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ARTICLES

Injured Industries, Imports and Industrial Policy: A Comparison of United States and Japanese Practices

by *H. William Tanaka**

and

B. Jenkins Middleton†

I. INTRODUCTION

Americans have developed a love-hate relationship with Japanese industry. They love Japanese automobiles, motorcycles, television sets, radios and numerous other high-quality products. Americans buy Japanese products in large quantities and at reasonable prices. Americans admire the Japanese management style and work habits which they believe are largely responsible for the high quality and low prices of these products. Yet, they blame Japanese industry for taking away their jobs and the productive capacity in American industries. They increasingly charge Japan with unfair trade practices such as predatory pricing, dumping and subsidization. More ominously, Americans fear that Japan is stealing their economic future, not only in causing U.S. basic industries to wither, but by overtaking its lead in high-technology industries through a targeted industrial policy.

These fears have been intensified by a series of recessions and growing unemployment, particularly since the first "oil shock" in 1973. Rising demands for protection against imports, especially in declining or "sunset" industries and mature-technology industries such as auto and steel, have combined with calls for greater government involvement in the pro-

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motion of high-technology "sunrise" industries. These demands call for something approaching an implicit American industrial policy. The related issues of coping with import competition, assisting the adjustment of declining industries, renovating the production base of mature-technology industries and shifting resources into the industries of the future have moved to the forefront of both the public consciousness and the political stage.

In keeping with this country's free-market, laissez-faire capitalism traditions over the years, the U.S. government's approach in dealing with these problems has been narrow and fragmented, lacking continuity and coherence. Generally speaking, the government does not intervene with respect to rising imports unless an interested private party brings an action for import relief under the escape clause,¹ considered a "fair" trade statute, or one of the laws dealing with unfair trade practices. Aside from action taken under these laws and *ad hoc* assistance, such as that afforded Lockheed and Chrysler by special legislation, the government offers little help to mature industries suffering from, or threatened with, depressed conditions.² What little help is offered is often fragmented and uncoordinated.³ Despite the widely-acknowledged need to shift resources from low-growth, technologically backward industries,⁴ which consume high ratios of labor, materials and energy, into high-growth, high-technology and information-intensive industries, which will provide the jobs and economic leadership of the future,⁵ government support for these leading-edge industries is largely confined to defense procurement and assistance to defense-oriented and non-fossil-fuel energy research and development.⁶

The Japanese government's approach to these issues is rooted in its own traditions and decision-making process, strives for consensus and permits a higher degree of government participation in the economy. Japan's approach tends to be more comprehensive than that of the United States. Japan provides "positive adjustment" through macroeconomic "indicative planning" and microeconomic industrial policy.⁷ Industry

¹ 19 U.S.C. §§ 2251-2253 (1976).

² The Trade Adjustment Assistance Act, 19 U.S.C. §§ 2341-2354 (1976), which never provided significant assistance to firms, is moribund. See, e.g., Comment, *Letting Obsolete Firms Die: Trade Adjustment Assistance in the United States and Japan*, 22 HARV. INT'L L.J. 595, 598-603 (1981). President Reagan's Fiscal 1984 budget would terminate its funding. U.S. IMPORT WEEKLY (BNA) 562 (Feb. 2, 1983).

³ Reich, *Making Industrial Policy*, 60 FOREIGN AFF. 852, 877 (1982).

⁴ *Id.* at 863.

⁵ *Id.* at 863-864.

⁶ *Id.* at 864.

⁷ REPORT BY THE COMPTROLLER GENERAL TO THE JOINT ECONOMIC COMMITTEE UNITED STATES CONGRESS, INDUSTRIAL POLICY: JAPAN'S FLEXIBLE APPROACH, GAO/ID-82-32 (June 23, 1982) [hereinafter cited as GAO INDUSTRIAL POLICY REPORT].

problems and potential, whether related to import competition, loss of comparative advantage, or the needs of an infant industry, are dealt with in their totality. Imports are not singled out as the sole factor to receive government attention.

This article compares the nature and effectiveness of the approaches employed by the United States and Japan and suggests how the American approach can be improved, particularly with regard to escape-clause relief from increased imports.⁸

II. THE UNITED STATES' IMPORT-TRIGGERED APPROACH

According to the most recent legislative history:

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.⁹

Any private "representative of an industry," which may be a trade association, a single firm, a union or a group of workers, may petition the International Trade Commission (Commission) for "eligibility for import relief."¹⁰ The petition triggers "an investigation to determine whether an article is being imported . . . in such increased quantities as to be a substantial cause"¹¹ (one which is "important and no less than any other

* The escape clause is the only import relief law discussed since this article focuses on the health of industries and the industrial adjustment process. The principal objective of the escape clause is to facilitate "the orderly transfer of resources to alternative uses and other means of adjustment to new conditions of competition." 19 U.S.C. § 2251(a)(1) (1976). This objective is to be accomplished by providing the quantum of relief from increased imports (which need not be due to unfair practices) "necessary to prevent or remedy" actual or threatened serious injury. *Id.* § 2251(d)(1)(A). Remedies, in the form of duties, under the antidumping and countervailing duty laws are designed merely to neutralize the particular unfair practice. Dumping duties are assessed at the amount by which the foreign market value of the merchandise found to be dumped exceeds the United States price. 19 U.S.C. § 1673 (1981). Countervailing duties are to be in the amount of the net subsidy found or estimated. *Id.* § 1671(a). Actual or threatened material injury to the industry in question is relevant only as a necessary precondition (except in the case of material retardation of the establishment of an industry) to relief under the antidumping and countervailing duty laws. *See id.* § 1671(a)(2), 1673(2).

⁹ S. REP. No. 1298, 93d Cong., 2d Sess. 119 (1974). Despite the report's reference to lowering of barriers to international trade, the Trade Reform Act of 1974, Pub. L. No. 93-618, to which the report related, for the first time abolished the requirement that the increased imports justifying import relief be caused by trade concessions. *Id.* at 120.

¹⁰ 19 U.S.C. § 2251(a)(1) (1976).

¹¹ *Id.*

cause"¹²) of actual or threatened serious injury to the domestic industry producing a "like or directly competitive"¹³ article. The petition must specifically state the objectives of the requested import relief, such as facilitating resource transfers to alternative uses and other means of adjustment.¹⁴ The Commission is required to investigate and report on, *inter alia*, efforts undertaken by the industry's firms and workers "to compete more effectively with imports."¹⁵

In reaching its determination, the Commission must consider all economic factors it deems relevant.¹⁶ Specifically, the Commission must take into account certain static criteria: the existence of idle plants, low profits and significant unemployment or underemployment in determining whether serious injury already exists;¹⁷ the existence of sales declines, higher inventories and downward trends in production, profits, wages or employment in assessing the threat of injury;¹⁸ and an actual or relative increase in imports in determining whether imports are a substantial cause of actual or threatened injury.¹⁹ If the Commission makes an affirmative determination, it recommends to the President either the imposition of duties or import restrictions sufficient to prevent or remedy serious injury,²⁰ or trade adjustment assistance.²¹ The President must provide some form of import relief if the Commission's determination is affirmative, unless he determines that relief is contrary to the "national economic interest."²² He may take into account whatever factors he considers relevant in deciding what action to take.²³ However, he is required to consider, *inter alia*: the probable effectiveness of the import relief in

¹² *Id.* § 2251(b)(4). The original escape clause statute, enacted in Section 7 of the Trade Agreements Extension Act of 1951, 65 Stat. 73, required that increased imports "result in whole or in part" from duty or customs treatment reflecting a trade agreement concession, and contribute substantially toward causing or threatening serious injury. Section 301(b)(1) and (3) of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872 (1962) (codified at 19 U.S.C. §§ 1801-1991 (1964)), stiffened the causation test, requiring that increased imports be attributable "in major part" to trade agreement concessions and be "the major factor" in causing or threatening serious injury. These provisions were in effect until 1974.

¹³ 19 U.S.C. § 2251(b)(1) (1976). Investigation may also be triggered by the request of the President or U.S. Trade Representative, a resolution of the House Ways and Means Committee or Senate Finance Committee, or on the Commission's own motion. *Id.*

¹⁴ *Id.* § 2251(a)(1).

¹⁵ *Id.* § 2251(b)(5).

¹⁶ *Id.* § 2251(b)(2).

¹⁷ *Id.* § 2251(b)(2)(A).

¹⁸ *Id.* § 2251(b)(2)(B).

¹⁹ *Id.* § 2251(b)(2)(C).

²⁰ *Id.* § 2251(d)(1)(A).

²¹ *Id.* § 2251(d)(1)(B).

²² *Id.* § 2252(a)(1)(A). In this case Congress may override the President's decision and put into effect the import relief recommended by the Commission. *Id.* § 2253(c)(1).

²³ *Id.* § 2252(c).

promoting adjustment;²⁴ the industry's own efforts to adjust;²⁵ the impact of import relief on consumers;²⁶ competition²⁷ and U.S. international economic interests;²⁸ possible foreign retaliation or demands for compensation, as permitted by international agreements;²⁹ and, the economic and social costs to taxpayers, communities and workers by granting or withholding import relief.³⁰ Import relief may be in the form of duties,³¹ quotas or other quantitative restrictions,³² a tariff-rate quota,³³ orderly marketing agreements with other countries³⁴ or any combination of these.³⁵ The import relief granted may not exceed five years³⁶ and may be renewed for another three years.³⁷

Whether the escape clause is viewed as effective legislation depends upon one's perspective. It no doubt provides a useful means of relieving the *political* pressures created by increased imports. Giving industries access to the Commission, as a forum for airing complaints regarding increases in imports, takes much of the pressure off Congress, which previously had been the only body which could provide relief.³⁸ The availability of the escape clause procedures also has permitted negotiated reduction of tariffs and has diminished the pressures on the Executive Branch to enter into ad hoc agreements and arrangements to reduce imports.³⁹

The usefulness of the escape clause is far less clear, however, if one is more interested in limiting imports or assisting the adjustment of injured industries than in providing a political safety valve. The principal in-depth study on this subject concluded that import relief under the es-

²⁴ *Id.* § 2252(c)(3).

²⁵ *Id.*

²⁶ *Id.* § 2252(c)(4).

²⁷ *Id.*

²⁸ *Id.* § 2252(c)(5).

²⁹ *Id.* § 2252(c)(6).

³⁰ *Id.* § 2252(c)(9).

³¹ *Id.* § 2253(a)(1).

³² *Id.* § 2253(a)(3).

³³ *Id.* § 2253(a)(2).

³⁴ *Id.* § 2253(a)(4).

³⁵ *Id.* § 2253(a)(5).

³⁶ *Id.* § 2253(h)(1).

³⁷ *Id.* § 2253(h)(3).

³⁸ In the automobile case, however, a negative Commission determination was followed by pressure on the Congress and the Administration and, in turn, the Japanese government. As a result, the latter imposed "voluntary" export restraints on Japanese automobiles. See U.S. INT'L TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-44, CERTAIN MOTOR VEHICLES AND CERTAIN CHASSIS AND BODIES THEREFOR, U.S.I.T.C. Pub. No. 1110, 45 Fed. Reg. 85,194 (1980); Recent Development, *Car Wars: Auto Imports and the Escape Clause*, 13 LAW & POL'Y INT'L BUS. 591, 614 (1981).

³⁹ See Recent Development, *supra* note 38.

cape clause has not been notably effective in either of these respects.⁴⁰ The study, conducted by the Commission which administers the escape clause, in effect damns with faint praise. The study concluded that, in most of the five major cases studied, import relief caused a moderate reduction in imports which "probably slowed the decline of the contracting industries . . . may also have contributed to the orderly transfer of resources to other uses . . . [and] probably encouraged the increase in investment and subsequent competitiveness of" the one industry (bicycles) which successfully modernized during the period of escape clause relief.⁴¹

The Commission's study analyzed the results of the import relief granted to five industries: bicycles, sheet glass, stainless steel flatware, watches and Wilton and velvet carpets.⁴² The study posits that "adjustment" to injury from import competition occurs when, without the crutch of protection, the industry's state of injury has ended.⁴³ Adjustment re-

⁴⁰ U.S. INT'L TRADE COMMISSION, *THE EFFECTIVENESS OF ESCAPE CLAUSE RELIEF IN PROMOTING ADJUSTMENT TO IMPORT COMPETITION* (Investigation No. 332-115), U.S.I.T.C. Pub. No. 1229, at vi-vii, 86 (Mar. 1982) [hereinafter cited as U.S.I.T.C. ESCAPE CLAUSE RELIEF REPORT].

⁴¹ *Id.* at vi.

⁴² Although hardly key industries to the nation's economy, these cases were selected for study because they were the largest industries (with one exception) to receive escape-clause relief prior to 1975, as well as having received prolonged relief (an average of twelve years). Moreover, perspective on the adjustment process was possible because over twenty years had elapsed since relief was first granted in each case. *Id.* at vi, 4.

Between 1951 and 1980, the Tariff Commission and its successor, the U.S. International Trade Commission, instituted 184 escape clause cases, deciding 60 affirmatively and 17 more by an evenly split vote (under which relief is possible, 19 U.S.C. § 1330(d)(1) (1976)). In the 77 cases recommending or permitting import relief, the President granted relief (sometimes in the form of trade adjustment assistance only) in 30 and denied it in 47. GENERAL ACCOUNTING OFFICE, *REPORT TO THE CONGRESS OF THE UNITED STATES, CHANGES NEEDED IN ADMINISTERING RELIEF TO INDUSTRIES HURT BY OVERSEAS COMPETITION*, GAO Doc. No. ID-81-42, at 3 (Aug. 5, 1981) [hereinafter cited as GAO ESCAPE CLAUSE ADMINISTRATION REPORT]. In most cases decided before 1970, the Commission and the President denied relief because they found an insufficient causal connection between either trade concessions and increased imports or increased imports and injury. Metzger, *The Escape Clause and Adjustment Assistance: Proposals and Assessments*, 1 LAW & POL'Y INT'L BUS. 352, 365-367 (1970). In most of the 13 cases between 1974 and 1981 in which the President rejected the recommended import relief on "national economic interest" grounds, he based his decision on considerations of higher costs to consumers, industry improvements, probable retaliation, or possible effects on U.S. efforts to reduce international trade barriers. [Reference file] U.S. IMPORT WEEKLY (BNA) 58:0106 (June 2, 1982). Congress has never overridden the President's rejection of a Commission recommendation and voted to implement import relief. U.S.I.T.C. ESCAPE CLAUSE RELIEF REPORT, *supra* note 40, at 4.

⁴³ U.S.I.T.C. ESCAPE CLAUSE RELIEF REPORT, *supra* note 40, at 6. There is, however, no general agreement on what adjustment means, either in general or as applied to specific industries seeking escape clause relief. GAO ESCAPE CLAUSE ADMINISTRATION REPORT, *supra* note 42, at 2, 39. The ITC definition is so broad as to be almost useless in attempting to specify the elements of an adjustment strategy.

sults either through industry contraction (with only competitive firms surviving), modernization or a combination of the two.⁴⁴ Import protection is supposed to give a contracting industry more time to shrink, reducing the harm to idled workers and extending the useful life of machinery and invested capital. In addition, if the industry is capable of modernizing, import relief is intended to afford it the time and cash flow required to make the reinvestments.⁴⁵

The problem is, of course, that shielding an industry from competition may delay rather than speed up adjustment.⁴⁶ Conditioning escape clause relief upon a finding that an industry is suffering or threatened with serious injury, and establishing static criteria for making these determinations, tend to assure that successful applicants for relief will be mature industries. These mature industries are more inclined to maintain the status quo than to move vigorously into new production technologies, product lines and customer bases.⁴⁷ This is true notwithstanding the legislative history which states that "[t]he escape clause is not intended to protect industries which fail to help themselves become more competitive through reasonable research and investment efforts, steps to improve productivity and other measures that competitive industries must continually undertake."⁴⁸ Thus, the two key questions in assessing the possible utility of escape clause relief are: (1) what are the industry's realistically achievable long-term prospects; and, (2) how will the owners and workers use the time afforded by the import relief?

A. *International Trade Commission Escape Clause Relief Report*

1. Wilton and Velvet Carpet Industry

Some of the limitations of escape clause relief as an industry adjustment tool are illustrated by the cases studied by the International Trade Commission. For example, the industry engaged in weaving Wilton and velvet carpets received relief in 1962.⁴⁹ The relief was in the form of a tariff increase.⁵⁰ However, by 1962 Wilton and velvet carpets were in the process of being displaced by a domestic substitute, tufted carpets. This substitute was produced by a new technology which resulted in much lower production costs. Though imports declined sharply, so did produc-

⁴⁴ U.S.I.T.C. ESCAPE CLAUSE RELIEF REPORT, *supra* note 40, at 6-13.

⁴⁵ *Id.* at 11.

⁴⁶ *Id.*; GAO ESCAPE CLAUSE ADMINISTRATION REPORT, *supra* note 42, at 40; Reich, *supra* note 3, at 855-56.

⁴⁷ Reich, *supra* note 3, at 856-57.

⁴⁸ S. REP. NO. 1298, *supra* note 9, at 122.

⁴⁹ U.S.I.T.C. ESCAPE RELIEF CLAUSE REPORT, *supra* note 40, at 14. For a comprehensive look at adjustment in the Wilton and velvet carpet industry, see *id.* at 14-26.

⁵⁰ *Id.* at 14.

tion of Wilton and velvet carpets. The import relief simply did not address the industry's basic problem. Nevertheless, the study concluded that the decline in imports may have slowed contraction sufficiently to help the carpet manufacturers shift from the old to the new technology and may have raised revenues above what they otherwise might have been.⁵¹ But escape clause relief was, according to the report, "at best a secondary factor in shaping the final outcome [since] the main cause of the contraction was of domestic origin."⁵²

2. Sheet Glass Industry

The sheet glass industry also received escape clause relief in 1962 through an approximate doubling of tariff rates.⁵³ This protection lasted until 1974. In 1958, however, float glass, a new type of flat glass with the desirable properties of plate glass yet less expensive to produce, was developed in England. Production of float glass began in the United States in 1963 and rapidly replaced plate glass production. By 1972, when the technology for producing thin window glass by this method had been developed, domestic float glass production equaled that of sheet glass and rapidly outdistanced it thereafter.⁵⁴ Thus, over the period of approximately a decade the flat glass industry was totally transformed by the substitution of float glass for both plate and sheet glass. This transition was slowed less by the import restrictions in force than by the high cost of the new technology and equipment necessary to develop float glass production.⁵⁵ The sheet glass producers did invest heavily in float glass facilities, some with the help of loans extended under the trade adjustment assistance program. The study concluded that import protection apparently reduced sheet glass imports and probably helped the industry sustain itself while contracting during the relief period, but other factors, such as the housing boom of the early 1970's, also aided the industry.⁵⁶

3. Bicycle Industry

The bicycle industry adjusted by modernizing. Escape clause relief granted to the industry in 1955 raised tariffs.⁵⁷ The tariffs were reduced

⁵¹ *Id.* at 25.

⁵² *Id.* at 26.

⁵³ *Id.* at 27. The domestic manufacturers promptly raised their prices by an amount exceeding the tariff increase, thereby opting to use it as a subsidy rather than as a vehicle for recapturing market share. For a comprehensive analysis of adjustment in the sheet glass industry, see *id.* at 27-42.

⁵⁴ *Id.* at 38.

⁵⁵ *Id.* at 39-40.

⁵⁶ *Id.* at 38, 42.

⁵⁷ *Id.* at 43. For a comprehensive look at adjustment in the bicycle industry, see *id.* at

in stages between 1967 and 1972. In 1955 most American bicycles were of the balloon-tire type; those made in Europe were lightweights. At about that time, the domestic industry began a concerted effort to modernize its facilities and adopt a more aggressive marketing strategy, including the introduction of a middleweight bicycle to compete with the increasingly popular lightweight imports from Europe. Imports declined in the first few years of import relief, but then resumed their increase.⁵⁸ Nevertheless, the domestic industry remained healthy because of the steady growth in the domestic demand for bicycles. Growth in demand was attributed to the increase in the number of children of bicycle-riding age, rising per capita income, the growth of suburbs, and, in the 1970's, the explosive growth in the popularity with adults of bicycles, particularly the 10-speed lightweights.⁵⁹ The industry experienced large increases in production, consumption, capital investment and new plants. The least competitive companies disappeared.

The study's highly speculative conclusions regarding the role of import protection in the industry's growth and adjustment stated that "the coincidence of increased investment and productivity suggests that [import relief] was helpful in promoting a modernization type of adjustment" but noted that the "other favorable circumstances" contributed to the result.⁶⁰ One is left to wonder not only whether the bicycle industry would not have adopted the successful strategies it did even *without* import relief, but also whether the industry was at any time, in fact, suffering the injury necessary to qualify for escape clause relief.⁶¹

4. Watch Industry

The watch industry has undergone several transformations in the three decades since since jeweled-lever and pin-lever watches received escape clause relief. The relief was in the form of higher tariffs and remained in effect until 1967.⁶² Consumer preference shifted from jeweled-lever watches to less-expensive pin-lever watches during the 1950's and 1960's. Since 1976 "nonconventional" digital and quartz analog watches have captured a major segment of the domestic market.

43-57.

⁵⁸ *Id.* at 46, Table 14.

⁵⁹ *Id.* at 47-48.

⁶⁰ *Id.* at 57.

⁶¹ In fact, the Tariff Commission, following a second petition by the domestic producers for escape clause relief in 1957, determined that bicycles were not being imported in such increased quantities as to cause or threaten serious injury warranting a further tariff increase. *Id.* at 44.

⁶² *Id.* at 58. For a complete discussion of adjustment in the watch industry, see *id.* at 58-70.

After the tariffs were raised, imports of jeweled-lever watches declined while pin-lever watch imports rose.⁶³ At the same time the domestic market was taken over by both domestic and imported pin-lever watches. Domestic production of jeweled-lever watches virtually ended. In addition, three out of four domestic producers of pin-lever watches also discontinued production by 1967, as Timex emerged as the dominant, and now sole surviving, producer of conventional watches in the United States.⁶⁴ Timex's success is attributed to its decision to add style to an inexpensive pin-lever watch, a low-margin, high-volume strategy with intensive advertising, highly automated production processes and parts standardization. In effect, Timex created a new domestic industry which ran away from the domestic competition. However, the overall industry adjustment process was one of contraction, particularly in the jeweled-lever segment.⁶⁵ Import protection had little effect on the pin-lever segment; at best, it reduced the pressures on the jeweled-lever manufacturers, thus allowing them to contract gradually.⁶⁶

5. Stainless Steel Table Flatware Industry

In 1957 there were 21 domestic manufacturers of stainless steel table flatware (SSTF).⁶⁷ Many of these manufacturers were diversified companies producing other tableware products, including sterling silver and silver-plated flatware. An escape clause petition filed in 1957 led to a tariff rate quota (TRQ) on SSTF imports in 1959, complementing a Japanese voluntary quota on exports to the United States imposed in 1958.⁶⁸ The TRQ remained in effect until 1967 and was reimposed at a lower level and under authority other than the escape clause⁶⁹ from 1971 to 1976. The first TRQ and the Japanese restraints successfully held down imports. Domestic consumption doubled and the domestic industry flourished. The second lower-level TRQ proved inadequate, however, to offset the lower prices and thereby to keep down imports of SSTF from Japan, Taiwan and Korea. Although U.S. domestic consumption continued to increase, the domestic industry contracted, with most firms ceasing production of SSTF; only Oneida, Ltd., prospered. Oneida, Ltd. invested in new equipment to improve its productivity in the manufacture of high-quality SSTF.

⁶³ *Id.* at 61.

⁶⁴ *Id.* at 65-69.

⁶⁵ *Id.* at 69.

⁶⁶ *Id.* at 69-70.

⁶⁷ *Id.* at 71. For a comprehensive analysis of adjustment in the stainless steel table flatware industry, see *id.* at 71-82.

⁶⁸ *Id.* at 73.

⁶⁹ *Id.* at 74.

The study concluded that the protection afforded the industry probably extended the adjustment period and reduced its costs, although expanding domestic consumption had the same effect.⁷⁰ While the particular segments of the carpet, glass and watch industries investigated by the Commission suffered from product substitution, or "technological predation," stainless steel flatware gained by displacing more expensive and higher profit silver-plated flatware and, to a lesser extent, even higher profit sterling silver flatware.⁷¹ The domestic industry contracted because the import relief provided could not overcome the high cost of domestic labor and raw materials. Many of the domestic producers left the flatware business entirely because of the erosion of profit margins in the industry.

6. Conclusion

In summing up, the Commission noted that in four of the five industries the majority of firms, or the part producing the protected product, left the industry.⁷² However, many of these, particularly the larger ones, succeeded in shifting their resources to alternative uses.⁷³ Although conceding that "any statement on the effect of the escape clause contains an element of speculation," the Commission concluded that "[e]scape clause protection probably had a positive, but relatively minor, effect."⁷⁴ Finally, and most significantly:

[L]ooking back at what happened to the five industries over a long period of time, one observes how relatively little effect escape-clause relief had on firm adjustment either because so much of the firm's injury was caused by non-import-related factors, or because the decline of imports following the relief was small.⁷⁵

B. Domestic Television Industry

An ongoing and more widely-publicized import controversy, regarding the domestic television industry, leads to similar conclusions. Here,

⁷⁰ *Id.* at 81.

⁷¹ *Id.* at 82. The above examples demonstrate the critical importance of how the "industry" is defined in an escape clause case. If, for example, the industries investigated had been defined as "carpets," "flat glass" and "table flatware" instead of "Wilton and velvet carpets," "sheet glass" and "stainless steel table flatware," respectively, the results doubtless would have been very different. The narrow legal definitions tend to obscure the economic realities revealed by using the broader definition, resulting in relief which may be unwarranted economically.

⁷² *Id.* at 85.

⁷³ *Id.* at 85-86.

⁷⁴ *Id.* at 86.

⁷⁵ *Id.*

too, import relief has not addressed the basic problems of the domestic industry. Moreover, the television industry has failed to use to its best advantage the respite from import competition afforded it not only under the escape clause but the antidumping law⁷⁶ and section 337 of the Tariff Act of 1930.⁷⁷

Despite this paucity of import relief, the domestic monochrome (black-and-white) television set industry continued its flight offshore to Taiwan. Virtually no monochrome sets are now produced in the United States. The color television industry also has lost substantial market share to imports for several reasons. Major domestic producers lagged behind the Japanese in shifting from tube and hybrid types to cost-efficient, upgraded, and more portable, fully solid-state circuitry. They doggedly adhered to an outmoded market strategy, refusing to sell custom design televisions under private labels to Sears Roebuck and other national mass merchandising retail outlets. Thus, these retailers were forced to seek offshore sources to develop their growing private-label market. Finally, the domestic industry was blind to the potential of the market for small-screen portable television sets.

The underlying process operative in the television industry was technological predation. The heavy and cumbersome tube-type sets were displaced by the truly portable, transistorized, smaller-screen television sets which were lower in price and required less maintenance. These new television sets created a second- and third-set mass market. No amount of successful legal action in an import-relief proceeding could have enjoined American consumers from preferring these sets. Relief and adjustment for the domestic industry could only be achieved by rapid disinvestment from the production of large tube-type console models and reinvestment in automated production of the smaller solid-state sets.

C. *International Trade Commission: Nonrubber Footwear Industry*

This is not to say that the escape clause cannot be usefully invoked to assist in this disinvestment/reinvestment process. There are instances where this has been done with marked success. For example, in 1977 the U.S. industry producing nonrubber footwear received escape clause relief.⁷⁸ Four years later, in deciding whether to grant a requested extension

⁷⁶ 19 U.S.C. §§ 1673-1675 (Supp. V 1981) (originally enacted as the Antidumping Act of 1921, Pub. L. No. 67-10, 42 Stat. 11).

⁷⁷ 19 U.S.C. § 1337 (1976). The dumping finding, published in 1971, 36 Fed. Reg. 4597, is still in effect. The escape clause action resulted in orderly marketing agreements with Japan, Korea and Taiwan beginning in 1977 which have now terminated.

⁷⁸ U.S. INT'L TRADE COMMISSION, INVESTIGATION RELATING TO FOOTWEAR (Investigation No. TA-201-18), U.S.I.T.C. Pub. No. 799, 49 Fed. Reg. 9065 (1977) (determination of serious injury).

of relief, the International Trade Commission concluded that, while the domestic industry had not completely solved its problems, it had used the relief period to make substantial and largely successful efforts to become more competitive and responsive to the market.⁷⁹ The Commission cited investments in new plants and equipment, major technological innovations, including laser cutting and computer tape stitching, and improved responsiveness to style changes as the reasons for the industry's success. One Commissioner concluded that "[t]he process of adjustment has had positive results thus far, and with some further limited protection these results should solidify."⁸⁰

D. Conclusion

Whether a domestic industry makes wise use of import relief, one can scarcely blame it for invoking available protectionist "solutions" to problems which arguably have some relationship to imports. The escape clause and other import relief laws provide tempting avenues for creative lawyers to obtain government assistance, which is available in virtually no other institutionalized form to declining or injured industries. At the same time, one should not be surprised to learn that import constraints are largely irrelevant if imports are not in fact a major cause of the industry's problems.

The doubtful or marginal results of even prolonged escape clause relief in many cases may be partly due to flaws in the escape clause process. Although theoretically the Commission's proceedings are investigative, in fact they are more akin to adversarial legal proceedings, pitting the representatives of firms or labor or both against importers and foreign manufacturers. Thus, they cater to the fallacy of the American legal mindset that for every perceived injury there must be a legal remedy.⁸¹ There is often no effective representation of consumers, distributors, or dealers, while the government's role, in the form of the Commission, is that of arbiter and judge. It is only after the Commission's determination of injury that considerations of the national interest, as distinguished from the interests of the petitioner, its industry, and its opposition, are injected by the President in deciding upon final action.⁸² Moreover, whatever "ad-

⁷⁹ U.S. INT'L TRADE COMMISSION, NONRUBBER FOOTWEAR: REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-203-7 UNDER SECTION 203 OF THE TRADE ACT OF 1974, U.S.I.T.C. Pub. No. 1139, at 7-9 (1981) (Statement of Chairman Alberger and Commissioners Calhoun and Bedell).

⁸⁰ *Id.* at 44 (Statement of Commissioner Stern).

⁸¹ See, e.g., Ehrenhaft, *What the Antidumping and Countervailing Duty Provisions of the Trade Agreements Act [Can] [Will] [Should] Mean for U.S. Trade Policy*, 11 LAW & POL'Y INT'L BUS. 1361, 1402 (1979).

⁸² The possibility of denying import relief on grounds of overriding national economic

justment plans" may be submitted in response to the statutory requirement that a petitioner, which may or may not be truly representative of its industry, state the purpose of seeking import relief tend to be "so vague as to be virtually useless" as a measuring stick of later progress.⁸³ In any event, no obligation is imposed upon the petitioner, much less the entire industry, to follow whatever course the petitioner projects. Indeed, if workers rather than management are the petitioners they will be incapable of taking most of the actions, other than reducing wages and benefits and altering work practices, which are normally required for adjustment.⁸⁴

To remedy these deficiencies, it has been suggested that (1) escape clause relief should be conditioned on the submission of specific adjustment strategies;⁸⁵ (2) petitioners should be required to enter into binding commitments to take the steps necessary to become competitive or otherwise adjust;⁸⁶ and (3) one industry segment (such as management or labor) should not be allowed to petition unless it is clear that commitments from that segment will suffice to achieve adjustment.⁸⁷ If the practical and antitrust problems connected with these proposals could be overcome, their adoption would serve to focus attention on the overall condition, actual intention and realistic capabilities of the industry. This would underscore the need for positive action by management and labor to address the industry's difficulties in their totality.

If the Commission's study of the results of escape clause relief is an accurate reflection of the effectiveness of the present law and its predecessors, one is left to wonder whether past escape clause proceedings may have been largely a waste of both government and private resources.⁸⁸ It

interest does, however, distinguish the escape clause from other import relief statutes. It has been cogently argued that the rigidities inherent in the calculation of dumping duties are such that the antidumping law should be repealed, leaving dumping cases to be handled under the more flexible escape clause provision. Caine, *A Case for Repealing the Antidumping Provisions of the Tariff Act of 1930*, 13 LAW & POL'Y INT'L BUS. 681, 726 (1981).

⁸³ GAO ESCAPE CLAUSE ADMINISTRATION REPORT, *supra* note 42, at 39.

⁸⁴ *Id.* at 39-41.

⁸⁵ *Id.*

⁸⁶ *Id.* at 40-41.

⁸⁷ *Id.* at 52; *see also* Reich, *supra* note 3, at 859. The third requirement, that petitioners must be capable of bringing about adjustment, might make it impossible for firms other than those in highly concentrated industries to file an escape-clause petition. Moreover, for all industries the second and third requirements could raise serious antitrust problems, unless the Noerr-Pennington exemption applies to insulate from antitrust liability joint efforts by a number of firms to achieve adjustment under the aegis of the escape clause. *See Eastern Railroad Presidents Conference v. Noerr*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

⁸⁸ An assessment of the considerable cost of escape clause relief to consumers and other segments of the economy is outside the scope of this article. Although no retaliation or compensation payments have resulted from relief granted under the 1974 amendments, the

seems apparent that the proceedings and any resulting relief may divert industry attention and energies from the significant non-import causes of its injury. The postponement of the necessary shifts in resources from obsolete to emerging industries, which import relief may entail, is a costly distortion affecting the entire economy, as well as American competitiveness in the world marketplace.

III. THE COMPREHENSIVE JAPANESE APPROACH

The Japanese approach to the problems and needs of declining and emerging industries, and the relationship of import competition to each, starts from an entirely different perspective than that of the United States. American policy is minimalist, fragmented and negative, focusing on the microeconomic, import-related problems of particular injured industries while largely ignoring the emerging industries. Japanese policy begins with the formulation of a macroeconomic view of the desired direction of the entire economy and proceeds within that framework to examine the role of individual industries, considering among many other factors the possible impact of imports on the industry.⁸⁹ Providing help to industries in difficulty is merely one aspect of this macroeconomic "indicative planning" and microeconomic industrial policy, adopted in postwar Japan to rebuild basic industries. The system has been adapted, in view of changed circumstances, to new goals of promoting high technology industries, furthering social goals, and providing help to "sunset" industries.⁹⁰ The result is a comprehensive and flexible "positive adjustment policy," which Robert Reich refers to as "managed adjustment."⁹¹ Recognizing that emerging industries can ease the adjustment problems of declining industries, the system features coordinated programs to assist in the shift of resources from the latter to the former.

As for imports, despite Japan's well-known policy, at least until 1976, of limiting imports to shelter growing industries,⁹² import relief is not often granted as a means of aiding adjustment of injured or declining industries. The Japanese government recognizes that to do so would relieve

possibilities of such action cannot be ignored. GAO ESCAPE CLAUSE ADMINISTRATION REPORT, *supra* note 42, at 1.

⁸⁹ See, e.g., GAO INDUSTRIAL POLICY REPORT *supra* note 7; Rapp, *Japan: Its Industrial Policies and Corporate Behavior*, 22 COLUM. J. WORLD BUS. 38 (1977); Reich, *supra* note 3; SUBCOMM. ON TRADE OF THE HOUSE COMM. ON WAYS AND MEANS, 96TH CONG., 2D SESS., HIGH TECHNOLOGY AND JAPANESE INDUSTRIAL POLICY: A STRATEGY FOR U.S. POLICYMAKERS (Comm. Print 1980) (report prepared by Dr. Julian Gresser) [hereinafter cited as GRESSER REPORT].

⁹⁰ GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 24.

⁹¹ Reich, *supra* note 3, at 855.

⁹² See, e.g., GRESSER REPORT, *supra* note 89, at 18. It is noteworthy that while the Japanese government once protected its industries from foreign competition, it has promoted vigorous competition between Japanese companies. Reich, *supra*, note 3, at 867.

the pressure on the industry to take the painful actions necessary to adjustment, thereby undercutting the government's leverage.⁹³

In the postwar era the Japanese government has channeled investment, growth and change in the economy through monetary and fiscal policies, indicative planning, and industrial policy.⁹⁴ Indicative planning, under the Economic Planning Agency, sets the macroeconomic forecast for the Japanese economy through non-binding plans, approved by the cabinet, whose purpose is to achieve a national consensus on long-range objectives and to establish the means of accomplishing them.⁹⁵ Industrial policy, administered by the Ministry of International Trade and Industry (MITI), identifies the resource needs, and the means of promoting either growth or decline, of selected key industries or industrial sectors.⁹⁶ MITI's Industrial Structure Council, consisting of representatives of various Japanese constituencies, including government, industry, labor and academia, drafts MITI's ten-year plans, or "MITI Visions," setting goals and criteria for government support of industry.⁹⁷

Specific tools utilized to achieve the established goals have included, particularly in the early years, use of the banking and savings institutions for rationing credit and assisting access to capital for selected industries, the provision of loans and guarantees and imposition of controls on capital flows and trade, including tariffs and quotas.⁹⁸ The government continues to employ such devices as tax incentives, including exemptions and allowances for specific industries; industrial targeting; and subsidies for joint research and development efforts. It also serves as a clearinghouse for technical information, and it sanctions cartels, including "rationalization cartels," of limited duration for specified purposes, which receive exemptions from the Antimonopoly Law.⁹⁹ In 1965, however, the government began to liberalize its tight controls of trade, technology imports, and capital movements so that today these controls have largely disappeared, though some remain with respect to computer and other key technology-intensive industries where there is a perceived need to close technology gaps.¹⁰⁰ The system now relies more than ever on incentives, guidance and cooperation rather than compulsion, thereby taking advan-

⁹³ GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 73.

⁹⁴ *Id.* at 3-4.

⁹⁵ *Id.* at 22-24; Rapp, *supra* note 89, at 41.

⁹⁶ GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 4.

⁹⁷ *Id.* at 28; Bendix, *Interaction of Business and Government in Japan: Lessons for the United States*, 15 THE INT'L LAW. 571, 573-574 (1981).

⁹⁸ Rapp, *supra* note 89, at 42-43; GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 6, 35-36.

⁹⁹ GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 45, 47, 53, 60-65, 69-71; Bendix, *supra* note 97, at 578.

¹⁰⁰ GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 42-44, 63.

tage of the relatively collaborative relationship between government and industry in Japan.¹⁰¹

The early post-war goals of reconstruction and independence of the Japanese economy soon shifted to the objective of catching up with other industrialized countries. In 1965, Japan began to focus on social development and welfare. In 1975, Japanese policy shifted once again, to promoting the stable development of the economy, coupled with improvements in the quality of Japanese life.¹⁰² Today there is heavy emphasis on the development of the technology-intensive, high-value-added, resource-conserving industries, particularly those whose products, such as computers, have the potential for increasing productivity and upgrading the quality of numerous other industries.¹⁰³ Financial assistance to industry is now channeled more toward non-growth-promoting purposes, including assistance in meeting environmental pollution control standards, conserving resources and energy, and aiding the structurally depressed industries¹⁰⁴ which were victims, largely, of the past decade's soaring energy costs and Japan's rising wage rates as compared to those in Taiwan, South Korea, Hong Kong and Singapore.¹⁰⁵ MITI, at the same time, devotes much of its energy to restraining competitive industries' exports as well as to depressed-industry adjustment.¹⁰⁶

The Japanese government's coordinated approach to assisting declining industries involves contractual obligations among industry, labor and government with the express aim of bringing about adjustment through resource shifts and tying together the adjustment of the workers and the community with that of industry.¹⁰⁷ In exchange for industry and worker participation in adjustment, the government provides unemployment and depressed-region assistance, including incentives to growth sectors to locate plants and facilities in depressed regions, as well as its usual forms of insurance, retraining and job-hunting allowances.¹⁰⁸

Measures to counter short-term problems may include authorization of an anti-recession or "production-reduction cartel."¹⁰⁹ Long-term problems of competitiveness may be dealt with by scrapping excess ca-

¹⁰¹ Rapp, *supra* note 89, at 41; Bendix, *supra* note 97, at 580-81.

¹⁰² GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 27.

¹⁰³ *Id.* at 24-27, 47-65; Rapp, *supra* note 89, at 40, 46.

¹⁰⁴ Bendix, *supra* note 97, at 580; GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 24; Comment, *supra* note 2, at 603 n.57.

¹⁰⁵ Boyer, *How Japan Manages Declining Industries*, 107 FORTUNE 58 (1983).

¹⁰⁶ GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 46.

¹⁰⁷ *Id.* at 66; Reich, *supra* note 3, at 863.

¹⁰⁸ GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 66, 69.

¹⁰⁹ *Id.* at 69; MITI Official Claims Japanese Cartels Increase Rather Than Impede Imports, DAILY REP. FOR EXECUTIVES (BNA) No. 22, at L-10 (Feb. 5, 1983) [hereinafter cited as *Japanese Cartels*].

capacity, modernization of production processes, or the shift of resources to other lines of business, usually under a "reduction of capacity cartel."¹¹⁰

One of the basic underpinnings of this collaborative government-industry process is the Structurally Depressed Industries Law, passed in 1978.¹¹¹ It permits an industry to be designated as a structurally depressed industry provided that 50 percent of the firms in the industry are in financial difficulty, excess plant capacity exists and firms representing two-thirds of the industry petition for the designation.¹¹² The designation permits the relevant ministry to prepare a stabilization plan in consultation with industry and labor representatives. The plan is subject to rejection or modification by the Japanese Fair Trade Commission (JFTC) which regulates and maintains competition.¹¹³ Approval by the JFTC, however, exempts the industry from compliance with the Antimonopoly Law, which is particularly important in implementing provisions for scrapping or mothballing excess capacity by allocating reductions on a firm-by-firm basis.¹¹⁴ Since Japan is no more immune than other countries from political and social constraints against phasing out established industries, despite the wisdom of that course from a purely economic standpoint, efforts may be made to try to revitalize the industry while at the same time nudging workers and companies into other lines of production.¹¹⁵

The basic philosophy behind the Japanese system is that the risks in salvaging declining industries should be spread as broadly as possible among those who have the biggest stakes in the outcome, particularly the manufacturing companies themselves and their principal investors, the banks.¹¹⁶ Though the government may on occasion contribute some financing, more often its role is catalytic, providing signals to the private sector.¹¹⁷ The cornerstone on which adjustment is built is the bargaining relationship between business, government and labor.¹¹⁸ This relationship leads to express agreement not only on the adjustment objective but on

¹¹⁰ See *Japanese Cartels*, *supra* note 109; GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 70.

¹¹¹ Law No. 44 of 1978. For discussions of the Structurally Depressed Industry Law, see GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 68; Boyer, *supra* note 105, at 58; Reich, *supra* note 3, at 862.

¹¹² GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 68. Eight industries have been so designated to date: aluminum, cardboard, cotton and wool spinning, electric-furnace steel, ferrosilicon, fertilizers, shipbuilding, and synthetic fibers; petrochemicals will probably be added soon. Boyer, *supra* note 105, at 58.

¹¹³ GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 68.

¹¹⁴ *Id.* at 68-71; Boyer, *supra* note 105, at 59-60.

¹¹⁵ GAO INDUSTRIAL POLICY REPORT, *supra* note 5, at 71.

¹¹⁶ Boyer, *supra* note 105, at 61.

¹¹⁷ *Id.*

¹¹⁸ Reich, *supra* note 3, at 863.

specific shifts in resources, which accommodate the needs of the industry's workers and affected communities, as well as its firms.¹¹⁹ This comprehensive, consensual approach relieves pressures which might otherwise be channeled into demands for protection from imports. The process is, however, truly consensual; the government cannot compel the industry to accept a stabilization program.¹²⁰ The process has, in fact, encountered disagreements, long delays and sometimes stiff resistance in negotiating adjustment programs in the shipbuilding, aluminum and electric-furnace steel industries.¹²¹

The benefits provided by the Japanese government focus on helping small and medium-sized companies through preferential financing, government purchase of scrapped equipment, access to the Depressed Industries Credit Guaranty Fund¹²² and allowing the formation of joint scrapping associations to facilitate disposal of excess capacity.¹²³ The larger firms, many of them diversified into other industries, are expected to cut back without major government help aside from exemption from the Antimonopoly Law.¹²⁴ They are also expected to provide significant help to the smaller companies, such as repaying adjustment loans made to the smaller firms.¹²⁵ The private sector has successfully shouldered the burden of retraining and shifting workers, devoting to this purpose the proceeds of subsidies for scrapping excess capacity,¹²⁶ as well as subsidies under both the Employees in Structurally Depressed Industries Law¹²⁷ and the Employment Insurance Law.¹²⁸ Growth industries have smoothed adjustment by taking on employees laid off by declining industries, either permanently or by "borrowing" employees still on the payroll of the declining company until the adjustment process has been completed.¹²⁹

Observers tend to agree that the Japanese program for assistance to depressed industries, while far from perfect, has worked relatively more successfully than the fragmented, largely "hands-off" approach in the United States.¹³⁰ The shipbuilding industry was successfully induced to

¹¹⁹ *Id.* at 856, 863; GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 66, 71.

¹²⁰ GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 73.

¹²¹ *Id.* at 74; Boyer, *supra* note 105, at 61-62.

¹²² The Depressed Industries Credit Guaranty Fund was authorized under the Structurally Depressed Industries Law in 1978. GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 68.

¹²³ Boyer, *supra* note 105, at 60; GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 72.

¹²⁴ GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 72.

¹²⁵ *Id.*; Boyer, *supra* note 105, at 61.

¹²⁶ Reich, *supra* note 3, at 862.

¹²⁷ Law No. 95 of 1977; *see* Comment, *supra* note 2, at 604-605 n.62.

¹²⁸ Law No. 116 of 1974; *see* Comment, *supra* note 2, at 604-607.

¹²⁹ Boyer, *supra* note 105, at 60; GAO INDUSTRIAL POLICY REPORT, *supra* note 7, at 75.

¹³⁰ Reich, *supra* note 3, at 856, 862; Boyer, *supra* note 105, at 58, 63; Comment, *supra* note 2, at 609-614, wherein the author praises the Japanese record in aiding workers and communities but concludes that "the Japanese program for 'aiding' firms in depressed in-

reduce capacity by 35 percent after lengthy consultations among the various constituencies, including an advisory group comprised of representatives of business and labor, as well as bankers, academics and journalists.¹³¹ Employees were successfully transferred to other work.¹³² The aluminum industry, overwhelmed by cheaper imports after the 1973 oil shock drove up Japanese electricity costs,¹³³ dismantled 57 percent of its capacity and much of the remainder is idle. It survives, however, because of aluminum's status as a basic industry.¹³⁴ Workers were shifted to parents or affiliates.¹³⁵ On the other hand, MITI guidelines have been in effect for the non-integrated electric-furnace steel industry for five years and demand remains stagnant. Yet the industry's 60-odd companies have actually expanded rather than contracted capacity during that time.¹³⁶

As a device to require legislative reconsideration of the Structurally Depressed Industries Law, one of its provisions called for the Japanese Diet to enact repealing legislation by June 1983.¹³⁷ MITI sought to replace the original law with one providing broader Antimonopoly Law immunity but was opposed by the Japanese Fair Trade Commission (JFTC), which wanted the law eliminated.¹³⁸ The JFTC argued that the law had not worked, that the results did not justify the antitrust exemptions and that its application exacerbated Japan's relations with the United States and with other trading partners.¹³⁹ The two agencies ultimately reached a compromise. The new law, effective last July, continues to provide for the creation of officially-approved cartels, exempt from the Antimonopoly Law, aimed at dismantling excess capacity. In addition, the law now permits cooperation or consolidation of businesses, including mergers but not cartelization, for the purpose of revitalizing an industry. The later may, upon request, be granted official approval but not Antimonopoly Law exemption.

United States government officials have expressed concern that application of the Structurally Depressed Industries Law, particularly the sanctioning of cartels, can have the effect of restricting imports into Ja-

dustries was economically less than prudent." *Id.* at 609. The author cited the excessive reliance on economically inefficient cartels to keep alive some obsolete industries, such as textiles. *Id.* at 609-614.

¹³¹ Boyer, *supra* note 105, at 59, 60.

¹³² *Id.* at 60.

¹³³ *Id.* at 61.

¹³⁴ *Id.* at 61-62.

¹³⁵ *Id.* at 62.

¹³⁶ *Id.*

¹³⁷ Comment, *supra* note 2, at 610, n.88.

¹³⁸ Okabe & Saida, *Rescue Plan for Troubled Industries Draws Suspicion at Home and Abroad*, Japan Economic Journal, Jan. 25, 1983, at 6, col. 1; Boyer, *supra* note 105, at 58, 63.

¹³⁹ Boyer, *supra* note 105, at 58-59, 63.

pan.¹⁴⁰ MITI officials argue that this is not so, noting that Japan's cartel policy is a form of "positive adjustment policy," which has been accepted by the Organization for Economic Cooperation and Development, of which the United States is a member.¹⁴¹ To the contrary, the MITI officials assert that the effect is actually to increase imports by curtailing production, thereby raising Japanese prices and giving imported goods a competitive advantage.¹⁴² In any case, it seems likely that any import-restrictive side effects of these Japanese policies are less pervasive than the explicit import constraints imposed or induced by the U.S. government in an attempt to aid depressed industries, such as the current "voluntary" restraints on exports to the United States of Japanese cars and European steel.

IV. A POLICY-ORIENTED APPROACH

What lessons can be learned from this comparison of U.S. and Japanese policies? It seems clear that a purely protectionist solution, such as that represented by the escape clause, is not notably effective as a means of coping with the complex problems of rising imports, declining industries and the need to shift resources into the industries of the future. Such a solution focuses too much attention on imports, which is merely one aspect of a larger problem and which case histories show may be a relatively minor factor in determining an industry's future. Indeed, given the dynamics of the economic process in Japan, it seems likely that increased protection by the United States and European countries against Japanese exports has, in the past, done less to help U.S. and European industries than it has to accelerate Japan's investment shift out of low-growth and into high-growth industries. By the same token, the recent spate of world-wide protectionism to constrain Japan will stimulate Japanese business toward achieving greater cost efficiencies and generating more new products through increased basic research and development efforts.

By contrast, the relative success of the comprehensive Japanese approach both to the nurturing of new industries and, more recently, fostering adjustment in declining sectors argues for a broad approach in this

¹⁴⁰ A high Commerce Department official, Clyde V. Prestowitz, Jr., has said that the U.S. government disapproves of the government's role in cartels because (1) an industrial plan for a declining industry amounts to carving up the market, thereby determining the import level; (2) designation as a depressed industry targets it as favored, signalling its customers not to look elsewhere for supplies; and (3) some designated industries are connected with the major trading houses which make decisions about imports. *Japanese Cartels*, *supra* note 109, at L-11, L-12.

¹⁴¹ *Id.* at L-11.

¹⁴² *Id.* at L-10.

country. Logically, such an approach would begin, as does the Japanese, with the development of a broad national consensus on the general direction of the economy as a supplement to sound fiscal, monetary and tax policies designed to keep inflation and interest rates low and promote savings and investment. An articulated agreement on the likely future role of not only the major economic sectors—manufacturing, agriculture and services—but also broad industrial categories such as heavy and light industry and high- technology, high-value-added industries, is desirable. Such a consensus should indicate which industries are likely to grow and possibly need nurturing and which ones are likely to decline and need assistance and adjustment.

To some, however, such an undertaking would smack too much of central economic planning and “creeping socialism.”¹⁴³ But Japanese “indicative planning” is just that—indicative, not mandatory. It should be possible for a presidentially-appointed commission of leaders from both the public and private sectors to perform a similar, essentially advisory function on an ongoing basis without transforming our free-market system into a planned economy, on the one hand, or raising unwarranted expectations of Utopia on the other. Industry is already heavily influenced by, and dependent upon, government, particularly with regard to macroeconomic monetary and fiscal policies which create an economic environment conducive to achieving growth and prosperity. Indeed, the difference between “planning” and the “free market” may be merely a difference in degree. Robert Reich has commented:

Our collective inability to organize ourselves for economic change stems largely from ideological blinders which severely limit our vision, forcing us to engage in an endless debate over the relative merits of two artificial categories: the “free” market, or centralized national “planning.” The real choice is between adjustment or protection.¹⁴⁴

Yet even without an indicative macroeconomic plan it should be possible for the United States to move in the direction of support for sunrise industries and managed adjustment for obsolete industries, restructuring or scaling down mature-technology industries to make them competitive again. Further, it should be possible to do so in a manner to promote, rather than inhibit, market forces. There is wide agreement that closer cooperation between industry, labor and government is a *sine qua non*. One way to achieve this would be to condition government help to firms in declining industries, whether in the form of escape clause import relief or domestic benefits, upon express commitments to restructure and to as-

¹⁴³ See, e.g., Kaus, *Can Creeping Socialism Cure Creaking Capitalism?*, HARPER'S, Feb. 17, 1983.

¹⁴⁴ Reich, *supra* note 3, at 878.

sume at least a modicum of responsibility for the adjustment of workers and affected communities. While such commitments on behalf of an entire industry would require changes in our antitrust laws, which might not be possible without undermining their underlying principles, it should be possible to devise certain limited arrangements in order to promote the transition from a declining industry to a growth industry.

Another suggested technique would require that government financial assistance be provided on a matching basis, with the industry (or firms) investing half of the necessary funds before the government contributes its share.¹⁴⁵ Whatever adjustment bargains are struck should involve mutual commitments regarding worker retraining and relocation, any necessary modernization of the infrastructure by government, explicit industry (or company) plans for restructuring to become competitive, and aid to injured communities. Without such plans and agreements, the benefits of government assistance are likely to be frittered away, with workers, managerial staff and capital remaining frozen in industries facing shrinkage as America's level of interdependence grows.

Surely, one of the first tasks of government is to undertake to coordinate the already-existing fragmented government policies and programs which affect an industry's health and competitiveness. Import relief, loans and guarantees, price supports, subsidies, special tax provisions, antitrust proscriptions and prosecutions, regulatory actions, government procurement and other government actions have been put in place in a piecemeal fashion with no awareness of the aggregate impact and no sense of the industry as a whole.¹⁴⁶ A modest beginning could be made by requiring that agencies proposing new regulations impacting industries accompany them with a "competitive impact statement" describing the regulation's anticipated favorable or unfavorable effects on the industry's long-term international competitiveness. A coordinated view of existing programs and their effect on competitiveness will provide a better perspective for determining whether new incentives and assistance for sunset and sunrise industries, such as new tax incentives, research and development support, financing, or modified antitrust rules, may be needed.

Experience dictates that the debate regarding where the responsibility should be vested for implementing such programs may be as heated as that over their substance. The program coordination function could best be carried out by a new entity within the White House, similar to the National Security Council.¹⁴⁷ Obviously, these proposals run counter to

¹⁴⁵ Kaus, *supra* note 143, at 20.

¹⁴⁶ Reich, *supra* note 3, at 877.

¹⁴⁷ See Wheeler, Pepper & Janow, *Implications of Japanese Industrial Development Policies in the 1980's for U.S. Trade and Investment* (Hudson Institute), summarized in U.S. DEP'T OF COMMERCE, BUSINESS AMERICA (Nov. 1, 1982). A more modest step would be

efforts to reduce the federal bureaucracy, budget and involvement in the affairs of industry. There is, nevertheless, a growing consensus that, with the nation's economic future at stake, government has a proper, even essential, role in the process of providing for industry adjustment and promoting leading-edge technologies and industries. President Reagan acknowledged as much in his January 1983, State of the Union address: "Education, training and retraining are as fundamental to our success as are research, development, and productivity. Labor, management, and government at all levels can and must participate in improving these tools of growth. Tax policy, regulatory practices, and Government programs all need constant re-evaluation in terms of our competitiveness."¹⁴⁸

If such coordination in the government's approach can be achieved, it will likely lessen the pressure on industry to resort to "quick-fix" options, such as the escape clause, as a means of solving its problems. The escape clause would be improved by requiring, if antitrust hurdles can be overcome, that petitioners be in a position to design and carry out a detailed and effective adjustment plan, that such a plan be submitted with the petition and that import relief be conditioned on the successful negotiation of binding agreements between the petitioners and the government containing mutual obligations regarding adjustment. Administration of the law would be improved by limiting import relief to a maximum of five years and requiring that the International Trade Commission designate, and pay for, representatives of consumers and the national interest (in the form of a government representative) to participate in in the investigation. In addition, five years after the termination of any import relief, the Commission should be required to analyze and report on the effectiveness of the relief granted.

With a coordinated approach and the implementation of the proposed changes in the law, the escape clause may become one potentially useful element, but no more than that, in a comprehensive package of government support for the adjustment of injured industries.

Finally, a more imaginative, non-adversarial and non-confrontational approach to shaping and implementing escape clause remedies in a pro-competitive, rather than anti-competitive, manner merits exploration. This would involve a procedure wherein foreign governments of the principal supplier countries may participate in the shaping and implementation of an industry adjustment program. The concerned foreign governments may make available financial, technical and other resources jointly

to require that the Council of Economic Advisors report annually on American industrial competitiveness on a sector-by-sector basis and state the effect of various government policies thereon, with suggestions for change. Tsongas, *Atarizing Reagan*, N.Y. Times, Mar. 1, 1983, at A23, col. 1, 2-3.

¹⁴⁸ 19 WEEKLY COMP. PRES. DOC. 105, 108 (Jan. 31, 1983).

with the domestic resources assembled by the U.S. government in implementation of the adjustment package.¹⁴⁹

This approach makes both political and economic sense. Given the underlying technology-driven economic process, inexorably pushing national economies into increasingly higher levels of economic interdependence, the problem of economic injury incurred from imports may increase rather than recede in the near term. This prospect suggests increased internal political pressures for protection more likely designed to achieve anti-competitive rather than pro-competitive solutions. This would not serve the longer-term national interest in increasing productivity, upgrading quality and promoting international competitiveness of the U.S. industrial base.

Viewed from the standpoint of U.S. trading partners, to the extent the international competitiveness of injured U.S. industries can be quickly restored or its resources rapidly shifted to more competitive product areas through the partners' direct participation in a truly effective adjustment program, the cumulative effect of such effort will serve to maintain the openness of U.S. markets.

The present U.S. approach, already largely discredited, of combining a compensatory approach to industry adjustment by restricting imports will, more likely than not, lead to other anti-competitive restrictions, erode important international relationships and, more importantly, retard efforts to upgrade the competitiveness of the U.S. industrial base, thereby encouraging the survival of the less competitive elements composing that base.

¹⁴⁹ Such a collaborative approach to resolve trade disputes through non-confrontational means was explored in the relief phase of the imported motorcycles escape clause case. U.S. INT'L TRADE COMMISSION, HEAVYWEIGHT MOTORCYCLES, AND ENGINES AND POWER TRAIN SUB-ASSEMBLIES THEREFORE (Investigation No. TA-201-47), U.S.I.T.C. Pub. No. 1342, 48 Fed. Reg. 6043 (1983)(determination of threat of serious injury). This involved informal consideration of a financial and technical assistance package put together by certain Japanese motorcycle manufactures to restore the viability of Harley-Davidson Motor Co., Inc., the sole applicant, as an alternative to the possible five-year imposition of prohibitive tariffs. *Honda, Yamaha and Suzuki May "Save" Harley-Davidson*, Japan Economic Journal, Mar. 15, 1983, at 3, col. 4.

