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## Section 201 of the Trade Act of 1974: The Reagan Record

Alan F. Holmer\*  
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*Section 201 of the Trade Act of 1974 allows a U.S. industry to obtain relief from fairly traded imports that seriously injure a U.S. industry. A domestic industry's right to relief from imports is not certain, however. The President has discretion to grant or deny any relief sought. The authors of this article, the Deputy U.S. Trade Representative and General Counsel to the U.S. Trade Representative, discuss cases in which the ITC recommended import relief for U.S. industry, but the President denied relief. They argue that the Administration granted substantial relief in most cases in which the International Trade Commission found injury, and properly denied relief for economically justifiable reasons in two cases. The authors also argue that Executive discretion to deny import relief to domestic industry is a necessary part of U.S. trade policy and should not be removed from section 201, as several early versions of the Omnibus Trade Bill proposed.*

Section 201 of the Trade Act of 1974, as amended (1974 Act),<sup>1</sup> is a central element of U.S. import relief laws. While the President has been criticized for "blue pencil[ing] Section 201 of the Trade Act out of the statute books,"<sup>2</sup> we believe such charges are ungrounded. Inasmuch as amendments to section 201 have been central to congressional consideration of trade legislation, we consider it timely to review the record of the Reagan Administration in implementing section 201. We will also analyze various legislative proposals to amend this statute.

### I. Background of Section 201

In the past half-century, the United States has negotiated a variety of trade agreements that reduced tariffs and increased discipline

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<sup>1</sup> 19 U.S.C. §§ 2251-2253 (1982 & Supp. III 1985).

<sup>2</sup> Following the President's September 1985 decision involving nonrubber footwear, see *infra* note 29, Senator John C. Danforth wrote:

The clear message from the White House is that if the shoe industry does not qualify for relief, no industry will qualify. If 78 percent import penetration in shoes is no basis for remedy, then textiles and apparel, with less than 25 percent import penetration, cannot hope to qualify. In effect, the President has blue-penciled Section 201 of the Trade Act out of the statute books.

Danforth, *A Rip in the Trade Laws*, Wash. Post, Oct. 23, 1985, at A23, col. 1.

over other barriers to trade. At the insistence of U.S. negotiators, the General Agreement on Tariffs and Trade (GATT)<sup>3</sup> contains an "escape clause"<sup>4</sup> provision which permits GATT member countries in special circumstances to raise duties or restrict imports even when they would otherwise be obligated not to do so.

The escape clause is found in section 201 of the 1974 Act.<sup>5</sup> The Senate Finance Committee's report accompanying the 1974 Act describes the reasoning behind this provision:

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.<sup>6</sup>

The period of relief provided under section 201 gives "additional time to permit a seriously injured domestic industry to adjust and to become competitive again under relief measures and, at the same time, to create incentives for the industry to adjust, if possible, to competitive conditions in the absence of long-term import restrictions."<sup>7</sup>

Unlike most other U.S. trade statutes,<sup>8</sup> section 201 focuses

<sup>3</sup> General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. 5, 6, T.I.A.S. No. 1700, 27 U.N.T.S. 19 [hereinafter GATT].

<sup>4</sup> If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, 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.

*Id.* Art. XIX(1)(a), 61 Stat. at A58-A59.

<sup>5</sup> Actually, the escape clause is found in sections 201-203 of the Trade Act of 1974, as amended. However, it is normally referred to as, and will be referred to in this article as, "section 201." See 19 U.S.C. §§ 2251-2253.

<sup>6</sup> S. REP. NO. 1298, 93d Cong., 2d Sess. 119 (1974).

<sup>7</sup> H.R. REP. NO. 571, 93d Cong., 1st Sess. 44 (1973).

<sup>8</sup> Most U.S. trade laws cover trade practices considered unfair as well as injurious. See, e.g., the countervailing duty (CVD) and antidumping laws. The CVD law is composed of two sections. Congress replaced earlier CVD provisions with § 303 of the Tariff Act of 1930, ch. 497, 46 Stat. 590, 687, amended by the Trade Act of 1974, Pub. L. No. 93-618, § 331, 88 Stat. 1978, 2049-52 (1975), and the Trade Agreements Act of 1979, Pub. L. No. 96-39, §§ 101-107, 93 Stat. 144, 150 (codified at 19 U.S.C. § 1303 (1982 & Supp. III 1985)). More recently, Congress enacted the Trade Agreements Act of 1979, which added title VII to the Tariff Act of 1930 and also includes the antidumping law. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144 (codified at 19 U.S.C. §§ 1671-1677g (1982 & Supp. III 1985)).

*But cf.* § 406 of the 1974 Act, 19 U.S.C. § 2436 (1982), which authorizes the President to provide relief if he determines that imports of a product of a Communist country are

solely on injury to a U.S. industry caused by all imports, regardless of whether they are fairly or unfairly traded.<sup>9</sup> Also, unlike most other statutes, escape clause relief is not “free.”<sup>10</sup> When import relief impairs a tariff concession, section 201 obligates the United States to compensate trading partners whose trade is damaged. If the United States does not compensate its trading partners, the escape clause entitles them to retaliate against U.S. exports. Often U.S. exporters represent the nation’s most competitive industries. The combination of import relief-retaliation can thus result in a competitive benefit to a weak, contracting industry at the expense of the stronger exporting industries.<sup>11</sup>

Any section 201 case consists of two phases. In the first phase, the International Trade Commission (Commission) must determine “whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.”<sup>12</sup>

If the Commission finds serious injury or even threat of serious injury, it recommends the amount and nature of import relief necessary to prevent or remedy the injury.<sup>13</sup> The Commission must make both the injury finding and relief recommendation to the President within six months of the filing of the petition.

The President then has sixty days to determine whether to provide import relief and, if so, the method and amount. In making this determination, the President retains broad discretion<sup>14</sup> and is re-

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causing market disruption in the United States. Like section 201, section 406 focuses exclusively on injury (whether certain rapidly increasing imports are a significant cause or threat of material injury).

<sup>9</sup> However, if during the course of its investigation, the Commission finds that increased imports are attributable in part to dumping, subsidies, or other unfair trade practices, it is required promptly to notify the appropriate agency so that action may be taken under the relevant unfair trade statute. 19 U.S.C. § 2251(b)(6) (1982 & Supp. III 1985).

<sup>10</sup> The Senate Finance Committee Report accompanying the 1974 Act states that:

This provision is designed to assure that the United States will not needlessly invoke the escape clause (article XIX of the GATT) and will not become involved in granting compensatory concessions or inviting retaliation in situations where the appropriate remedy may be action under one or more U.S. laws against unfair competition for which no compensation or retaliation is in order.

S. REP. NO. 1298, *supra* note 6, at 123.

<sup>11</sup> The prospect of compensation or retaliation is a significant factor in the President’s decision-making process under section 202. See *infra* notes 103-05, 121-36, 149-58, 169-70, 178-80, 189-94 and accompanying text.

<sup>12</sup> Trade Act of 1974, § 201(b)(1), 19 U.S.C. § 2251(b)(1) (1982 & Supp. III 1985).

Prior to the 1974 Act, escape clause relief under U.S. domestic law required a causal link between increased imports and trade agreement concessions. S. REP. NO. 1298, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7186, 7263-64.

<sup>13</sup> 19 U.S.C. § 2251(d)(1) (1982 & Supp. III 1985).

<sup>14</sup> 19 U.S.C. § 2252(c) (1982) requires the President to take into account:

(1) information and advice from the Secretary of Labor on the extent to which workers in the industry have applied for, are receiving, or are likely to

quired to consider a wide range of factors relevant to the national economic interest.<sup>15</sup>

Section 203(c)(1) of the 1974 Act<sup>16</sup> provided for a two-house legislative veto of the President's determination on import relief when it differed from the Commission's recommendation. Section 203(c)(1) authorized Congress to override the President's denial of import relief or to disapprove the type or amount of relief selected by the President by passing a concurrent resolution by the House of Representatives and the Senate. Passage of a congressional resolution required the President to put into effect the relief which the Commission had recommended.<sup>17</sup>

In *Immigration & Naturalization Service v. Chadha*,<sup>18</sup> however, the Supreme Court held that the legislative veto was unconstitutional.

receive adjustment assistance under chapter 2 or benefits from other manpower programs;

(2) information and advice from the Secretary of Commerce on the extent to which firms in the industry have applied for, are receiving, or are likely to receive adjustment assistance under chapters 3 and 4;

(3) the probable effectiveness of import relief as a means to promote adjustment, the efforts being made or to be implemented by the industry concerned to adjust to import competition, and other considerations relative to the position of the industry in the nation's economy;

(4) the effect of import relief on consumers (including the price and availability of the imported article and the like or directly competitive articles produced in the United States) and on competition in the domestic markets for such articles;

(5) the effect of import relief on the international economic interests of the United States;

(6) the impact on the United States industries and firms as a consequence of any possible modification of duties or other import restrictions which may result from international obligations with respect to compensation;

(7) the geographic concentration of imported products marketed in the United States;

(8) the extent to which the United States market is the focal point for exports of such article by reason of restraints on exports of such article to, or on imports of such article into, third country markets; and

(9) the economic and social costs which would be incurred by taxpayers, communities, and workers, if import relief were or were not provided.

<sup>15</sup> While the scheme of sections 201-203 gives the President great discretion, the original Senate Finance Committee version of the 1974 Act would have required the President to provide import relief or adjustment assistance if recommended by the Commission. The Committee's report stated:

This section would require the President to implement import relief or, if the Commission finds that adjustment assistance offers a viable alternative to import relief, to direct that expeditious consideration be given petitions for adjustment assistance. That relief ought not to be denied for reasons that have nothing whatever to do with the merits of the case as determined under U.S. law. In particular, the Committee feels that no U.S. industry which has suffered serious injury should be cut off from relief for foreign policy reasons.

S. REP. No. 1298, *supra* note 6, at 24. There is a substantial similarity in the concept approved by the Senate Finance Committee in 1974 and that considered by the committee in 1986, as will be discussed *infra*.

<sup>16</sup> As amended by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, 2998 (codified as amended at 19 U.S.C. § 2253 (c)(1) (Supp. III 1985)).

<sup>17</sup> *Id.*

<sup>18</sup> 462 U.S. 919 (1983).

In *Chadha*, the veto could not be used to allow the House or the Senate to override a decision by the executive branch to allow a deportable alien to remain in the United States.<sup>19</sup> The Court determined that a valid law must be passed by the House and Senate (bicameralism) and then presented to and approved by the President (presentment).<sup>20</sup> While the legislative veto provided for in section 203(c)(1) did not violate the bicameralism requirement, the Court decided it was inconsistent with presentment requirements. Therefore, the procedure for Congress to override the President's escape clause decisions was invalid. Since the legislative veto provisions in section 203(c)(1) were considered severable from the remainder of Title II, the lack of a valid legal basis for a congressional override did not invalidate the escape clause itself.

Recognizing the impact of *Chadha*,<sup>21</sup> Congress amended section 203 in the Trade and Tariff Act of 1984. The amended section 203 provides for a congressional veto of the President's decision to provide no relief, or relief different from that recommended by the Commission, through the enactment by the House and Senate of a joint resolution within ninety days.<sup>22</sup>

## II. Section 201 Injury Determinations: 1981-1986

Since President Reagan took office, the Commission has made decisions regarding sixteen section 201 cases. The Commission found no injury in ten of those cases.<sup>23</sup> Of the remaining six cases where the Commission found injury and recommended import relief, the President granted such relief or alternative relief in four:

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<sup>19</sup> That particular legislative veto was contained in § 244(c)(2) of the Immigration and Naturalization Act, 8 U.S.C. § 1254(c)(2) (1982).

<sup>20</sup> 462 U.S. at 951.

<sup>21</sup> *Chadha* struck "down in one fell swoop provisions in more laws enacted by Congress than the [Supreme] Court has cumulatively invalidated in its history." 462 U.S. 919, 1002 (1983) (White, J., dissenting). The 1974 Act alone contained six legislative vetoes in addition to section 203(c)(1), 19 U.S.C. § 2253(c)(1). See also 19 U.S.C. §§ 2193, 2412(b), 1303(e)(2), 2432(d), 2435(c) (Supp. III 1985). See generally Koh, *Congressional Controls on Presidential Trade Policymaking After I.N.S. v. Chadha*, 18 N.Y.U.J. INT'L L. & POL. 1191 (1986).

<sup>22</sup> 19 U.S.C. § 2253(c) (Supp. III 1985). H.R. REP. NO. 1156, 98th Cong., 2d Sess. 142-43 (1984), explains that the purpose of the amendment was to conform current procedures to the *Chadha* ruling by substituting joint for concurrent resolutions. As a result, the President can veto any joint resolution disapproving the President's determination.

<sup>23</sup> Fishing Rods and Parts Thereof, USITC Pub. 1194, Inv. No. TA-201-45 (Nov. 1981) [hereinafter Fishing Rods]; Tubeless Tire Valves, USITC Pub. 1286, Inv. No. TA-201-46 (Sept. 1982); Stainless Steel Flatware, USITC Pub. 1536, Inv. No. TA-201-49 (June 1984); Nonrubber Footwear, USITC Pub. 1545, Inv. No. TA-201-50 (July 1984) [hereinafter Footwear III]; Certain Canned Tuna Fish, USITC Pub. 1558, Inv. No. TA-201-53 (Aug. 1984); Potassium Permanganate, USITC Pub. 1682, Inv. No. TA-201-54 (Apr. 1985); Electric Shavers and Parts Thereof, USITC 1819, Inv. No. TA-201-57 (Mar. 1986) [hereinafter Electric Shavers]; Certain Metal Castings, USITC Pub. 1849, Inv. No. TA-201-58 (June 1986); Apple Juice, USITC Pub. 1861, Inv. No. TA-201-59 (June 1986); Steel Fork Arms, USITC Pub. 1866, Inv. No. TA-201-60 (July 1986).

heavyweight motorcycles,<sup>24</sup> stainless steel and alloy tool steel,<sup>25</sup> carbon steel,<sup>26</sup> and wood shakes and shingles.<sup>27</sup> In only two of the cases where the Commission found injury did the President deny import relief: copper<sup>28</sup> and footwear.<sup>29</sup> This record is hardly that of an Administration that has blue-penciled section 201 out of the statute books.<sup>30</sup>

<sup>24</sup> Heavyweight Motorcycles and Engine and Power Train Subassemblies Therefor, USITC Pub. 1342, Inv. No. TA-201-47 (Feb. 1983); Temporary Duty Increase and Tariff-Rate Quota on the Importation into the United States of Certain Heavyweight Motorcycles, 48 Fed. Reg. 16,639 (Apr. 15, 1983).

<sup>25</sup> Stainless Steel and Alloy Tool Steel, USITC Pub. 1377, Inv. No. TA-201-48 (May 1983); Specialty Steel Import Relief Determination, 48 Fed. Reg. 31,177, 33,233 (1983).

<sup>26</sup> Carbon and Certain Alloy Steel Products, USITC Pub. 1553, Inv. No. TA-201-51 (July 1984); Steel Import Relief Determination, 49 Fed. Reg. 36,813 (1984).

<sup>27</sup> Wood Shakes and Shingles, USITC Pub. 1826, Inv. No. TA-201-56 (Mar. 1986); Memorandum of May 23, 1986, 51 Fed. Reg. 19,157 (1986).

<sup>28</sup> Unwrought Copper, USITC Pub. 1549, Inv. No. TA-201-52 (July 1984) [hereinafter Unwrought Copper]; Copper Import Relief Determination, 49 Fed. Reg. 35,609 (1984).

<sup>29</sup> Nonrubber Footwear, USITC Pub. 1717, Inv. No. TA-201-55 (July 1985) [hereinafter Footwear IV]; Memorandum of Aug. 28, 1985, 50 Fed. Reg. 35,205 (1985).

<sup>30</sup> During the Carter Administration, 33 cases were filed under section 201. In 13 of those cases, the ITC found no injury. Round Stainless Steel Wire, USITC Pub. 779, Inv. No. TA-201-13 (June 1976); Plant Hangers, USITC Pub. 797, Inv. No. TA-201-15 (Dec. 1976); Low-Carbon Ferrochromium, USITC Pub. 825, Inv. No. TA-201-20 (July 1977); Cast Iron Cooking Ware, USITC Pub. 817, Inv. No. TA-201-21 (May 1977); Fresh Cut Flowers, USITC Pub. 827, Inv. No. TA-201-22 (Aug. 1977); Certain Headware, USITC Pub. 829, Inv. No. TA-201-23 (Aug. 1977); Live Cattle and Certain Edible Meat Products of Cattle, USITC Pub. 834, Inv. No. TA-201-25 (Sept. 1977); Malleable Cast Iron Pipe and Tube Fittings, USITC Pub. 835, Inv. No. TA-201-26 (Sept. 1977); Unalloyed Unwrought Zinc, USITC Pub. 894, Inv. No. TA-201-31 (June 1978); Certain Machine Needles, USITC Pub. 936, Inv. No. TA-201-38 (Feb. 1979); Certain Fish, USITC Pub. 1028, Inv. No. TA-201-41 (Jan. 1980); Fresh Cut Roses, USITC Pub. 1059, Inv. No. TA-201-42 (Apr. 1980); Automobiles, USITC Pub. 1110, Inv. No. TA-201-44 (Dec. 1980).

Of the remaining 20 cases, the President provided import relief in 10 of them. Shrimp, USITC Pub. 773, Inv. No. TA-201-12 (May 1976); Letter of July 1, 1978, 41 Fed. Reg. 27,709 (1978) (import relief granted by President Ford); Sugar, USITC Pub. 807, Inv. No. TA-201-16 (1977); Proclamation No. 4538, 42 Fed. Reg. 59,037 (1977); Proclamation No. 4539, 42 Fed. Reg. 59,039 (1977); Footwear, USITC Pub. 799, Inv. No. TA-201-18 (Feb. 1977); Proclamation No. 4510, 13 WEEKLY COMP. PRES. DOC. 908 (June 27, 1977); Television Receivers, Color or Monochrome, Assembled or Not Assembled, Finished or Not Finished and Subassemblies Thereof, USITC Pub. 808, Inv. No. TA-201-19 (Feb. 1977) [hereinafter Footwear II]; Proclamation No. 4511, 13 WEEKLY COMP. PRES. DOC. 914 (June 27, 1977); Citizens Band (CB) Transceivers, USITC Pub. 852, Inv. No. TA-201-29 (Feb. 1978); Memorandum of March 27, 1978, 43 Fed. Reg. 12,843, 15,127 (1978); High-Carbon Ferrochrome, USITC Pub. 911, Inv. No. TA-201-35 (Sept. 1978); Proclamation No. 4608, 43 Fed. Reg. 4245 (1978); Clothespins, USITC Pub. 933, Inv. No. TA-201-36 (Dec. 1978); Memorandum of Oct. 2, 1978, 43 Fed. Reg. 45,547 (1979); Bolts, Nuts, and Large Screws, USITC Pub. 924, Inv. No. TA-201-37 (Nov. 1978); Proclamation No. 4632, 44 Fed. Reg. 1697 (1979); Non-Electric Cookware, USITC Pub. 1008, Inv. No. TA-201-39 (Nov. 1979); Memorandum of Jan. 2, 1980, 45 Fed. Reg. 759 (1980); Mushrooms, USITC Pub. 1089, Inv. No. TA-201-43 (Aug. 1980); Proclamation No. 4801, 45 Fed. Reg. 72,617 (1980).

The Executive provided no relief in the rest. Honey, USITC Pub. 781, Inv. No. TA-201-14 (June 1976); Memorandum of Aug. 28, 1976, 41 Fed. Reg. 36,787 (1976); Mushrooms, USITC Pub. 708, Inv. No. TA-201-17 (Jan. 1977); Memorandum of March 10, 1977, 42 Fed. Reg. 13,801 (1977); Cast Iron Stoves, USITC Pub. 826, Inv. No. TA-201-24 (July 1977); Memorandum of Sept. 20, 1977, 42 Fed. Reg. 55,081 (1978); Bolts, Nuts, and

*A. International Trade Commission Injury Determinations*

In determining whether increased imports are “a substantial cause of serious injury, or the threat thereof, to the domestic industry,”<sup>31</sup> the Commission uses a five-part analysis:

- (1) which domestic industry is affected?
  - (2) are imports increasing?
  - (3) is the domestic industry seriously injured?
  - (4) if not seriously injured, is the domestic injury threatened with serious injury?
  - (5) are increased imports a “substantial cause” of the injury?
- Each of these parts will be discussed below.

*1. Domestic Industry*

First, the Commission must define “the domestic industry producing an article like or directly competitive with an imported article.”<sup>32</sup> The House Ways and Means Committee Report defines “like” articles as “those which are substantially identical in inherent or intrinsic characteristics (*i.e.*, materials from which made, appearance, quality, texture, and etc.). . . .”<sup>33</sup> “Directly competitive” articles, on the other hand, “are those which, although not substantially identical in their inherent or intrinsic characteristics, are substantially equivalent for commercial purposes, that is, are adapted to the same uses and are essentially interchangeable therefor.”<sup>34</sup> Both producers of a like product and a directly competitive product can be considered part of a domestic industry under section 201. The Com-

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Large Screws, USITC Pub. 847, Inv. No. TA-201-27 (Dec. 1977); Memorandum of Feb. 10, 1978, 43 Fed. Reg. 6575 (1978); High-Carbon Ferrochrome, USITC Pub. 845, Inv. No. TA-201-28 (Dec. 1977); Memorandum of Jan. 27, 1978, 43 Fed. Reg. 4245 (1978); Stainless Steel Flatware, USITC Pub. 884, Inv. No. TA-201-30 (May 1978); Memorandum of June 30, 1978, 43 Fed. Reg. 29,259 (1978); Unalloyed Unwrought Copper, USITC Pub. 905, Inv. No. TA-201-32 (Aug. 1978); Presidential Memorandum of Oct. 24, 1978, 43 Fed. Reg. 49,523 (1978); Bicycle Tires and Tubes, USITC Pub. 910, Inv. No. TA-201-33 (Sept. 1978); Memorandum of Oct. 30, 1978, 43 Fed. Reg. 50,995 (1978); Fishing Tackle, USITC Pub. 917, Inv. No. TA-201-34 (Sept. 1978); Memorandum of Nov. 22, 1978, 43 Fed. Reg. 55,233 (1978); Leather Wearing Apparel, USITC Pub. 1030, Inv. No. TA-201-40 (Jan. 1980); Memorandum of March 24, 1980, 45 Fed. Reg. 19,543 (1980).

<sup>31</sup> 19 U.S.C. § 2251(b)(1) (1982 & Supp. III 1985).

<sup>32</sup> In defining the domestic industry concerned, 19 U.S.C. § 2251(b)(3) (1982 & Supp. III 1985), authorizes the Commission to disregard any imports of like or directly competitive articles by a domestic producer. Where a domestic producer makes more than one article, it further authorizes the Commission to treat as part of the domestic industry only that portion or subdivision of the producer which makes the like or directly competitive article. Finally, where U.S. production concentrated in a major geographic area constitutes a substantial portion of the U.S. domestic industry and primarily serves that market, it authorizes the Commission to treat as the domestic industry only producers located in such area.

<sup>33</sup> H.R. REP. NO. 571, *supra* note 7, at 45. Identical language is contained in the Senate Finance Committee’s report. S. REP. NO. 1298, *supra* note 6, at 121-22.

<sup>34</sup> *Id.* S. REP. NO. 1298, *supra* note 6, at 122.



mission attempts to define like or directly competitive in a manner that reflects the realities of the market.

In addition to addressing which domestic article or articles are "like or directly competitive with the imported articles," the Commission also considers "what domestic facilities . . . produc[e] the like or directly competitive article."<sup>35</sup> The Commission will consider the machines and plants that produce the domestic articles, as well as the workers employed in those facilities. Legislative history directs the Commission to consider "the question of serious injury to the productive resources (*e.g.*, employees, physical facilities, and capital) employed in the divisions or plants in which the article in question is produced."<sup>36</sup>

In applying the statute, the Commission had traditionally considered: (1) production facilities and processes, including the ownership of plant and equipment (*e.g.*, what articles domestic producers make and whether they are made in the same or separate facilities); (2) marketing practices (*e.g.*, whether the marketing channels are the same or substantially different); (3) interchangeability of the products; (4) the nature of the products in appearance, size, and shape; and (5) the requests of the domestic producers (*e.g.*, what facilities are alleged to be injured).

In applying these factors to the 1981-1986 period, the Commission found it inappropriate in several steel or metal cases to find a single applicable domestic industry. In *Stainless Steel and Alloy Tool Steel*,<sup>37</sup> the Commission found four separate industries producing alloy tool steel, stainless steel bar and wire rod, stainless steel plate, and stainless steel sheet and strip. While the Commission recognized that all stainless steel products are interrelated and share certain basic physical properties, it found that the products were made by different industries since the products varied in appearance, size, and shape, and were generally produced on different machinery and in different facilities.<sup>38</sup> The Commission reached similar decisions in *Certain Metal Castings* (eleven industries)<sup>39</sup> and *Carbon and Certain Alloy Steel Products* (nine industries).<sup>40</sup>

In other cases, however, the Commission has focused on "whether products are essentially interchangeable in the sense of being substantially equivalent for commercial purposes."<sup>41</sup> On this ba-

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<sup>35</sup> See, *e.g.*, *Certain Canned Tuna Fish*, *supra* note 23, at 6.

<sup>36</sup> H.R. REP. NO. 571, *supra* note 7, at 46.

<sup>37</sup> *Stainless Steel and Alloy Tool Steel*, *supra* note 25, at 16.

<sup>38</sup> *Id.* at 11-15.

<sup>39</sup> *Certain Metal Castings*, *supra* note 23, at 4-9.

<sup>40</sup> *Carbon and Certain Alloy Steel Products*, *supra* note 26, at 12-23.

<sup>41</sup> *Wood Shakes and Shingles*, *supra* note 27, at 3-7 (where the Commission found one industry on the basis that the various shakes and shingles were, "to a greater or lesser extent, interchangeable"); *Footwear IV*, *supra* note 29, at 59 (opinion of Comm'r Eckes) (where the Commissioners considered whether to find two separate industries, one ori-

sis, it found a single domestic industry.

### 2. *Increased Imports*

The Commission next considers whether the imported articles are being imported in "increased quantities."<sup>42</sup> Normal Commission practice is to consider the most recent five-year period as the relevant period for determining whether imports have increased.<sup>43</sup> Use of the five-year period is not mandatory, however, and the Commission may adopt shorter or longer periods where special circumstances warrant.<sup>44</sup>

The Commission has taken the view that an increase in imports, either in absolute quantities or relative to domestic production, satisfies the requirement for increased imports.<sup>45</sup> Thus, in *Carbon and Certain Alloy Steel Products*,<sup>46</sup> the Commission found imports to have increased for plates, railway-type products, bars, structural shapes and units, and pipes and tubes, even though, in absolute terms, imports had declined. In light of the changing membership of the Commission, and the fact that Vice Chairman Brunsdale has not taken a position, this issue bears continued close scrutiny.

### 3. *Serious Injury*

The Commission next considers whether the domestic industry is seriously injured.<sup>47</sup> According to the Commission, serious injury requires "an important, crippling, or mortal injury, one having permanent or lasting consequences."<sup>48</sup> Chairman Liebler views this definition as equivalent with a "major contraction of a domestic industry or its extinction."<sup>49</sup>

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ented to nonathletic footwear and the other to athletic footwear; instead, they found a single domestic industry, rejecting the argument that "directly competitive" means "two-way substitution;" and *Certain Canned Tuna Fish*, *supra* note 23, at 4-7 (where the Commission found that the domestic industry was canned tuna, whether packed in oil, water or any other medium). *But see Electric Shavers*, *supra* note 23, at 4-7 (where the Commission found that "electric shavers are not substantially equivalent for commercial purposes").

<sup>42</sup> 19 U.S.C. § 2251(b)(1) (1982 & Supp. III 1985).

<sup>43</sup> *Birch Plywood Doorskins*, USITC Pub. 732, Inv. No. TA-201-1, at 12-19 (Oct. 1975) (views of Comm'r Leonard).

<sup>44</sup> *See, e.g., Stainless Steel Table Flatware*, *supra* note 23, at 9-10, where the Commission used a six-year period because it "capture[d] the most recent business cycle."

<sup>45</sup> This position is reflected in virtually all the Commission determinations made in the 1981-1986 time period. The most thorough defense of this position is presented in *Carbon and Certain Alloy Steel Products*, *supra* note 26, at 24-28. *Cf.* § 406 of the 1974 Act, *supra* note 8, which expressly authorizes the President to provide relief if, *inter alia*, imports are increasing "absolutely or relatively."

<sup>46</sup> *See supra* note 26, at 28-34.

<sup>47</sup> 19 U.S.C. § 2251(b)(1) (1982 & Supp. III 1985).

<sup>48</sup> *Electric Shavers*, *supra* note 23, at 8; *Certain Metal Castings*, *supra* note 23, at 11.

<sup>49</sup> *Steel Fork Arms*, *supra* note 23, at 24. In *Carbon and Certain Alloy Steel Products*, *supra* note 26, at 134-36, Chairman Liebler describes her approach to serious injury:

It is my opinion that it is appropriate to consider injury to the viability of the

In making this determination regarding serious injury, the Commission takes into account the following factors under the statute. First, the Commission must consider the significant idling of productive facilities in the industry.<sup>50</sup> Cases applying this criterion include an analysis of such factors as plant closings, new entrants, U.S. production and shipments, capacity, and capacity utilization. The "significance of this idling" of production facilities can be "diminished by [an] increase in capacity and the structural shift in the domestic industry to lower volume, higher value" products.<sup>51</sup>

A second relevant factor is "the inability of a significant number of firms to operate at a reasonable level of profit."<sup>52</sup> The Commission has emphasized the importance of industry profitability<sup>53</sup> and normally has applied this test by looking at the firm's actual profits and ratio of net profits to net sales.

Third, the Commission must take into account "significant unemployment or underemployment within the industry."<sup>54</sup> This factor also involves a relatively straightforward analysis of employment of production and production-related workers, hours worked, wages, and total compensation. Not all of these factors will necessarily be moving in the same direction at the same time.

The presence or absence of any one of these factors is not dispositive of the injury question.<sup>55</sup>

#### 4. *Threat of Serious Injury*

In determining whether there is a threat of serious injury, the Commission must consider, among other economic factors, the following: "a decline in sales, a higher and growing inventory . . . and a

industry, rather than injury to the economic well-being of those who provide the factors of production to the industry, *i.e.*, labor and capital.

In order to illustrate the difference, I will restate my example of two hypothetical industries, A and B. Assume that: labor and capital in Industry A can readily be moved to other uses without significant losses; labor and capital in Industry B cannot readily be moved to other uses; and rates of return in each industry are at competitive levels. . . .

These two extreme examples illustrate the difference in the meaning of injury to a domestic industry. In the first case, Industry A is so severely affected that it disappears, but the workers and suppliers of capital are not adversely affected. In the second case, Industry B continues to produce, but the suppliers of the capital and labor are severely injured. I believe that the correct construction of the statute requires that Industry A but not Industry B be eligible for import relief under section 201.

<sup>50</sup> 19 U.S.C. § 2251(b)(2)(A) (1982 & Supp. III 1985). The Trade and Tariff Act of 1984 defined "significant idling of productive facilities" to include "the closing of plants or the underutilization of production capacity." 19 U.S.C. § 2251(b)(7) (Supp. III 1985).

<sup>51</sup> Stainless Steel Table Flatware, *supra* note 23, at 11.

<sup>52</sup> 19 U.S.C. § 2251(b)(2)(A) (1982 & Supp. III 1985).

<sup>53</sup> *See, e.g.*, Stainless Steel Table Flatware, *supra* note 23, at 13.

<sup>54</sup> 19 U.S.C. § 2251(b)(2)(A) (1982 & Supp. III 1985).

<sup>55</sup> 19 U.S.C. § 2251(b)(2)(D) (Supp. III 1985). This provision was added as an amendment to § 201 in the Trade and Tariff Act of 1984.

downward trend in production, profits, wages, or employment (or increasing underemployment) in the domestic industry concerned.”<sup>56</sup> The Senate Finance Committee report defined threat of serious injury to exist “when serious injury, although not yet existing, is clearly imminent if import trends continued unabated.”<sup>57</sup>

The Commission has traditionally required that the threat be “real rather than speculative” and that “serious injury be highly probable in the foreseeable future.”<sup>58</sup> While the threat of injury analysis focuses on future events, “the fundamental statutory tests of injury and causation are no less rigorous.”<sup>59</sup> In addition to the items specifically noted by Congress,<sup>60</sup> the Commission has considered such other factors as: high inventories maintained by importers and dealers,<sup>61</sup> excess capacity in the exporting country,<sup>62</sup> the lack of a domestic market for the product in the exporting country,<sup>63</sup> a sudden increase in imports or a strong upward trend in imports,<sup>64</sup> and a downward trend in the prices of imports.<sup>65</sup>

### 5. *Substantial Cause*

Finally, the Commission determines whether increased imports are a substantial cause of the serious injury or threat of serious injury

<sup>56</sup> 19 U.S.C. § 2251(b)(2)(B) (Supp. III 1985).

<sup>57</sup> S. REP. No. 1298, *supra* note 6, at 121. According to the Committee Report:

With respect to threat of serious injury, the commission should consider a decline in sales, a higher and growing inventory, and downward trend in production, profits, wages, or employment (or increasing underemployment) in the affected domestic industry. The existence of any of these factors such as the growth in inventory would not in itself be relevant to the threat of injury from imports if it resulted from conditions unrelated to imports. Such conditions could arise from a variety of other causes, such as changes in technology or in consumer tastes, domestic competition from substitute products, plant obsolescence, or poor management. It is the intention of the Committee that the threat of serious injury exists when serious injury, although not yet existing, is clearly imminent if import trends continued unabated.

*Id.*

<sup>58</sup> Footwear III, *supra* note 23, at 19; Certain Metal Castings, *supra* note 23, at 11.

<sup>59</sup> Heavyweight Motorcycles and Engines and Power Train Substitutes Therefor, USITC Pub. 1342, Inv. No. TA-201-47, at 70 (Feb. 1983) [hereinafter Heavyweight Motorcycles].

<sup>60</sup> See *supra* note 56 and accompanying text.

<sup>61</sup> Heavyweight Motorcycles, *supra* note 59, at 13 (views of Chairman Eckes):

The primary factor underlying the threat of injury to this industry consists of importers' and dealers' inventories. Importers' inventories have tripled since 1979, and most recently doubled in the first nine months of 1982 over the same period in 1981.

<sup>62</sup> See, e.g., Stainless Steel and Alloy Tool Steel, *supra* note 25, at 11 (views of Comm'rs Moore and Bedell).

<sup>63</sup> Heavyweight Motorcycles, *supra* note 59, at 14 (views of Chairman Eckes):

Because motorcycles of more than 750cc, which include the merchandise under investigation here, cannot be sold in Japan under current law, Japanese producers cannot consider domestic sales as a replacement for exports. . . .

<sup>64</sup> Mushrooms, *supra* note 30, at 12.

<sup>65</sup> Honey, *supra* note 30, at 12.

to the domestic industry.<sup>66</sup> The "substantial cause" determination "lies at the heart of the statutory framework and is the single most important feature of most Section 201 investigations."<sup>67</sup>

The term "substantial cause" is defined as "a cause which is important and not less than any other cause."<sup>68</sup> Thus, as a part of its analysis, the Commission must: (1) identify other potential causes of serious injury, (2) determine whether increased imports are an important cause of serious injury, and (3) decide whether any other cause has a more important effect on the condition of the domestic industry than increased imports.<sup>69</sup> The statute directs the Commission, in determining substantial cause, to take into account all economic factors it considers relevant, including "an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers."<sup>70</sup>

In making its determinations, the Commission applies more than just a mathematical test. It weighs causes wherever possible, in order to decide whether imports are one of a multitude of equal causes or threats of injury, or rather a substantial cause or threat of injury.<sup>71</sup>

One of the keys to this analysis involves determining what is a separate cause of injury. If the Commission subdivides the various causes narrowly, it is far more likely to find substantial causation.

In *Unwrought Copper*,<sup>72</sup> Vice Chairman Liebler cautioned against

<sup>66</sup> 19 U.S.C. § 2251(b)(1) (1982 & Supp. III 1985). The Senate Finance Committee report accompanying the Trade Reform Act of 1974 described the earlier standard and the reason for change:

The requirement of the Trade Expansion Act that increased imports result in major part from trade concessions has been very difficult to satisfy in the past and has become a major barrier to import relief. The criteria for import relief under the bill would relax the present import relief criteria by: (1) removing the "causal link" requirement that imports result in major part from trade agreement concessions and (2) requiring that increased imports need only be a "substantial cause", rather than "the major cause", of actual or threatened injury. The increase in imports referred to would generally be such increases as have occurred since the effectiveness of the most recent trade agreement concessions proclaimed by the President, i.e. as of now, the effectiveness of the Kennedy Round concessions beginning in 1968. Modification of the requirement that increased imports be the major cause of actual or threatened injury is necessary because "the major cause" has been interpreted as being a cause greater than all other causes combined (although there is some indication that in recent years the Commission has moved away from this standard). This has proved in many cases to be an unreasonably difficult standard to meet.

S. REP. NO. 1298, *supra* note 6, at 120.

<sup>67</sup> Carbon and Certain Alloy Steel Products, *supra* note 26, at 89 (views of Chairman Stern).

<sup>68</sup> 19 U.S.C. § 2251(b)(4) (1982 Supp. III 1985).

<sup>69</sup> S. REP. NO. 1298, *supra* note 6, at 120.

<sup>70</sup> 19 U.S.C. § 2251(b)(2)(C) (Supp. III 1985).

<sup>71</sup> S. REP. NO. 1298, *supra* note 6, at 120-21.

<sup>72</sup> See *supra* note 28. Vice Chairman Liebler followed a similar analysis in Wood

“compar[ing] a genus with a species or subspecies. It is important that one compare increases in imports with concepts of the same level of generality.”<sup>73</sup> She maintained there are only three types of causes of injury or the threat of injury at the appropriate level of generality: “(1) decline in demand; (2) decline in domestic supply; and (3) an increase in foreign supply.”<sup>74</sup>

In making its causation determinations, the Commission has looked at various criteria: cyclical changes resulting from economic recession,<sup>75</sup> low levels of imports,<sup>76</sup> small increases in imports,<sup>77</sup> declines in export shipments,<sup>78</sup> increased domestic competition,<sup>79</sup> shift in market preferences,<sup>80</sup> declining raw material supply,<sup>81</sup> increase in

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Shakes and Shingles, *supra* note 27, at 53-73. She was joined in that opinion by Commissioner Brunsdale.

<sup>73</sup> Unwrought Copper, USITC Pub. 1549, Inv. No. TA-201-52, at 60 (July 1984). In Electric Shavers, *supra* note 23, at 13-16, Commissioner Rohr stated his view that that investigation illustrates the limitations in analyzing causation in terms of supply and demand.

<sup>74</sup> Unwrought Copper, *supra* note 73, at 60.

<sup>75</sup> Unwrought Copper, *supra* note 73, at 12-13. In Heavyweight Motorcycles, *supra* note 59, at 14-15, Chairman Eckes said:

In reaching this conclusion I have considered the significance of the present recession in my analysis. Without a doubt the unusual length and severity of the present recession has created unique problems for the domestic motorcycle industry. Without a doubt the rise in joblessness, particularly among blue-collar workers, who constitute the prime market for heavyweight motorcycles, has had a severe impact on the domestic industry. Nonetheless, if the Commission were to analyze the causation question in this way, it would be impossible in many cases for a cyclical industry experiencing serious injury to obtain relief under section 201 during a recession. In my opinion Congress could not have intended for the Commission to interpret the law this way.

In Stainless Steel and Alloy Tool Steel, *supra* note 25, at 65, Commissioner Stern (who dissented in Heavyweight Motorcycles, *supra* note 59) stated:

Some have oversimplified the choice facing the Commission when it analyzes cyclical industries during recessions. One extreme would treat all recession-related effects as a single cause to be weighed against imports; the other would eliminate recession as a possible alternative cause. The law is silent on a direct resolution to this issue, whether heavily cyclical or not, be on an equal footing when applying for section 201 relief. To count blindly all recession-related effects as one single cause weighed against imports could effectively thwart cyclical industries, like steel, from getting relief when they may need it most. On the other hand, eliminating from consideration all recession-related effects could give highly cyclical industries special advantages in obtaining relief during a downturn. Fortunately, there is a path between the two extremes: considering only the unusual or abnormal effects on an industry in a downturn as causes of injury. This gives any kind of industry *equal access* to import relief, and I have consistently applied this approach (emphasis in original).

<sup>76</sup> Certain Metal Castings, *supra* note 23.

<sup>77</sup> Tubeless Tire Valves, *supra* note 23, at 9; Fishing Rods, *supra* note 23, at 11-12.

<sup>78</sup> Potassium Permanganate, *supra* note 23, at 11 n.40 (views of Chairwoman Stern); Stainless Steel and Alloy Tool Steel, *supra* note 25, at 36 (views of Comm'r Stern).

<sup>79</sup> Tubeless Tire Valves, *supra* note 23, at 9-11; Carbon and Certain Alloy Steel Products, *supra* note 26, at 49; and Heavyweight Motorcycles, *supra* note 59, at 66, 69-70 (views of Comm'r Stern).

<sup>80</sup> Wood Shakes and Shingles, *supra* note 27, at 17 (“increased concern for safety and fire retardant considerations and the availability of substitute roofing and siding materials

prices of input product,<sup>82</sup> decline in demand,<sup>83</sup> noncompetitive cost structure of U.S. producers,<sup>84</sup> "loss of the domestic industry's major customer,"<sup>85</sup> U.S. Government actions,<sup>86</sup> and labor contracts.<sup>87</sup>

### III. Section 201 Remedy Recommendations and Presidential Decisions: 1981-1986

If it makes an affirmative injury determination, the Commission is required to:

(A) find the amount of increase in, or imposition of, any duty or import restriction on such article which is necessary to prevent or remedy such injury, or

(B) if it determines that adjustment assistance under subchapters 2, 3, and 4 can effectively remedy such injury, recommend the provision of such assistance.<sup>88</sup>

The purpose of the statute is to provide "temporary relief . . . so that the industry will have sufficient time to adjust to the freer international competition."<sup>89</sup>

The President is authorized to provide the following forms of relief:

- (1) increased duties, which have been provided seven times out of the sixty section 201 cases filed thus far;<sup>90</sup>
- (2) tariff-rate quotas, *i.e.*, increased duties above a certain level

at competitive prices"); Certain Canned Tuna Fish, *supra* note 23, at 16 ("shift in consumer preferences to tuna packed in water"); Fishing Rods, *supra* note 23, at 12 ("shift in demand from rods of tubular construction to less expensive solid rods").

<sup>81</sup> Wood Shakes and Shingles, *supra* note 27, at 14-16 ("declining supply and harvest of western red cedar suitable for the production of shakes and shingles").

<sup>82</sup> Certain Canned Tuna Fish, *supra* note 23, at 16 ("large increase in raw fish prices between 1979 and 1981").

<sup>83</sup> Unwrought Copper, *supra* note 73, at 11-12 (views of Comm'r's Eckes, Lodwick, and Rohr) and 30, 36-38 (views of Chairwoman Stern); Certain Metal Castings, *supra* note 23, at 41; Tubeless Tire Valves, *supra* note 23, at 9-11; Heavyweight Motorcycles, *supra* note 59, at 66-69 (views of Comm'r Stern); Carbon and Certain Steel Alloy Products, *supra* note 26, at 47-49, 65, 93-97; Stainless Steel and Alloy Tool Steel, *supra* note 25, at 36-37 (views of Comm'r Stern on stainless steel plate).

<sup>84</sup> Unwrought Copper, *supra* note 73, at 30-36; Carbon and Certain Alloy Steel Products, *supra* note 26, at 85.

<sup>85</sup> Potassium Permanganate, *supra* note 23, at 11-14.

<sup>86</sup> Carbon and Certain Alloy Steel Products, *supra* note 26, at 48-49 (government regulations—views of Chairwoman Stern and Comm'r's Eckes, Lodwick and Rohr). *See also id.* at 90 (government action affecting environmental costs and the tax system—additional views of Chairwoman Stern).

<sup>87</sup> Unwrought Copper, *supra* note 73, at 12-13.

<sup>88</sup> 19 U.S.C. § 2251(d)(1) (1982 & Supp. III 1985).

<sup>89</sup> S. REP. NO. 1298, *supra* note 6, at 119.

<sup>90</sup> Memorandum of March 27, 1978, *supra* note 30; Proclamation No. 4608, *supra* note 30; Proclamation No. 4632, *supra* note 30; Memorandum of Jan. 2, 1980, *supra* note 30; Mushrooms, *supra* note 30; Temporary Duty Increase on Heavyweight Motorcycles, *supra* note 24; Specialty Steel Import Relief Determination, *supra* note 25 (*see infra* note 121); Memorandum of May 23, 1986, *supra* note 27.

of imports, provided once;<sup>91</sup>

(3) quotas, provided four times;<sup>92</sup>

(4) negotiated orderly market agreements, *i.e.*, where a foreign government or governments negotiate an agreed limit on exports to the United States, provided three times;<sup>93</sup>

(5) adjustment assistance, where financial assistance is provided to firms and/or workers to assist them to adjust to import competition, provided six times;<sup>94</sup> or

(6) any combination of the above actions, provided twice.<sup>95</sup>

There are certain restrictions on the manner in which the President can implement import relief.<sup>96</sup>

### A. Motorcycles

#### 1. Commission Recommendation

In *Heavyweight Motorcycles*,<sup>97</sup> the Commission<sup>98</sup> found that increased imports of heavyweight motorcycles were a substantial cause of the threat of serious injury to the domestic industry. The Commission<sup>99</sup> recommended that, in addition to the then-existing duty rate of 4.4%, an incremental duty be imposed for five years<sup>100</sup> at the

<sup>91</sup> Temporary Duty Increase on Heavyweight Motorcycles, *supra* note 24.

<sup>92</sup> Stainless Steel and Alloy Tool Steel, USITC Pub. 756, Inv. No. TA-201-5 (Jan. 1976), 41 Fed. Reg. 4,269 (1976); Clothspins, *supra* note 30; and Stainless Steel and Alloy Tool Steel, *supra* note 25.

<sup>93</sup> Stainless Steel and Alloy Tool Steel, *supra* note 92; Footwear II, *supra* note 30.

<sup>94</sup> Slide Fasteners, USITC Pub. 757, Inv. No. TA-201-6 (Feb. 1976); Footwear, USITC Pub. 758, Inv. No. TA-201-7 (Feb. 1976); Memorandum of April 16, 1976, 41 Fed. Reg. 16,545 (1976) [hereinafter Footwear I]; Stainless Steel Flatwear, *supra* note 23; Mushroomrooms, *supra* note 30; Shrimp, *supra* note 30; Footwear IV, *supra* note 29.

<sup>95</sup> Stainless Steel and Alloy Tool Steel, *supra* note 92 (orderly marketing agreements and quotas); *see, e.g.*, Stainless Steel and Alloy Tool Steel, *supra* note 25 (quotas and tariff increases).

<sup>96</sup> For example, any duty increase cannot result in a duty "which is more than 50 percent ad valorem above the rate (if any) existing at the time of the proclamation" (19 U.S.C. § 2253(d)(1) (1982 & Supp. III 1985)); initial relief can be for no more than five years (19 U.S.C. § 2253(h)(1) (1982 & Supp. III 1985)); initial relief can be extended once for not more than three years, but may not be made more restrictive (19 U.S.C. § 2253(h)(3) (1982 & Supp. III 1985)); any quantitative restriction or orderly marketing agreement must permit imports of the article not less than the quantity or value of such article imported into the United States during the most recent representative period (19 U.S.C. § 2253(d)(2) (1982 & Supp. III 1985)); any relief must be phased down after three years "to the extent feasible" (19 U.S.C. § 2253(h)(2) (1982 & Supp. III 1985)).

<sup>97</sup> *Heavyweight Motorcycles*, *supra* note 59.

<sup>98</sup> Chairman Eckes and Commissioner Haggart found a threat of injury; Commissioner Stern dissented. *Id.* at 1.

<sup>99</sup> While Chairman Eckes and Commissioner Haggart presented separate views on injury and remedy, their recommendations on remedy were identical. Commissioner Stern found no injury or threat and recommended no relief. *Id.* at 16-19 (remedy views of Chairman Eckes), 47-54 (remedy views of Comm'r Haggart), and 79-83 (remedy views of Comm'r Stern).

<sup>100</sup> Commissioner Haggart noted that five-year relief periods have been recommended in the past in cases where a large inventory of imported merchandise posed a threat of serious injury to the domestic industry. *CB Radio Transceivers*, *supra* note 30.



declining rates of 45, 35, 20, 15, and 10% *ad valorem*.<sup>101</sup> Chairman Eckes noted two reasons for providing this relief: the need to discourage further imports while the large inventory was liquidated; and the need to enable Harley-Davidson, the sole U.S. producer of heavyweight motorcycles not affiliated with a Japanese parent company, to modernize plants and equipment and improve its product lines.<sup>102</sup>

## 2. Presidential Decision

The President followed the Commission's recommendation, except for its five-year tariff rate quotas.<sup>103</sup> The additional duties applied only to imports above the quota level specified.

Arguments within the Administration in favor of section 201 relief included a desire to save Harley-Davidson from bankruptcy, which would result in job losses for 2,500 Harley employees and 500 employees of Harley suppliers.<sup>104</sup> Another argument for providing relief was that denial of relief could have encouraged congressional efforts to limit Presidential discretion in section 201.

Arguments against relief under section 201 focused on the significant price increases for heavy motorcycles, estimated to be initially 10% to 17%.<sup>105</sup> Opponents also stressed the resulting vulnerability of the United States to claims for compensation or retaliation, and threat to the credibility of the Administration's free trade policies.

Virtually all sides agree that *Heavyweight Motorcycles* represented a successful use of section 201 to enable an industry to adjust to import competition. Harley-Davidson implemented most of its original adjustment plan, including statistical quality controls and just-in-

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<sup>101</sup> Commissioner Haggart noted that section 203(d)(2) limits quotas to a level that is not less than the quantity imported into the United States in the most recent representative period (19 U.S.C. § 2253(d)(2) (Supp. III 1985)); she concluded that it would not be possible to impose "a quota low enough to have a sufficient impact on the current oversupply of motorcycles." *Heavyweight Motorcycles*, *supra* note 59, at 48.

<sup>102</sup> *Heavyweight Motorcycles*, *supra* note 59, at 17-18. Commissioner Stern opposed this remedy recommendation, based on her belief that: (1) "the length of relief is disproportionate to the short-lived nature of any threat," (2) the relief will provide a windfall to the healthy segments of the domestic industry while doing little to benefit Harley-Davidson, and (3) "the relief will unduly penalize BMW and other minor importers." *Id.* at 79-83.

<sup>103</sup> The tariff-rate quotas were 5,000 units (increasing yearly to 6,000, 7,000, 8,500, and 10,000) for imports from the Federal Republic of Germany, 6,000 units (increasing 1,000 yearly) for imports for all other countries. 48 Fed. Reg. 16,639, 16,641 (1983).

The tariff-rate quotas were established to maintain an open U.S. market for small volume producers that pose no threat of injury to the U.S. industry. Office of the U.S. Trade Representative, *President Takes 201 Action on Motorcycle Imports* (April 1, 1983).

<sup>104</sup> There was a general belief within the Administration that the Harley-Davidson adjustment plan was realistic and that the import relief recommended by the Commission would permit sufficient adjustment that the industry would be able to meet import competition at the end of the relief period.

<sup>105</sup> Cost to consumers in the first year was estimated to be \$75 to \$100 million.

time inventory controls that resulted in substantial increases in productivity and competitiveness.<sup>106</sup> In fact, in 1987 Harley-Davidson unprecedentedly requested that relief be terminated early, and the President complied.<sup>107</sup>

## B. Specialty Steel

### 1. Commission Recommendation

In *Stainless Steel and Alloy Tool Steel*,<sup>108</sup> the Commission found that increased imports were a substantial cause of serious injury to the stainless steel sheet and strip, stainless steel plate, stainless steel bar and rod, and alloy tool steel industries.<sup>109</sup> Commissioners Stern and Haggart proposed that the President impose quantitative restrictions based on market shares<sup>110</sup> for a period of three years,<sup>111</sup> as follows:

Calendar Year	Stainless Steel <sup>112</sup>				Alloy Tool Steel
	Sheet & Strip	Plate	Bar	Rod	
1983-85	An amount for each calendar year equivalent to the following percentages of forecasted apparent U.S. consumption for that year, but not less than the quantities specified.				
	8%	10%	17%	42%	20%
In short tons	62,900	10,700	27,000	19,100	22,100

Crucial to this decision was the choice of the representative period,<sup>113</sup> since import levels and market share had varied significantly

<sup>106</sup> *Testimony on Title III of S. 1860 and S. 2099, before Senate Comm. on Finance*, 99th Cong., 2d Sess. (July 17, 1986) (statements of Ambassador Yeutter) [hereinafter *Yeutter Testimony*] (source available from authors).

<sup>107</sup> Proclamation No. 5727, 52 Fed. Reg. 38,075 (1987). See also Bivens, *Harley-Davidson Climbing Back Into Saddle*, Wash. Post, June 29, 1986, at F2, col. 1. Bivens noted that: Since 1983, the company has slashed its work force in half and raised the average productivity of its employees by 30 percent . . . .

After being flattened in its home market by foreign motorcycle producers—chiefly those from Japan—Harley-Davidson has capped a three-year rebound by moving into second place in the U.S. market for heavy motorcycles. . . .

<sup>108</sup> *Stainless Steel and Alloy Tool Steel*, *supra* note 25.

<sup>109</sup> With respect to stainless steel plate, Commissioner Stern dissented and found that imports, although important, were not a substantial cause of serious injury. *Id.* at 33-37 (views of Comm'r Stern).

<sup>110</sup> Commissioners Stern and Haggart supported market-share quotas because (1) other types of relief, such as tariffs, do not provide the certainty of protection that quotas do, while (2) market-share quotas "automatically allow the quantity of imports to adjust to fluctuations in market demand . . ." *Id.* at 53-54.

<sup>111</sup> Three years was considered a sufficient period for the domestic industry to adjust to changing conditions of competition. *Id.* at 54 (views of Chairman Eckes). See also *id.* at 44-45 (views of Comm'rs Stern and Haggart). The relief period was made retroactive to January 1, 1983, to avoid any possible "rush to beat the imposition of relief." *Id.* at 45.

<sup>112</sup> *Id.* at 39 (views of Comm'rs Stern and Haggart).

<sup>113</sup> There was a number of other important issues in this recommendation, including how the quotas would be allocated (either on a country-by-country basis or on a country-

in recent years.<sup>114</sup> Commissioners Stern and Haggart recommended a representative period of 1972 to 1982, excluding the years 1975 and 1982.<sup>115</sup> In recommending this period, they argued first that there was no truly representative period;<sup>116</sup> second, that a longer time period was preferable in light of distorted import levels;<sup>117</sup> and third, their proposed remedy would match the import relief provided to the relative impact of the imports.<sup>118</sup>

In his minority view, Chairman Eckes recommended a representative period of 1979 to 1981. He argued first that it was consistent with recent Commission practice.<sup>119</sup> Second, he maintained that from 1978 to 1981, imports essentially responded to the free operation of supply and demand in the world market. Third, he noted that imports from 1972 to 1982 had already been subject to review under the trade laws. Finally, he submitted that the Commission's proposed remedy for alloy tool steel was too restrictive and for stainless

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by-country basis with a basket quota open to all other suppliers) and which products should be exempted from any import relief. *See id.* at 39-52.

<sup>114</sup> As Chairman Eckes stated:

the choice of a recent representative period is of fundamental importance to shaping the appropriate level of relief, because selection of this period operates to establish floor figures for import levels and the market-share percentages.

*Id.* at 57 (views of Chairman Eckes). *See also id.* at 40 (views of Comm'rs Stern and Haggart). The 1974 Act provides:

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

19 U.S.C. § 2253(d)(1) (Supp. III 1985).

<sup>115</sup> The years 1975 and 1982 were excluded because those were years in which serious injury was caused by imports. *Stainless Steel and Alloy Tool Steel*, *supra* note 25, at 40 (views of Comm'rs Stern and Haggart).

<sup>116</sup> Distortions in the market for specialty steel were created by quotas, voluntary restraint arrangements, price controls, and various economic conditions such as a worldwide steel shortage, "exceptionally high inflation rates, a construction boom, the termination of quotas, a mini-recession, exceptionally low dollar exchange rates, exceptionally high real interest rates, and the nearly complete turn around in both inflation and dollar value in a short time." *Id.* at 43-44 (views of Comm'rs Stern and Haggart).

<sup>117</sup> *Id.* at 44 (views of Comm'rs Stern and Haggart).

<sup>118</sup> Commissioner Stern was particularly concerned that, under Chairman Eckes' proposed remedy, the industry which she considered least injured (stainless steel plate) would receive the strongest relief. *Id.* at 92-94 (views of Comm'r Stern).

<sup>119</sup> Chairman Eckes states that the remedy recommendation of Commissioners Stern and Haggart—

deviates from recent Commission practice. Since section 201 was amended in the Trade Act of 1974, the Commission in recommending quotas has based its proposal on the most recent years of non-injurious imports. These are the years immediately preceding the period in which the Commission has found increased imports to be a substantial cause of serious injury. Ordinarily Commissioners have chosen a recent two to five year representative period, or elected to exclude one or more years from the period as representative, as my colleagues have done.

*Id.* at 58.

steel plate not restrictive enough.<sup>120</sup>

## 2. *Presidential Decision*

The President proclaimed import relief, but modified its form and duration from that recommended by the Commission. He provided relief for four years rather than three, "to provide time for the industry to complete important investment projects, improve productivity, and regain profitability."<sup>121</sup> Relief took the form of a "combination of tariffs and quotas."<sup>122</sup> Tariffs applied to sheet, strip, and plate were at levels less restrictive than those recommended by the Commission. The President reasoned that producers of flat-rolled products were more competitive than other stainless steel products, which were subject to greater import competition. The President further noted that recently the former had successfully used the U.S. antidumping and countervailing duty laws to obtain offsetting duties on unfairly traded imports from three principal foreign competitors.<sup>123</sup> The President, therefore, concluded that producers of nonflat-rolled products needed greater relief to enable them to make necessary investments.<sup>124</sup>

The President established quotas for imports of stainless bar, rod, and tool steel. The four-year global quotas implemented the Commission's proposed minimum import quantities in the first year, and allowed imports to expand at a rate of three percent annually.

The history of this section 201 case is important to understanding the President's decision. The U.S. Trade Representative had initiated investigations under section 302 of the 1974 Act<sup>125</sup> in February<sup>126</sup> and August of 1982<sup>127</sup> in response to petitions filed by the Tool and Stainless Steel Industry Committee and the United Steelworkers of America.<sup>128</sup> Under section 301 of the 1974 Act,<sup>129</sup> the President directed the U.S. Trade Representative to ask the

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<sup>120</sup> Commissioners Stern and Haggert, on the other hand, maintained that rigid adherence to a single representative period for a number of industries can create undesirable anomalies. *Cf.* Stainless Steel and Alloy Tool Steel, *supra* note 25, at 57-61 (views of Comm'r Eckes). *See* Carbon and Certain Alloy Steel Products, *supra* note 26.

<sup>121</sup> Memorandum of July 5, 1983, 48 Fed. Reg. 31,177 (1983); *see also* Proclamation No. 5074, 48 Fed. Reg. 33,233 (1983).

<sup>122</sup> Letter to Speaker of the House and the President of the Senate on Import Relief for the Specialty Steel Industry, 2 PUB. PAPERS 1016 (1983) [hereinafter Specialty Steel Import Relief Message].

<sup>123</sup> *Id.* at 1017; *see supra* note 8.

<sup>124</sup> Specialty Steel Import Relief Message, *supra* note 122, at 1017.

<sup>125</sup> 19 U.S.C. § 2412 (1982).

<sup>126</sup> Tool and Stainless Steel Industry Committee and United Steelworkers of America, initiation of Investigation on Petition Filed Seeking Relief, 47 Fed. Reg. 10,107 (1982).

<sup>127</sup> Tool and Stainless Steel Industry Committee and United Steelworkers of America, initiation of Investigation on Petition Filed Seeking Relief, 47 Fed. Reg. 35,387 (1982).

<sup>128</sup> Petitioners principally alleged that the European Community, Belgium, France, Italy, the United Kingdom, Austria, and Sweden had subsidized the production of specialty steel in a manner inconsistent with the Agreement on Interpretation and Application of

Commission to conduct an expedited investigation under section 201. As a part of the President's determination under section 301, he stated: "The injury to the domestic industry is clear."<sup>130</sup> The President based his conclusion on the "[fight] for survival" by many U.S. firms, despite U.S. industry's efficiency, modern technology, and innovation.<sup>131</sup> While he recognized that the recession accounted for part of the problem, nonetheless he focused on increasing imports and their depressing effect on operating rates, employment, prices, and revenues.<sup>132</sup> Following the Commission's affirmative determination of injury,<sup>133</sup> the President granted import relief.

The President's decision emphasized the unfairness of the practices of foreign governments and foreign specialty steel suppliers, thus underscoring the distinction between the "fair trade" statute (section 201) and unfair trade statutes (*e.g.*, section 301<sup>134</sup> and the antidumping and countervailing duty laws<sup>135</sup>).<sup>136</sup>

### 3. *Subsequent Developments*

In 1983, U.S. Trade Representative Brock announced the conclusion of orderly marketing agreements for stainless steel bar, rod, and alloy tool steel exports from Sweden, Austria, Japan, Canada, Poland, Argentina, and Spain.<sup>137</sup> In early 1984, the European Economic Community (EEC) retaliated by restricting imports into member states of the EEC of certain alarm systems, sporting goods, and

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Articles VI, XVI, and XXIII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619 [hereinafter the Subsidies Code].

<sup>129</sup> Pub. L. No. 93-618, 88 Stat. 1978, 2041 (1975) (codified as amended at 19 U.S.C. § 2411 (1982)).

<sup>130</sup> Memorandum of Nov. 16, 1982, 47 Fed. Reg. 51,717 (1982).

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 51,717-18.

<sup>133</sup> *See supra* note 124.

<sup>134</sup> 19 U.S.C. § 2411 (Supp. III 1985).

<sup>135</sup> *See supra* note 8.

<sup>136</sup> 49 Fed. Reg. 36,813 (1984). In its press release, USTR offered the following analysis:

Trade problems in the specialty steel area have been widespread. These difficulties stem from persistent excess productive capacity, some of it uneconomic and unsupported by subsidies, as well as trade restrictive and distortive practices used by many of our trading partners to protect their industries and stimulate exports.

Office of the U.S. Trade Representative, Statement by U.S. Trade Representative Brock (July 5, 1983) (source available from author). *See also* the President's decision concerning Carbon and Certain Alloy Steel Products, *supra* note 26, *infra* notes 154-58 and accompanying text.

<sup>137</sup> Office of the U.S. Trade Representative, *Brock Concludes Specialty Steel Quota Arrangements with Seven Countries* (Oct. 19, 1983) (source available from author).

19 U.S.C. § 2253(e)(1) (1982 Supp. III 1985) provides that if the President announces his intention to negotiate orderly marketing agreements, "import relief shall be proclaimed and take effect within 90 days after the import relief determination date."

petrochemicals.<sup>138</sup>

Following the President's announcement of his national policy for the steel industry,<sup>139</sup> the U.S. Trade Representative concluded agreements with fifteen countries and the EEC.<sup>140</sup> Among other things, these agreements incorporated the orderly marketing agreements on stainless steel bar, rod, and alloy tool steel and replaced the increased tariffs on imports of stainless steel sheets, strip, and plate with quotas.

### C. Carbon Steel

#### 1. Commission Recommendation

In *Carbon and Certain Alloy Steel Products*,<sup>141</sup> the Commission determined that an increase in imports was a substantial cause of serious injury to the following industries: producers of semi-finished goods (ingots, blooms, billets, slabs, and sheet bars),<sup>142</sup> plates, sheets and strip, wire and wire products, and structural shapes and units.<sup>143</sup> The Commission made negative findings for the following industries: producers of wire rod, railway-type products, bars, and pipes and tubes.<sup>144</sup>

The Commission<sup>145</sup> recommended that the President proclaim five years<sup>146</sup> of import relief, as follows: (1) a tariff-rate quota on imported semi-finished products,<sup>147</sup> (2) market-share quotas on imported sheet and strip, plate, structural shapes and units (excluding

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<sup>138</sup> Council Regulation (EEC) 21 O.J. EUR. COMM. (No. 140), art. 1, at 1-2 (1984).

<sup>139</sup> 49 Fed. Reg. 36,813 (1984), 20 WEEKLY COMP. PRES. DOC. 1307 (Sept. 20, 1984).

<sup>140</sup> See *infra* notes 159-60 and accompanying text.

<sup>141</sup> See *supra* note 26.

<sup>142</sup> Commissioners Lodwick and Rohr found a threat of serious injury; Commissioner Eckes found present injury. *Id.* at 56.

<sup>143</sup> In each of these industries where the Commission's vote was affirmative, Commissioners Eckes, Lodwick, and Rohr found injury; Chairwoman Stern and Vice Chairman Liebler did not. *Id.* at 87, 130.

<sup>144</sup> For each of the negative determinations, the vote was unanimous except in the case of pipes and tubes, where Commissioners Eckes and Rohr voted in the affirmative; Chairwoman Stern, Vice Chairman Liebler, and Commissioner Lodwick voted in the negative. *Id.* at 65, 68, 117, 155.

<sup>145</sup> The Commission's import relief recommendation was presented by Commissioners Eckes, Lodwick and Rohr. *Id.* at 71-79. In opposing any form of import relief, Chairwoman Stern argued that: (1) imports were not the most critical problem facing the American steel industry, and (2) the majority's recommendation was "more likely to inhibit rather than enhance the overdue efforts of U.S. steel producers to adjust to conditions of competition of the 1980's." *Id.* at 119-29. Vice Chairman Liebler also opposed import relief. *Id.* at 155-65 (views of Vice Chairman Liebler).

<sup>146</sup> The majority believed that, given the size of the investment required for modernization of facilities and the time for such items as continuous casters to become operational, a shorter period of relief would be effective. *Id.* at 78-79.

<sup>147</sup> Many inside and outside of the U.S. industry felt that unrestrained access to cheap semi-finished imports could reduce the incentive for integrated producers to modernize their facilities. This would have a large impact on jobs; over half of all U.S. steelworkers were employed in semi-finished production at the time.

light structurals), and wire,<sup>148</sup> and tariffs on imported wire products.<sup>149</sup> The following table summarizes the recommendation:

<u>Product</u>	<u>Remedy</u>	<u>Imports at Existing Duty</u>	<u>Additional Duty</u>	
			<u>Years 1-3</u>	<u>Years 4-5</u>
<u>Semi-finished Wire products</u>	Tariff-rate quota	1.5 million tons	15 percent	10 percent
	Tariff		12 percent	10 percent

<u>Product</u>	<u>Remedy</u>	<u>Level</u>		<u>Minimum Quantity</u>
		<u>Years 1-3</u>	<u>Years 4-5</u>	
<u>Sheet and strip products</u>				
Hot-rolled	Quota	11 percent	12.1 percent	1.8 million tons
Cold-rolled	Quota	10.6 percent	11.7 percent	1.9 million tons
Galvanized	Quota	21.4 percent	23.5 percent	1.6 million tons
Other sheet and strip	Quota	6.4 percent	7.0 percent	400,000 tons
<u>Plates</u>	Quota	21.2 percent	23.3 percent	2.1 million tons
<u>Structurals</u>	Quota	28.9 percent	31.8 percent	2.1 million tons
<u>Wire</u>	Quota	24.5 percent	26.9 percent	400,000 tons

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The minimum import levels in the Commission's recommended remedy are based on a representative period of 1979-1981. The Commission's application of a uniform representative period for all industries for which quotas were recommended created import levels contrary to the apparent needs of the domestic industry and U.S. consumers.<sup>151</sup>

Commissioners Lodwick and Rohr recommended that "import relief be conditioned on adjustment plans that describe how the period of relief will be used to 'facilitate an orderly adjustment to import competition.'" Vice Chairman Liebler, who found no injury

<sup>148</sup> *Id.* at 72.

<sup>149</sup> Tariffs were considered to be preferable to quotas for wire products because there is a vast array of wire products and quotas would be difficult to determine and administer. *Id.* at 76-77.

<sup>150</sup> *Id.* at 72.

<sup>151</sup> During the summer of 1984, in the midst of strong economic recovery, there was a surge in demand for cold rolled sheet that the domestic industry could not fully meet. Conversely, the plate industry had scarcely felt the effects of the recovery and continued to be in substantial difficulty. Yet by rigidly adhering to the 1979-1981 base period, the Commission's recommendation would have provided no relief to the plate industry which needed it badly (market share quota and minimum share amounts were substantially in excess of those that prevailed in 1982 and 1983), and far more relief than was needed by the sheet and strip industry.

and recommended no import relief, proposed that import relief, if granted, should be conditioned on a twenty percent compensation cut to the steel workers.<sup>152</sup> Commissioner Eckes opposed such “conditionality,” on the grounds that it would be “inconsistent with [the Commission’s] statutes, mandate and its traditional role as a fact finding, not a policy-making, agency.”<sup>153</sup>

## 2. *Presidential Decision*

In addressing this case, the President faced a difficult policy dilemma. If he rejected relief, he would be criticized for ignoring: (1) the serious injury to the U.S. industry and its importance to overall U.S. economic and national security interests; (2) unfair foreign trade practices; and (3) the risk of legislation limiting steel imports<sup>154</sup> or removing Presidential discretion under section 201. Conversely, if he provided relief, he would be criticized for ignoring: (1) earlier commitments to resist protectionist measures, (2) the prospect of compensation or retaliation, and (3) the increased costs to steel consumers (*e.g.*, automobile and machine tool producers), who would be placed at a competitive disadvantage.

Within the Administration, there was extensive debate whether relief should be provided outside of section 201. The principal problem with relief under section 201 was that it would fail to provide comprehensive relief to the industry. Section 201 relief would create an enormous diversion of imports from the products covered by relief to those not covered because the Commission had found no injury (particularly pipe and tube, wire rod, and bars). But many feared that relief outside the context of section 201 could place the United States on the slippery slope toward a Multifiber Arrangement for steel. Import restraint actions outside the context of section 201 lack the discipline on duration, product coverage, transparency, and minimum import levels provided by section 201 procedures.

Ultimately, the President decided to establish a government policy for the industry. He directed the U.S. Trade Representative to: negotiate “surge control” arrangements or understandings . . . with countries whose exports to the United States have increased significantly in recent years due to an unfair surge in imports—unfair because of dumping, subsidization, or diversion from other importing countries who have restricted access to their markets.<sup>155</sup>

As in *Stainless Steel and Alloy Tool Steel*,<sup>156</sup> the Administration em-

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<sup>152</sup> Carbon and Certain Alloy Steel Products, *supra* note 26, at 162-63 (views of Vice Chairman Liebler).

<sup>153</sup> *Id.* at 82-85 (views of Comm’r Eckes).

<sup>154</sup> For a discussion of the factors to consider in a section 201 case, see H.R. REP. NO. 571, *supra* note 7, at 49.

<sup>155</sup> 49 Fed. Reg. 36,813 (1984).

<sup>156</sup> See *supra* note 25.



phasized the need to address unfair foreign trade practices.<sup>157</sup>

The President also expressed the hope that this combination of actions would result in the market seeking "a return to a more normal level of steel imports, or approximately 18.5%, excluding semi-finished steel."<sup>158</sup>

### 3. *Subsequent Developments*

Since the President's announcement in September 1984 agreements have been signed with twenty countries.<sup>159</sup> Each agreement has a similar structure, being effective until September 30, 1989.<sup>160</sup>

While steel imports were 27% of apparent consumption in 1984, they declined to 26% in 1985, 23% in 1986, and 21% in 1987.<sup>161</sup>

## D. *Copper*

### 1. *Commission Recommendation*

In the *Copper* case the Commission found that increased imports caused serious injury to the domestic industry.<sup>162</sup> In fashioning a remedy, the Commission faced an industry experiencing "decreased demand for copper, high inventories, high domestic production costs, and a depressed world price."<sup>163</sup> Chairwoman Stern noted that the industry suffered from a comparative disadvantage: lower quality ore, steeper energy and environmental costs, and higher wages.<sup>164</sup>

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<sup>157</sup> In addition to the President's statement, Ambassador Brock noted "an 'unprecedented and unacceptable' surge of imported steel as a result of (1) diversion of steel imports into the U.S. markets due to quotas and import restraints in other nations, and (2) massive unfair trade practices such as subsidies and predatory below-market pricing, or dumping." Office of the U.S. Trade Representative, *Brock Announces President's Steel Decision* (Sept. 18, 1984) (source available from authors).

<sup>158</sup> 49 Fed. Reg. at 36,814.

<sup>159</sup> Agreements have been signed with Australia, Austria, Brazil, China, Czechoslovakia, East Germany, the European Economic Community (EEC), Finland, Hungary, Japan, Mexico, Poland, Portugal, Romania, South Africa, South Korea, Spain, Trinidad, Venezuela, and Yugoslavia.

<sup>160</sup> Market shares negotiated with each country are: Australia (0.18%), Austria (0.21%), Brazil (0.8%), the EEC (5.4%), Finland (0.224%), Japan (5.89%), Mexico (0.36%), South Africa (0.42%), South Korea (1.9%), and Spain (0.67%). Specific tonnage agreements have been negotiated with: China (68,000 tons), Czechoslovakia (40,000 tons), East Germany (110,000 tons), Hungary (34,000 tons), Poland (90,000 tons), Portugal (40,000 tons), Romania (150,000 tons), Trinidad (73,500 tons), Venezuela (180,000 tons), and Yugoslavia (25,200 tons).

<sup>161</sup> Monthly Reports on the Status of the Steel Industry, USITC Pub. 2007, Inv. No. 332-226 (Sept. 1987).

<sup>162</sup> Unwrought Copper, *supra* note 73, at 1. Vice Chairman Liebeler and Commissioners Eckes, Lodwick, and Rohr made this finding; Chairwoman Stern found that increasing imports threaten to cause further serious injury.

<sup>163</sup> *Id.* at 6 (views of Comm'rs Eckes, Lodwick, and Rohr).

<sup>164</sup> U.S. ore grade is lower quality than that of many foreign suppliers, and it therefore costs more for U.S. producers to extract the same amount of cop-

The Commission had a difficult task to devise a recommendation that would “prevent or remedy”<sup>165</sup> the serious injury suffered by the industry and “facilitate orderly adjustment to import competition.”<sup>166</sup> Commissioners Eckes and Lodwick recommended a five-year quota of 425,000 short tons per year.<sup>167</sup> Commissioners Stern and Rohr recommended an additional five cent per pound tariff for copper for five years.<sup>168</sup>

## 2. Presidential Decision

The President did not find import relief to be in the national economic interest. First, he determined that restricting imports—whether through quotas, tariffs or orderly marketing agreements—would create a differential between U.S. and world copper prices. The higher U.S. price would harm the copper-fabricating industry in the United States (including an estimated 106,000 workers in 1983), by giving its foreign competitors a significant price advantage. Over time, demand for copper in the United States would decline, thus exacerbating the serious problems faced by U.S. copper producers.<sup>169</sup>

Second, the President found that import relief would adversely affect the export earnings of the foreign copper-producing countries, many of which (such as Chile, Zambia, and Zaire) were heavily indebted and highly dependent on copper exports.<sup>170</sup>

The Administration also considered but rejected petitioners’ proposal that the United States negotiate commitments from key exporting countries to reduce substantially annual copper production.

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per from a given quantity of ore. Energy costs are higher for U.S. producers, both because these costs have risen and because U.S. mines are necessarily more energy intensive. Environmental costs are higher in the United States. And wages for U.S. copper workers are higher than those of their foreign counterparts . . . . Indeed, when total average operating costs per pound of refined copper are calculated for U.S. producers and all other foreign producers, the difference is about 23 percent. Most U.S. producers need a price of about 80 to 95 cents to cover costs, while copper producers in Chile, the most source of imports, require a price of only 45-50 cents per pound to break even.

*Id.* at 23, 31.

<sup>165</sup> 19 U.S.C. § 2251(d)(1)(A) (1982 Supp. III 1985).

<sup>166</sup> S. REP. NO. 1298, *supra* note 6, at 126. Vice Chairman Liebler concluded that none of the relief alternatives available to the Commission would facilitate an adjustment to import competition. She therefore took the unprecedented step of recommending against relief (despite her finding of serious injury), but expressed a preference for a tariff approach if relief were provided. Unwrought Copper, *supra* note 73, at 65-71 (views of Vice Chairman Liebler).

<sup>167</sup> Unwrought Copper, *supra* note 73, at 19 (views of Comm’rs Eckes and Lodwick). They recommend that the aggregate amount be allocated to allow for 375,000 short tons of unwrought copper, including a separate allocation of 25,000 short tons of wire bar; and for 50,000 short tons of black, blister, and anode copper.

<sup>168</sup> *Id.* at 47-52 (views of Chairwoman Stern and Comm’r Rohr).

<sup>169</sup> 49 Fed. Reg. 35,609 (1984).

<sup>170</sup> *Id.*

First, such efforts would have been inconsistent with the Administration's market-oriented trade and commodity policy objectives. Second, negotiation of such reduction would have been very difficult, at best. And finally, even if reductions in production were negotiated, most economists doubted that they would be effective.

### *E. Footwear*

#### *1. Commission Recommendation*

In *Footwear*,<sup>171</sup> the Commission unanimously found that increased imports were a substantial cause of serious injury or threat thereof to the U.S. industry.<sup>172</sup> The Commission<sup>173</sup> recommended that quotas be imposed on imports of nonrubber footwear with a customs value over \$2.50 a pair for five years.<sup>174</sup> Chairwoman Stern and Commissioner Rohr recommended that the quota be divided into three segments.<sup>175</sup>

The Commission recommended quotas as opposed to tariffs be-

<sup>171</sup> *Footwear IV*, *supra* note 29. This case was preceded by *Footwear III*, *supra* note 23, where the Commission unanimously found no injury; *Footwear II*, *supra* note 30, where the Commission found injury and President Carter negotiated orderly market agreements with Taiwan and Korea; and *Footwear I*, *supra* note 94, where the Commission found injury and President Ford found that adjustment assistance was the most effective remedy for the industry's injury.

<sup>172</sup> Chairwoman Stern and Vice Chairman Liebler found that increased imports were a substantial cause of a threat of serious injury. *Footwear IV*, *supra* note 29, at 5-23 (views of Chairwoman Stern), 25-53 (views of Vice Chairman Liebler). Commissioners Eckes, Lodwick, and Rohr found the increased imports were a substantial cause of present serious injury. *Id.* at 55-75 (views of Comm'r Eckes), 77-89 (views of Comm'r Lodwick on injury), and 91-113 (views of Comm'r Rohr on injury).

<sup>173</sup> Vice Chairman Liebler recommended against import relief. *Id.* at 171-205 (remedy views of Vice Chairman Liebler), as she did in *Unwrought Copper*, *supra* note 73, at 71. Instead, she recommended that the President provide adjustment assistance. *Footwear IV*, *supra* note 29, at 204.

<sup>174</sup> The following table shows the quantity of footwear imports which would be allowed in each of the final five years:

<i>Year</i>	<i>Quantity (in millions of pairs)</i>
First	474
Second	474
Third	488
Fourth	517
Fifth	564

*Footwear IV*, *supra* note 29, at 2.

<sup>175</sup> The recommendation of Chairwoman Stern and Commissioner Rohr was as follows:

<i>Year</i>	<i>Licenses type</i>			<i>(millions of pairs)</i>
	<i>A</i>	<i>B</i>	<i>C</i>	
First	150	214	110	
Second	150	214	110	
Third	155	220	113	
Fourth	164	233	120	
Fifth	179	254	131	

cause the volume of imports, rather than price factors, affected the condition of the domestic industry.<sup>176</sup> They excluded footwear valued at less than \$2.50 per pair because domestic producers could not meet the consumer demand for low cost footwear. If the Commission imposed relief on all footwear, foreign suppliers would move into the higher-value product lines to compensate for the loss in the volume of shipments. Relief would fall disproportionately on the low-cost sector, with little relief to the higher value products.<sup>177</sup>

## 2. Presidential Decision

The President's decision in the *Footwear* case was made amid intense congressional pressure. Thirty-nine Senators and 167 Representatives supported relief, arguing that this was a "classic" section 201 case. Nonetheless, the President decided that import relief was not in the national economic interest for three reasons. First, the President concluded that quotas would not help the industry become more competitive. The President cited the industry's failure to adjust during a prior period of import protection, and conversely some signs of adjustment while unprotected by quotas.<sup>178</sup>

Second, the President considered the consumer burden of import relief to be unjustifiable. He noted the Council of Economic Advisors' estimate that consumer costs could total \$2.9 billion over the next five years. This amounted to an annual cost of \$26,300 for each average \$14,000 job saved.<sup>179</sup>

Third, the President cited as much as \$2.1 billion in U.S. trade damage as a result of compensatory U.S. tariff reductions or retaliation by governments of foreign suppliers. Brazil, an important mar-

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where A = nonathletic footwear valued over \$2.50 but not over \$5.00 per pair; B = nonathletic footwear valued over \$5.00 per pair, and C = athletic footwear valued over \$2.50 per pair. *Id.* at 2.

Licenses for athletic footwear would be reserved only for athletic footwear; licenses for athletic footwear over \$2.50 per pair but not over \$5.00 per pair could also be used for athletic footwear; licenses for nonathletic footwear valued over \$5.00 could be used for any footwear subject to the quota.

*Id.*

<sup>176</sup> *Id.* at 115 (views of Chairwoman Stern and Comm'rs Eckes, Lodwick, and Rohr regarding remedy).

<sup>177</sup> *Id.* at 116-17 (views of Chairwoman Stern and Comm'rs Eckes, Lodwick, and Rohr regarding remedy).

<sup>178</sup> The President said:

Between 1977 and 1981, U.S. footwear manufacturers received protection from foreign imports, but emerged from that period even more vulnerable to international competition than before. In fact, while unprotected by quotas, the shoe industry has begun to show positive signs of adjustment. Producers have invested in state of the art manufacturing equipment, modernizing their operations, and diversifying into profitable retail operations.

President's White House Statement at 1, 21 WEEKLY COMP. PRES. DOC. 1008 (Aug. 28, 1985).

<sup>179</sup> Nonrubber Footwear Import Relief Determination, Memorandum of Aug. 28, 1985, for the United States Trade Representative, 50 Fed. Reg. 35,205 (1985).

ket for U.S. exports, would have been particularly hard hit.<sup>180</sup>

*F. Wood Shakes and Shingles*

*1. Commission Recommendation*

In *Wood Shakes and Shingles*,<sup>181</sup> Chairwoman Stern and Commissioners Eckes, Lodwick and Rohr found that increased imports were a "substantial cause of serious injury to the domestic industry."<sup>182</sup>

Commissioners Eckes, Lodwick, and Rohr recommended a five-year,<sup>183</sup> 35% tariff on imports of western red cedar shingles and shakes. They estimated that such a tariff would have increased domestic prices by 10.5% had it been in effect in 1984. They believed "this effect best approximates the decline in prices attributable to increased imports in the recent period, and would restrict imports to historical levels."<sup>184</sup>

Chairwoman Stern opposed a 35% (and any other) import relief. She argued that it would result in "miniscule changes in production and minor increases in employment."<sup>185</sup> Moreover, she argued, it would likely be counterproductive, as demand would be shifted to cheaper, substitute, fire-resistant products.<sup>186</sup> Instead, she proposed adjustment assistance.<sup>187</sup>

Vice Chairman Liebler and Commissioner Brunsdale agreed with Chairwoman Stern that temporary import relief would not prevent or remedy the injury suffered by the industry. Commissioner Brunsdale supported adjustment assistance in the form of job training and relocation assistance. Vice Chairman Liebler did not recommend adjustment assistance, but found it preferable to a 35% tariff.<sup>188</sup>

<sup>180</sup> *Id.*

<sup>181</sup> *Wood Shakes and Shingles, supra* note 27.

<sup>182</sup> *Id.* at 3, 7-8. Vice Chairman Liebler and Commissioner Brunsdale found that the industry was seriously injured, but that the contraction in U.S. domestic demand was a more important cause than increased imports. *Id.* at 53-73 (views of Vice Chairman Liebler and Comm'r Brunsdale).

<sup>183</sup> *Id.* at 20. Because of the difficulty in predicting housing construction, they concluded it would not be "feasible to reduce the proposed tariff over the relief period." *Id.* (views of Comm'rs Eckes, Lodwick and Rohr with respect to remedy).

<sup>184</sup> *Id.* at 20 (views of Comm'rs Eckes, Lodwick and Rohr with respect to remedy).

<sup>185</sup> *Id.* at 34. Chairwoman Stern indicated that "a 35 percent tariff would have a negative effect on production, while increasing the workforce by between 24 and 183 workers." *Id.* (views of Chairwoman Stern).

<sup>186</sup> *Id.* at 35. Chairwoman Stern predicted that "after a 35 percent tariff for five years, demand would fall between 25 percent and 34 percent." *Id.* (views of Chairwoman Stern).

<sup>187</sup> *Id.* at 37-39. Commissioners Eckes, Lodwick, and Rohr rejected adjustment assistance, noting that it had been criticized as both ineffectively administered, and inadequately funded. *Id.* at 21 (views of Comm'rs Eckes, Lodwick, and Rohr with respect to remedy).

<sup>188</sup> *Id.* at 79-80 (views of Vice Chairman Liebler and Comm'r Brunsdale).

## 2. *Presidential Decision*

The President provided a five-year tariff program with a duty of 35% for the first thirty months, 20% for months thirty-one through fifty-four, and 8% for months fifty-five through sixty. He directed the Commission to provide an interim report on the economic effect of terminating relief at the end of thirty months.<sup>189</sup>

In announcing the decision, Deputy U.S. Trade Representative Smith cited dramatic increases in these imports in recent years and a substantial drop in domestic production, profits, and employment. He stated the President's import relief program would enable the U.S. industry to increase its search for alternative raw materials and improved anti-flammability, to the benefit of U.S. consumers.<sup>190</sup>

This case had a certain populist appeal, because it was filed by a small industry without the aid of Washington lawyers, and entailed relatively low costs to consumers.<sup>191</sup> It was the first section 201 case considered by the President after his controversial *Footwear* decision,<sup>192</sup> at a time when Congress was seriously considering legislative proposals to restrict the President's discretion under section 201.<sup>193</sup> Because the U.S. tariff on wood shakes and shingles is not bound under the General Agreement on Tariffs and Trade (GATT), the United States was not required to compensate its trading partners for any resulting trade damage. All these factors improved the prospects for import relief.

Almost all U.S. imports of cedar shakes and shingles came from Canada. While the Canadians had no legal right to challenge the U.S. action in the GATT, they nevertheless imposed a series of tariff increases in response to the U.S. action.<sup>194</sup>

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<sup>189</sup> Western Red Cedar Shakes and Shingles Import Relief Determination, Memorandum of May 23, 1986, for the United States Trade Representative, 51 Fed. Reg. 19,157 (1986). The President stated his intent to continue relief for the full five-year period if market conditions warranted and domestic producers made reasonable progress toward adjustment. *Id.*

<sup>190</sup> Office of the U.S. Trade Representative, *President Grants Import Relief to U.S. Western Red Cedar Shakes and Shingles Industry* (May 22, 1986) (source available from author).

<sup>191</sup> Estimates of consumer cost ranged from \$6.1 million to \$25.4 million.

<sup>192</sup> *Footwear IV*, *supra* note 29.

<sup>193</sup> See *infra* notes 195-239 and accompanying text.

<sup>194</sup> The Canadian tariff increases were on certain books; periodicals and miscellaneous published items; computer parts; semiconductors; diesel motor rail cars, units and chassis; and some tea, oats products, trees, cider and ozone generators or airfilters. See *Mulroney 'Furious' At Reagan Approval of Lumber Tariffs*, N.Y. Times, May 24, 1986, at 1, col. 1; *Canada Weighs Steps to Counter U.S. Trade Moves*, Wall St. J., May 27, 1986, at 3, col. 1; Wall St. J., May 28, 1986, at 4, col. 2; *U.S. Reaffirms Trade Commitment to Canada But Won't End Shingle Levy*, Wall St. J., June 2, 1986, at 4, col. 3; *Canada Imposes Levies To Check New U.S. Tariff*, Wall St. J., June 3, 1986, at 18, col. 1; and *U.S. Move on Canada Doubted*, N.Y. Times, June 4, 1986, at D1, col. 6.

#### IV. Legislative Proposals to Amend Section 201

The 99th Congress considered a number of proposals to amend section 201. The most significant of these were contained in H.R. 4750,<sup>195</sup> S. 1860,<sup>196</sup> S. 2099,<sup>197</sup> and proposals prepared by the staff of the Senate Finance Committee.<sup>198</sup> While these proposals differed in important respects, they also contained a number of common elements. Each of the proposals emphasized improving the effectiveness of section 201 relief in promoting adjustment to import competition. Most of the proposals restricted the President's authority and discretion under section 201. They also proposed other amendments, such as emergency relief for perishable products, provisional relief in critical circumstances, a broader definition of serious injury or threat of serious injury, and a requirement for estimates of the impact of relief on consumers.

##### A. *Emphasis on Adjustment*

In describing several adjustment-oriented provisions in H.R. 4750, the House Ways and Means Committee underscored in several ways its desire to use section 201 to promote adjustment. First, the Committee noted that the establishment of an adjustment advisory group—composed of representatives of business, labor, government, communities, and consumers—would be a positive step toward making section 201 a more effective adjustment tool.<sup>199</sup> Second, it stressed that domestic industries seeking temporary import relief must not only indicate their willingness to use the period of relief for adjustment, but also demonstrate actual progress toward such adjustment. For this purpose, H.R. 4750 would have required the Commission to review and report on the domestic industry's ad-

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<sup>195</sup> H.R. 4750 was originally reported by the House Ways and Means Committee on May 6, 1986. 132 CONG. REC. H2417 (daily ed. May 6, 1986). H.R. 4750 was incorporated into H.R. 4800, which passed the House of Representatives on May 22, 1986, by a vote of 295 to 115. 132 CONG. REC. H3162, H3225 (daily ed. May 22, 1986).

<sup>196</sup> S. 1860 was originally introduced by Senator Danforth and was cosponsored by 32 senators. 131 CONG. REC. S15,958 (daily ed. Nov. 20, 1985). The provisions relating to section 201 were introduced separately as S. 1863 on the same day by Senator Mitchell, cosponsored by 14 senators. *Id.* at S15,959.

<sup>197</sup> S. 2099 was introduced by Senator Roth, with Senators Wallop and Durenberger as cosponsors. 132 CONG. REC. S1579 (daily ed. Feb. 25, 1986).

<sup>198</sup> In September 1986, as the Senate Finance Committee prepared for markup of omnibus trade legislation, the staff prepared two documents for the Committee's consideration. The first were "Staff Proposals" released on September 12, 1986 (source available from author). The second was a side-by-side comparison of present law, H.R. 4800, Senate Bills, and Senate staff proposals on Sept. 18, 1986 (source available from author). While these proposals were never formally introduced, the concepts embodied in them were reviewed by key Senators, including Bob Packwood (R-Ore.), John C. Danforth (R-Mo.), and Lloyd Bentsen (D-Tex.), before they were presented to the Committee.

<sup>199</sup> H.R. REP. NO. 581, 99th Cong., 2d Sess. 70 (1986) (explaining H.R. 4750, *supra* note 195, which created the right to have established industry adjustment advisory groups prepare industry adjustment plans in section 201 cases). *Id.*

justment efforts annually beginning after the second year of import relief. The Committee envisaged that this information would be useful to the Office of the U.S. Trade Representative in determining whether import relief should be modified, terminated, or extended.<sup>200</sup>

The various legislative proposals would have required heightened attention to industry adjustment plans, expansion of the options for relief under section 201, and follow-up by the Commission and the Executive Branch following the provision of import relief.

### 1. *Adjustment Plans*

Each of the major legislative proposals amending section 201 either would have required adjustment plans or provided optional procedures. Senate bill 2099, for example, required that all section 201 petitions include an adjustment proposal, including objectives, goals, timetable, and actions to be taken to meet these objectives.<sup>201</sup> This provision of Senate bill 2099 was incorporated into the Senate Finance Committee Staff Proposals.<sup>202</sup>

House bill 4750<sup>203</sup> and Senate bill 1860<sup>204</sup> provided for elaborate industry adjustment advisory groups that could be created at the option of the petitioner. The Administration opposed the establishment of boards with representatives of government, industry, and labor (and others) to draw up adjustment plans. Ambassador Clayton Yeutter explained the Administration's view that these proposals would transform the Commission from an independent commission into an industrial policy-making agency. He maintained that such proposals were impractical and unworkable and would involve unacceptable extensive governmental intervention in the economy.<sup>205</sup>

Moreover, Ambassador Yeutter stressed that there was no reason to believe that government bureaucrats are better-equipped to devise adjustment plans than business executives. He said that the

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<sup>200</sup> *Id.* at 80 (explaining H.R. 4750, *supra* note 195, which required the Commission to report annually on the adjustment efforts of domestic industry following import relief).

<sup>201</sup> S. 2099, 99th Cong., 2d Sess., 132 CONG. REC. S1579, 1580 (daily ed. Feb. 25, 1986).

<sup>202</sup> *Supra* note 198, at 3-4.

<sup>203</sup> Section 141 of H.R. 4750, *supra* note 195, provides for advisory groups, chaired by USTR, consisting of two to four representatives of workers, two to four representatives of firms (at least one of which must be a representative of small business), one representative of affected communities, one individual knowledgeable of special consumer concerns, and one representative from the Departments of Labor, Commerce, and Agriculture (when an agricultural product is involved). H.R. REP. NO. 581, *supra* note 199, at 69.

<sup>204</sup> 131 Cong Rec. S15,958 (daily ed. Nov. 20, 1985). Section 305 of S. 1860 provided for advisory groups, established by USTR, consisting of individuals designated by petitioner and representing firms, workers and officials of USTR, the Departments of Labor and Commerce, and any other heads of departments and agencies designated by USTR. *Id.* at S15,963.

<sup>205</sup> Yeutter Testimony, *supra* note 106, at 4-5.



marketplace allocates capital and human resources better than government bureaucrats would. Therefore, individual firms should make their own adjustment plans, based on their own projections of future market conditions and their willingness to commit the resources needed to become internationally competitive. They, rather than the government, should be held accountable by their shareholders for their success or failure in implementing those plans.<sup>206</sup> Some proposals also would have required the Commission to hold hearings on the adjustment plan,<sup>207</sup> and the President to consider or follow the adjustment proposal.<sup>208</sup>

In light of Congressional interest in ensuring that section 201 relief results in adjustment, the Senate Finance Committee staff proposals were particularly noteworthy. The staff proposals stated that "the standard for recommending and granting import relief would be identical for both the ITC and the President (*i.e.*, such action as can reasonably be expected to lead to a domestic industry that can be competitive without further import relief after expiration of such import relief)." The effect of this change would have been to preclude the Commission from recommending import relief unless it found that the industry would be competitive at the end of the relief period. In addition, the staff proposals would have required the President, if he denied import relief, to grant Trade Adjustment Assistance in an effort to facilitate adjustment.<sup>209</sup>

## 2. *Additional Options for Import Relief*

Senate bill 1860 and the Senate Finance Committee staff proposals included the following additional options for import relief under section 201: (1) accelerated antidumping and countervailing duty cases where appropriate;<sup>210</sup> (2) limited antitrust exemptions for

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<sup>206</sup> *Id.*

<sup>207</sup> *E.g.*, § 305(b)(2) of S. 1860, 131 CONG. REC. S15,958, S15,964 (daily ed. Nov. 20, 1985). Under section 305(b)(2) of S. 1860, *id.* at S15,964, the Commission would consider whether there was a reasonable expectation that implementation of the adjustment plan and associated commitments would enable the industry to adjust to import competition and to be competitive without further import relief. If its determinations were affirmative, under § 305(d), the President would be required to provide the relief recommended by the Commission or substantially equivalent relief, unless he obtained congressional authorization to do otherwise through a bill submitted to the Congress under fast track procedures.

<sup>208</sup> *Id.* at S15,964.

<sup>209</sup> *See supra* note 198.

<sup>210</sup> *See* § 306 of S. 1860, 131 CONG. REC. S15,965 (daily ed. Nov. 20, 1985); and Staff Proposals, *supra* note 198 (providing for only expedited dumping cases). This provision would treat a Commission determination of serious injury (with respect to global imports) as an affirmative Commission determination of material injury (with respect to dumped or subsidized imports from those countries subject to the antidumping or countervailing duty investigation). The Administration objected to this provision because the statutory definition of industry in § 201 is different from that in Title VII of the Tariff Act of 1930; the Commission often defines the industry more broadly in a § 201 case than in an antidump-

mergers and acquisitions in specified import-affected circumstances,<sup>211</sup> and (3) multilateral negotiations to address problems not susceptible to unilateral solution, such as global oversupply or diversion because of government targeting.<sup>212</sup>

### 3. *Follow-up to Relief*

The proposals required the President to establish procedures for monitoring achievement of the goals of the adjustment plan.<sup>213</sup> Senate bill 2099 also would have barred any new section 201 investigation for any industry granted relief under section 201 during two nonconsecutive periods.<sup>214</sup>

## B. *Restrictions on President's Authority*

### 1. *Transfer of Authority*

The House bill (H.R. 4750) would have transferred decision-making authority in section 201 cases from the President to the U.S. Trade Representative.<sup>215</sup> The Administration opposed this provi-

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ing or countervailing duty case. Moreover, a serious injury finding with regard to all imports is not equivalent to a material injury finding with regard to only dumped or subsidized imports.

<sup>211</sup> See § 306 of S. 1860, 131 CONG. REC. S15,965 (daily ed. Nov. 20, 1985); S. 2099, 132 CONG. REC. S1579 (daily ed. Feb. 25, 1986); and Staff Proposals, *supra* note 198. These proposals would provide limited antitrust exemptions for mergers and acquisitions reasonably related to enhancing competition with foreign competitors to whom market share has been lost and that outweigh adverse competitive impact on the domestic market. Such "double-dipping" of both import relief and antitrust exemptions could have a large negative impact on both competition and consumer welfare.

<sup>212</sup> See § 306 of S. 1860, 131 CONG. REC. S15,965 (daily ed. Nov. 20, 1985); S. 2099, 132 CONG. REC. S1579 (daily ed. Feb. 25, 1986); and Staff Proposals, *supra* note 198. Under the proposals in S. 1860, the President would have one year to negotiate. If negotiations failed to provide substantial relief from the serious injury, the President would be required to proclaim the relief originally recommended by the Commission unless he obtained "fast track" legislation authorizing him to provide no relief or different relief.

<sup>213</sup> See § 141 of H.R. 4750; § 305 of S. 1860, 131 CONG. REC. S15,964 (daily ed. Nov. 20, 1985); S. 2099, 132 CONG. REC. S1579 (daily ed. Feb. 25, 1986).

<sup>214</sup> Under S. 2099, relief would have been authorized for up to five years, with a possible extension of up to three years. After a two-year wait following the expiration of relief, an industry could apply again for further relief. However, relief could be granted a second time only to facilitate the orderly transfer of resources to alternative uses. The second relief period would have a maximum duration of five years, with no possibility of extension.

The rationale of S. 2099 in this regard was to clarify that relief is for a limited duration, to put additional pressure on firms to adjust to import competition. Senator Roth noted his concern that of the 58 § 201 investigations that had then taken place, 13 involved industries that had been the subject of prior investigations. To avoid the use of § 201 as a mechanism for permanent protection of inefficient industries, S. 2099 would have limited its availability more stringently than current law. 132 CONG. REC. S1581 (daily ed. Feb. 25, 1986).

<sup>215</sup> See § 141 of H.R. 4750, *supra* note 195. The House Ways and Means Committee report accompanying H.R. 4750 stated:

The purpose of these changes is to strengthen the role of the U.S. Trade Representative in being the chief official in the executive branch whose sole responsibility is to look after the international trade interests of the United

sion on the grounds that it violated the GATT. Both H.R. 4800 and S. 1860 would have raised tariffs or imposed quotas in violation of tariff findings.<sup>216</sup>

## 2. Requirement of Import Relief

As discussed above,<sup>217</sup> S. 1860 would have allowed (but not required) petitioner to submit the adjustment plan created by the tripartite plan development group. If petitioner did so and the Commission found a reasonable expectation that the strategy, plus industry commitments, would lead to a competitive domestic industry by the time relief expired, then S. 1860 would have required the President to provide the import relief recommended by the Commission or substantially equivalent relief. He would have been excused from doing so only if Congress passed "fast track"<sup>218</sup> legislation allowing him to provide no relief or other relief.<sup>219</sup>

From the Administration's perspective, this limitation on Presidential discretion was as controversial as any of the legislative proposals considered in the 99th Congress.<sup>220</sup> Ambassador Yeutter told the Senate Finance Committee that such curtailment of the President's discretion would put the Commission in the position of making decisions with far-reaching foreign and domestic policy implications.

Moreover, Ambassador Yeutter emphasized that the President should be able to provide no or lesser escape clause relief, since it is not without international and domestic repercussions. To the contrary, it has a cost in trade compensation or retaliation, often ironically borne by the most competitive U.S. industries, the aggressive

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States. This statutory change in decision-making responsibility is not meant to remove any Presidential power or to reduce the influence of the President in making trade decisions. The U.S. Trade Representative is, after all, an individual chosen by the President to act as his chief trade policymaker and spokesperson. The Committee does not anticipate that the U.S. Trade Representative, who serves at the pleasure of the President, will make decisions with which the President disagrees. The Committee does, however, have serious concerns about the degree of control and influence which other members of the executive branch currently have over trade policy decisions made by the President under current procedures. This statutory change is designed to ensure that the Administration official who is solely responsible for the coordination and implementation of U.S. trade policy is directly accountable for determination [sic] under U.S. trade laws.

H.R. REP. NO. 581, *supra* note 199, at 68-69.

<sup>216</sup> *Id.*

<sup>217</sup> See *supra* note 204 and accompanying text.

<sup>218</sup> See Koh, *supra* note 21, at 1202.

<sup>219</sup> S. 1860 also included a provision (§ 307) to legislate import relief for the copper and footwear industries. 131 CONG. REC. S15,965-66 (daily ed. Nov. 20, 1985).

<sup>220</sup> While H.R. 4750, the House omnibus trade bill, was highly protectionist and delegated the President's authority in § 201 cases to the U.S. Trade Representative, it retained the flexibility to deny import relief in those cases where it was determined that relief would not be in the national economic interest. See H.R. REP. NO. 581, *supra* note 199, at 68.

exporters. When import relief saves more jobs than it costs and gives an industry a fighting chance to adjust and survive, the Administration would pay the price willingly. But when the costs are too high and the benefits fleeting, the President must be able to refuse since relief would not be in the national economic interest.<sup>221</sup>

### C. Other Proposed Changes to Section 201

In his September 23, 1985, speech to the President's Export Council, President Reagan described emergency relief for perishable agricultural products as a legislative change the Administration would support.<sup>222</sup> Senate bill 1860<sup>223</sup> and House bill 4800<sup>224</sup> both required fast-track relief for such products under section 201 if the Secretary of Agriculture determines within fourteen (or twenty) days that such relief is warranted, unless the President (or USTR) decides within seven days that such relief is not in the national economic interest.

The Administration opposed this provision on the grounds that it violated the GATT. Both H.R. 4800 and S. 1860 would have raised tariffs or imposed quotas in violation of tariff bindings.<sup>225</sup> The approach in these two bills would have given hasty relief to some industries even where the Commission later found no injury; the United States would have had to pay compensation had to its trading partners been adversely affected.

#### 1. Provisional Import Relief

House bill 4800<sup>226</sup> and Senate bill 1860<sup>227</sup> included virtually

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<sup>221</sup> Yeutter Testimony, *supra* note 106, at 2-4.

<sup>222</sup> President's Message to Business Leaders and Members of the President's Export Council and the Advisory Committee for Trade Negotiations, 21 WEEKLY COMP. PRES. DOC. 1128, 1130 (Sept. 23, 1985).

<sup>223</sup> Section 303 of S. 1860, 131 CONG. REC. S15,963 (daily ed. Nov. 20, 1985), provides fast-track relief where a § 201 petition is filed on a perishable product, if a petition requests such relief and is also filed with USDA. The Secretary of Agriculture must decide within 14 days whether such relief is warranted, and the President then has 7 days to determine whether such relief is in the national economic interest.

<sup>224</sup> Section 233 of H.R. 4800, 132 CONG. REC. H3179 (daily ed. May 22, 1986), provides fast-track import relief for perishable products if a request for such relief is made during a § 201 case, if the Secretary of Agriculture decides within 20 days that such relief is warranted, unless the U.S. Trade Representative decides within 7 days that such relief is not in the national economic interest.

<sup>225</sup> Supporters of the perishable product provisions of H.R. 4800 or S. 1860 have attempted to justify its GATT legality by citing the fact that the Caribbean Basin Initiative and the U.S.-Israel Free Trade Area provide safeguard provisions for emergency relief from imports of perishable products from those countries under fast-track procedures. See United States-Israel Free Trade Area Implementation Act of 1985, 19 U.S.C. § 2112 (1985). However, those relief provisions only removed a special trade preference and restored the usual tariff; the provisions in H.R. 4800 and S. 1860 would have raised tariffs or imposed quotas in violation of tariff bindings.

<sup>226</sup> Section 233 of H.R. 4800, 132 CONG. REC. H3179 (daily ed. May 22, 1986), relates to provisional import relief.

identical provisional relief proposals. Section 302 of S. 1860, for example, authorized provisional import relief before a finding of serious injury by the Commission, if the President found that "critical circumstances" existed. He would find critical circumstances to exist if a significant increase in imports (actual or relative to domestic production) over a short period of time had led to circumstances in which delay in the imposition of relief would cause damage to the domestic industry which is difficult to remedy.<sup>228</sup>

The Administration opposed this provision because it violated the GATT. The GATT requires an objective finding of serious injury caused by increased imports before any action can be taken against imports.<sup>229</sup> If the United States were to take provisional action, and the Commission later found no injury, the United States would still owe compensation.

## 2. *Threat of Serious Injury*<sup>230</sup>

Senate bill 2099 added the following additional factors for the Commission to consider in determining threat of material injury: (1) targeting, (2) existence of preliminary or final antidumping or countervailing duty determinations on goods produced by the U.S. industry, (3) lack of ability of U.S. firms to maintain adequate levels of research and development, (4) the extent to which trade restraints abroad divert exports to the United States, (5) rapid increase in market penetration and the likelihood that it will increase the level of serious injury, (6) increase in capacity, or unused capacity abroad, (7) probability of price suppression or depression caused by imports, and (8) potential for product shifting. H.R. 4750<sup>231</sup> and S. 1860<sup>232</sup> also included changes in the threat standard.

The Administration considered some of these additional factors unnecessary; others it opposed. As already discussed,<sup>233</sup> to be consistent with the GATT, threatened injury must be real and imminent.

<sup>227</sup> Section 302 of S. 1860, 131 CONG. REC. S15,963 (daily ed. Nov. 20, 1985).

<sup>228</sup> *Id.*

<sup>229</sup> GATT, *supra* note 3, Art. XIX.

<sup>230</sup> In addition to those changes relative to threat of serious injury, H.R. 4750, *supra* note 195, would also change the definition of serious injury and threat of serious injury to require that, in considering the inability of a significant number of firms to operate at a reasonable level of profit, only the profitability of domestic production facilities is relevant. *Id.*

<sup>231</sup> H.R. 4750 added the following criteria: (1) decrease in market share, (2) extent to which import restraints abroad divert exports to the United States, and (3) the inability of U.S. producers to generate capital for modernization. *Id.*

<sup>232</sup> S. 1860 added the following criteria: (1) decline in market share, (2) targeting, (3) preliminary or final affirmative antidumping and countervailing duty determinations, (4) inability of firms in the U.S. industry to maintain adequate levels of research and development, and (5) the extent to which trade restraints abroad divert exports to the United States § 301, 131 CONG. REC. S15,962 (daily ed. Nov. 20, 1985).

<sup>233</sup> See *supra* notes 3-4 and accompanying text.

Thus, the Administration considered it essential that the factors should remain relevant to the question of whether injury is real and imminent to the domestic industry. In particular, the Administration was concerned about including the existence of antidumping or countervailing duty determinations as such a factor. Such determinations suggest that the threat of serious injury is reduced, not increased, because the dumping or subsidization should be offset by the application of antidumping or countervailing duties.

## V. The Omnibus Trade and Competitiveness Legislation

After considerable activity in the 99th Congress without resolution, the 100th Congress passed omnibus trade legislation. H.R. 4800<sup>234</sup> was introduced in the House of Representatives without change as H.R. 3 and passed by a vote of 290 to 137 on April 30, 1987.<sup>235</sup> By a vote of 71 to 27, the Senate passed H.R. 3 as amended on July 21, 1987.<sup>236</sup> The two bodies proceeded to a mammoth 199-member conference, which concluded its work on March 31, 1988.<sup>237</sup> By a vote of 312 to 107, the House agreed to the conference report on April 21.<sup>238</sup> By a vote of 63 to 36, the Senate so agreed about a week later.<sup>239</sup>

However, on May 24, 1988, the President vetoed the bill<sup>240</sup> largely because of its mandatory provisions regarding advance notice of business closings and mass layoffs.<sup>241</sup> The House voted 308 to 113 to override that veto,<sup>242</sup> but the Senate sustained it by a vote of 61 to 37.<sup>243</sup> Nonetheless, at the time of this article's writing, the prospects for trade legislation in 1988 still appear positive. The President stated his support for a "second" trade bill,<sup>244</sup> and many speculate that a second bill is likely to be passed.<sup>245</sup> It is worthwhile,

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<sup>234</sup> See *supra* note 224.

<sup>235</sup> 133 CONG. REC. H2981 (daily ed. April 30, 1987).

<sup>236</sup> 133 CONG. REC. S10,372 (daily ed. July 21, 1987).

<sup>237</sup> Omnibus Trade and Competitiveness Act of 1988: Conference Report to Accompany H.R. 3, H.R. REP. NO. 576, 100th Cong., 2d Sess. (1988).

<sup>238</sup> 134 CONG. REC. H2375 (daily ed. April 21, 1988).

<sup>239</sup> 134 CONG. REC. S4926 (daily ed. April 27, 1988).

<sup>240</sup> H.R. Doc. No. 200, 100th Cong., 2d Sess., 134 CONG. REC. 3531-32 (daily ed. May 24, 1988).

<sup>241</sup> Sections 6401-6410 of H.R. 3, H.R. REP. NO. 576, 100th Cong., 2d Sess. at 459-63 (1988).

<sup>242</sup> 134 CONG. REC. H3553 (daily ed. May 24, 1988).

<sup>243</sup> 134 CONG. REC. S4291 (daily ed. June 8, 1988).

<sup>244</sup> In his veto message, the President disapproved H.R. 3 "with sincere regret." He stated unequivocally, "I want a trade bill," and he pledged to "continue to work vigorously to secure sound legislation this year." He concluded: "I am committed to enactment of a responsible trade bill this year. . . . I want to sign a trade bill this year. I urge prompt action on a second bill immediately after Congress sustains my veto." 134 CONG. REC. H3531-32 (daily ed. May 24, 1988).

<sup>245</sup> Swoboda, *Labor Won't Try for Compromise on Trade Bill*, Wash. Post, June 3, 1988, at G1, col. 5, G10, col. 6.

then, to review amendments to section 201 in the vetoed Omnibus Trade and Competitiveness Act of 1988.<sup>246</sup> While these changes are not nearly so sweeping as many proposals made in the 99th and 100th Congresses, they included some significant developments.

Most importantly, H.R. 3 stressed the objective of facilitating adjustment to import competition. For example, it authorized the ITC to seek information from firms and workers regarding steps they are taking or plan to take to achieve a positive adjustment to import competition, and provided an opportunity for firms, workers, and associations to submit voluntary adjustment plans and commitments (after an affirmative ITC injury determination) regarding adjustment actions.<sup>247</sup> The Omnibus Trade Act authorized the ITC to recommend relief to facilitate positive adjustment,<sup>248</sup> and generally required the ITC to make a determination as to injury within four months, so as to leave sufficient time (normally two months) for its remedy recommendation.<sup>249</sup> If the ITC found injury, the Omnibus Trade Act required the President to take all appropriate and feasible action to facilitate efforts by the domestic industry to make a positive adjustment to import competition, unless he determined that such relief was not in the national interest,<sup>250</sup> and required the President to consider various specified factors in determining whether import relief would facilitate positive adjustment.<sup>251</sup> The act also added, as a new remedy option, appropriate adjustment measures (beyond normal trade adjustment assistance),<sup>252</sup> and required the ITC to evaluate the effectiveness of any relief provided under section 201 after termination of the relief.<sup>253</sup> Through these measures, H.R. 3 substantially improved the likelihood that section 201 will be used to facilitate successful adjustment to import competition, and thus to enhance competitiveness.

The Omnibus Trade legislation did not reduce significantly the President's discretion in deciding whether or how to provide relief, as several early versions of the trade legislation proposed. Ultimately, the President retained the authority to decide not to provide any relief under section 201, or to provide less relief than recommended by the ITC, if he determined that such relief is not in the national economic interest.<sup>254</sup>

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<sup>246</sup> The provisions concerning section 210 are contained in section 1401 of H.R. 3, H.R. REP. No. 576, 100th Cong., 2d Sess. at 125-43 (1988).

<sup>247</sup> *Id.* at 126-27.

<sup>248</sup> *Id.* at 133.

<sup>249</sup> *Id.* at 128.

<sup>250</sup> *Id.* at 135.

<sup>251</sup> *Id.* at 135-36.

<sup>252</sup> *Id.* at 133.

<sup>253</sup> *Id.* at 140.

<sup>254</sup> *Id.* at 135.

**Conclusion**

The Reagan Administration's record in section 201 cases has been subject to close scrutiny by the Congress. The last two Congresses in particular entertained a large number of proposals for changing section 201 and making it more likely the President would provide relief if the ITC made an affirmative injury determination. The legislative consensus developed to date, however, does not substantially reduce the President's discretion under this trade remedy. Rather, it constructively emphasizes the role of section 201 relief in facilitating a positive adjustment to import competition by U.S. industries seeking relief. If a trade bill is enacted in 1988, it is likely to tread closely this careful path.



