THE RESPONSE OF "ESCAPE CLAUSE" OF GATT AND SECTION 201 OF THE TARIFF AND TRADE ACT OF 1974 TO THE NEEDS OF DEVELOPING COUNTRIES

INTRODUCTION

The protectionist fires, in the eyes of many, are burning uncontrollably.[1] The United States is struggling to protect its own domestic industry while continuing to promote its policy of global economic growth.[2] To accomplish this policy, the United States implemented several of its own devices which could be termed "protectionist." Generally, protectionism consists of measures to insure that the economy and a domestic industry are safe from burdensome competition. Restraints, such as increased tariffs or quantitative limits, make it harder for foreign competitors to sell their products in the United States.[3] The circumstances under which the need for protectionism arises are often common among nations.[4]

The United States, in opening its markets to foreign imports, places its industry in competition with foreign goods. Very often, these imports can be sold at a lower price than United States' produced goods because of the significantly lower production costs of some foreign countries. United States producers are faced with tremendous overhead costs including high wages, workers' compensation insurance, union costs and retirement benefits. For example, the United States' footwear producers experienced difficulty when faced with foreign competition for some of these very reasons.[5] Several foreign exporters and domestic importers started to dominate the shoe market beginning in 1978.[6] The foreign advantage con-

1. Mervosh & Jonas, *The New Trade Strategy*, BUS. WK., Oct. 7, 1985, at 90.
2. *Id.*
3. In the modern trade era, there has been a proliferation of barriers such as voluntary export restraints (VREs) and orderly marketing agreements (OMAs). These are bilateral arrangements between importing and exporting countries which place limits on the quantity of goods shipped in the open market. These agreements generally apply to a particular type of goods or industry.

Tariff increases are restrictive as to the cost rather than the quantity of importing. They also apply to particular types of goods, but, unlike VREs and OMAs, tariff increases apply to all nations importing that product. *See generally* D. YOFFIE, POWER AND PROTECTIONISM: STRATEGIES OF THE NEWLY INDUSTRIALIZING COUNTRIES (1983).

4. The recent problem in the footwear industries is illustrative. *Nonrubber Footwear*, USITC Pub. 1717, Inv. No. TA-201-55 (July 1985) [hereinafter cited as *Footwear*).
5. *Id.* at 6.
6. *Id.* at 7.

sisted mainly of lower production costs and hence a less expensive product to the consumer.[7] The impending question with respect to domestic producers is what can be done so that they can maintain their share of the market.

Some of the responses to foreign competition are aimed at combatting "unfair" trade practices[8] while others concentrate on fair trading practices that threaten domestic industries.[9] In general, when an industry in the United States begins to suffer the effects of competition in the form of lower profits, declining production, increasing plant closings and increased layoffs, it may turn to the United States government for relief.[10] An industry may ask for protection in the form of increased tariffs[11] and restrictions on the quantity of imports.[12] The responses to fair trading practices are not unlimited but must be within the guidelines offered by, among others, the General Agreement on Tariffs and Trade[13] and Section 201 of the Tariff and Trade Act of 1974.[14]

GATT is a multilateral trade agreement to which the United States became a signatory in 1947.[15] Shortly after World War II, in response to the disrupted state of the world economy,[16] the United States and several other nations gathered to formulate a coherent policy consistent with three assumptions:[17] 1) international trade is beneficial to economic growth; 2) self-interested policies breed unstable relations and inhibit trade cooperation; and 3) an international agreement is the most efficient means of accomplishing stated goals because individual efforts are easily frustrated.[18]

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7. *Id.* at 5.

8. 19 U.S.C. §§ 2411-2416 (1982 & Supp. III 1985) are designed to allow for a response to foreign imports which are being traded unfairly. Goods entering the U.S. because of subsidies, dumping or countervailing duties come within the purvue of this statute. 19 U.S.C. § 1337 (1982 & Supp. III 1985) allows domestic producers to seek governmental relief when imported goods compete with domestic goods in a potential violation of a patent or a trademark.

9. 19 U.S.C. § 2251 (1982 & Supp. III 1985).

10. *Id.*

11. *Id.* An increased tariff makes the sale of imported goods more expensive. This effectively takes away some of the advantage of lower production costs.

12. *Id.* Quantitative restrictions place a maximum on the total number of a particular product which can be sold in the restricting country.

13. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5, T.I.A.S. No. 1700, 55 U.N.T.S. 187, *reprinted as amended in* H.R. Doc. 29-617, 93d Cong., 2d Sess. (1974)

14. 19 U.S.C. § 2251 (1982 & Supp. III 1985)

15. *See generally* J. Jackson, World Trade and the Law of GATT (1969).

16. *Id.* at 9.

17. *Id.* at 9-10.

18. Prior to 1934, the President had authority to enter into trade agreements on behalf of the United States under the Reciprocal Trade Agreement Act of 1934.

This policy clearly indicates a desire for free world trade.[19]

Due to the hardship that GATT obligations can sometimes create, Article XIX of GATT [20] establishes what is referred to as the

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The history of GATT is conspicuously meshed with the attempted International Trade Organization ("ITO") Draft Charter. *See* Hudec, *Retaliation Against "Unreasonable" Foreign Trade Practices: The New Section 301 and GATT Nullification and Impairment*, 59 MINN. L. REV. 461, 466-67 (1975). The ITO negotiations have been a source of interpretive material for GATT. Some have questioned its persuasive authority on the grounds that GATT was premised on the existence of the ITO.

The first talk of the ITO came from the Americans and the British who sought to prevent further deterioration of the world market. In 1945, the United States prepared preliminary draft proposals for the ITO and invited several nations to gather and consider an agreement. After a series of preliminary conferences between 1946 and 1948, GATT emerged. The initial talk of GATT emanated from one of the committees at the 1946 London conference.

The final meeting of the ITO Draft Charter took place in Havana in 1947. At this point, GATT was thrust into the center of attention when Congress refused to resubmit the draft for congressional approval. GATT achieved its independent identity in 1947 when, during the course of the Havana Charter, some twenty-three nations met to consider it.

19. The Preamble to GATT reflects the desires of the contracting nations to effectuate this policy:

> The Governments of the COMMONWEALTH OF AUSTRALIA, the KINGDOM OF BELGIUM, the UNITED STATES OF BRAZIL, BURMA, CANADA, CEYLON, the REPUBLIC OF CHILE, the REPUBLIC OF CHINA, the REPUBLIC OF CUBA, the CZECHOSLOVAK REPUBLIC, the FRENCH REPUBLIC, INDIA, LEBANON, the GRAND-DUCHY OF LUXEMBURG, the KINGDOM OF THE NETHERLANDS, NEW ZEALAND, the KINGDOM OF NORWAY, PAKISTAN, SOUTHERN RHODESIA, SYRIA, the UNION OF SOUTH AFRICA, the UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, and the UNITED STATES OF AMERICA:
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> Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods,
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> Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce . . .

Preamble to GATT, *reprinted in* H.R. DOC. 29-617, *supra* note 13, at 1.

20. Article XIX of GATT states:

> *Emergency Action on Imports of Particular Products*
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> 1. (*a*) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.
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> (*b*) If any product, which is the subject of a concession with respect to a preference, is being imported into the territory of a contracting party in the circumstances set forth in sub-paragraph (*a*) of this paragraph, so as to cause or threaten serious injury to domestic producers of like or directly competitive products in the territory of a contracting party which receives or received such preference, the importing contracting party shall be free, if that other contracting party so requests, to suspend the relevant obligation in whole or in part or to withdraw or modify the concession in respect of the product, to the extent and for such time as may be necessary to prevent or remedy such injury.

Escape Clause. The Escape Clause allows a signatory or "contracting party"[21] to literally escape its GATT obligations[22] if its domestic industry is under the threat of serious injury as a result of increasing foreign imports.[23] The Escape Clause allows for the implementation of protectionist measures despite the overall policy of GATT being the promotion of unrestricted world trade.[24]

For the United States, the first problem arises in ensuring consistency between relief measures and its GATT obligations.[25] This includes protectionist measures instituted under Section 201 which is very similar to the Escape Clause.[26] It allows the President to take

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2. Before any contracting party shall take action pursuant to the provisions of paragraph 1 of this Article, it shall give notice in writing to the CONTRACTING PARTIES as far in advance as may be practicable and shall afford the CONTRACTING PARTIES and those contracting parties having a substantial interest as exporters of the product concerned an opportunity to consult with it in respect of the proposed action. When such notice is given in relation to a concession with respect to a preference, the notice shall name the contracting party which has requested the action. In critical circumstances, where delay would cause damage which it would be difficult to repair, action under paragraph 1 of this Article may be taken provisionally without prior consultation, on the condition that consultation shall be effected immediately after taking such action.

3. (*a*) If agreement among the interested contracting parties with respect to the action is not reached, the contracting party which proposes to take or continue the action shall, nevertheless, be free to do so, and if such action is taken or continued, the affected contracting parties shall then be free, not later than ninety days after such action is taken, to suspend, upon the expiration of thirty days from the day on which written notice of such suspension is received by the CONTRACTING PARTIES, the application to the trade of the contracting party taking such action, or, in the case envisaged in paragraph 1(*b*) of this Article, to the trade of the contracting party requesting such action, of such substantially equivalent concessions or other obligations under this Agreement the suspension of which the CONTRACTING PARTIES do not disapprove.

(*b*) Notwithstanding the provisions of sub-paragraph (*a*) of this paragraph, where action is taken under paragraph 2 of this Article without prior consultation and causes or threatens serious injury in the territory of a contracting party to the domestic producers of products affected by the action, that contracting party shall, where delay would cause damage difficult to repair, be free to suspend, upon the taking of the action and throughout the period of consultation, such concessions or other obligations as may be necessary to prevent or remedy the injury.

GATT art. XIX, *reprinted in* H.R. DOC. 29-617, *supra* note 13, at 36-37.

21. GATT refers to the signatories as contracting parties.

22. It is not entirely clear what is meant by "GATT obligations;" however, one could argue that it covers tariff concessions and the elimination or reduction of quantitative restrictions. *See* J. JACKSON, *supra* note 15, at 559; *see also* Preamble to GATT, *supra* note 19.

23. GATT art. XIX, *supra* note 20.

24. *See* Preamble to GATT, *supra* note 19 and accompanying text.

25. Comment, *Foreign Industrial Targeting: Section 301 of the Trade Act of 1974 as a Remedy*, 25 VA. J. INT'L L. 483 (1985).

26. Section 201 is considered an escape clause as well and was closely modeled after GATT art. XIX. *See generally* Adams & Dirlam, *Import Competition and the Trade Act of 1974: A Case Study of Section 201 and Its Interpretation by the International Trade Commission*, 52 IND. L.J. 535 (1977).

measures[27] to protect domestic industries faced with injurious foreign import competition.[28] The policy of Section 201 is to provide short-term relief to domestic producers in order to prepare them for unrestricted future import competition.[29] By satisfying the statutory requirements, one petitioning under Section 201 can obtain relief from the government in the form of increased tariffs or quantitative restrictions.[30]

The United States' second problem concerns the method of determining whether the statutory requirements providing relief are met. Collaterally, the United States faces a problem in ensuring that the determinations made under Section 201 are consistent with GATT. Of particular concern for the purposes of this Comment is whether the manner of determination by countries in invoking the Escape Clause and by the United States in invoking Section 201 adequately protects developing nations.[31]

Several GATT provisions mandate that preferential treatment be given to developing nations. Article XVIII recognizes that the overall objectives of GATT[32] can be best obtained through the development of economies which are only able to support a low standard of living and are in early development stages.[33] Those countries qualifying as "developing" are allowed to deviate from their GATT obli-

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27. 19 U.S.C. § 2253 (1982 & Supp. III 1985).

28. *Id.* § 2251.

29. S. REP. No. 1298, 93d Cong., 2d Sess. 119 (1974).

30. *See supra* notes 11-12.

31. GATT defines developing nations as those which are only able to support the lowest standard of living and whose industry is in the early stages of development. As amended, article XVIII of GATT in part applies to developing nations:

> *Governmental Assistance to Economic Development*
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> 1. The contracting parties recognize that the attainment of the objectives of this Agreement will be facilitated by the progressive development of their economies, particularly of those contracting parties the economies of which can only support low standards of living[] and are in the early stages of development.[]
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> . . .
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> 3. The contracting parties recognize finally that, with those additional facilities which are provided for in Sections A and B of this Article, the provisions of this Agreement would normally be sufficient to enable contracting parties to meet the requirements of their economic development. They agree, however, that there may be circumstances where no measure consistent with those provisions is practicable to permit a contracting party in the process of economic development to grant the governmental assistance required to promote the establishment of particular industries[] with a view to raising the general standard of living of its people. Special procedures are laid down in Sections C and D of this Article to deal with those cases.

GATT art XVIII, *reprinted in* H.R. DOC. 29-617, *supra* note 13, at 27-29.

32. *See* Preamble to GATT, *supra* note 19.

33. GATT art XVIII, *supra* note 31, ¶ 1.

gations in order to secure a more favorable position in the market.[34] Article XXIII protects developing countries by providing a procedure through which they may obtain review of actions by any of the other contracting parties which in any way nullifies or impairs any benefit which is rightfully theirs under GATT.[35] Articles XXXVI-XXXVIII[36] pertain to the recognized need for all contracting parties to afford preferential treatment to less developed nations.[37] The Most Favored Nation (MFN) principle, often considered to be the cornerstone of GATT,[38] also helps developing nations. Included in

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34. *Id.* ¶ 3.

35. Paragraph 1 of Article XXIII of GATT allows developing nations to get special review:

Nullification of Impairment

1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

(*a*) the failure of another contracting party to carry out its obligations under this Agreement, or

(*b*) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or

(*c*) the existence of any other situation, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned. Any contracting party thus approached shall give sympathetic consideration to the representations or proposals made to it.

2. If no satisfactory adjustment is effected between the contracting parties concerned within a reasonable time, or if the difficulty is of the type described in paragraph 1(*c*) of this Article, the matter may be referred to the CONTRACTING PARTIES. The CONTRACTING PARTIES shall promptly investigate any matter so referred to them and shall make appropriate recommendations to the contracting parties which they consider to be concerned, or give a ruling on the matter, as appropriate. The CONTRACTING PARTIES may consult with contracting parties, with the Economic and Social Council of the United Nations and with any appropriate intergovernmental organization in cases where they consider such consultation necessary. If the CONTRACTING PARTIES consider that the circumstances are serious enough to justify such action, they may authorize a contracting party or parties to suspend the application to any other contracting party or parties of such concessions or other obligations under this Agreement as they determine to be appropriate in the circumstances. If the application to any contracting party of any concession or other obligation is in fact suspended, that contracting party shall then be free, not later than sixty days after such action is taken, to give written notice to the Executive Secretary to the CONTRACTING PARTIES of its intention to withdraw from this Agreement and such withdrawal shall take effect upon the sixtieth day following the day on which such notice is received by him.

GAAT art. XIX, *reprinted in* H.R. DOC. 29-617, *supra* note 13, at 39-40.

36. *See infra* Appendix A for the text of GATT arts. XXXVI-XXXVIII, *reprinted in* H.R. DOC. 29-617, *supra* note 13, at 53-57.

37. GATT art. XXXVI, *infra* Appendix A, ¶ 1

38. Article 1 of GATT contains the Most Favored Nation principle:

1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in

Article 1 and requiring equal treatment to all nations, operation of the MFN principle results in comprehensive tariff reductions, even though the reductions may have been initially aimed at aiding only one country.[39]

The foregoing policy raises several important questions with respect to protectionism. First, does the manner in which a determination is made by any of the contracting parties under the Escape Clause protect developing countries? Second, does the manner in which a determination is made by the United States under Section 201 protect developing countries? Third, does either manner of de-

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paragraphs 2 and 4 of Article III,[] any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:

(*a*)Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;

(*b*)Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are listed in Annexes B, C and D, subject to the conditions set forth therein;

(*c*)Preferences in force exclusively between the United States of America and the Republic of Cuba;

(*d*)Preferences in force exclusively between neighbouring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such prefernces are approved under paragraph 5 of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference[] on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(*a*)in respect of duties or charges on any product described in such Schedule, the difference between the most-favoured-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favoured-nation rate is provided for, the margin shall not exceed the difference between the most-favoured-nation and preferential rates existing on April 10, 1947;

(*b*)in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favoured-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in sub-paragraphs (*a*) and (*b*) of this paragraph shall be replaced by the respective dates set forth in that Annex.

GATT art. I, *reprinted in* H.R. Doc. 29-617, *supra* note 13, at 2-3 (footnote omitted).*See also* S. WEINTRAUB, TRADE PREFERENCE FOR THE LESS DEVELOPED COUNTIRES: AN ANALYSIS OF U.S. POLICY 7 (1966).

39. GATT art. I, *supra* note 38.

termination reflect the preferential treatment that GATT intended to afford to developing nations? The purpose of this Comment is to examine these questions in the context of the Escape Clause and Section 201 by analyzing the present methods of determining that measures such as increased tariffs and quantitative restrictions are necessary to protect the invoking countries' domestic industry.This Comment will begin with an analysis of the Escape Clause.[40] Next, a discussion will follow outlining the standards used in determining whether a country can escape from its GATT obligations[41] and how, if at all, these standards protect developing countries.[42] Section 201 will then be considered in a similar manner.[43] A substantial portion of this Comment will review the International Trade Commission's authority to decide disputes and suggest relief under Section 201 and how the lack of consistent standards affects developing nations.[44] Finally, proposals for modifications to the Escape Clause and Section 201 will be offered.[45]

I. GATT Escape Clause

The Escape Clause was included in GATT at the insistence of the United States government. One of the advantages of the Escape Clause is that it allows contracting parties to institute unilateral tariff increases or other trade barriers without having to seek prior authorization from the other countries.[46] Also, compensatory adjustment, which may consist of tariff reductions or lifting of quantitative restrictions, is not required under GATT. Often, however, on its own, the applicant party offers compensation.[47] Finally, the Escape Clause's basic advantage is that it allows applicants to escape from GATT obligations when faced with hardship.[48]

A contracting party may escape from its GATT obligations by

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40. *See infra* notes 46-51 and accompanying text.
41. *See infra* notes 52-62 and accompanying text.
42. *See infra* notes 63-82 and accompanying text.
43. *See infra* notes 85-104 and accompanying text.
44. *See infra* notes 105-74 and accompanying text.
45. *See infra* notes 83-84, 175-78 and accompanying text.
46. *See* Hudec, *supra* note 18, at 465; GATT art. XIX, *supra* note 20. It appears that this could encourage more cautious countries to enter into tariff bindings. K. Dam, The GATT Law and International Economic Organization 101 (1970).
47. K. Dam, *supra* note 46, at 101.
48. The Escape Clause also involves disadvantages. First, the clause is only available for a single concession or a group of closely related concessions within an industry. *Id.* at 100. Second, the relief is temporary in nature. *Id.* In fact, it has been argued that the relief measures imposed should be reassessed after the initial period of danger has passed. Adams & Dirlam, *supra* note 26, at 540.

satisfying a minimum of three elements: 1) imports must be entering in increased quantities;[49] 2) the increase in imports must be as a result of unforeseen developments and of existing GATT obligations;[50] and 3) the increase in imports must cause serious injury to a domestic industry.[51]

The first prerequisite[52] is usually not difficult to determine because of the availability of statistics.[53] However, the problem frequently encountered from an analytical standpoint is whether the increase in imports should be relative or absolute.[54] Since each of the three elements must be satisfied, it is crucial to choose a consistent starting point and a consistent method of analysis for all three. Moreover, with respect to an increase, there are no provisions which allow for a higher level of an increase when the imports are arriving from developing nations which need more protection for their industries than do developed nations.

The requirement that the increase in imports must be the result of unforeseen developments[55] and existing GATT obligations[56] present problems of proof for one seeking to invoke the Escape Clause. There is an initial difficulty in separating cause from pure coincidence.[57] Considering the growing complexity of international market structures, this difficulty will continue to be one of the central obstacles to obtaining relief under the Escape Clause.[58] The language is ambiguous at best and does not afford interpretive assistance.[59]

The final element, that the increase in imports must cause or threaten serious injury,[60] can be broken down in order to analyze "serious injury" separate from "cause." Causation, the ultimate hurdle to overcome, is merely the last in a series.[61] Causation must be established 1) when the serious injury is related to previous GATT obligations; 2) when the serious injury relates to unforeseen

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49. *See infra* notes 52-54 and accompanying text.
50. *See infra* notes 55-59 and accompanying text.
51. *See infra* notes 60-62 and accompanying text.
52. GATT art. XIX, *supra* note 20, ¶ 1(a).
53. *See, e.g.*, J. JACKSON, *supra* note 15, at 558.
54. *Id.*
55. GATT art XIX, *supra* note 20, ¶ 1(a).
56. *Id.*
57. J. JACKSON, *supra* note 15, at 559-60.
58. *Id.*
59. It has been suggested that one way to determine cause would be to analyze what specific changes in international obligations took place as a result of GATT. *Id.* at 557.
60. GATT art. XIX, *supra* note 20, ¶ 1(a).
61. K. DAM, *supra* note 46, at 101.

developments; and 3) when the serious injury is the result of increased imports.[62] Hence, causation is a common theme throughout all the Escape Clause requirements. The serious injury criteria has evaded any black letter standards thus leaving the determination to be made on a case by case basis.

A. The Escape Clause and Developing Nations

Undeveloped nations are at a distinct disadvantage when they compete with more developed countries in the international market.[63] The various protectionist measures are likely to lead to severe damage[64] to the economic growth of these countries and the growth of world economy. The constrictive nature of international trade policies of some of the more prominent trading nations is perhaps the most important and difficult obstacle for the developing nations to overcome.[65] When GATT was formed, ten of the twenty-three signatories were developing countries.[66] Preferences given to developing countries are evidenced in several provisions of GATT.[67] These preferences, which were based on the differing levels of the nations' development, insure a free flow of exports from the developing nations.[68] The slow development of these countries dictate that the more developed nations should focus on long-term worldwide economic development rather than immediate trade advantages.[69]

The protectionary nature of the Escape Clause is a direct reflection of the standards under which a determination is made to allow an escape from GATT obligations. The burden of proving causation protects the developing nation by making it difficult for any applicant to obtain relief.[70] However, the causal relationship may be easier to isolate when the imports are coming from a developing country. The evidence used to establish causation is generally not specific[71] and the evidentiary requirements tend to be relatively in-

62. *Id.* at 101-02.
63. D. YOFFIE, *supra* note 3, at 213.
64. *Id.* at 8.
65. *Id.* at 17.
66. ECONOMIC RELATIONS AFTER THE KENNEDY ROUND 48 (E. Alting Von Geusau ed. 1969).
67. *See generally* notes 32-39 and accompanying text.
68. Alting Von Geusau, *supra* note 66, at 51.
69. *Id.* at 3.
70. *See supra* notes 60-62 and accompanying text.
71. K. DAM, *supra* note 46, at 103.

effective.[72] However, developing nations whose imports are not able to easily penetrate a particular market may not know if their actions to gain entry will indeed cause an injury to a domestic industry. In turn, this may discourage some developing nations from vigorously expanding their trade and hence economic growth. Also, the vague injury definition has had the effect of expanding the scope of the clause, rendering it more applicable to a wider variety of situations.[73] However, the vague causal criteria often provide sufficient protection for the developing nations by making it difficult for anyone wishing to escape its GATT obligation.[74]

The definition of serious injury has also avoided strict definition.[75] The lack of standards creates important and varied ramifications for the developing country whose imports may be affected. The loose definition of injury reduces the predictability of application of the Escape Clause; however, this same ambiguity also provides the necessary flexibility if the affected industry or product originates from a developing nation.

The remedies afforded under the Escape Clause also help to protect developing nations. There are two different types of remedies available under the Escape Clause: suspension of GATT obligations in whole or in part;[76] and modification or withdrawal of concessions.[77] There are also several qualifications to these remedies. First, the nation seeking relief under Article XIX must notify the affected nation before any action can be taken.[78] This allows the affected nation a chance to consult and hopefully negotiate compensatory relief.[79] Second, the withdrawn GATT obligations must be causally related to the increased imports.[80] This qualification ensures that the suspension of GATT obligations will not be overbroad. Third, the withdrawal must be limited to prevention of the specific injury.[81] Effectively, this will limit the withdrawal to a spe-

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72. *Id.*

73. J. JACKSON, *supra* note 15, at 561. There is also a problem with the basic defintion of injury. *Id.*

74. *See supra* notes 60-62 and accompanying text.

75. Adams & Dirlam, *supra* note 26, at 539.

76. J. JACKSON, *supra* note 15, at 564.

77. This would amount to changing an existing tariff which is not excessive. *Id.*

78. GATT art. XIX, *supra* note 20, ¶ 2.

79. Compensatory relief may be in the form of reduced tariffs on other items which are not a threat to domestic industry at the time.

80. J. JACKSON, *supra* note 15, at 564.

81. For instance, one cannot increase tariffs beyond a reasonable level, that is to that point which remedies the injury. *Id.*

cific product, thereby limiting the scope of the action.[82] Fourth, the withdrawal should be consistent with the MFN principle.

B. Conclusion

Most of the positive and negative aspects of the Escape Clause would apply equally to developing and developed countries. However, since the continued growth of the less developed countries is crucial to overall economic growth,[83] careful review must be made of the potential of the Escape Clause to unjustifiably injure these countries. First, an added provision to the Escape Clause could require a more serious injury criterion. Second, more definite economic and statistical standards could be formulated so that developing nations would have some way in which to predict whether their imports will be likely targets of increased tariffs. Third, notice and consultation could be made a requirement before any action could be taken under the Escape Clause. Finally, when GATT obligations are suspended or concessions withdrawn, compensatory measures could be made mandatory. These changes would be consistent with the policies of GATT to give preferential treatment to developing countries.[84] Moreover, they would continue to allow implementation of the Escape Clause for those situations which warrant it. Similar considerations are applicable to remedies available under United States domestic laws.

II. SECTION 201 OF THE TARIFF AND TRADE ACT OF 1974

In contrast to GATT, Section 201 of the Tariff and Trade Act of 1974 allows a domestic producer to seek relief from the United States government under domestic laws. In their constant struggle to impact the world economy and "repel invaders,"[85] United States industries often look to the public laws for a remedy when private actions are not applicable.[86] One such public remedy is Section 201. The preference of public over private action is the result of

82. *Id.* As is often the case with developing nations, production is limited to a fewer number of products. A nation seeking relief in the form of increased tariffs will rarely ask for narrowly defined relief. More often, it will seek relief broadly defined, i.e., the entire steel industry.

83. *See supra* note 1 and accompanying text.

84. *See supra* notes 1-7 and accompanying text.

85. Adams & Dirlam, *supra* note 26, at 535.

86. *Id.*

two modern phenomena.[87] First, not only the industry, but also the individual worker suffers from foreign competition.[88] Second, the problems of foreign competition are more complex[89] and become emphasized when the United States' economy experiences periods of inflation and recession.[90]

The current U.S. trade policies must be strictly followed in order for Section 201 to become a viable remedy for domestic industry. Failure to do so could result in strained foreign relations and a subsequent tendency for those nations which have had their own imports restricted in some manner to retaliate by making the sale of American goods abroad more difficult. There is, by necessity, an intricate balance which must be maintained between the goals of prosperous international trade on the one hand[91] and protection of domestic industries on the other.[92] Presently, domestic policy favors relief to struggling industries.[93]

A. The Role of Policy in the Application of 201

The current United States' trade policy can be summarized in the following four principles: First, any limitations, restraints or withdrawals of concessions with respect to imports must be consistent with the United States' GATT obligations.[94] Second, the interest of global economic growth is best served by multilateral rather than unilateral or bilateral solutions.[95] Third, the existing international institutions should be further expanded to consider several areas not presently covered under present international agreements.[96] Fourth, the President should be given increased latitude in his efforts to liberalize world trade.[97]

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87. *Id.* at 535.
88. *Id.*
89. *Id.*
90. Nordhause, *Inflation Theory and Policy*, 66 AM. ECON. REV. 59, 66 (1976).
91. *Hearing Before the Subcomm. on Trade*, S. REP. NO. 14 98th Cong., 1st Sess., pt. 1, at 5 (1983).
92. *Id.* at 6.
93. Associated with this policy is the Darwinian notion of survival of the fittest. Perhaps if an industry cannot accomodate the influx of competitive goods, it is not adequately serving the public's interest and should bow to the more efficient producer or make changes. In its operation, the survival notion may give one seeking to invoke section 201 a tendency to avoid petitioning for relief under the belief that it will signal failure. *See* B. SCOTT & G. LODGE, U.S. COMPETITIVENESS IN THE WORLD ECONOMY 304 (1985).
94. S. REP. NO. 14, *supra* note 91, at 7.
95. *Id.*
96. This could include high technology, services and investments. *Id.*
97. *Id.*

The United States looks first to its domestic rules of law such as Section 201 in formulating trade policy.[98] These rules should not be abused, for it is generally feared that imposition of trade restrictions will only result in protectionism on a global scale.[99] These restrictions, if not imposed equally on all nations and all industries, may make trading nations apprehensive about taking chances in new markets.[100] The ultimate goal to be reached is a world market free from barriers.[101]

The present policy is the culmination of lessons learned from trade practices carried on forty-eight years ago in the period following the Depression.[102] In an effort to shield United States' industries from foreign competition, the government implemented sweeping tariff increases[103] without any consideration as to what effect these increases would have on the world economy.[104] Since then, the United States has been more careful in its trade practices, but significant problems still remain. The following will focus on the United States' response to fair trading practices of foreign competitors and how these responses are consistent with the aforementioned policies but lack predictability and coherent standards.

B. The International Trade Commission and Section 201

The International Trade Commission was formed under the Tariff Act of 1930.[105] The Commission was given authority under that act to investigate activities preliminary to, and in the aid of, authorized investigations in international trade problems.[106] The Commission is an executive agency composed of six individuals who are appointed by the President with the consent of Congress.[107] During the maximum five year period of a commissioner's tenure, he hears a variety of actions under international trade statutes.[108]

One specific role of the Commission is to make determinations under Section 201. The findings must conclude whether an article

98. B. SCOTT & G. LODGE, *supra* note 93, at 303.
99. *Id.* at 302.
100. *Id.* at 303.
101. *Id.* at 302.
102. *Id.* at 301.
103. *Id.* at 301, 302.
104. *Id.* at 302.
105. 19 U.S.C. § 1330 (1982 & Supp. III 1985).
106. 19 C.F.R. § 201.7 (1985).
107. 19 U.S.C. § 1330 (1982 & Supp. III 1985).
108. *Id.*

is being imported in such increased quantities as to be a substantial cause or threat of serious injury to the domestic industry producing an article similar to or directly competitive with the imported article.[109] The Commission makes its investigation on its own motion, on the filing of a petition, on the request of the President or on the resolution of the applicable congressional committees.[110] A petitioner must represent a trade association, firm, certified or organized union or group of workers in order to file with the Commission.[111]

Section 201 is similar to the GATT Escape Clause and was codified as part of the Trade Extension Act of 1962.[112] One of the most significant changes between the 1962 Act and the Tariff and Trade Act of 1974 was that the latter eased the burden of proof by changing the major cause requirement to "substantial cause."[113]

Section 201 has far reaching effects[114] and is primarily designed as a mechanism through which a domestic industry can attempt to restrict foreign competition which interferes with its domestic well-being.[115] Section 201 has great potential for misuse,[116] however, and has encountered some stiff criticism:

> [T]he ITC still has far to go, not only in providing an adequate foundation for its conclusions, but in achieving consistency in its reports. . . .
>
> . . . In a society that relies on precedent for the functioning of its administrative and judicial institutions, the suppression of thorough explanation for an executive decision saps the spirit of due process.[117]

This potential misuse affects developing nations such that the guidelines under which the Commission determines if relief measures are appropriate must be carefully scrutinized. The following discussion will outline the elements of a Section 201 determination

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109. 19 U.S.C § 2251(b)(1) (1982).

110. *Id.* These committees are the House Ways and Means Committee and the Senate Finance Committee.

111. *Id.* § 2251(a)(1). The only requirement here is that the petitioner include a statement as to why import relief is sought.

112. 19 U.S.C. § 1901 (1970), *repealed by* Pub. L. 98-618, Title VI, § 602 (d), (e), 88 Stat. 2072 (1972).

113. 19 U.S.C. § 2251(b)(1) (1982); Adams & Dirlam, *supra* note 26, at 537-38.

114. Adams & Dirlam, *supra* note 26, at 537.

115. 19 U.S.C. § 2251 (1982 & Supp. III 1985).

116. "[T]he Trade Act of 1974 had unusual potential for both good and ill." Adams & Dirlam, *supra* note 26, at 537.

117. *Id.* at 577.

and conclude that the lack of legal or economic standards[118] renders Section 201 a dangerous weapon.

C. *Elements of a Section 201 Determination*

Section 201 encompasses the following four elements: 1) industry definition; 2) increased imports; 3) serious injury or threat of serious injury; and 4) increased imports as the cause of serious injury or threat of serious injury.

1. Industry Definition

Often, the initial definition of "industry" will be crucial to determining a point of comparison.[119] The statute itself does not define what an industry is and Congress did not make it clear whether, to obtain relief, the injury must be to the entire firm or only a portion of its output relating to the imports.[120] Section 201 allows the Commission to define industry based on any of the following: what the industry produces,[121] a portion of the producer which produces the like or directly competing article[122] or a specific market or geographic area.[123] The obvious problems with defining industry arise when a producer markets more than one product or is concentrated in several areas.[124] The House Ways and Means Committee has suggested that the Commission consider the question of serious injury in the context of the productive resources[125] used in the division or plants in which the article in question is produced.[126] "Like" and "directly competitive"[127] can be thought of as two distinct concepts.[128] "Like" has been defined as substantial or inherent in in-

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118. *Id.*
119. *Id.* at 546.
120. *Id.* at 552-53.
121. 19 U.S.C. § 2251 (b)(3)(A) (1982). This section was recently amended to allow the commission to consider even more variables it thinks are relevant. For an application of these broad criteria, *see Certain Canned Tuna Fish*, USITC Pub. 1558, Inv. No. TA-201-53 (Aug. 1984); *Unwrought Copper*, USITC Pub. 1549, Inv. No. TA-201-52 (July 1984); *Carbon and Certain Alloy Steel Products*, USITC Pub. 1553, Inv. No. TA-201-51 (July 1984).
122. 19 U.S.C. § 2251(3)(b) (1982).
123. *Id.* § 2251 (3)(c).
124. Adams & Dirlam, *supra* note 26, at 546-47.
125. Such resources might include employees, physical facilities and capital expenditures.
126. H.R. REP. No. 571, 93d Cong., 1st Sess. 47 (1973).
127. 19 U.S.C. § 2251(b)(1) (1982).
128. *Footwear*, *supra* note 4, at 26.

trinsic characteristics.[129] Directly competitive items have been termed those that are not identical but have a similar commercial purpose or are adaptable for similar uses.[130]

In practice, the Commission is free to take whatever view it chooses, whether narrow or broad.[131] This discretionary determination is the only one that the Commission must make throughout its entire investigation.[132]

2. *Increased Imports*

Under Section 201, there must exist an actual increase in imports or there must be some increase over a previous level of imports.[133] Crucial to the determination of an increase is the choice of a starting point from which to measure, for when the increase is from zero, the significance is less than when the increase is from an existing base.[134] The Commission often adopts its own standard of tracing the increase for five years; however, this is not applied with uniformity.[135]

The express provisions of Section 201 offer little in the way of coherent standards.[136] The Commission's determination also uncovers a wide array of applications that are essentially void of any legal analysis. Quantitative measures alone will not suffice but they may provide at least an economic basis for arriving at some consistency.[137] However, to ensure that consistency, there must also be a legal basis to guide the Commission.[138]

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129. S. REP. NO. 1298, *supra* note 29 at 122.

130. *Id.* The Commission made a crucial determination of industry in the *Footwear* case which included both athletic and non-athletic footwear. *Nonrubber Footwear, supra* note 4, at 9 (opinion of Chairwoman Stern). This initial finding made all subsequent analysis dependent on this one set of statistics. For example, had the Commission included in the "footwear industry" only non-athletic footwear, the data it reviewed to make its determination might have revealed that quantitative restrictions were not necessary. *Id.*

131. *Bolts, Nuts, Screws*, USITC Pub. 747 (Nov. 1975) (opinion of Comm'r Leonard).

132. Congress has agreed to let the Commission exercise its discretion and had every intention of doing so when it enacted the legislation. Adams & Dirlam, *supra* note 26, at 541.

133. 19 U.S.C. § 2251(b)(2)(C) (Supp. III 1985); S. REP. NO. 1298, supra note 29, at 121.

134. *Plant Hangers*, USITC Pub. 797 (Dec. 1976).

135. For example, in the *Footwear* case, there was a strong disagreement as to whether the increase should be measured by the increase in imports in relative market share or the increase in imports as a function of the value in constant dollars. *Footwear, supra* note 4, at 30; *see also Birch Plywood Doorskins*, USITC Pub. 743 (Oct. 1978).

136. Adams & Dirlam, *supra* note 26, at 547.

137. *Id.* at 542.

138. *Id.* at 557. *See also supra* note 117 and accompanying text.

3. *Serious Injury or Threat of Serious Injury*

At some point in the proceedings, the Commission must determine what constitutes serious injury in that context.[139] In arriving at a conclusion, the Commission may take into account the following:

1) all economic factors it considers relevant;[140]
2) the significant idling of productive facilities;[141]
3) the inability of a significant number of firms to operate at a profitable level;[142] and
4) significant unemployment or underemployment.[143]

The hazy nature of the definition makes uniformity nearly impossible.[144] The guidelines offer substantial leeway to the Commission. The question will continue to be: What is serious? The answer will be: Serious is that which is significant. But what is significant? The most that can be gained from the legislative history is that the legislature did not intend that injury mean only a temporary misfortune.[145] Commissioner Liebler has suggested that serious injury is "a major contraction of a domestic industry or its extinction."[146] As a result of these flimsy criteria, the definitions have gone through several transmutations.[147]

An example of the difficulty in deciding what constitutes a serious injury can be found in the *Nonrubber Footwear* matter. There, a majority of the Commission determined that a drop in operating profits in the industry from 6.4% to 5.3% was significant.[148] The Commission looked to dozens of balance sheet indicators,[149] but failed to conclude which of these statistics was important or whether the decline in profits and production was the cumulative effect of some indicators and not others.

Section 201 also allows for relief when there is a threat of serious injury.[150] The Commission must define what constitutes a threat taking into account the following factors:

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139. Adams & Dirlam, *supra* note 26, at 542.
140. 19 U.S.C. § 2251(b)(2) (Supp. III 1985).
141. 19 U.S.C. § 2251 (b)(2)(A) (1982).
142. *Id.*
143. *Id.*
144. Adams & Dirlam, *supra* note 26, at 554.
145. S. REP. No. 1298, *supra* note 29, at 120-21.
146. *Footwear*, *supra* note 4, at 32. *See also* S. REP. No. 1298, *supra* note 29, at 119.
147. Adams & Dirlam, *supra* note 26, at 555.
148. *Footwear*, *supra* note 4, at 19.
149. *Id.*
150. 19 U.S.C. § 2251(b)(1) (1982).

1) a decline in sales;
2) higher or growing inventory;
3) downward trend in production, profits, wages and employment (or increasing underemployment).[151]

The legislative history does not supplement these general guidelines but does indicate that the threat exists if the injury is not yet existing but is clearly imminent if the imports continue unrestricted.[152]

These enumerated factors do not adequately define injury.[153] Each investigation before the Commission is *sui generis* such that there is almost a complete lack of standards.[154] What constitutes a serious decline in sales in the tuna industry could be rather insignificant in the steel industry. The inability to make lateral comparisons with other industries causes the Commission to rely on percentage increases, decreases or relative declines. However, the commissioners often review a biased accumulation of data and manipulable figures. Each party presents the data in a manner which makes its case more appealing.

Even though the foregoing shows how legal and economic standards are not consistently applied, nowhere is the problem more crucial than in the causal determination required by Section 201.[155] Even if a petitioner is able to show an increase in imports and a serious injury or a threat of a serious injury, he must also prove a causal connection between the two.

4. Increased Imports as the Cause of Serious Injury or Threat of Serious Injury

Cause is often the major issue in a Section 201 case[156] and is often the basis of overruling an otherwise viable petition.[157] Substantial cause necessary for relief has been defined as "a cause which is important and not less than any other cause."[158] To find such a cause, the Commission may look to an increase in imports and a decline in the proportion of the market occupied by domestic

151. 19 U.S.C § 2251(b)(2)(B) (Supp. III 1985)
152. S. REP. NO. 1298, *supra* note 29, at 121.
153. *Footwear*, *supra* note 4, at 31.
154. *See, e.g.*, Adams & Dirlam, *supra* note 26, at 557.
155. The example used by Adams and Dirlam of the specialty steel industry illustrates this problem. *Id.* at 558.
156. *Id.*
157. *Id.*
158. 19 U.S.C. § 2251(b)(4) (1982).

goods.[159]

The determination of cause under Section 201 is very complex[160] and the Commission's ability to deal with the issue is questionable. First, there are insufficient statutory guidelines[161] and an absence of precedent to guide the Commission.[162] Second, there is a limited number of staff economists and lawyers, shortages of time and inconsistent standards.[163] The main problem with consistency is that there is no analytical framework that can be regularly applied.[164] Therefore, a findng of cause is often made on a superficial basis.[165] While the broad definition of cause was intended to allow the Commission to exercise its intuition,[166] it could not have been meant to displace the application of legal or economic standards.[167]

There are likely to be situations where the application of economic or legal standards is impossible. From a legal standpoint, the Commission has settled on a tort type "but for" analysis of cause.[168] From an economic standpoint, there is no one analytical tool which predominates, nor is there one which gives a fair indication of what would constitute cause.[169] Economists maintain that a growth in imports would have a net positive effect on the economy by increasing the intensity of competition.[170] This growth would thus operate to reduce domestic prices and force producers to change with fashions and technology.[171] It is crucial that the foundation be laid in order to determine injury in the context of competitive world markets.[172]

The determination of a causal relationship between increased import and injury clearly is difficult. The statutory language which states that a substantial cause is one which is not less than any other is really ineffective.[173] There are obvious problems with what will amount to "substantial."[174] The statute does recognize that

159. 19 U.S.C. § 2251(b)(2)(C) (Supp. III 1985).
160. Adams & Dirlam, *supra* note 26, at 558-59.
161. *Id.*
162. *Id.* at 560.
163. *Id.* at 558-59.
164. *Id.*
165. *Id.*
166. S. REP. No. 1298, *supra* note 29, at 121.
167. *See supra* note 117 and accompanying text.
168. Adams & Dirlam, *supra* note 26, at 561.
169. *Id.* at 559.
170. *Id.* at 559-60.
171. *Id.*
172. *Id.* at 558.
173. H.R. REP. No. 571, *supra* note 126, at 46.
174. *Id.*

there may be several causes of the injury and only requires that one of those causes be substantial. Perhaps the cause need only be important; the question remains unanswered.

D. Proposals

Taken together, the ambiguity of Section 201 presents problems for developing countries in attemping to predict when their imports will satisfy the statutory criteria and allow a domestic producer to seek relief. They will be unable to protect themselves if the Commission is suddenly swayed by political pressure to make an affirmative decision.[175] The Commission is essentially ignorant of facts which are relevant to domestic industries and those with respect to foreign competition. This makes it difficult to formulate consistent trade policies.[176] The following suggestions for amendment could protect developing nations.

First, an amendment to Section 201 should provide for a higher level of injury and more direct proof of causation when the allegedly injurious import originates from developing countries. Second, the statute should be amended to include a mandatory notification requirement to the affected country of the investigation and the nature of the complaint and relief sought. Third, compensatory relief to the affected nation should be made automatically available. Fourth, the investigation should follow up with a mandatory reevaluation after an eighteen month period to determine if the relief measures are still necessary.[177]

The problems inherent in Section 201 are in no way uniquely injurious to developing nations, however. But if world-wide free trade is the ultimate objective of trade, then the welfare of these countries which do not have the resources to adequately protect their industries from protectionist practices should be a prime consideration of any legislation. No one has gone so far as to say that domestic industries should be made to suffer under the present statutes. However, protectionist measures are unnecessary and even inappropriate when domestic industries have simply failed to manage

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175. The organization of the Commission does not provide stringent protection from political pressure. *See* 19 U.S.C. § 1330
(1982 & Supp. III 1985).

176. B. SCOTT & G. LODGE, *supra* note 93, at 306.

177. Presently, relief can be effective for up to five years without mandatory review. 19 U.S.C. § 2253 (1982 & Supp. III 1985).

their affairs properly.[178]

CONCLUSION

The Escape Clause and Section 201 are very similar in that they allow United States' domestic industries a means to employ protectionist measures when that industry is being injured by increased foreign imports. It is generally believed that Section 201 is consistent with GATT.[179] However, the previous discussion clarifies that the respective provisions might yield inconsistent results under certain circumstances. Section 201 has one significant distinction from the Escape Clause in that the Commission's determination is not conclusive of a grant of relief. The findings of the Commission are reported to the President[180] who then makes a final determination after taking into consideration several factors.[181]

The Commission has recommended that relief measures be taken in thirty-two of the fifty-five cases that it has handled[182] but the President has granted relief in only half of these.[183] So, it appears intitially that the burden of proof is difficult and, after that hurdle is overcome, the political forces preclude automatic relief.

The various changes which have been proposed for the Escape Clause and Section 201 will begin to make these escape provisions more responsive to the needs of developing countries. Other problems may not become apparent until the Commission abuses its discretion and the United States consistently violates GATT. It is feared, however, that if the Commission and the President continue to refuse to grant relief under Section 201 and if the pressures continue to mount in Congress, industries might push for automatic relief after the Commission's ruling.[184] The United States, while maintaining domestic tranquility, should not sacrifice amenable foreign relations by responding with sweeping protectionism.

*Rochelle A. Fandel**

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178. *Unwrought Copper*, USITC Pub. 1549, Inv. No. TA-201-52 (July 1984).
179. *See Comment*, *supra* note 25, at 490.
180. 19 U.S.C. § 2251(d)(1) (1982).
181. *Id.* § 2252.
182. Wall St. J., Oct. 22, 1985, at 32, cols. 1-2.
183. *Id.*
184. B. SCOTT & G. LODGE, *supra* note 93, at 307.

* To my parents, Mike and Nancy Fandel, and my "second mom" Mary Lou Reilly Merickel. I hope the love, care and support you have given me, and taught me how to share with others, is reflected in everthing I do.

Appendix A

Article XXXVI

Principles and Objectives

1.[] The contracting parties,

(*a*)recalling that the basic objectives of this Agreement include the raising of standards of living and the progressive development of the economies of all contracting parties, and considering that the attainment of these objectives is particularly urgent for less-developed contracting parties;

(*b*)considering that export earnings of the less-developed contracting parties can play a vital part in their economic development and that the extent of this contribution depends on the prices paid by the less-developed contracting parties for essential imports, the volume of their exports, and the prices received for these exports;

(*c*)noting, that there is a wide gap between standards of living in less-developed countries and in other countries;

(*d*)recognizing that individual and joint action is essential to further the development of the economies of less-developed contracting parties and to bring about a rapid advance in the standards of living in these countries;

(*e*)recognizing that international trade as a means of achieving economic and social advancement should be governed by such rules and procedures—and measures in conformity with such rules and procedures—as are consistent with the objectives set forth in this Article;

(*f*)noting that the CONTRACTING PARTIES may enable less- developed contracting parties to use special measures to promote their trade and development;

agree as follows.

2. There is need for a rapid and sustained expansion of the export earnings of the less-developed contracting parties.

3. There is need for positive efforts designed to ensure that less-developed contracting parties secure a share in the growth in international trade commensurate with the needs of their economic development.

4. Given the continued dependence of many less-developed contracting parties on the exportation of a limited range of primary products,[] there is need to provide in the largest possible measure more favourable and acceptable conditions of access to world mar-

kets for these products, and wherever appropriate to devise measures designed to stabilize and improve conditions of world markets in these products, including in particular measures designed to attain stable, equitable and remunerative prices, thus permitting an expansion of world trade and demand and a dynamic and steady growth of the real export earnings of these countries so as to provide them with expanding resources for their economic development.

5. The rapid expansion of the economies of the less-developed contracting parties will be facilitated by a diversification[] of the structure of their economies and the avoidance of an excessive dependence on the export of primary products. There is, therefore, need for increased access in the largest possible measure to markets under favourable conditions for processed and manufactured products currently or potentially of particular export interest to less-developed contracting parties.

6. Because of the chronic deficiency in the export proceeds and other foreign exchange earnings of less-devloped contracting parties, there are important inter-relationships between trade and financial assistance to development. There is, therefore, need for close and continuing collaboration between the CONTRACTING PARTIES and the international lending agencies so that they can contribute most effectively to alleviating the burdens these less-developed contracting parties assume in the interest of their economic development.

7. There is need for appropriate collaboration between the CONTRACTING PARTIES, other intergovernmental bodies and the organs and agencies of the United Nations system, whose activities relate to the trade and economic development of less-developed countries.

8. The developed contracting parties do not expect reciprocity for commitments made by them in trade negotiations to reduce or remove tariffs and other barriers to the trade of less-developed contracting parties.[]

9. The adoption of measures to give effect to these principles and objectives shall be a matter of conscious and purposeful effort on the part of the contracting parties both individually and jointly.

Article XXXVII

Commitments

1. The developed contracting parties shall to the fullest extent possible—that is, except when compelling reasons, which may include legal reasons, make it impossible—give effect to the following provisions:

(*a*)accord high priority to the reduction and elimination of barriers to products currently or potentially of particular export interest to less-devloped contracting parties, including customs duties and other restrictions which differentiate unreasonably between such products in their primary and in their processed forms;[]

(*b*)refrain from introducing, or increasing the incidence of, customs duties or non-tariff import barriers on products currently or potentially of particular export interest to less-developed contracting parties; and

(*c*)(i) refrain from imposing new fiscal measures, and

(ii) in any adjustments of fiscal policy accord high priority to the reduction and elimination of fiscal measures, which would hamper, or which hamper, significantly the growth of consumption of primary products, in raw or processed form, wholly or mainly produced in the territories of less-developed contracting parties, and which are applied specifically to those products.

2. (*a*) Whenever it is considered that effect is not being given to any of the provisions of sub-paragraph (*a*), (*b*) or (*c*) of paragraph 1, the matter shall be reported to the CONTRACTING PARTIES either by the contracting party not so giving effect to the relevant provisions or by any other interested contracting party.

(*b*)(i) The CONTRACTING PARTIES shall, if requested so to do by any interested contracting party, and without prejudice to any bilateral consultations that may be undertaken, consult with the contracting party concerned and all interested contracting parties with respect to the matter with a view to reaching solutions satisfactory to all contracting parties concerned in order to further the objectives set forth in Article XXXVI. In the course of these consultations, the reasons given in cases where effect was not being given to the provisions of sub-paragraph (*a*), (*b*) or (*c*) of paragraph 1 shall be examined.

(ii) As the implementation of the provisions of sub-paragraph

(*a*), (*b*) or (*c*) of paragraph 1 by individual contracting parties may in some cases be more readily achieved where action is taken jointly with other developed contracting parties, such consultation might, where appropriate, be directed towards this end.

(iii) The consultations by the CONTRACTING PARTIES might also, in appropriate cases, be directed towards agreement on joint action designed to further the objectives of this Agreement as envisaged in paragraph 1 of Article XXV.

3. The developed contracting parties shall:

(*a*) make every effort, in cases where a government directly or indirectly determines the resale price of products wholly or mainly produced in the territories of less-developed contracting parties, to maintain trade margins at equitable levels;

(*b*) give active consideration to the adoption of other measures[] designed to provide greater scope for the development of imports from less-developed contracting parties and collaborate in appropriate international action to this end;

(*c*) have special regard to the trade interests of less-developed contracting parties when considering the application of other measures permitted under this Agreement to meet particular problems and explore all possibilities of constructive remedies before applying such measures where they would affect essential interests of those contracting parties.

4. Less-developed contracting parties agree to take appropriate action in implementation of the provisions of Part IV for the benefit of the trade of other less-developed contracting parties, in so far as such action is consistent with their individual present and future development, financial and trade needs taking into account past trade developments as well as the trade interests of less-developed contracting parties as a whole.

5. In the implementation of the commitments set forth in paragraphs 1 to 4 each contracting party shall afford to any other interested contracting party or contracting parties full and prompt opportunity for consultations under the normal procedures of this Agreement with respect to any matter or difficulty which may arise.

Article XXXVIII

Joint Action

1. The contracting parties shall collaborate jointly, within the framework of this Agreement and elsewhere, as appropriate, to further the objectives set forth in Article XXXVI.

2. In particular, the CONTRACTING PARTIES shall:

(*a*) where appropriate, take action, including action through international arrangements, to provide improved and acceptable conditions of access to world markets for primary products of particular interest to less-developed contracting parties and to devise measures designed to stabilize and improve conditions of world markets in these products including measures designed to attain stable, equitable and remunerative prices for exports of such products;

(*b*) seek appropriate collaboration in matters of trade and development policy with the United Nations and its organs and agencies, including any institutions that may be created on the basis of recommendations by the United Nations Conference on Trade and Development;

(*c*) collaborate in analysing the development plans and policies of individual less-developed contracting parties and in examining trade and aid relationships with a view to devising concrete measures to promote the development of export potential and to facilitate access to export markets for the products of the industries thus developed and, in this connexion, seek appropriate collaboration with governments and international organizations, and in particular with organizations having competence in relation to financial assistance for economic development, in systematic studies of trade and aid relationships in individual less-developed contracting parties aimed at obtaining a clear analysis of export potential, market prospects and any further action that may be required;

(*d*) keep under continuous review the development of world trade with special reference to the rate of growth of the trade of less-developed contracting parties and make such recommendations to contracting parties as may, in the circumstances, be deemed appropriate;

(*e*) collaborate in seeking feasible methods to expand trade for the purpose of economic development, through international harmonization and adjustment of national policies and regula-

tions, through technical and commercial standards affecting production, transportation and marketing, and through export promotion by the establishment of facilities for the increased flow of trade information and the development of market research; and

(f) Establish such institutional arrangements as may be necessary to further the objectives set forth in Article XXXVI and to give effect to the provisions of this part.