in the House*

Submitted in anticipation of a new GATT⁴⁶ round of multilateral trade negotiations scheduled to commence in Tokyo,⁴⁷ H.R. 6767 predictably won less than universal domestic support in respect of the trade liberalisation and increased presidential negotiating authority provisions that were the central feature of that Bill⁴⁸:

The most important shift in U.S. political constellation on trade policy [was] organized labor's move to the protectionist camp. This shift cannot be explained simply by high unemployment. Labor was becoming more protectionist even as unemployment was dropping steadily after 1962, and had adopted a completely protectionist stance when unemployment stood at its post-Korea low in early 1969. . . . Organized workers have apparently achieved sufficient income levels that the movement as a whole [had] become more interested in avoiding shifts of geographic location, seniority rights, local interests, etc., than in seeking higher real incomes elsewhere.⁴⁹

Testifying before the House Ways and Means Committee, Leonard Woodcock, President of the United Auto Workers Union, urged Congress largely "to ignore the Administration trade proposal and to

⁴⁵ *Ibid.* See also Davis, "The Trade Reform Act of 1973," 15 *Harv. Int. L.J.* 126 (1974).

⁴⁶ The GATT is comprehensively treated in Jackson, *World Trade and the Law of the GATT* (1969). See also Jackson, "The General Agreement on Tariffs and Trade in United States Domestic Law," 66 *Mich. L. Rev.* 249 (1967).

⁴⁷ See generally Declaration of the Ministerial Meeting, Tokyo, September 12-14, 1973, GATT Press Release GATT/1134 (Sept. 14, 1973), in 12 *Int. Legal Materials* 1533-35 (1973).

⁴⁸ See e.g. *Cong. Rec.* (Dec. 10, 1973) (remarks of Congressman Dent). But see the remarks of Congressman Landrum which were made during the floor debate on whether the Administration's Bill was properly to be considered by the House: "I would say to the members from my region of the country which is concerned primarily with agricultural products and textiles that it is imperative that we have this . . . Bill. Our negotiators today are in Geneva trying to negotiate a renewal of the long-term cotton agreement that expired in September. They are hoping to get into a renewal agreement an understanding that will include man-made fibres as well as cotton, and unless we have this, the textile industry, the agricultural industry, and more than 2 million employees in the apparel and textile industry are going to suffer a serious set-back." *Ibid.* at 10917-18.

⁴⁹ Bergsten, "Crisis in U.S. Trade Policy," 49 *Foreign Affairs* 630, 635 (1971). See also the remarks of Congressman Dent wherein he introduced letters from numerous labour organisations calling for defeat of the bill, among them the UAW, the International Union of Electrical Workers, the Amalgamated Meatcutters and Butcher Workmen, the Amalgamated Clothing Workers. 119 *Cong. Rec.* 10, pp. 968-970 (Dec. 10, 1973).

fashion new trade legislation. . . ."⁵⁰ Paramount concern was expressed over the inadequacy of the provisions for adjustment assistance; while the Bill significantly liberalised the circumscriptive language of the Trade Expansion Act,⁵¹ job security alone was no longer sufficient as a yardstick—health care and insurance protection, pension rights, fringe benefits, and seniority were not to be compromised. Reservations were voiced over "the breathtaking powers to be given to the President, at the further expense of Congress,"⁵² and over the tax incentives for overseas investment activity by U.S.-based multinational corporations. As to the latter issue, the UAW was in accord with the Burke-Hartke provisions. Woodcock cautioned, however, that the UAW's "chief deviation from Burke-Hartke is on the use of quotas and the rest, which we think would lead to a retaliatory trade war to the detriment of this and all the other involved countries."⁵³ In short, the Burke-Hartke approach to trade reform was "not recommended."⁵⁴

Representing the AFL-CIO, I. W. Abel⁵⁵ was even more adamant in opposing the Trade Bill, characterising it as "bad legislation, containing confusing and conflicting provisions, wrapped in not-so-plain language. It is a patchwork of yesterday's answers for tomorrow's problems. It ignores the realities of today."⁵⁶ In particular, the AFL-

⁵⁰ *Trade Hearings* 849. In the Senate hearings, Senator Hartke agreed with Woodcock that "the Trade Bill betrays labour."

⁵¹ 19 U.S.C. sec. 1901 (c) (1), (2) & (3) (1970). The prerequisites for import relief for beleaguered domestic industries—which also correspond to those underlying an allowance for adjustment assistance—were construed by the Tariff Commission in *Non-rubber Footwear 6* (No. 359, Jan. 1971), noted in "Recent Decisions," 7 *Texas Int.L.J.* 163 (1971). See Bale, "Adjustment Assistance Under the Trade Expansion Act of 1962," 9 *J.Int.L. & Economics* 49 (1974); Robertson, "Adjustment Assistance Under the Trade Expansion Act of 1962: A Will-O'-the Wisp," 33 *Geo.Wash.L.Rev.* 1088 (1965).

⁵² *House Trade Hearings*, p. 851.

⁵³ *Ibid.* at p. 880.

⁵⁴ Mr. Woodcock: "[I]f you will forgive me, we are still not standing along with the rest of the labor movement in support of your Bill."

Senator Hartke: "I understand. As long as you come out for the principles for which I stand, you can support anybody you want to. You are for quotas [*sic*] and I am for quotas."

Hearings on H.R. 10710 Before the Senate Comm. on Finance, 93rd Cong., 2nd Sess., at 863 (1974) [hereinafter cited as *Senate Hearings*].

⁵⁵ In the Senate, the AFL-CIO was represented by its president, George Meany. By far, he was the most outspoken of all public witnesses in his calling not for merely a revision of U.S. trade policies by "an entire restructuring based on the recognition that the concept of free trade versus protectionism which dominated the thinking of the thirties and forties is badly out of phase with today." *Senate Hearings*, at p. 1136. Meany's testimony characterised the Bill in no uncertain terms as "totally obsolete . . . worse than no Bill at all." *Ibid.* Increasing imports displacing American jobs, as well as vast expansion of agricultural exports, together had redounded to the marked detriment of the American consumer. In particular, Meany attacked the export of sophisticated American technology, which has led to an erosion of America's industrial base. Few words were minced in recommending to the Senate such proposals as a reduction in imports, regulation of multinational firms—including banks—and elimination of U.S. tax advantages and other subsidies. *Ibid.*

⁵⁶ *House Trade Hearings*, p. 1216.

CIO opposed that portion of the Bill which drastically changed the relationship between Congress and the Executive in regard to the negotiation and approval of agreements to reduce non-tariff trade barriers (NTBs) such as quotas and markings of country of origin.⁵⁷ Representing interests that were threatened by any dilution of such NTBs, the AFL-CIO predictably were apprehensive over the fact that congressional consultation and "approval" of any negotiated reductions in this area were in fact optional and within the discretion of the President.⁵⁸ It is no surprise, therefore, that the posture of the AFL-CIO vis-à-vis the Burke-Hartke amendments was in marked contrast to the views espoused by the UAW:

[T]he AFL-CIO supports the Burke-Hartke Foreign Trade and Investment Act of 1973. . . . We believe that H.R. 62 provides a rational, logical, reasonable framework for attacking the pressing problems we face as a result of our world trade position. These problems are, as we have said, the result of a fundamental change in America's economic position in relation to the rest of the world, and this change requires a fundamental shift in policy. We believe the Burke-Hartke Bill provides this fundamental change. It points the way to getting at the specific problems we see threatening our future economic well being. It is not a protectionist theory, it is a pragmatic approach based on an analysis of the problems for their causes.⁵⁹

On October 10, 1973, the House Ways and Means Committee reported out an amended version of H.R. 6767; the debate had lasted more than five months and had produced in excess of five thousand pages of testimony.⁶⁰ Although largely paralleling the Administration's draft proposal, H.R. 10710 contained several important revisions introduced by the Committee,⁶¹ not the least of which was the "Jackson-Vanik Amendment" which would prohibit the extension of Most Favoured Nation treatment to any communist country that denied its citizens the opportunity to emigrate freely.⁶²

The Administration had, in effect, won major victories—as against the protectionists—on four of the five major provisions⁶³ in its original

⁵⁷ s. 103 (d).

⁵⁸ "The basic change from prior law is the provision for presidential discretion almost without limit, the right to negotiate changes and impose them almost at will, and the authority to act without prior congressional or public approval to impose decisions reached abroad in secret with little of these actions subject to congressional veto. . . . The President's proposal also asks for advance authority from Congress to negotiate the removal of non-tariff barriers. One of these non-tariff barriers is marking of origin. That means that a product imported into this country must carry a stamp showing the country of origin; if it was made in Hong Kong, it must show it was made in Hong Kong. . . . We think this is an important provision in the present trade law that we would want to be made even more definitive. We want to know where the goods and components are coming from, and the American people want to know where they are coming from." *House Trade Hearings*, p. 1217.

⁵⁹ *Senate Hearings* at pp. 1222-1224.

⁶⁰ See generally *House Trade Hearings*.

⁶¹ See H.R. Rep. No. 93-571, 93rd Cong., 1st Sess. (1973).

⁶² See 119 *Cong. Rec.* 6920-21.

⁶³ To recapitulate, see text related to n. 47 *supra*.

proposal; it clearly lost on the MFN issue.⁶⁴ On December 11, 1973, H.R. 10710 was passed by the House and subsequently submitted to the Senate Committee on Finance which began hearing on March 4, 1974.

(e) *The Senate Revisions*

From its introduction in the Senate committee⁶⁵ to final ratification by both Houses of Congress took another nine months. The volume of testimony put before the Committee was also considerable. The cast of characters was slightly varied, but the impetus of the dialogue—and often the language itself—differed imperceptibly.⁶⁶ In the committee, the Trade Act of 1974, Public Law 93-618, was beginning to take final shape, and as if to justify the Senate's prolonged absorption with it, the changes made in it were many. Substantively, however, the majority of the issues had been predetermined and real revisions were few.

The Public Law 93-618 signed on January 3, 1975, by President Nixon's successor essentially follows the Administration's proposed draft submitted almost two years earlier. Four of the five basic provisions escaped major modification in Congress. Even the MFN provision—though it did not survive in the proffered form—probably incorporates as much of the original as could reasonably have been expected.

II. TOWARDS A NEW REGIME OF INTERNATIONAL TRADE

(a) *The Thrust of the 1974 Act*

The provisions of the 1974 Act fall within two classes. To the first class belong: Title I (Negotiating authority), Title IV (Trade with Countries

⁶⁴ See generally *Staff of Senate Comm. on Finance, 93rd Cong., 2nd Sess., "The Trade Reform Act of 1973"* (Comm. Print 1974) [Hereinafter cited as *Comm. Print*], in particular, title IV of the Act, s. 401 and 402. By a mindbogglingly complex procedure, the Committee on Ways and Means attempted to stifle to the utmost the President's authority to grant MFN treatment to communist countries. It chose to do this, however, in such a disguised manner that it wasted fully four pages on unintelligible language which can only cause problems of future construction.

⁶⁵ See S.Rep. No. 93-1298, 93rd Cong., 2nd Sess. (1974).

⁶⁶ In the Senate—as in the House—while conceding that "what came out of the House was somewhat better than that proposed by the administration," the UAW reiterated its "opposition to the Bill in its totality because of . . . willfully inadequate provisions for adjustment": *Senate Hearings* 858.

Mr. Meany. "I want to remind you, Senator [Hartke], we of the American trade union movement from the time of the Hull reciprocal trade pacts, were free traders. We were free traders right down the line, but we have got a different situation today. In those days we were for lower tariffs. We were dealing with backward European policies where they had the cartel system. But this is a different ballgame today entirely. This is American multinationals. This is American money. This is American technology. This is American know-how, and sitting back here is the American consumer, and I say that trading with any of these other countries should be dictated by our own self-interests. That is the way they trade. This is the way they do business. They shut the door. You could not go to any of these countries and come in there with some kind of a trade deal that was going to take their jobs away." *Ibid.* at p. 1136.

currently not receiving non-discriminatory Treatment), and Title V (Generalized System of Preferences) dealing with conditions of trade. To the second class belong Title II (Relief from Injury Caused by Import Competition) and Title III (Relief from Unfair Trade Practices). In other words, while trade liberalisation is the main target of the Act's provisions, it also contains techniques and procedures which permit the U.S. Government to correct miscalculations or effects of legitimate or illegitimate competition.

The Act is primarily addressed (Title I) to countries who are partners in trade with the United States and with whom it is desirable to establish a world trade system leading to fair and equitable social and economic relations based on comparative advantage, in the hope that this would promote, to everybody's profit, a more perfect international division of labour.

It is also important that non-market economy countries (Title IV) should be involved in one form or another in the world system of trade. Owing to their structural characteristics, however, a wholesale approach is not possible. Each country must be treated on its merits, and where most favoured nation (MFN) status has been achieved, this is to be respected. The extension of MFN status to other member countries of the socialist bloc depends upon their willingness to meet certain minimal standards in the area of human rights (and in particular freedom of emigration). Special provisions apply to developing countries (Title V) who, as aspirants to full member status in the first group, and because of their backward condition, need economic assistance, protection for their infant industries, and preferential treatment for their export trade, to finance their economic development.

The outline of the international trade policy in Titles I, IV and V is paralleled by Titles II and III which deal with those adverse effects of trade liberalisation which call for the application of corrective measures, requiring trade competition. A distinction is made between legitimate import competition and unfair trade practices which distort conditions of trade, such as subsidies, grants, remission of taxes, etc. In the first case, the purpose of the measures is to blunt the social effects of import competition. In the second case, the purpose is to deal with unfair trade practices and eliminate sources of competition which cannot produce fair trading based on the comparative advantage to individual nations to be derived from the international division of labour.⁶⁷

The present essay is primarily concerned with the policy of reforming the current international trade mechanism to take account of GATT's new role. This policy does not always appear clearly in the

⁶⁷ Cf. *infra*, text related to n. 108.

1974 Act; specific circumstances have affected the final product of the legislative process and clouded the perspective of the Act. The U.S. Government realised that the "policy of trade expansion . . . depends on broad domestic support which suffered . . . considerable erosion" in the 1960s. Important sectors of organised labour and of the business community had reached the conclusion that temporary relief from injurious import competition was virtually inaccessible and that grievances over allegedly unfair import competition would not be given full or timely consideration in Washington.

In order to promote further the policy of trade liberalisation the Trade Act had to make concessions to both labour and business points of view.⁶⁸

(b) *Disruption of the GATT*

At the time when the draft of the Trade Reform Act of 1973 was submitted to the House, the international trade regime which had slowly developed after World War II found itself under considerable stress. Its main instrument was the General Agreement on Tariffs and Trade of 1947 structured round the Most Favoured Nation clause and an obligation to follow the principle of non-discrimination and fair trade practices. It also bound its members to a progressive elimination of trade barriers.⁶⁹

At the moment when GATT came into force, it was joined by 34 States and was dominated by Western industrial nations. Today there are over 100 States associated with the GATT and the developed countries are a minority. The core of the GATT system is the principle of Most Favoured Nation, which rules out discrimination.⁷⁰ With the emergence of the Common Market, Latin American Free Trade Area, East African Common Market, the Andean Common Market, and various other trading organisations, GATT lost its original unity and homogeneity, and evolved into a superstructure of trading systems, based upon the formation of a number of foreign trade areas, each of them with its own influences and discriminations. While the capacity of most of these "markets" is generally insignificant, the European Common Market (EEC) represents an important barrier to a unitary system of world trade, particularly in the area of agricultural products; for its Common Agricultural Policy (CAP) and the abolition by it of internal tariffs (customs union) discriminates against non-Common

⁶⁸ Eberle, "U.S. Trade Policy—Appearance and Reality," *N.Y. Times*, Dec. 7, 1975, 14:3).

⁶⁹ Cf. Whitney, "The Trade Act of 1974: Coping with Unequal Control Costs," 16 *B.C. Industrial and Commercial L. Rev.* at p. 605.

⁷⁰ K. Dam, *GATT, Law and International Economic Organisation* (1970); J. Jackson, *World Trade and the Law of the GATT* (1968); See also, "The Trade Act of 1971: A Fundamental Change in United States Foreign Trade Policy," *Y.L.J.*, Vol. 80, 1971, 1418 (78).

Market countries. In addition, the EEC negotiated preferential agreements with a number of non-Market countries, beginning with Greece and Turkey and ending with a group of some 50 countries which joined the Lomé Agreement covering Mediterranean countries, Africa and Latin America, again acting outside the GATT framework.⁷¹

In 1955 Japan joined the GATT, raising the level of trade competition to an unprecedented level, and causing a number of consequential difficulties. In defence of their interests, members of the GATT resorted to practices hardly compatible with the non-discrimination and most favoured treatment principles which were the foundation of the GATT. Finally, primary materials exporting countries, with OPEC in the lead, established cartels which led to a raising of prices and discrimination against consumer nations. The ultimate effect was the ideological and functional bankruptcy of the GATT and a resort to practices—non-tariff trade barriers—which were at odds with the original vision of the GATT.⁷²

With this background in mind, the primary role of the 1974 Act may be seen as authorising the U.S. President to participate in the new round of negotiations aimed at making the GATT once again a useful instrument for the management of international trade in new conditions. In this sense, the 1974 Act was to provide a long-range policy programme.⁷³

(c) *The Tokyo Declaration*

The feeling that the legal system of GATT had been outstripped by developments and could no longer provide a useful instrument for the management of world trade was shared by others. The Declaration of the Ministers of GATT who met in Tokyo (September 12–14, 1973)⁷⁴ outlined a reform programme with an agenda which anticipated the thrust of the 1974 Act. It included the following items: the reduction of tariffs and the removal of non-tariff barriers, or, where that was not altogether feasible, their application on the principle of non-discrimination to all member countries. The Declaration proposed a re-examination of article XIX of the GATT on multilateral safeguards (escape clause) in order to promote further liberalisation of trade, and declared Ministers' support for the principles of the GATT.

⁷¹ Convention ACP-CEE de Lomé (Afrique, Caraïbe, Pacifique, Communauté Economique Européenne), Jan. 31, 1975. *Le Courrier*, No. 31, March 1975.

⁷² Committee on Finance, United States Senate. *World Oil Developments and U.S. Oil Import Policies*, A report prepared by the U.S. Tariff Commission, Dec. 12, 1973. U.S. Govt. Printing Office. Cf. *Dam*, n. 77 at pp. 70–71, 265, 297–299, 347–350.

⁷³ House Rep. No. 91–1435, 21. See also, R. E. Hudec, *The GATT Legal System and World Trade Diplomacy* (1975), pp. 200–215.

⁷⁴ GATT Press Release 1134, Sept. 14, 1973, *XII International Legal Materials* 1973, 1533.

Special attention was given to the needs of the developing countries, a problem which did not exist in 1947. In this connection, the Ministers declared themselves in favour of the generalised system of preferences, out of recognition for the need for the protection of internal markets of the developing countries, their weakness in regard to balance of payments problems, and price stability for their products. The declaration contained a promise that agriculture shall be specially considered—an important item in the trade reform outlined in the 1974 Act.

Finally, the Ministers decided to approach the key problem of the world trade system by recognising that—

The policy of liberalising world trade cannot be carried successfully in the absence of parallel efforts to set up a monetary system which shields the world economy from the shocks and imbalances which have previously occurred. The Ministers will not lose sight of the fact that the efforts which are to be made in the trade field imply continuing efforts to maintain orderly conditions and to establish durable and equitable monetary systems.

The Ministers declared their support for the principles of the GATT and promised to turn their attention to procedures to enforce them. "Consideration shall be given," the Declaration goes on to say, "to improvements of the international framework for the conduct of world trade. . . ." Thus the declaration recognised that there was little wrong with the GATT system, except for procedures which needed improvement and the tendency of groups of states to act on their own, departing from the principle of non-discrimination. As the Ministers stated, negotiations should "reduce or eliminate non-tariff measures or, where this is not appropriate, to reduce or eliminate their trade restricting or distorting effects, and to bring such measures under more effective international discipline." The declaration promised to consider a total reduction of all trade restrictions in selected sectors.

(d) Recognition of the GATT

In the long tradition of U.S. foreign trade legislation, the Act of 1974 occupies an exceptional position. For the first time Congress recognised the fact that the United States had become a member of the General Agreement on Tariffs and Trade and that, within its framework, a system of foreign trade was established which included practically all the important trading countries.

Already in the course of the Second World War, the U.S. and Britain had discussed—within the general plan for the world political order—the future regime of foreign trade and of economic co-operation. The outcome of these discussions was the Charter of the International Trade Organisation, which was to include all members of the United Nations and to be a part of the new world order to prevent

future wars. In 1946, a conference representing a number of countries assembled in London, appointed a Preparatory Committee to prepare a draft of the Charter of the ITO, which was adopted by the full Conference in Havana on March 24, 1948.⁷⁵ ITO was never ratified. Submitted to the Congress in April 1949, it was withdrawn by the State Department in December 1950⁷⁶ after it became apparent that it had no chance of approval. With ITO's failure in the United States, it likewise was not ratified by any other country. Of the ITO Charter, only Chapter Five (GATT) containing rules of international trade was adopted, in December 1947 in Geneva, as an interim measure to provide a basis for the operation of the future ITO. It came into force in January 1948, pursuant to a protocol of provisional application.⁷⁷ In the United States its authority rested on the 1945 extension of the Trade Agreements Act, and its status was that of an Executive Agreement made pursuant to an earlier Congressional authorisation.⁷⁸ In order to meet the conditions of that authorisation, the GATT was not conceived as an international organisation but rather as a multilateral trade agreement. Consequently, it contained no provisions regarding its staff or organisation, the only official organ being the conference of Contracting Parties.⁷⁹

From GATT's inception, the U.S. Congress' attitude was that GATT was a trade policy instrument which was the exclusive responsibility of the Executive, bound by the foreign trade rules as developed by the U.S. internal legislation, and, as such, not a concern for the legislative branch of government. The 1951 Extension of the Trade Agreements Act, section 10, provided that "the enactment of this Act shall not be construed to determine or indicate the approval or disapproval of the Congress of the Executive Agreement known as the General Agreement on Tariffs and Trade."⁸⁰

In 1954-55, the Conference of the Contracting Parties assembled in a Review Session which prepared a Charter of a formal Organisation for Trade Co-operation (OTC) to administer the General Agreement on Tariffs and Trade. However, Congress refused to be moved, and the proposal died.⁸¹

⁷⁵ Hudec, n. 80, pp. 19-43; Cf. W. A. Brown, *The United States and the Restoration of World Trade* (1950), pp. 89-90.

⁷⁶ Hudec, n. 73, at p. 50.

⁷⁷ 55 U.N.T.S. 194.

⁷⁸ See n. 5.

⁷⁹ Hudec, n. 73, at p. 54.

⁸⁰ 65 Stat. 72. To a certain extent the attitude of the Congress to GATT was the result of the feeling of resentment due to the fact that GATT (a multinational agreement) was made under the authority of the 1945 Trade Agreements Extension Act which authorised bilateral negotiations only. (Gibson, "The Trade Reform Act at Mid-Passage: A Commentary on H.R. 10710," 5 *Journal of Maritime Law and Commerce* (1974).

⁸¹ Hudec, n. 73, at p. 357, n. 28.

Although Congress did maintain its hostile attitude toward the GATT, it continued to grant the Administration the negotiating authority needed to participate in the GATT tariff reductions negotiations, and to fund U.S. participation in GATT. The provisions of section 10 continued to appear in subsequent trade agreements legislation, but were omitted from the Trade Expansion Act which authorised the Kennedy Round.

Section 10 returned as section 121 (d) of the 1974 Act. It was however in a new form which bears quotation in full:

(d) There are authorised to be appropriated annually such sums as may be necessary for the payment by the United States of its share of the expenses of the Contracting Parties to the General Agreement on Tariffs and Trade. This authorisation does not imply the approval or disapproval by the Congress of all articles of the General Agreement on Tariffs and Trade.

The immediate significance of section 121 (d) is that, from now on, U.S. participation in the conference and work of GATT is permanently funded. In those terms the attitude of the Congress to GATT assumes different proportions and reservations voiced in regard to it seem to be directed to special provisions of the General Agreement which make it a less perfect instrument of trade liberalisation policy, particularly in the area of agricultural commodities.⁸²

These impressions are strengthened by reference to the rest of section 121, particularly those parts which set a programme of GATT reform which, if realised, would indeed reconstruct GATT as an international organisation for the administration of an international trade code.

One of the most important concessions which Congress has declared its intention of making is that the President shall have power to take action to bring U.S. trade agreements into line with the principles of the open, non-discriminatory and fair world economic system. The Congress reserved the right to approve of changes in such international agreements, should they bring material changes in the Federal law, except when the President acted in pursuance of an already obtained authorisation.⁸³

At the same time, section 121 (a) authorises the President to negotiate changes in the GATT structure as regards: (a) the decision-making process (giving the United States a weighted vote reflecting the balance of economic interest); (b) revision of Article XIX (of the GATT) into a strong international safeguard procedure; (c) dispute resolution, including regular consultations and a method of establishing such a system within the GATT agreements dealing with restrictions

⁸² Dam, n. 70, at p. 257 *et seq.*

⁸³ s. 121 (c).

on imports of specific commodities; development of provisions dealing with import restraints in relation to injurious imports and border adjustments for international taxes (*e.g.* value added tax in the EEC); measures designed in accordance with the GATT articles dealing with balance of payments deficits; and assuring access to supplies of food, raw materials, manufactured and semi-manufactured goods. A special provision proposes the adoption and inclusion in the General Agreement of multilateral procedures with respect to member and non-member countries which deny fair and equitable access to the supply of food and other commodities and which substantially injure the international community. In a special concession to labour interests, Congress said that it would like to see the GATT as a vehicle for the adoption of international fair labour standards and fair trade practices which would remove the handicap of low wages paid to foreign labour and the elimination of unfair trade practices employed in foreign countries.

In the perspective of the GATT reform provisions (section 121 (a)) and of the debate which preceded the enactment of the 1974 Act, another aspect of the general design became apparent. It is particularly visible in the desire expressed in section 121 (a) (4) to achieve "the adoption of international fair labour standards and of public petition and confrontation procedures in the GATT"—a postulate which can hardly be expected to be reached by means of bilateral negotiations. The usual techniques, frequently resorted to by the U.S. Government, are the protection of the labour market by means of tariffs and restrictions denying access to goods produced by countries resorting to cheap labour. This technique cannot be employed in a world economic system as it stands today. The only method reasonably available is a gradual adoption of new standards through the process of economic integration on a world-wide scale.

Title I authorises the President to negotiate new conditions and rules of international trade and at the same time amends U.S. foreign trade legislation as regards the mechanism to be applied to foreign trade management in the United States.

The Act still maintains the fiction that American foreign trade conditions are a matter of bilateral negotiation, which will yield concessions for American exports in other countries.⁸⁴ Reform of the GATT and its code of international trade is a separate problem calling for a separate approach.⁸⁵ In fact, GATT is an all-embracing trade agreement which replaced most, if not all, of the bilateral agreements made by the United States with individual countries. Trade concessions

⁸⁴ s. 105.

⁸⁵ s. 121.

negotiated by the United States in individual bilateral agreements are now replaced (for the most part) by the schedules attached to the General Agreement. The Act would have gained in clarity if the negotiating authority had dealt primarily with negotiating GATT changes and reform of the code of international trade at which it clearly aims (see s. 2 of the Act and *passim*). It is clear from the circumstances of the Act that its main purpose was to set up the level of concessions the United States delegation to the Tokyo Round would be authorised to make, and this was the purpose of the legislative proposal submitted in 1973 by the Nixon Administration. Its main thrust, as regards the removal of trade barriers, was to negotiate the removal of non-tariff obstacles to trade, offering as a *quid pro quo* the removal of the American Selling Price (ASP) for the purpose of duty valuation.⁸⁶

Parallel to the removal of trade barriers, the purpose of the Act is to restrict, if not to replace altogether, unilateral action to solve imbalances in trade by the GATT members. This is to be done by consultation, agreed adjustment or third party adjudication. A typical example of such action which is aimed at here is the case of the U.S. dairy product restrictions, imposed under the Defence Production Act of 1950, which has caused considerable difficulty with U.S. trade partners.⁸⁷ It is not quite clear how far the U.S. Congress would go in accepting that aspect of the GATT reform, as it would result in considerable restriction of its power to regulate foreign commerce, but formal authorisation to negotiate a dispute settling is granted.⁸⁸

In spite of the fact that tariff reduction negotiations have been actively pursued since 1934, tariff reductions remain the most important incentive to the expansion of trade and the Act grants the President considerable powers in this area for the next five-year period, including the authority to reduce rates to 40 per cent. of those in force on January 1, 1975. Rates of duty of no more than 5 per cent. *ad valorem* are exempt. The President has power to increase U.S. tariffs, as a result of negotiations, but such increases cannot exceed 50 per cent. of the rate in force on January 1, 1975. No rate of 20 per cent. *ad valorem* may be increased.⁸⁹

The Act adopted three approaches to tariff concessions: those granted on the basis of equality,⁹⁰ those extended to developing countries on the basis of preferences,⁹¹ and those made to assure equitable access to supplies.⁹² Each of these classes of agreement would call for a different combination of mutual concessions, depending upon the needs and interests of the countries involved. At the

⁸⁶ ss. 102 and 103 (g) (1). Cf. Dam., n. 77, at pp. 190-192.

⁸⁷ Hudec, n. 73, at pp. 165 *et seq.*

⁸⁸ s. 121 (a) (9).

⁸⁹ s. 101.

⁹¹ s. 106.

⁹⁰ s. 105.

⁹² s. 108.

same time, section 107 urges that trade agreements made by the U.S. with its partners should provide for internationally agreed rules and procedures providing for the use of temporary measures to ease the adjustment of internal markets to the expanded flow of trade, attributable to the removal or reduction of trade barriers. Such agreements should provide for proper notifications of exporting countries, consultations, joint reviews of the flow of trade, making proper adjustments and mediation of disputes.

Section 102 of the Act speaks of the non-tariff barriers and other distortions of trade, without defining them closely. More specific examples of them may be found in section 121 of the Act which deals with the GATT revision.

Obstacles to the sale of American products abroad fall into two classes.

To the first belong various measures which give advantage to goods either coming from special areas (*e.g.* preferences in the case of Commonwealth countries)⁹³ and tax or duty devices which lower the price of exported commodities. One example of such a measure is the Common Agricultural Policy of the EEC. Another is value added tax, a turnover tax which is not levied on goods exported abroad and which are therefore sold there at lower prices than in EEC markets. Value added tax (an indirect tax) performs the same function in the EEC as taxes on a manufacturer's profits (direct tax) and therefore discriminates against American manufacturers and places a handicap on American exports. At the same time GATT article XVI prohibits any form of direct subsidising of exports and this is interpreted as a prohibition on the remission of direct taxes to subsidise exports. However, the remission of value added tax is not considered a subsidy.⁹⁴

To the second class of obstacles to the sale of American products abroad belong measures of a social nature such as "fair labour standards" which cannot be settled through the mechanisms of international trade agreements, although low wages may favour exports and disadvantage countries offering high living standards to their workers.

The general programme of trade liberalisation and harmonisation of the international trade code is combined with an effort to regularise procedures dealing with those situations where trade restriction is necessary in order to counteract the adverse effect of increased imports on the economy of the trading partners. The specific example of such a situation arises where the balance of payments is disturbed by the imports. While the Act recognises that the interested State must reserve

⁹³ s. 121 (a) (10). Cf. Gibson, n. 80, at pp. 565-568. Cf. Dam, n. 70 at pp. 121-124, 140.

⁹⁴ s. 121 (a) (5).

to itself freedom of action, nevertheless it expressed a desire to have this freedom exercised with moderation on two specific occasions. Of the two alternative techniques open to the interested party—a surcharge and a quota restriction—section 121 (a) (6) lays down that a surcharge is the preferred method “by which industrial countries may handle balance-of-payments deficits in so far as import restraint measures are required.” The provisions of section 121 (a) (6) are aimed specifically at article XII of the GATT which deals with this situation.

Section 122 (balance of payments) still, however, uses both techniques of import restriction (import quotas and the surcharge). Resort to these methods is permitted in two situations: first, when there is a serious balance of payments problem and it is necessary to prevent an imminent and significant depreciation of the dollar; and secondly, in order to correct an international balance of payments disequilibrium, even when the American dollar is not threatened. The use of quotas (quantitative restrictions) is reserved only to the case where the use of quotas has been agreed to in an international trade agreement and the problem cannot be corrected by a surcharge.⁹⁵

In a reverse situation, when the U.S. balance of payments is likely to show constant and persistent surplus, or considerable appreciation in the value of the dollar on foreign markets is imminent, the President may encourage imports by lowering custom duties, but by no more than 5 per cent. *ad valorem*. Another measure authorised by the Act is to increase the value of imported articles or temporarily lift restrictions on imports. However, this does not apply in a situation where restriction on the importation of such articles would materially injure firms or workers or endanger national security or otherwise affect the national interest adversely.⁹⁶

Surcharges or quotas may be imposed by the President for a period of no longer than 150 days, but this may be extended by Congress.⁹⁷ The Act strongly suggests that the U.S. should make agreements with its partners, that surcharge duties should only be used, and that adjustment liabilities should be shared between the surplus and deficit countries. As a rule, all import controlling measures should apply to all countries without discrimination, except in those exceptional cases when the purpose of balance of payments control may be achieved by action against one or more countries with persistent balance of payments surpluses. In such cases, other countries may be exempt from import restriction measures.⁹⁸

No tariff or non-tariff barrier may be reduced or removed, if the interests of national security come into play.

⁹⁵ s. 122 (a) and (b).

⁹⁷ s. 122 (c).

⁹⁶ s. 122 (c).

⁹⁸ s. 122 (d) (2).

The general tenor of directives to the Administration is to replace unilateral decisions to protect the balance of payments, national security or the welfare of social groups, firms or communities by previously agreed procedures.

To balance the authority of the Administration to proceed unilaterally in order to protect the American balance of payments, the Act authorises the Administration to compensate possible losses to American trading partners.⁹⁹

Two methods of action are open to the Administration. In the first place, the President may negotiate additional concessions, with partners whose trade may be hurt by escape clause measures. In the second place, the President may unilaterally make such concessions, by reducing tariff rates even below the maximum reduction generally provided for in section 101, or below the rate appropriate to any stage of the process of reduction. The reduced rates may not be less than 70 per cent. of the permissible lowest rates and not more than 30 per cent. of such duty at each stage.¹⁰⁰

Section 123 (Compensation Authority) follows the pattern outlined by the General Agreement (articles XII and XIX). The emphasis is on agreed action. All emergency measures to prevent or correct damage to balance of payments, or to avoid damage to the national economy, or to avoid adverse effects of increased imports on specific classes of commodities, are to be the result of consultations and negotiations and should provide for compensatory concessions.

In order to give a full presentation of the general drift of the provisions of the 1974 Act in situations in which some restriction of the flow of imports may be necessary (whether within or without the projected reform of the GATT) section 107 of the Act (International Safeguard Procedure) must be referred to. It states that the purpose of the Act is to negotiate international agreements which—

in the context of the harmonisation, reduction, or reduction of barriers to, and other distortions of international trade, which permit the use of temporary measures to ease adjustment to changes occurring in competitive conditions in the domestic markets. . . .

Such agreements may provide for:

(1) notification of affected exporting countries; (2) international consultations; (3) international review of changes in trade flows; (4) making adjustments in trade flows . . . ; and (5) international mediation. In addition such agreements may exclude mutual compensation, or retaliation and provide for domestic procedures which may give foreign interests access to internal procedures undertaken under the escape clause.¹⁰¹

To round up the description and analysis of the provisions of the 1974 Act aimed at authorising the Administration to participate effec-

⁹⁹ s. 123, Compensation Authority.

¹⁰⁰ *Ibid.*

¹⁰¹ Title II, ss. 201–203, Import Relief.

tively in the Tokyo Round, two more aspects of the 1974 regime of foreign trade must be mentioned. All actions by the Administration undertaken in order to protect U.S. interests (balance of payments and national security) are temporary, and their extension must involve action by Congress,¹⁰² with all the safeguards of the legislative process. Secondly, the President has the power to retaliate against any party which is in violation of its agreed obligations.

Section 126 imposes upon the President the duty to keep a check on the actual performance of foreign trade partners of the United States, including their implementation of accepted obligations to grant reciprocal trade concessions (duty-free treatment or removal of other import restrictions). This applies, in the first place, to major industrial countries, in the event that any of them fail to make concessions under the 1974 Act providing for competitive opportunities for the commerce of the United States. In such a situation the Act provides that the President shall recommend to Congress appropriate legislative action either for the termination of concessions granted under a trade agreement, or to deny the application to the trade of that country of legislation enacted for the purpose of implementing a trade agreement. The term "major industrial country" covers Canada, the European Economic Community and its members, Japan, and any other foreign country designated by the President.¹⁰³

Directives addressed to the Administration to negotiate further trade concessions and reform the code of international trade were supplemented by an instruction as to how diplomatic processes should be utilised to obtain the best results.

The guiding principle of trade negotiation is to proceed on a sectoral basis, *i.e.* to seek trade concessions on an industry-by-industry basis. According to section 135 the President, before entering into a trade agreement, shall seek advice from the private sector as regards negotiating objectives and bargaining positions. He shall consult the Advisory Committee for Trade Negotiations consisting of representatives of government, labour, industry, agriculture, small business, service industries, retailers, consumer interests and the general public. The President may establish general policy advisory committees for industry, labour and agriculture, and may create and seek advice from sector advisory committees representing individual sectors, industry, labour or agriculture. He may also seek advice from private organisations. The Act thus provides for various channels of information and communication to inform the President on the special problems facing each sector and industrial or labour interests in connection with negotiations in progress. These committees shall also review and report on

¹⁰² See *infra* text related to nn. 329 *et seq.*

¹⁰³ s. 126 (d).

agreements negotiated by the President or the Congress or the Special Representative for Trade Negotiations. In sum, the Act assumes that particular interests are effectively represented in trade negotiations, and that their voices are heard.

The same guiding principle is also sustained by section 104 which insists that negotiation of mutual concessions "be conducted on the basis of appropriate product sectors of manufacturing." The basic idea is that mutual trade concessions shall be granted on a sector-by-sector basis and presumably corresponding industrial sectors are to be treated on a basis of reciprocity. This understanding is strengthened by the provisions of subsection (e) of section 104 which states:

For the purposes of this section . . . the Special Representative for Trade Negotiations together with the Secretary of Commerce, Agriculture, or Labour as appropriate, shall after consultation with the Advisory Committee for Trade Negotiations established under section 135, and after consultations with interested private organisations, identify appropriate product sectors of manufacturing.

At the same time, it is clear that the sectoral approach will not necessarily always be appropriate. For example, one of the problem sectors in the American economy is agriculture, a sector heavily discriminated against in imports to industrial countries. To overcome artificial barriers against agricultural exports, section 103 (Overall Negotiating Objective) visualises that there may have to be departures from the sector principle in that it provides that "to the maximum extent feasible," the harmonisation, reduction, or elimination of agricultural trade barriers and distortions shall be undertaken in conjunction with the harmonisation, reduction, or elimination of industrial trade barriers and distortions.

Another exception to the sectoral approach is included in section 123 (Compensation Authority) which gives the President the power to negotiate compensation in the form of new import concessions to a country affected by quota restrictions on its products, where this is necessary, to remedy large and serious balance of payments deficits. Section 123 suggests that import quota restrictions shall be compensated for by concessions relating to other classes of goods, so as to maintain an overall balance of trade between the United States and that other country. Thus while trade concessions are negotiated on a sectorial basis, the actual progress of the exchange of goods is viewed from the standpoint of maintaining the overall health of the national economy.

The sectoral approach is not an American invention. It reflects the fact that, at this time, the disparity in the competitive position of imports from various countries, to a large degree depending on the disparity in national standards of living, prevents a general removal of

trade barriers. Kennedy Round negotiations were saved because it was possible, through the sectoral approach, to agree to concessions affecting sectors rather than the general tariff structure.¹⁰⁴ It is also on the basis of the sectoral approach that the Tokyo Round aims at devising the total removal of trade barriers. The Ministerial Declaration of September 14, 1973, proposed "an examination of the possibilities for the co-ordinated reduction or elimination of all barriers to trade in selected sectors as a complementary technique."¹⁰⁵

Viewed from a very general point of view, it is clear that on no account can the 1974 Act be considered as the ultimate model for the international trade pattern. Rather, it is a stepping-stone towards liberalised trade among the most important industrial nations, which recognise that free trade ideals are still a possibility.

This understanding of the 1974 Act is strengthened by the terms of section 121 (a) (12) which directs the Administration to seek "to establish within GATT an international agreement on articles (including footwear) including the creation of regular and institutionalised mechanisms for the settlement of disputes and of surveillance body to monitor all international shipments of such articles."

This authorisation has its history. It has been mentioned before^{105a} that some time after its inception the GATT system suffered a serious breakdown. In 1955, Japan joined the GATT with its low-wage labour and highly developed industry, ready to flood world markets with its exports and so threatening serious market disruptions. Later on, Japan was joined by other competitors, mostly newly developing countries, which also threatened to invade the markets of the GATT members with cheap commodities (mainly textiles), causing serious economic difficulty. The response of GATT members varied. Some of them refused to grant Japan a Most Favoured Nation treatment. Others—including the United States—forced Japan and textile producers to agree to voluntary quota restrictions, and negotiated a Long Term Textile Agreement.

A full account of these developments is given elsewhere.¹⁰⁶ Here it is sufficient to say that the 1974 Act, with its aim of reforming the GATT, moved to replace unilateral action on the part of individual countries by an agreed international process supervised by GATT, thus legalising in effect a permanent international trade organisation.

III. FUNCTIONAL ANALYSIS

To implement the complicated scheme of negotiation and regulation devised in it, the Trade Act of 1974 provides for a precise interplay

¹⁰⁴ Dam, n. 70, at pp. 77-78.

¹⁰⁵ N. 81.

^{105a} Cf. *supra*, text related to nn. pp. 63-71.

¹⁰⁶ Dam, n. 70, at pp. 296-315; Hudec, n. 73, at pp. 212-215.

between the major functionaries whose actions—pursuant to guidelines established by the Act itself—determine the desired foreign trade policy of the United States. These major functionaries are: the President, Congress, the International Trade Commission (the “revised” Tariff Commission), the Office of the Special Representative for Trade Negotiations, the Secretaries of Labour, Commerce, and the Treasury, and the various advisory and co-ordinating committees established under the Act.

The President

The Chief Executive is the prime mover in effectuating the negotiatory objectives promulgated under Titles I and IV of the Act. The President is empowered by the Act to enter into five basic types of trade agreement: trade agreements aimed at eliminating tariff barriers,¹⁰⁷ trade agreements aimed at eliminating non-tariff barriers and similar distortions¹⁰⁸; trade agreements aimed at effecting General Agreement on Tariffs and Trade (GATT) revisions¹⁰⁹; limited commercial agreements extending non-discriminatory (MFN) treatment to countries previously denied such treatment¹¹⁰; and orderly marketing agreements¹¹¹ (alone or in combination with other, unilateral actions)¹¹² to provide relief from injury—or the threat thereof—caused by import competition.¹¹³ The section 101, 102, 405, and 203 agreements may be characterised as permissive¹¹⁴; the section 121 agreements are mandatory.¹¹⁵ Presidential authority for effectuating section 101 and 102 agreements is limited to five years from the date of the enactment of the Act,¹¹⁶ although the section 101 authority may be extended for an additional

¹⁰⁷ s. 101.

¹⁰⁸ s. 102.

¹⁰⁹ s. 121. At least one commentator has suggested that the s. 101 authority is granted solely in order to execute the GATT revision mandate outlined in s. 121. See, e.g. Gibson, n. 87. It would appear, however, that such a restrictive view is unwarranted. First, while that author's views may have been accurate as regards H.R. 10710, the law as enacted has been expanded—together with s. 121. Secondly, subs. (b) of s. 121 may be taken as authorising independent—of s. 101—action by the President “to establish the principles described in [s. 121].” Thirdly, s. 105 expands the presidential authority under s. 101 to bilateral agreements as well, if they would prove to be more effective. And, finally, s. 101 is also to be used in connection with ameliorative compensatory concessions necessitated by the imposition of s. 203 import relief: s. 123 (d).

¹¹⁰ s. 405.

¹¹¹ s. 203 (a) (4).

¹¹² s. 203 (a) (5).

¹¹³ s. 203 (a).

¹¹⁴ “[T]he President . . . may enter into trade agreements with foreign countries or instrumentalities thereof. . . .” (emphasis added): ss. 101 (a) (1), 102 (b). “[T]he President may authorise the entry into force of bilateral commercial agreements providing non-discriminatory treatment. . . .” (emphasis added): s. 405 (a). While the language of s. 203 appears to be mandatory—“ . . . the President . . . shall . . . negotiate orderly marketing agreements with foreign countries . . .” (emphasis added), any presidential action is predicated on his determination to provide import relief in the first place: s. 203 (a).

¹¹⁵ “The President shall . . . enter into [trade] agreements with foreign countries or instrumentalities: . . .” (emphasis added): s. 121 (b).

¹¹⁶ ss. 101 (a) (1), 102 (b).

two years.¹¹⁷ Until their authority terminates, section 101 trade agreements are to be used to grant new concessions by way of ameliorating the effects of section 203 import relief¹¹⁸; thereafter, section 123 provides the authority for such ameliorative relief.¹¹⁹ In order to carry out section 101 trade agreements, the President may manipulate duties "as . . . required or appropriate."¹²⁰

In the case of section 102 trade agreements, the President must, "not less than 90 days before the day on which he enters into such trade agreement," notify Congress and promptly thereafter publish notice in the Federal Register of his intention to enter into such a trade agreement. He must enter into consultations concerning its implementation with the Senate Committee on Finance, the House Committee on Ways and Means, "and with each committee of the House and the Senate and each joint committee which has jurisdiction over legislation involving subject-matters which would be affected by such trade agreement."¹²¹ After entering into a section 102 trade agreement, the President must submit to Congress a draft of the implementing Bill and a statement of any proposed administrative action with explanations thereof,¹²² as well as a statement of how such an agreement "serves the interests of United States commerce" and why the Bill and administrative action are "required or appropriate to carry out the agreement."¹²³

The President is authorised to enter into bilateral section 101 and 102 trade agreements if he "determines that . . . [such] agreements will more effectively promote the economic growth of, and full employment in, the United States. . . ."¹²⁴ If a section 101 or 102 trade agreement will significantly affect "competitive opportunities in one or more product sectors [of manufacturing] . . .," the President is required to submit to Congress an analysis of the extent to which the section 104 "Sector Negotiating Objective" would be achieved by such an agreement.¹²⁵ In negotiating section 101 or 102 trade agreements, the President must reach certain specified negotiating objectives.¹²⁶ In addition, he is required "from time to time to publish and furnish the International Trade Commission . . . with lists of articles

¹¹⁷ s. 124 (d).

¹¹⁹ s. 123 (a).

¹²⁰ He ". . . may proclaim such modification or continuance of any existing duty, such continuance of duty-free or excise treatment, or such additional duties . . .": s. 101 (a) (2).

¹²² s. 102 (e) (2) (A).

¹²⁴ s. 105.

¹²⁶ s. 101 and 102 objectives: "Overall Negotiating Objective": ("obtain more open and equitable market access and the harmonisation, reduction, or elimination of devices which distort trade or commerce"), s. 103; "Sector Negotiating Objective": s. 104; "Agreements with Developing Countries": s. 106. S. 102 *only* objectives: "International Safeguard Procedures": s. 107; "Access to Supplies ['Important to the Economic Requirement of the United States']": s. 108.

¹¹⁸ s. 123 (d).

¹²¹ s. 102 (c).

¹²³ s. 102 (e) (2) (B).

¹²⁵ s. 104 (a).

which may be considered for . . . ¹²⁷ section 101 trade agreement negotiational purposes.” ¹²⁸ Before making an offer with respect to such trade agreements, the President must have sought ¹²⁹ and received the advice of the International Trade Commission (ITC), unless the ITC has failed to respond within the statutorily imposed time limit.¹³⁰ Moreover, before making an offer with respect to either a section 101 or 102 trade agreement, the President is required to have afforded a public hearing to interested parties and to have received—and apparently reviewed—a summary thereof.¹³¹

Whenever the implementation of a section 101 trade agreement requires a reduction in duty in excess of ten per cent. of the previous rate, the President is required to implement the reduction by “staging” it at one-year intervals.¹³² He is authorised to exceed the relevant per-year limit ¹³³ only for the purpose of “rounding” to “simplify the computation.” ¹³⁴ There is a ten-year staging period limit.¹³⁵

In negotiating section 121 trade agreements, the President is required to promote “the development of an open, non-discriminatory, and fair world economic system.” ¹³⁶ Twelve trade liberalising “principles” are specifically outlined in the Act,¹³⁷ but from the directive it is clear that action should not be limited to those specified principles only.¹³⁸

The authority extended by section 121 is really two-fold: the President is required to conform to existing GATT agreements within the trade liberalising principles,¹³⁹ and, “to the extent feasible,” to enter into new agreements guided by the same principles.¹⁴⁰ Whenever the implementation of a trade agreement entered into pursuant to this section would effect a change in any provision of federal law or administrative procedure, the agreement must be submitted to Congress so that it may pass implementing legislation, unless Congress explicitly delegates such implementing authority.¹⁴¹

Title IV of the Trade Act of 1974 begins with a general prohibition against extending non-discriminatory (MFN) treatment to countries which had not previously qualified for such treatment.¹⁴² It then sets out specific categories of non-market economy countries which are

¹²⁷ s. 131 (a).

¹²⁸ This also concerns s. 123 and 124 trade agreements.

¹²⁹ s. 131 (b).

¹³⁰ s. 134.

¹³¹ ss. 133 (a) (b), 134.

¹³² s. 109 (a).

¹³³ s. 109 (a) (1).

¹³⁴ s. 109 (b).

¹³⁵ s. 109 (c) (1).

¹³⁶ s. 121 (a).

¹³⁷ s. 121 (a) (1)–(a) (12).

¹³⁸ *Ibid.*

¹⁴¹ s. 121 (c).

¹³⁸ s. 121 (a).

¹⁴⁰ s. 121 (b).

¹⁴² s. 401.

ineligible for the extension of MFN treatment.¹⁴³ However, these prohibitions are replete with exculpatory provisions. For example, they all apply prospectively, and not retrospectively, so that no country, already enjoying MFN treatment would be denied such a preference¹⁴⁴; the proscriptions merely enjoin the President from providing new concessions to this class of non-market economy countries.¹⁴⁵ But even new concessions are not totally denied to countries burdened by sections 402 and 409 prohibitions.¹⁴⁶ Should the President decide that a non-market economy country affected by these prohibitions has implemented legislation which would substantiate a finding that it had "mended its ways," he is empowered to enter into commercial agreements with such a country, impeded only by the requirement that he must submit a report to Congress delineating the change of circumstances, both at the outset of the agreement and at six-month intervals thereafter^{146a}. The only risk factor is that Congress—by adopting a disapproval resolution in either House within 90 days of the submission of the report¹⁴⁷—may not only render the commercial agreement thus entered into by the President void, but may preclude his entering into any future agreements "with such country under . . . title [IV] . . ." ¹⁴⁸ apparently for the duration of the Act.

In addition, "[d]uring the 18-month period beginning on the date of the enactment of this Act, the President is authorized to waive by Executive order the application of" section 402 (a)¹⁴⁹ and 409 (a)¹⁵⁰ prohibitions, thereby circumventing the risk¹⁵¹ of proceeding under section 402 (b) or 409 (b) merely by submitting a report to Congress¹⁵² which asserts that ". . . he has determined that such waiver will *substantially* promote the objectives of this section . . ." ¹⁵³ and that ". . . he has received *assurances* that the emigration practices of that country will henceforth lead *substantially* to the achievement of the objective of this section." ¹⁵⁴ The waiver would, of course, free the President to exercise his authority under section 405 to enter into a bilateral commercial agreement with that country.

¹⁴³ s. 402 (a) (countries which deny or impose economic restrictions on emigration); s. 403 (a) (countries which do not co-operate with the U.S. in resolving the issue of personnel missing in action in Southeast Asia) s. 409 (a) (countries which deny or impose economic restrictions on their citizens who wish to emigrate to join a "very close" relative in the United States).

¹⁴⁴ ss. 402 (a), 403 (b), 409 (c).

¹⁴⁵ See e.g. s. 402 (a): ". . . the President of the United States shall not conclude any commercial agreement with any such country . . ."

¹⁴⁶ ss. 402 (b), 409 (b), & 402 (c).

^{146a} ss. 402 (b), 409 (b).

¹⁴⁷ s. 407 (c) (3).

¹⁴⁸ s. 407 (c) (3) (C).

¹⁴⁹ s. 402 (c) (1).

¹⁵⁰ s. 409 (d).

¹⁵¹ See *supra*, text related to nn. 62-65.

¹⁵³ s. 402 (c) (1) (A).

¹⁵² s. 402 (c) (1).

¹⁵⁴ s. 402 (c) (1) (B).

Waiver authority seems a somewhat superfluous safeguard. It does not grant any independent affirmative action authorisation beyond waiving the proscriptions of section 402 (a) and 402 (b). In other words, should the President wish to accomplish any extension of MFN treatment to a country absolutely denying or imposing economic restrictions on emigration, he would still have to conclude a commercial agreement with that country¹⁵⁵—an agreement which would take effect *only* if approved by Congress.¹⁵⁶ Notwithstanding this safeguard mechanism, Congress saw fit to promulgate a complicated scheme for subsequent 12-month extensions of waiver authority.¹⁵⁷ This, in effect, states that, following the initial 18-month waiver period, the President may extend waiver authority for any number of successive 12-month periods, provided that the conditions for the initial grant of waiver persist and neither House of Congress has succeeded in blocking the extension by adopting a resolution disapproving it within the statutorily mandated period(s).¹⁵⁸

In any event, the President may authorise "the entry into force of bilateral commercial agreements providing non-discriminatory treatment to the products of countries heretofore denied such treatment . . ." ¹⁵⁹ and "by proclamation extend [such] treatment to the products of a foreign country ¹⁶⁰ which has entered into [such] a bilateral commercial agreement. . . ." ¹⁶¹ The President is empowered "at any time [to] suspend or withdraw any extension of non-discriminatory treatment . . ." unilaterally and without the consent, approval, or right to disapproval of Congress.¹⁶² The type of agreement into which the President may enter under the provisions of section 405 is restricted as to parties,¹⁶³ and term,¹⁶⁴ and by the mandatory inclusion of various safeguard conditions.¹⁶⁵ Whenever the President takes action

¹⁵⁵ ss. 404, 405.

¹⁵⁶ 405 (c) (1).

¹⁵⁷ s. 405 (d) (1)–(d) (5).

¹⁵⁸ Eighteen months, s. 402 (d) (2) (B), plus 60 days, s. 402 (d) (3) (A), plus 45 days, s. 402 (d) (4), in the case of the first extension, and twelve-months plus 60 days, s. 402 (d) (5), in the case of succeeding twelve-month periods.

¹⁵⁹ s. 405 (a).

¹⁶⁰ It may be emphasised that the s. 404 and 405 authority extends to all foreign countries, and, as to the countries not characterised as non-market economies practicing discrimination in emigration, the s. 402 (c) & (d) waiver provisions do not apply. That does not, however, mean that this grant of general authority is unencumbered, see *infra*, nn. 88–90.

¹⁶¹ s. 404 (a).

¹⁶² s. 404 (c).

¹⁶³ The agreement must be a bilateral agreement, s. 405 (b).

¹⁶⁴ The agreement is limited to a 3-year initial period, but is renewable for additional 3-year periods, s. 405 (b) (1), if the country has exhibited "good faith" performance of its obligations, see s. 405 (b) (1) (A) & (B).

¹⁶⁵ Suspension or termination for national security reasons, s. 405 (b) (2); consultative, s. 405 (b) (4) (A), and remedial, s. 405 (b) (3) (B), safeguards to prevent market disruption; protection of industrial intellectual property rights for patents and trade marks, s. 405 (b) (4); copyrights, s. 405 (b) (5); and trade secrets, s. 405 (b) (6); dispute settlement mechanism, s. 405 (b) (7); promotion of trade, s. 405 (b) (8); ongoing assessment machinery, s. 405 (b) (9); and any "other arrangements of a commercial nature as will promote the purposes of this Act," s. 405 (b) (10).

under section 404 (a), he must "promptly" transmit to Congress the proclamation, the agreement, and his reasons for so acting.¹⁶⁶ Congress may then approve¹⁶⁷ or disapprove—in the case of agreements "entered into before the date of the enactment of this Act. . . ."¹⁶⁸

Finally, the President is authorized to "negotiate orderly marketing agreements"¹⁶⁹—alone or in combination with other forms of import relief¹⁷⁰—"limiting the export from foreign countries and the import into the United States of [certain] articles"¹⁷¹ in order "to prevent or remedy serious injury or the threat thereof to [an] industry . . . and to facilitate the orderly adjustment to new competitive conditions by the industry in question. . . ."¹⁷² It should be mentioned here that the whole panoply of Title II import relief measures may be brought into operation by entirely fair, non-discriminatory, and non-restrictive trade practices which are, unfortunately, successful enough to injure seriously or threaten so to injure a "domestic industry producing an article like or directly competitive with [the] imported article. . . ."¹⁷³ In contradistinction, Title III relief is available only pursuant to a determination of unfair, unjustifiable, unreasonable, or discriminatory trade practices,¹⁷⁴ and here the element of competition with a domestic producer is, largely, irrelevant. Moreover, while the initiative for taking action under Titles I, III, IV, and V rests, for the most part, with the President,¹⁷⁵ the preferred initiative for affording Title II import relief is from "an entity . . . which is representative of [the] industry . . ." alleging a need thereof.¹⁷⁶ The President,¹⁷⁷ as well as other officials and agencies,¹⁷⁸ are not, however, precluded from "casting the first stone," in the unlikely eventuality of there being severe import competition and no outcry from the industry concerned.

In determining whether or not to apply the forms of import relief for which he is responsible,¹⁷⁹ the President may negotiate a trade agreement to limit the import into the United States of the offending

¹⁶⁶ s. 407 (a).

¹⁶⁸ s. 407 (c) (2).

¹⁷⁰ s. 203 (a) (5).

¹⁷² s. 203 (a).

¹⁷⁴ See generally s. 301.

¹⁷⁵ See generally ss. 101, 102, 121, 301, 404, 405 and 501.

¹⁷⁶ See s. 201, in particular, s. 201 (a) (1).

¹⁷⁸ *Ibid.* Included are the Special Representative for Trade Negotiations, the Committee on Ways and Means (House) and Finance (Senate) and the ITC.

¹⁷⁹ The criteria for presidential action with respect to import relief occasioned by competition are the same regardless of whether the relief is a s. 203 (4) trade agreement or some form of direct import manipulation—which will be discussed more fully in the following paragraphs. For that reason, s. 203 (4) trade agreements were treated last as they provided a perfect transition from the discussion of the Presidential trade agreement authority to his other, more unilateral, authorities. Since the criteria will be examined here, they will not be repeated later, and the reader is reminded that, although the focus is on trade agreements, the same provisions apply to all the forms envisioned as part and parcel of s. 203 relief. The discussion of the other forms of relief pursuant to this section will, therefore, merely refer back to this treatment of the issues.

¹⁶⁷ s. 407 (c) (1).

¹⁶⁹ s. 203 (a) (4).

¹⁷¹ s. 203 (a) (4).

¹⁷³ Defined, s. 201 (b) (3).

¹⁷⁷ s. 201 (b) (1).

competitive article.¹⁸⁰ Even after receiving a report containing an affirmative finding by the ITC, under section 201 (b), to the effect "that increased imports have been a substantial cause of serious injury or the threat thereof with respect to an industry," the President may refuse to take action as long as "he determines that provision of such relief is not in the national economic interest of the United States. . . ." ¹⁸¹ However, he must thereupon report his reasons for so deciding to Congress ¹⁸² and risk being overruled.¹⁸³

Trade agreements may be negotiated after the imposition of other forms of import relief, in which case they could replace such relief,¹⁸⁴ in whole or in part, or they may be negotiated as preliminary steps in the provision of other forms of import relief.¹⁸⁵ In negotiating section 203 (4) trade agreements, the President must operate within the general premises of the abuses this import relief mechanism was designed to preclude, namely serious injury or threat of serious injury due to *increased* imports of competing articles.¹⁸⁶ The trade agreement, therefore, should not require a decrease in imports below ". . . the quantity or value of such article imported into the United States during the most recent period which . . . is representative of imports of such article." ¹⁸⁷ In order to carry out such trade agreements, the President may issue regulations concerning withdrawal from warehouse stocks of articles covered by the agreement.¹⁸⁸ The trade agreements negotiated pursuant to this section are restricted as to their term,¹⁸⁹ but are renewable.¹⁹⁰ Import relief which is to be provided for more than three years must "to the extent feasible" be phased down gradually, with the first reduction occurring no later than the first day of the fourth year in which relief will be provided.¹⁹¹

In addition to the authority to enter into trade agreements, the President is empowered by the Trade Act of 1974 to proclaim by executive order four types of unilateral, import-manipulative devices: relief from injury caused by import competition ¹⁹²; relief from unfair trade practices ¹⁹³; temporary relief from balance-of-payments disequilibria ¹⁹⁴; and duty-free preferences.¹⁹⁵

¹⁸⁰ s. 203 (a) (4).

¹⁸¹ s. 202 (a) (1) (A). See also sec. 202 (c) (1)—(a) (factors to consider pertaining to "national economic interest").

¹⁸² s. 203 (b) (2).

¹⁸³ s. 203 (c). In which case the action recommended by the ITC shall take effect, *ibid.*

¹⁸⁴ s. 203 (e) (2). Cf. also s. 203 (a) (4) and (5).

¹⁸⁵ s. 203 (e) (1) & (e) (3).

¹⁸⁶ See s. 201 (b) (1) (emphasis added).

¹⁸⁷ s. 203 (d) (2).

¹⁸⁸ s. 203 (g) (2).

¹⁸⁹ s. 203 (h) (1) (five years from taking effect).

¹⁹⁰ s. 203 (h) (3) (one 3-year period).

¹⁹² s. 203 (a) (1)—(a) (3) & (a) (5).

¹⁹⁴ s. 122.

¹⁹¹ s. 203 (h) (2).

¹⁹³ s. 301 (a).

¹⁹⁵ s. 501.

The first of these, relief from injury caused by import competition, is basically the same authority allowing the President to conduct the last type of trade agreements examined earlier.¹⁹⁶ The authority commences with an affirmative finding by the ITC "that increased imports have been a substantial cause of serious injury or threat thereof with respect to an industry. . . ." ¹⁹⁷ Thereupon, the President may ¹⁹⁸ provide four types of relief (excluding the trade agreements discussed earlier): (a) increase or imposition of a duty ¹⁹⁹; (b) imposition of a tariff-rate quota ²⁰⁰; (c) modification or imposition of a quantitative restriction ²⁰¹; or "any combination of such actions," including and in conjunction with a trade agreement.²⁰² The President, if he intends to proclaim such relief, must act promptly.²⁰³ All the provisions already enumerated with respect to section 203 (a) (4) trade agreements apply to the other forms of relief also.²⁰⁴

The President is also empowered to take affirmative action to provide relief from unfair trade practices,²⁰⁵ defined as (a) tariff or other import restrictions ²⁰⁶; (b) discriminatory or otherwise unjustifiable or unreasonable acts or policies ²⁰⁷; (c) subsidies ²⁰⁸; or (d) unjustifiable or unreasonable restrictions on access to critical supplies.²⁰⁹ In making his determination, the President is instructed to assess the relationship of his action to the purposes of the Act,²¹⁰ namely, to remove impediments which burden or restrict United States commerce, with respect to tariff/import restrictions,²¹¹ discriminatory acts/policies,²¹² and restrictions on access to critical supplies.²¹³ With respect to subsidies, he is enjoined to consider also (i) whether the Secretary of the Treasury has found that subsidies are being provided ²¹⁴; (ii) whether the ITC has found a substantial effect on competitive U.S. product(s) ²¹⁵; and (iii) whether " . . . the Antidumping Act 1921, and section 303 of the Tariff Act of 1930 are inadequate to deter such prac-

¹⁹⁶ See text *supra*, related to nn. 94-118.

¹⁹⁷ s. 202 (a). For definitions of the various elements of this multifaceted test, see s. 201 (b) (1)-(b) (6).

¹⁹⁸ The permissive nature of this authority is explained at n. 24, *supra*. A more complete treatment of the entire "presidential determination" process is contained in nn. 104-110, *supra*, and the corresponding text.

¹⁹⁹ s. 203 (a) (1).

²⁰⁰ s. 203 (a) (2).

²⁰¹ s. 203 (a) (3).

²⁰² s. 203 (a) (5).

²⁰³ s. 203 (e) (1) ("within 15 days after the import relief determination date").

²⁰⁴ Except, of course, those specifically reserved. See *supra*, text related to nn. 94-118.

²⁰⁵ s. 301.

²⁰⁶ s. 301 (a) (1).

²⁰⁷ s. 301 (a) (2).

²⁰⁸ s. 301 (a) (3).

²⁰⁹ s. 301 (a) (4).

²¹⁰ s. 301 (b).

²¹² s. 301 (a) (2).

²¹⁴ s. 301 (c) (1).

²¹¹ s. 301 (a) (1).

²¹³ s. 301 (a) (4).

²¹⁵ s. 301 (c) (2).

ties.”²¹⁶ Before taking action, the President is required to “provide an opportunity for the presentation of views”²¹⁷ and provide for public hearings at the request of *any* interested person,²¹⁸ unless “expeditious action” in line with “national interest” require otherwise,²¹⁹ in which case the presentation of views and hearings may be postponed until after action is taken.²²⁰ Having made the above determinations and having provided for (or legitimately postponed) the presentation of views and hearings, the President may negate the application or benefits of trade agreements²²¹; impose duties, fees or other restrictions²²²; and “take all appropriate and feasible steps . . . to obtain the elimination of such restrictions or subsidies. . . .”²²³

Under “balance-of-payments authority”²²⁴ the President is authorised²²⁵ to proclaim temporary²²⁶ import surcharges²²⁷ or quota limitations,²²⁸ or both,²²⁹ “[w]henever fundamental international payments problems require special import measures”²³⁰ to correct U.S. balance-of-payments deficits,²³¹ U.S. dollar depreciations,²³² or international balance-of-payments disequilibria.²³³ The President is also authorised to act to prevent “fundamental international payments problems” favourable to the United States.²³⁴ However, he may correct only U.S. balance-of-trade surpluses²³⁵ or U.S. dollar appreciations²³⁶ and then only by proclaiming temporary²³⁷ reductions in the relevant rate of duty,²³⁸ in conjunction with quota increases.²³⁹ The

²¹⁶ s. 301 (c) (3).

²¹⁷ s. 301 (d) (1).

²¹⁸ s. 301 (e) (2) (emphasis added).

²¹⁹ s. 301 (e).

²²⁰ *Ibid.*

²²¹ s. 301 (a) (A).

²²² s. 301 (a) (B).

²²³ s. 301 (a).

²²⁴ s. 122.

²²⁵ It is interesting to note that the language of s. 122 (a) (balance-of-payments deficits and dollar depreciation) is mandatory (“ . . . the President *shall* proclaim . . .) but the standard “contrary to the national interest” (not even “national economic interest”—this may be significant) exception is available, s. 122 (b), *i.e.* it is really permissive. But the language of s. 122 (c) (balance-of-payments surpluses and dollar appreciation) is permissive (“ . . . the President is authorised to proclaim . . .”) while the “national interest”—and a few other—exceptions are mandatory, s. 122 (c).

²²⁶ “[N]ot exceeding 150 days (unless such period is extended by Act of Congress) . . .,” s. 122 (a), and substantially the same, “ . . . for a period of 150 days (unless such period is extended by Act of Congress) . . .,” s. 122 (c).

²²⁷ s. 122 (a) (A).

²²⁸ s. 122 (a) (B).

²²⁹ s. 122 (a).

²³⁰ s. 122 (a) (2).

²³¹ s. 122 (c).

²³² s. 122 (c) (2).

²³³ s. 122 (c) (A). It is interesting to note that the level of relief—via import surcharge—available to cure unfavourable (to the U.S.) world market fluctuations is up to and including 15 per cent. *ad valorem*, s. 122 (a) (A), while the level of relief—via duty reduction—available to cure favourable (to the U.S.) world market fluctuations is only up to and including 5 per cent. *ad valorem*.

²³⁴ s. 122 (c) (B).

²²⁹ s. 122 (a) (C).

²³¹ s. 122 (a) (1).

²³³ s. 122 (a) (3).

²³⁵ s. 122 (c) (1).

²³⁷ See *supra*, n. 140.

Act allows the President to "suspend, modify, or terminate, in whole or in part, any proclamation under this section . . ." at any time.²⁴⁰

Finally, the President is authorised to provide, for a period not exceeding ten years,²⁴¹ duty-free treatment²⁴² to certain classes of articles²⁴³ from certain classes of countries, designated "beneficiary developing countries."²⁴⁴ Subsequently, the President may withdraw, suspend, or modify such preferential treatment,²⁴⁵ but, by so doing, cannot establish a rate of duty ". . . other than the rate which would apply . . ." under ordinary circumstances.²⁴⁶ The President is required to withdraw or suspend the "beneficiary developing country" designation²⁴⁷ upon the occurrence of specified changed circumstances,²⁴⁸ with certain exceptions.²⁴⁹

In taking any form of action under the Act, the President is authorised to: (a) terminate, in whole or in part at any time, any proclamation made under the Act²⁵⁰; (b) withdraw, suspend, or modify trade agreements and increase duties in retaliation for a unilateral withdrawal, suspension, or modification of trade agreement obligations by a foreign country or instrumentality, without granting adequate compensation²⁵¹; (c) recommend to Congress termination or denial of trade agreement benefits to any "major industrial country" which has failed to reciprocate with substantially equivalent concessions²⁵²; and (d) to reserve from negotiations articles critical to national security²⁵³ and certain other articles.²⁵⁴

The President is also responsible for appointing the Special Representative for Trade Negotiations²⁵⁵ and his two Deputies,²⁵⁶ as well as the Commissioners of the ITC.²⁵⁷ The Act requires the Chief Executive to establish an Advisory Committee for Trade Negotiations.²⁵⁸ In addition, he may, if necessary, establish general industry, labour, and agriculture policy advisory committees²⁵⁹ and sector advisory committees.²⁶⁰

²⁴⁰ Both during the initial 150-day period and during subsequent extension periods, if applicable. s. 122 (g).

²⁴¹ s. 505 (a).

²⁴² s. 501.

²⁴³ s. 503.

²⁴⁴ s. 502.

²⁴⁵ s. 504 (a).

²⁴⁶ *Ibid.*: i.e. cannot use this title for unauthorised duty manipulations.

²⁴⁷ s. 504 (b).

²⁴⁸ s. 504 (c) (1) (A) & (c) (1) (B).

²⁴⁹ s. 504 (c) (1) (i)-(c) (1) (iii), (d) & (e).

²⁵⁰ s. 125 (b).

²⁵¹ s. 125 (c) and (d).

²⁵² s. 126.

²⁵³ s. 126 (a).

²⁵⁴ s. 126 (b).

²⁵⁵ s. 141 (b) (1).

²⁵⁷ s. 172 (a).

²⁵⁹ s. 135 (c) (1).

²⁵⁶ s. 141 (b) (2).

²⁵⁸ s. 135 (b) (1).

²⁶⁰ s. 135 (c) (2).

The Special Representative for Trade Negotiations

The Special Representative for Trade Negotiations heads the Office of the Special Representative for Trade Negotiations²⁶¹ within the Executive Office of the President.²⁶² His primary function is that of chief representative²⁶³ of the U.S. for trade negotiations under Title I (sections 101, 102, 121) and section 301 of the Trade Act of 1974.²⁶⁴ He is also responsible for advising the President and Congress with respect to matters related to the trade agreements programmes²⁶⁵ and for chairing the Advisory Committee for Trade Negotiations.²⁶⁶ The Deputy Special Representatives for Trade Negotiations, of whom there are two,²⁶⁷ function primarily in conducting trade negotiations²⁶⁸ under the Act and assisting the Special Representative.²⁶⁹ One Deputy Special Representative is responsible for chairing the Adjustment Assistance Co-ordinating Committee.²⁷⁰

The Special Representative may initiate, on his own authority, section 201 (import competition)²⁷¹ and section 406 (market disruption by a Communist country)²⁷² investigations by the ITC. He is also responsible for conducting the reviews and public hearings concerning unfair trade practices²⁷³ and (in concert with the Secretary of Commerce, Agriculture, or Labour and after consultation with the Advisory Committee for Trade Negotiations) for identifying "appropriate product sectors of manufacturing" to be considered in achieving the "sector negotiating objective" of section 101 and 102 trade agreements.²⁷⁴ Being under the direct control of the President, the Special Negotiator is, of course, "responsible for such other functions as the President may direct."²⁷⁵

The United States International Trade Commission

The ITC is the United States Tariff Commission renamed.²⁷⁶ The six commissioners are the President's appointees,²⁷⁷ and they serve, at his discretion, for nine-year terms. Their voting record is a matter of public record,²⁷⁸ and they may be represented in judicial proceedings by

²⁶¹ s. 141 (b) (1).

²⁶² s. 141 (a).

²⁶³ For which purpose he holds the rank of Ambassador Extraordinary and Plenipotentiary, s. 141 (b) (1).

²⁶⁴ s. 141 (c) (1) (A).

²⁶⁵ s. 141 (c) (1) (C).

²⁶⁶ s. 135 (b) (2).

²⁶⁷ s. 141 (b) (2).

²⁶⁸ For which purpose they hold the rank of Ambassador, *ibid.*

²⁶⁹ s. 141 (c) (2).

²⁷⁰ s. 281.

²⁷¹ s. 201 (b) (1).

²⁷² 406 (a) (1).

²⁷³ s. 104 (c).

²⁷⁴ s. 171 (a).

²⁷⁵ s. 173.

²⁷³ s. 301 (d) (2).

²⁷⁵ s. 141 (c) (1) (F).

²⁷⁷ s. 172 (a).

their own staff attorneys or by the Attorney-General of the United States.²⁷⁹ Like the Special Representative,²⁸⁰ they perform both in advisory and affirmative capacities; however, while the Special Representative's primary affirmative capacity is negotiational, the ITC performs essentially investigative and decisional (adjudicatory) functions. In its advisory capacity, the ITC is responsible for conducting various types of investigation,²⁸¹ as well as for holding public hearings²⁸² and advising the President as to the probable economic impact on domestic industries²⁸³ and consumers²⁸⁴ of any proposed section 101, 123 or 124²⁸⁵ or 102 trade agreements.²⁸⁶ The ITC also advises the President on the probable domestic economic impact of extensions of duty-free preferences with respect to certain articles from specified beneficiary countries,²⁸⁷ and may, if requested to do so, advise the President on the extension, reduction, or termination of section 203 import relief.²⁸⁸

Besides rendering purely advisory recommendations, the ITC is directed by the 1974 Act to conduct certain types of investigations and render more binding recommendations, including an independent affirmative action, pursuant to Titles II,²⁸⁹ III,²⁹⁰ and IV²⁹¹ of the Act. Under Title II, the ITC is required to conduct an investigation²⁹² and make a determination "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."²⁹³ It must, in turn, report to the President its findings, the basis therefor, and its recommendations, including dissenting or separate views.²⁹⁴ A similar provision pertains to market disruption by a Communist country.²⁹⁵ While the President is empowered to disregard an affirmative finding by the ITC of injury caused by import competition,²⁹⁶ he cannot provide such relief unless he receives such

²⁷⁹ s. 174.

²⁸⁰ See, *supra*, text related to nn. 188-202.

²⁸¹ s. 131 (e).

²⁸² Including labour, agriculture, mining, fishing, and manufacturing, s. 131 (b).

²⁸³ *Ibid.*

²⁸⁴ *Ibid.*

²⁸⁵ s. 503 (a).

²⁸⁵ s. 131 (c).

²⁸⁷ s. 203 (i) (2).

²⁸⁸ Under s. 337 of the Tariff Act of 1930, as amended by s. 341 (a) of the Trade Act of 1974, the ITC is empowered to investigate alleged unfair import practices and, upon finding a violation, exclude the offending articles from entry, permit entry only upon the posting of a bond, or issue cease and desist orders to enjoin further violations. The President may, apparently for any reason, disapprove the Commission's action in which case it shall have no force.

²⁸⁹ s. 201.

²⁹⁰ ss. 321 (a), 331 (a) and 341 (a).

²⁹¹ s. 405 (a) (1).

²⁹² Based on certain specified criteria: see s. 201 (b) (2)-(b) (6) and (c).

²⁹³ s. 201 (b) (1).

²⁹⁴ s. 201 (d) (1).

²⁹⁵ See s. 406 (a) (1).

²⁹⁶ See, *supra*, text related to nn. 94-102 and 117.

an affirmative determination by the ITC.²⁹⁷ Moreover, the commencement of an investigation by the ITC under section 201 invokes action on the part of the Secretary of Labour with respect to adjustment assistance.²⁹⁸

Pursuant to authority granted under Title III of the Act,²⁹⁹ the ITC is required to investigate allegations of unfair trade practices with respect to the levying of anti-dumping duties,³⁰⁰ countervailing duties,³⁰¹ and unfair import competition³⁰² and to make determinations thereon. The implementation of action based on an affirmative finding by the ITC, however, is reserved to others—except with respect to unfair import competition.³⁰³

The ITC is also responsible for providing Congress annually with factual information on the operation of the trade agreements programme³⁰⁴; establishing, maintaining, and publishing annually a summary of the data collected under the East-West Trade Statistics Monitoring System³⁰⁵; and—in concert with the Secretaries of Commerce and the Treasury—collect and publish uniform statistical data on imports, exports, and production.³⁰⁶

The Cabinet

The various Cabinet members are authorised under the provisions of the Act to render advisory assistance on trade-related matters.³⁰⁷ But the more important functions are those performed by the Secretaries of Commerce and Labour under Title II of the Act, and by the Secretary of the Treasury under Title III and V of the Act.³⁰⁸

To the Secretary of Labour is delegated the primary responsibility in overseeing and implementing adjustment assistance for workers.³⁰⁹ He is responsible for receiving petitions for adjustment assistance,³¹⁰ publishing notice of their receipt,³¹¹ conducting public hearings thereon,³¹² conducting investigations of the allegations therein,³¹³

²⁹⁷ See s. 202 (a).

²⁹⁸ As it amends ss. 303 and 337 of the Tariff Act of 1930, ss. 331 (a) and 341 (a), respectively, and s. 201 of the Anti-dumping Act, 1921.

³⁰⁰ s. 321 (a).

³⁰¹ s. 331 (a).

³⁰² s. 341 (a).

³⁰³ See, *supra*, text related to n. 193.

³⁰⁴ s. 163 (b).

³⁰⁵ s. 410.

³⁰⁶ s. 608 (amending and expanding on the authority granted under ss. 484 (e) and 332 (g) of the Tariff Act of 1930).

³⁰⁷ See, e.g., ss. 132 and 431 (a).

³⁰⁸ Because the implementation of the various forms of Adjustment Assistance is critically examined elsewhere, this portion of the Trade Act of 1974 will only be cursorily described here.

³⁰⁹ Ch. of Title II. See generally ss. 221–250.

³¹¹ *Ibid.*

³¹³ ss. 221 (a), 224.

³¹⁰ s. 221 (a).

³¹² s. 221 (b).

making the determination of whether or not adjustment assistance is warranted,³¹⁴ and, if it is warranted, certifying the group of workers who are eligible to apply for such assistance.³¹⁵ He is also responsible for the general administration of the Adjustment Assistance for Workers Programme.³¹⁶

Likewise, the Secretary of Commerce is primarily responsible for the implementation of the Adjustment Assistance for Firms Programme,³¹⁷ and, on consultation with the Secretary of Labour,³¹⁸ for the implementation of the Adjustment Assistance for Communities Programme.³¹⁹

Pursuant to authority granted him by Title III of the Trade Act of 1974³²⁰ the Secretary of the Treasury is empowered to investigate, determine the necessity of, assess and collect anti-dumping³²¹ and countervailing duties.³²² He is also responsible for prescribing regulations necessary to designate articles eligible for Title V duty-free preferences.³²³

Advisory and Co-ordinating Agencies

The Advisory Committee for Trade Negotiations³²⁴ is responsible for providing the President with overall policy advice on sections 101 or 102 trade agreements.³²⁵ The President may choose to establish two additional private-sector advisory committees, as necessary.³²⁶ The Adjustment Assistance Co-ordinating Committee is responsible for the overall co-ordination of the policies, studies, and effective and efficient implementation of the Adjustment Assistance programmes.³²⁷ The East-West Foreign Trade Board is responsible for monitoring "trade between persons and agencies of the United States Government and non-market economy countries or instrumentalities of such countries to insure that such trade will be in the national interest of the United States."³²⁸

³¹⁴ s. 223.

³¹⁵ s. 222.

³¹⁶ See generally ss. 221-250.

³¹⁷ Ch. 3 of Title II. See generally, ss. 251-264.

³¹⁸ s. 271 (e).

³¹⁹ Ch. 4 of Title II. See generally ss. 271-274.

³²⁰ As it amends s. 201 of the Antidumping Act, 1921, and s. 303 of the Tariff Act of 1930.

³²¹ s. 321 (a).

³²² s. 331 (a).

³²³ s. 503 (b) (1).

³²⁴ Established by the President, s. 135 (b) (1), and comprising not more than 45 representatives of government, labour, industry, agriculture, small business, service industries, retailers, consumers, and the general public: *ibid.*

³²⁵ s. 135 (b) (1).

³²⁶ s. 135 (c) (1) and (c) (2).

³²⁷ s. 281.

³²⁸ s. 411 (a).

The Congress

The United States Congress reserved for itself the "right of final approval" with respect to most, but not all,³²⁹ of the activities authorised by the 1974 Act. Section 101 ostensibly grants the "basic authority for trade agreements."³³⁰ Immediately section 102 speaks in broad general terms of "any barriers to (or other distortions of) international trade," but is, oddly enough, entitled "non-tariff barriers to and other distortions of trade," and it, apparently, also provides authority for entry "into trade agreements. . . ."³³¹ Subsequent provisions of the Act refer to both section 101 and 102 trade agreements as if they were discrete entities.³³² Certain negotiational objectives apply to both kinds of agreements,³³³ but others to only one kind.³³⁴

It would appear that three conclusions may be drawn from this substantive gap: (i) that Congress intended that presidential authority under section 101 should be absolute and that trade agreements entered into thereunder needed no implementation; (ii) that Congress intended that an isolated clause in section 121 would suffice to extend its "right of final approval" to section 101 trade agreements; and (iii) that Congress intended section 101 and section 121 agreements to be one and the same. None of the above alternatives makes complete sense; however, it is assumed that a hybrid of the first conclusion pertains: that where section 101 trade agreements are used to effect outcomes provided for under other sections of the Act,³³⁵ the Congressional "right of final approval" pertaining to that section will also govern trade agreements so negotiated, but where a section 101 trade agreement is concluded with respect to a general "basic authority" to remove burdensome and restrictive duties (and other restrictions), if this is possible, no Congressional approval authority exists.

Congress has the authority to approve certain categories of presidential actions, and without such approval they will not take effect. These are (a) section 121 GATT revision trade agreements³³⁶; (b) extensions—beyond the initial 18-month period³³⁷—of extensive waiver authority

³²⁹ See e.g. s. 122 (balance-of-payments authority).

³³⁰ s. 101. Whether this means "all" trade agreements or only some is never explicated. However, the first sentence of subsection (a) refers to "duties or other [presumably similar] import restrictions." In any event, the section grants a 5-year (later expanded by a 2-year residual period: s. 124) authorisation to enter into trade agreements and manipulate duties in order to carry them out.

³³¹ s. 102 (b).

³³² See e.g. s. 104 (d): "If the President determines that competitive opportunities . . . will be significantly affected by a trade agreement concluded under section 101 or 102, he shall . . ." (emphasis added).

³³³ See e.g. s. 106.

³³⁴ See e.g. s. 107.

³³⁵ For example, the President is granted authority under s. 203 (a) (4) to negotiate trade agreements. He is also authorised to do so pursuant to s. 121.

³³⁶ s. 121 (c).

³³⁷ s. 122 (a).

concerning MFN agreements with non-market economy countries³³⁸; (c) section 102 agreements³³⁹; and (d) section 405 MFN commercial agreements.³⁴⁰

Conversely, Congress has the authority to disapprove: (a) import relief action taken by the President under section 203 (a)³⁴¹; (b) action taken by the President under section 301, but only when the action is against "any country . . . other than the country . . . whose restriction, act, policy, or practice was the cause for taking such action . . ."³⁴²; (c) assessment of countervailing duties³⁴³; (d) extensions of executive waiver authority concerning MFN agreements with non-market economy countries³⁴⁴ and (e) section 402 (b) and 409 (b) MFN commercial agreements.³⁴⁵

Congress may also, on the recommendation of the President, terminate or deny the benefits of trade agreements³⁴⁶ and declare section 102 trade agreements implementing legislation³⁴⁷ void for lack of reciprocal concessions by a "major industrial country."³⁴⁸ Congress is empowered to select from among its membership³⁴⁹ ten delegates to serve as official advisors to the U.S. delegation at trade agreement negotiations.³⁵⁰ Congress also confirms the Special Representative for Trade Negotiations,³⁵¹ his two Deputies,³⁵² and the six ITC Commissioners.³⁵³

IV. THE PLAN FOR THE INTEGRATED MANAGEMENT

At a time when the Tokyo Round is in its initial stages, the negotiating authority outlined in Title I is only a projection of future trends and developments. There is considerable promise, borne out by the terms of the Tokyo Declaration, that this projection will become a reality, and the GATT will emerge as an international organisation, with its own institutions and techniques of action. It will be able to initiate action to move towards further trade liberalisation, and what is even more important, will be equipped to handle disputes resulting from conflicts of interests and differences of national policy.

³³⁸ s. 402 (d) (1)-(3). See discussion at nn. 173-181, *supra*, and corresponding text. Most provisions are either "approvable" or "disapprovable." In this instance Congress chose to retain both rights of approval and disapproval: s. 402 (d) (4).

³³⁹ s. 102 (d) and (e) (3).

³⁴⁰ ss. 405 (c) and 407 (c) (1).

³⁴¹ s. 203 (c) (1).

³⁴² s. 302.

³⁴³ s. 331 (a).

³⁴⁴ s. 402 (d) (4).

³⁴⁵ s. 407 (c) (3).

³⁴⁶ s. 126 (c) (1).

³⁴⁷ s. 126 (c) (2).

³⁴⁸ Defined in s. 126 (d).

³⁴⁹ Five from the House Committee on Ways and Means and five from the Senate Committee on Finance: s. 161 (a).

³⁵⁰ *Ibid.*

³⁵² s. 141 (b) (2).

³⁵¹ s. 141 (b) (1).

³⁵³ s. 172 (a).

Should this happen, international trade regulation will rest importantly in the international domain in the same manner as international civil aviation, international postal or telecommunications services are in the international domain, on the strength of international conventions and agreements which have established international organisations to take charge of intergovernment co-operation in these areas.

It must be realised that, ever since 1934, when Congress vested the Administration with an authorisation to negotiate trade agreements, the role of tariff legislation has changed materially. From then on tariffs were at least partly dependent upon the outcome of negotiations, and in this area of governmental activity the reins of power were in the hands of the President and his Administration.

Creation of the GATT in 1947 changed the situation materially. Although ignored by Congress, it developed its own legal system and regime of international trade which served its members well until, owing to changes in the international community, simple methods of informal negotiation proved inadequate in the highly complicated situations of modern economic co-operation. Should GATT develop as projected in the 1974 Act and in the Tokyo Declaration, it may regain the ability to handle conflicts resulting from international trade or initiate further progress towards trade liberalisation. It will also contribute significantly towards the solution of international problems connected with the uneven distribution of wealth, uneven economic and political development, and disparities in standards of living among nations.