THE OMNIBUS TRADE ACT OF 1988: TRADE LAW DIALECTICS

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1. INTRODUCTION

The Omnibus Trade Act of 1988[1] is, if nothing else, comprehensive. It covers a broad spectrum of subjects, including fast-track authority to negotiate a new round of reciprocal trade agreements (the Uruguay Round), extensive revision of the trade laws, adjustment assistance, the encouragement of exports, tariff harmonization, international trade policy, agricultural and telecommunications trade, international trade in technology, competitiveness policy, foreign investment, the Foreign Corrupt Practices Act,[2] government procurement, patent policy, Sematech,[3] and the budget deficit.

Perhaps the areas of most interest to United States and foreign corporations are those which affect imports, exports, and international transactions. This essay focuses on the amendments which the Omnibus Act makes to the U.S. laws governing unfairly traded (dumped or subsidized) imports, imports of intellectual property, access to foreign markets, exports, and corrupt practices in international transactions.

The Act had a very long gestation and a very troubled birth. It was conceived in 1985. That year, the House Ways and Means Committee held extensive hearings. Hundreds of witnesses were heard. Thousands of pages of transcript were compiled. Trade bills were introduced in each Congress thereafter. Ultimately, the Omnibus Bill was enacted and signed by President Reagan in August of 1988. The path from the hearings in 1985 to the 1988 Act was anything but peaceful. Along the way, bills passed by either body of Congress were denounced by the President as "Sons of Smoot-Hawley"[4] and "Rambo-esque."

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[1] Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107 (1988).

[2] Foreign Corrupt Practices Act of 1977, 15 U.S.C. § 78a (1982).

[3] SEMATECH is the semiconductor industry's new research and development consortium. CONG. Q. WEEKLY REP., Mar. 26, 1988, at 769.

[4] The Smoot-Hawley tariffs of 1930 increased barriers to international trade and contributed to the severity of the Great Depression. *See* BARTON & FISHER, INTERNATIONAL TRADE AND INVESTMENT 91 (1986).

Nineteen eighty-seven was to be the year of the trade bill. But it passed without legislation being enacted because the House and Senate had passed massive, but very different, bills. Under the best of circumstances, producing a compromise bill would have been a daunting business. But the leadership of the Congress held fast. The conference appointed to produce a trade bill may have been the largest, most complicated legislative effort ever undertaken. Nearly 200 members of the Senate and House, divided into seventeen separate subconferences, were appointed. With the Administration actively participating, the process seemed certain to turn into a three-ring circus—with no ringmaster. The conferees faced an enormous challenge to reconcile two bills, each of which ran to more than a thousand pages. The side-by-side comparison of the bills alone took up more than 500 pages.

It must be seen as a minor miracle that a compromise emerged from this process. But Pauline's Perils weren't over yet. The fate of this massive piece of legislation hinged, ironically, on an issue which did not even deal with trade: the plant closing provision. President Reagan declared unyielding opposition to the provision. The Democrats adopted a similarly rigid position. Bets were called. The entire trade bill was vetoed and the veto sustained. Suddenly, years of work seemed about to go down the legislative drain. Worse, the next President would inherit not a new trade law but an old trade policy mess. All the deals cut to shape the Omnibus Act would come up for grabs as the Congress and the new President tested each other's mettle. And all this because of a non-trade issue.

In the end, Congress passed the plant closing provision as a separate bill,[5] and the President allowed it to become law. Congress then passed the trade bill, now shorn of plant closing, and the President signed it. The result: Congress could not override the President's veto, but it got exactly what it wanted anyway—the Omnibus Trade Act and a plant closing law.

What does this new, Omnibus Trade Act do? Does it tilt the system in favor of protectionism, procedural or substantive? Will it mean more import relief and less export restraint for domestic industries? Does it foreshadow more trade strife with our trading partners? More to the point, does it mean more and different trade litigation?

A framework for analyzing these issues can be organized around four enduring trade policy dialectics:

—Congress versus the President,

[5] Worker Adjustment and Retraining Notification Act, Pub. L. No. 100-379, 102 Stat. 890 (1988).

—The role of discretion versus the rule of law,
—Unilateralism versus multilateralism, and
—Protectionism versus adjustment.

2. Congress versus the President

The struggle between the Congress and the President for primacy over trade policy is one of the longest running confrontations in the history of the republic. The institutional confrontation traces back to the Constitution, which gave Congress the power "to lay and collect duties" and to "regulate Commerce with foreign nations."[6] This power was quickly exercised. Indeed, the Tariff Act of 1789,[7] which provided for the imposition of customs duties, was the first piece of substantive legislation passed by the Congress. And until adoption of the 16th Amendment in 1913,[8] these duties provided a principal source of revenue for the federal government. Tariffs were also used, of course, as a tool of economic policy, to shelter infant industries and encourage the shift from agriculture to industry.

So long as trade policy retained its central role in raising revenue and implementing domestic economic policies, Congress held a tight rein over the President. The reins were loosened by the Wilson Administration, which sought and received authorization from Congress to reduce duties. But the failure of President Wilson's internationalist policies produced an isolationist backlash which eventually contributed to the disastrous Smoot-Hawley tariffs.[9]

The balance of power between the President and Congress was altered dramatically by the Depression and the New Deal. Congress granted President Roosevelt broad authorization to negotiate reciprocal tariff-cutting agreements on a bilateral basis. Because of the most-favored nation clauses in these agreements, tariff concessions given to one country were extended to others without any further legislative authorization from Congress.

From this point forward, the power to determine trade policy shifted decisively to the President. After World War II, international trade was not of much concern to Congress, whose constituents had little fear of import competition. The President was allowed a relatively free hand in balancing trade interests against foreign policy considera-

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[6] U.S. Const. art. I, § 8, cl. 3.

[7] Act for Laying a Duty on Goods, Wares, and Merchandises Imported Into the United States, ch. 2, 1st Cong., 1st Sess. 24 (1789).

[8] U.S. Const. amend. XVI.

[9] *See* Barton & Fisher, *supra* note 4, at 91.

tions. Congress' rejection of the International Trade Organization[10] was an exception, but this decision was based more on sovereignty than economic considerations.

The pendulum shifted in the opposite direction as Congress began to reassert itself in the post-Vietnam, post-Watergate period. Witness the Trade Acts of 1974[11] and 1979,[12] which reflect renewed Congressional assertiveness over trade policy. The Omnibus Trade Act of 1988 continues this trend. Indeed, it is no exaggeration to say that much of the impetus for the Omnibus Act arose out of Congress' belief that the Administration was ideologically insensitive to the serious international trade problems of the 1980s—problems of great import to constituents. Esoteric trade problems suddenly became page one news. In this supercharged trade climate, laissez-faire was not politically acceptable. Many of the provisions in the Act, therefore, are intended to push, prod, and propel the Administration into taking a more aggressive stance.

Examples of this approach abound. The Act is replete with reporting requirements. The United States Trade Representative (USTR), for example, must include in its annual foreign trade report an estimate of the value of the trade lost because of barriers identified in the report. Similarly, the USTR is to review and report on whether other parties to the Subsidies Code[13] are complying with their obligations and, if not, to recommend appropriate action. The USTR is not the only agency so favored; the Treasury must submit to Congress a written report on exchange rate policy. And Congress was not shy about what is to be covered in the report: everything bearing on international economic policy, from an evaluation of the factors underlying conditions in currency markets to the international competitive performance of U.S. industries.

The reports do several things. They focus the Administration's attention on the policy concerns of the Congress, they generate pressure for action lest the report reveal executive indifference to Congressional priorities, and they provide an evidentiary basis for future legislative action. Here, Congress is exercising one of its principal powers over the conduct of trade policy, the oversight power. The other primary power, to legislate or lay down rules, involves essentially narrowing adminis-

[10] *See* BARTON & FISHER, *supra* note 4, at 91-92.

[11] Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978 (1974). General Agreement on Tariffs and Trade, April 12, 1979, 31 U.S.T. 513, T.I.A.S. No. 9619, 19 U.S.C. § 2563 (1982).

[12] Trade Act of 1979, Pub. L. No. 96-39, 93 Stat. 114 (1979).

[13] The Agreement on Subsidies and Countervailing Measures was adopted by GATT Contracting Parties at the 1979 Tokyo Round of multinational trade negotiations. 18 I.L.M. 579; *see* BARTON & FISHER, *supra* note 4, at 351-61.

trative discretion, which leads to the second of the dialectics: discretion versus the legalization of trade policy.

3. Discretion versus the Rule of Law

The legalization of unfair trade remedies has been characteristic of trade legislation since the 1974 Act. It reached its high-water mark with the 1979 Trade Agreements Act.[14] The Omnibus Act makes further modifications in this direction; for example, the United States International Trade Commission (ITC) is directed to explain its analysis of each material injury factor and to disclose to the parties, under protective order, business proprietary information.

The revisions to Section 301 are far more significant in this connection, both for what they do and for what they don't do. By definition, Section 301, which aims at opening markets to U.S. exports, does not lend itself to the legal process which has come to characterize remedies for unfair import competition. There are several reasons: first, it is difficult to fashion an entitlement to a remedy which is inherently discretionary since the targeted behavior involves denial of access to a foreign market; second, the only remedy is retaliation, which may do the claimant little, if any, good; third, the rights at stake, at least in the case of enforcement of trade agreements, are those of the nation, not of any individual; and finally, the political stakes, in foreign policy terms, are far higher in cases involving allegedly unreasonable—but not necessarily unlawful—acts of a foreign country. Those stakes are too high to allow the outcome to be controlled by individual litigants or reviewing courts.

Congress flirted with moving Section 301 in the direction of greater legalization—towards the model in place for dumping and countervailing duty cases. The House wanted to establish formal investigatory mechanisms, in the USTR, for example. And both the House and Senate wanted to mandate retaliation in a broad range of cases. What emerged in the Act was little more than a nod in the direction of subjecting 301 investigations to the rule of law, but a significant tilt towards more aggressive enforcement. Thus, the USTR is now required to make an unfairness finding—to determine whether or not a specific act or practice is unreasonable—but only if she decides to initiate an investigation. She may decline to do so if she decides that such action would not be effective. Retaliation is said to be mandatory in cases involving violations of trade agreements, but the USTR may grant waivers for a variety of reasons, including a determination that

[14] 19 U.S.C. § 2501 (1982).

retaliation would cause harm out of proportion to the potential benefits. The USTR is required to self-initiate investigations into certain high-priority practices in high-priority countries, under the so-called Super 301 provisions. But the USTR would retain her waiver authority, as in non-Super 301 investigations.

In the end, Congress opted for more traditional, more political means of limiting executive discretion: tight time tables for action, transparency in the form of reports and published findings, legislative policy directives, and political pressure points in the form of waiver decisions. A determined President could resist all of the above legally, but he would do so—assuming continued, massive deficits—at his political peril.

Congress took the opposite approach in the export license area, enlarging the rule of law in aid of a goal which commands a clear consensus: limiting export controls, which are widely seen as self-imposed barriers to U.S. export trade. Under the Omnibus Act, enforcement decisions are now subject to judicial review by the United States Court of Appeals for the District of Columbia Circuit. Decisions of the Department of Commerce imposing sanctions can be set aside "if not supported by substantial evidence on the record" or if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"—the traditional standard for judicial review of administrative actions.

4. Unilateralism versus Multilateralism

The third of the trade dialectics is a pervasive one: unilateralism versus multilateralism. It presents especially sensitive and serious considerations at a time of growing economic interdependence, a massive U.S. trade deficit, and frustration with the GATT.[15] Here the Act points, Janus-like, in both directions.

The most important commitment to multilateralism, of course, is the renewal of authority to negotiate trade agreements. Perhaps the principal achievement of the Act is the fast-track ratification procedure which runs through May 31, 1991, five months after the Uruguay Round is scheduled to end. Furthermore, the authority can be extended for two more years—just in case. Fast-track authority is indispensable to a successful multilateral trade negotiation, since our trading partners cannot be expected to negotiate twice, first with the executive and then with the legislature. The negotiating authority, which is laced with

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[15] General Agreement on Tariffs and Trade, April 12, 1979, U.S.T. 513, T.I.A.S. No. 9619, 19 U.S.C. § 2503 (1982).

congressionally set objectives and consultation provisions, shows also that Congress and the President can collaborate on trade policy, subordinating their competing and often conflicting priorities in the interest of liberalizing world trade.

Other features of the Omnibus Act point in the opposite direction, toward unilateralism. For example, there is the unilateral declaration of unfair trade practices actionable under Section 301: export targeting, denial of workers' rights, and governmental toleration of systematic private anti-competitive practices. Similarly, Super 301, and the telecommunications provisions authorizing retaliation against imports from countries which the President determines deny market opportunities to U.S. exports, represent expressions of unilateralism in pursuing remedies against practices perceived by the U.S. to be unfair. The reciprocity provisions which define fairness in terms of U.S. practice are of a kind. In each of these areas, however, the Act stopped short of mandating retaliation—so it will be up to the next Administration to ride or break the unilateralist wave.

5. Protectionism versus Adjustment

The last of the dialectics is protectionism versus adjustment. Here, the Act stands strongly in support of adjustment and does little overtly aimed at turning U.S. trade law and policy towards protectionism.

On the adjustment side of the ledger, the most prominent feature of the new law is the resurrection of trade adjustment assistance. The Act provides substantially increased funding—to a level of nearly $1 billion—for financial assistance to dislocated workers. The process of qualifying for such assistance has been simplified. Given the Administration's prior opposition to adjustment assistance, its endorsement of the adjustment policy reflected in the Omnibus Act represents a sea change. Of course, it remains to be seen whether the new program will be implemented more effectively than prior programs of a similar nature. But this, too, is a matter for the next Administration.

Section 201, the most important overtly protectionist provision in U.S. trade law, has also been oriented towards adjustment. Section 201 allows for import relief on a showing of serious, import-caused injury without a finding of any underlying unfair trade practice. The new adjustment orientation is reflected in the encouragement given to petitioners to submit adjustment plans. More significantly, the ITC is directed to recommend relief which it believes will most effectively facilitate the industry's adjustment to import competition. And the President is to take "all appropriate and feasible action" that will help the industry to adjust. It is an open question whether an industry which is incapable of adjustment can qualify for relief.

What Congress did *not* do to Section 201 is as important as the amendments adopted. At various times during the history of the Omnibus Act, members of Congress tried to tilt Section 201 toward easier and more certain relief for domestic petitioners. At one point, the President's discretion to reject a remedy recommendation from a unanimous ITC was about to be removed. This and other efforts with a similar purpose were turned back. Also noteworthy in the "what-Congress-did-not-do" category are some of the proposed amendments to the antidumping law which did not find their way into the Act. For example, the Senate bill would have amended the dumping law to make a finding of dumping far more likely in cases involving sales through related companies. Imports from non-market economy countries would also have been more vulnerable to dumping determinations under the Senate bill. These protectionist impulses were ultimately resisted.

If there is little front door protection in the Omnibus Act, there is a danger that the back door may be open. The purpose of the amendments to Section 301 and, indeed, of Section 301 itself, is not to close the U.S. market in order to protect U.S. industries, but the effect may be just that. Surely, retaliation is not bad per se; trade compensation is the customary remedy for violation of a trade agreement. But that's just the rub; there is no international agreement banning many of the practices which the Act would make actionable under U.S. law. Retaliation could lead to counter-retaliation. More fundamentally, one of the cornerstones of the international trading system—the commitment to multinationalism—would be undermined as the U.S. purports, unilaterally, to define trade wrongs and impose trade sanctions.

Overall, the Omnibus Act strikes a reasonable balance between pressures for protection of U.S. industries and made-in-the-U.S.A. market access remedies on the one hand, and the continuing commitment to free trade and multilateralism on the other. Indeed, given the huge and continuing trade deficit, the real question to ask is why the Act did not go much further. Some reasons for the Act's ultimate moderation lie in its legislative history.

Not surprisingly, the trade bill was extremely sensitive to economic and political developments during the course of its long passage through Congress. In earlier years—1985 and 1986—before the Administration adopted its more aggressive use of Section 301 and when the trade deficit showed no signs of abating, the legislation seemed headed toward more protection for U.S. industry and unilateral efforts to open foreign markets, whatever the cost.

With the fall of the dollar and the rise in U.S. export activity, these pressures began to lessen. Legislative restraint was encouraged by the Administration's more aggressive use of Section 301, starting in 1985. The stock market crash of October 1987 was perhaps the decisive event in shaping the Act. It caused Congress to stop and think. Few Congressional leaders wanted to run the risk of being blamed for sending a signal to international financial markets which could trigger worldwide depression. No one wanted to play the role of Messrs. Smoot and Hawley. The legislative process slowed perceptibly. The huge conference committee, once expected to produce a bill before the year's end, ground to a virtual halt.

Finally, the outcome of the Act reflects in no small measure the continued commitment of the leadership of both houses and of the Administration to the world trading system and the rule of international law. Authorities such as Alan Holmer, former Deputy U.S. Trade Representative, and Judy Bello, former General Counsel of the U.S. Trade Representative's Office, have stated that by 1988, GATT was back and the leadership of the trade committees had decided to rid the bill of all provisions illegal under GATT. This represented a complete reversal of the attitudes prevailing in 1985 and 1986.

And the story is not yet over. It remains, to be seen how the Act, particularly the revisions to Section 301, will be implemented by the new Administration. The numerous political pressure points created by Congress in the form of waivers, and similar provisions which invite pressure on the decisionmaker, could turn the U.S. toward unilateralism. All of this puts added pressure, too, on those who will be negotiating the Uruguay Round. The process of strengthening the world trading system is like riding a bicycle: if you stop, you fall off—and the world falls into a protectionist pit. Sustaining momentum toward a new and more effective trade agreement is essential if we are to avoid falling into that pit before the negotiations are concluded.