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THE UNITED STATES IN PENDING WORLD TRADE NEGOTIATIONS

*Theodore R. Gates**
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I. INTRODUCTION

The United States emerged from World War II as the only major trading nation with a strong economic and financial position. The post-War international trading structure, embodied in the General Agreement on Tarriffs and Trade (GATT)[1] and the International Monetary Fund (IMF) frameworks, was established with the United States in the position of a dominant, largely self-sufficient producer of many and superior goods. The succeeding three decades, however, have witnessed radical changes in that circumstance. No longer is a "fortress America" economically feasible. The United States is no longer self-sufficient in a number of raw materials on which it depends; indeed, the scarcity of natural resources may well be one of the dominating issues for the next decade, if not for the remainder of the century. More than one study has predicted acute shortages of basic agricultural, mineral, and other industrial materials in coming decades.[2] While technological improvements and the cultivation of substitutes for some materials may alleviate shortages, the problem of resource scarcity is still serious, and the effects of a variety of shortage situations are already being felt. State officials contemplate the possibility of Texas becoming a net importer of petroleum within five years.[3]

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1. General Agreement on Tariffs and Trade, *done* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT].

2. *See, e.g.*, MEADOWS, LIMITS OF GROWTH (1972); NATIONAL ACADEMY OF SCIENCES, RESOURCES AND MAN (1969).

3. Langdon, *The Energy Crisis and the Producer States*, 6 NATURAL RESOURCES LAW. 485 (1973 ABA SECTION PROCEEDINGS).

World food production is being pushed to capacity. Demand curves, moreover, following population curves and increased consumption by the Third World, must inevitably increase the strain on stable markets. Substantial increases in costs—reflecting in large part a real increase in commodity value through decreased supply, increased demand or increased costs of production—seem unavoidable and already apparent.[4]

The rise in costs, and for the United States, the increasing reliance on imports, will contribute to continuing international monetary strains. The United States paid only approximately three billion dollars for petroleum imports in 1970; conservative estimates place imports at 30 billion dollars by 1985. The effect on the United States balance of payments is obvious. In addition, and for the first time since World War II, the United States is required to compete with strong foreign economies for access to raw materials, advanced technology, capital investment and sufficient exports to sustain a favorable balance of payments.[5] American technology is no longer unique and inaccessible.[6] New steel processes only recently adopted for United States production were developed a decade or more before in Western Europe and are a part of their existing plant; the Japanese and the French are well advanced in the design and development of computers; and the newest developmental work in aviation, supersonic transport, has been undertaken by a joint venture of France and the United Kingdom. Indeed, capital investment in American ventures is no longer assured; domestic industries must compete for investment dollars with business opportunities all over the world and, as in the case

4. The world price of oil was raised by producer governments over 400% in the course of 1973, largely through the efforts of the Organization of Petroleum Exporting Countries (OPEC). The example has not been lost on other resource exporting countries. Australia, Guyana, Jamaica, Sierre Leone, Surinam and Yugoslavia have formed an International Bauxite Association, which has presumably encouraged, explicitly or implicitly, Jamaica in its recent demands for an increased government share. Similarly, six Latin American countries have formed a Union of Banana Exporting Nations and have raised taxes on banana exports from approximately 2¢ per 40 pound box to $1.00.

5. DEP'T OF INTERIOR, REPORT ON MINING AND MINERALS POLICY 61 (1973).

6. Many spokesmen for American labor attribute this dispersion of the United States technology lead to activities of multinational corporations. The Burke-Hartke Bill, S. 151, 93d Cong., 2d Sess. (1973), would seek to discourage the export of such technology.

of steel, additional investment may be threatened if there is fear of increased imports of competitive products. Finally, United States exports no longer consistently pay for our imports. Although the United States enjoyed a trade surplus in 1973 of 1.7 billion dollars, it was the first surplus since 1970 and is not expected to recur in 1974.

The challenges presented by these drastic changes in the international trading and monetary climate are obvious; the United States must increase its exports to pay for both the higher volume and higher cost of materials it will be necessary for it to import. Notwithstanding limitations inherent in its free market economy, there are at least two areas in which the United States Government can act to foster the necessary trade increase. First, it can espouse more strongly than ever the interests of an exporting nation to further the reduction of barriers to free trade and to increase exports by negotiating the reduction or elimination of barriers to free trade in efficiently produced American products. Secondly, it can take action to promote the development of new geographical markets for its products.

II. THE TRADE REFORM BILL OF 1973 AND AUTHORITY TO PARTICIPATE IN WORLD TRADE NEGOTIATIONS

The Trade Reform Bill of 1973, passed by the House of Representatives[7] and now before the Senate Finance Committee, represents initiatives in both of these approaches. Like the Trade Expansion Act of 1962[8] and prior trade legislation, the objectives of the Trade Reform Bill stress the purpose "to stimulate the economic growth of the United States and to maintain and enlarge foreign markets for the products of United States agriculture, industry, mining, and commerce; and . . . to strengthen economic relations with foreign countries through the development of fair and equitable market opportunities and through open and nondiscriminatory world trade."[9]

7. H.R. 10710, 93d Cong., 2d Sess. (1973) [hereinafter cited as Trade Reform Bill or the Bill].

8. Act of June 16, 1951, Ch. 141, 65 Stat. 72, *as amended*, Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-1991 (1970) [hereinafter cited as Trade Expansion Act of 1962 or the 1962 Act].

9. Trade Reform Bill § 2. The adoption of record high tariffs in the Smoot-Hawley Tariff Act of 1930, Ch. 497, 46 Stat. 590 (1930), *as amended*, 19 U.S.C.

The most important provision of the Trade Reform Bill is authority for the President to negotiate and conclude trade agreements with foreign countries to reduce tariffs and other restrictions on international trade and to minimize the discriminatory effects of those restrictions that remain. The authority accorded by section 101 of the Trade Reform Bill[10] is substantially identical to that which existed under section 201 of the Trade Expansion Act of 1962, pursuant to which the Kennedy Round of tariff reductions were negotiated. In fact, in one form or another, there had been such authority from 1934 to 1967. The President's authority would extend for five years, like that under the 1962 Act which expired in 1967. Other provisions substantially like those in the 1962 Act include percentage limits on the amount by which United States tariff rates can be increased or decreased,[11] and staging requirements, which spread out any decrease in tariffs in order to allow

§§ 1301-1654 (1970), resulted in a disastrous withering of world trade, including that of the United States; for example, 3,221 items were subjected to duties averaging 53%. YOUNG, THE INTERNATIONAL ECONOMY 297 (4th ed. 1963). The United States share of world trade declined from 13.8% in 1929 to 9.9% in 1933. This disastrous impact on United States exports brought about the Trade Agreements Act of 1934 for the purpose of achieving reciprocal reduction of tariffs. *See* Note, 7 VAND. J. TRANSNAT'L L. 137, 159 (1973).

10. Trade Reform Bill § 101. In addition to the five-year negotiating authority granted in section 101, the Bill provides authority for the President to negotiate and execute supplementary agreements with foreign countries during the two-year period immediately following the five-year negotiating period. This supplementary authority is limited to the extent that, in any one year, agreements under this section may not reduce duties on articles accounting for more than 2% of the value of United States imports, that duties may not be decreased more than 20%, and that duty rate changes are limited by the maximum percentage authority granted by section 101. Additional executive negotiating authority is found in section 124, authorizing agreements that grant new tariff concessions to foreign countries as compensation for action taken under the import relief provisions.

11. Trade Reform Bill § 101(b). The authority to reduce tariffs which exceeded 25% *ad valorem* on July 1, 1973, is limited to a reduction of 75% (but the tariff cannot be reduced below 10% *ad valorem*); for tariffs then 25% or less, reductions are limited to 60%. Duties of 5% or less can be eliminated. The authority to increase tariffs is limited to 50% of the 1934 rate or 20% of the 1973 rate, whichever is higher. Under both the 1962 Act and the 1973 Bill, the President's authority to reduce tariffs is limited to 50% of the 1962 rates, and increases are limited to 50% over the 1934 rates. Articles whose rates were less than 5% in 1962 were exempt from the reduction limitation.

domestic industries time to adjust to increased competition from lower tariffs.[12]

The House Bill materially differs from previous acts, however, in providing explicit executive authority to negotiate agreements for the elimination of nontariff barriers to trade. Although the 1962 Act authorized the President to proclaim modifications in "other restrictions," the specific authorities dealt only with modifications or changes in tariff rates. In the absence of such specificity, and because of congressional sensitivity with respect to incursion on its constitutional "foreign commerce" power, the negotiations conducted under the 1962 Act did not deal in major part with barriers to trade other than tariffs, even though in some instances other countries, unhampered by similar constitutional limitations, were willing to do so.

While, in certain areas and for certain products, tariffs remain a substantial problem, it is generally recognized that nontariff restrictions now constitute important impediments to trade. As the level of tariffs has been lowered worldwide as a result of successive negotiations over the past 30 years, nontariff barriers have increased both in quantity and in relative importance; indeed in some critical areas they have replaced tariffs as a principal obstacle to expanded trade. Nontariff practices such as quantitative limitations, product specification requirements, product classifications, labeling requirements, onerous customs procedures, export subsidies, and government procurement limitations have all been used to inhibit the importation of foreign goods and enhance the competitiveness of domestic products. In an attempt to reduce nontariff barriers, section 102 of the Trade Reform Bill provides that the President, during the five-year negotiating period, may enter into trade agreements for the reduction or elimination of "barriers to or other distortions of international trade" whenever he determines that such agreements will further the purposes of the Bill and that such barriers "are unduly burdening and restricting the foreign trade of the United States."[13] To the maximum extent appropriate, agreements are to be negotiated by product sector since equivalent market access can most meaningfully be negotiated on a product-sector basis. (A particular nontariff prac-

12. Trade Reform Bill § 103.
13. Trade Reform Bill § 102.

tice may, however, affect various products or sectors differently, which could cause problems in negotiations, and the Administration has asked for more flexibility than provided in the Trade Reform Bill.)

Efforts to reduce nontariff barriers to trade face special problems because of the various and changing forms these barriers can assume. Indeed, a major task facing negotiators will be determining which practices reflect valid objectives with respect to health, safety, engineering and other standards, and which unreasonably or unjustifiably inhibit imports. While some practices are clearly designed to inhibit the importation of foreign goods or enhance the competitiveness of domestic goods, others, such as bona fide safety and health standards, may have such effect only in an incidental way. Unreasonable restrictions may sometimes be hard to identify, evaluate, and categorize. Negotiations, therefore, will be far more difficult than those for tariffs, and solutions far more complex.

For the United States special problems are raised in that domestic requirements affecting trade, which might require compromise in the course of negotiations, are interwoven throughout statutory law, administrative regulations and procedures, and informal practices of local, state and federal agencies.[14] Some changes in United States practice can be made through executive agreement implemented by a presidential proclamation, without action by Congress, and nothing in the Bill would impair executive authority to enter into such agreements when appropriate. But most United States proposals to reduce or eliminate nontariff barriers would require action by Congress, under its constitutional power to regulate foreign and interstate commerce. While such authority can be delegated, the compromise of nontariff practices, unlike the mere adjustment of tariff rates, could affect numerous enactments inextricably connected with domestic policy. The wide range of regulations countenanced by the term "nontariff barrier" makes it virtually impossible to prescribe in advance the specific authorities to be delegated by the legislature. The President may, of course, when congressional assent to a change in United States law is required, either complete the agreement as a treaty and submit it to the Senate, or agree to the modification by executive agreement

14. *See, e.g.*, regulations governing marking of imports and containers as to place of origin, 19 U.S.C. § 1304 (1970).

subject to implementing legislation by Congress. The history of such procedures, however, is not such as to give confidence to the parties with whom we must negotiate.

In 1965, the United States and Canada entered into an executive agreement concerning trade in automotive products.[15] The agreement went beyond the President's existing negotiating authority, primarily in that it would exempt certain products from duty altogether. The agreement between the two countries provided that it was subject to appropriate action by their respective legislatures.[16] Notwithstanding this deference to the ultimate power of Congress, a number of Senators asserted the President had exceeded his executive power even in making so limited a commitment and the pact became a subject of considerable controversy.[17] Ultimately, however, Congress enacted the legislation effecting the agreement.[18] The executive branch utilized another approach in connection with the Anti-Dumping Code[19] to which it subscribed in 1967. In that case, the executive used every effort to remain within the confines of existing United States legislation. When requested to express its sense that United States dumping laws should thereafter be interpreted in accordance with the Code, however, the Congress instead passed legislation requiring that such laws should be interpreted as before the Code.[20]

Similarly, in 1967, after years of difficult negotiations, the executive branch negotiated an agreement with the European Economic Community and other countries for the reduction of certain

15. Agreement with Canada Concerning Automotive Products, Jan. 16, 1965, [1966] 1 U.S.T. 1372, T.I.A.S. No. 6093. [Automotive Products Agreement].

16. Automotive Products Agreement art. 6.

17. A number of members of Congress objected to having their hand forced by the Administration. *See, e.g., Hearings on H.R. 9042 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess. at 85-87 (1965) (remarks of Senator Gore). *See also id.* at 221-27 (letter of Senator Fulbright to the Department of State). The agreement had been negotiated in secret and presented to Congress as a *fait accompli*. As Canada had implemented her side of the agreement within two days, there was considerable pressure for the United States to uphold its agreement. *See generally* Macrory, *The United States—Canadian Automotive Products Agreement: The First Five Years*, 2 LAW & POL. INT'L BUS 1, 18-19 (1970).

18. Automotive Products Trade Act of 1965, 19 U.S.C. 1202, 2001 et seq. (1965).

19. GATT, Doc. L/2812 (1967); JACKSON, WORLD TRADE AND THE LAW OF GATT 426-38 (1969).

20. Act of Oct. 24, 1968, Pub. L. No. 90-634, Title II, § 201, 82 Stat. 1347 (1968).

tariffs in exchange for the elimination of the American Selling Price (ASP) as the basis for United States tariffs, primarily for benzenoid chemical imports.[21] (Tariffs are usually based on the foreign market price, which is generally lower.) Because of the statutory basis of the ASP, the agreement required congressional approval, and was, in fact, negotiated on an *ad referendum* basis. While the House at one time voted approval, the Senate took no action, after five years, the parties determined to treat the agreement as terminated. Foreign reaction was sharply negative, and no future negotiations with respect to such matters can be anticipated without adequate preliminary authority. The unreliability of subsequent affirmative action by the Congress with respect to international agreements negotiated by the executive branch in accordance with treaty and legislative procedures can prove embarrassing to the Executive, and if its negotiating authority depends on such procedures, there can be little prospect of success in this difficult field.

Seeking to effect a compromise between a blank check to negotiate matters that might well result in changes or even repeal of domestic law without any specific authority from Congress on the one hand, and submitting the results of each negotiation for *ex post facto* approval on the other, the Administration developed the compromise now incorporated in section 102 of the Bill. This section would protect the legislative role of Congress by a variety of means. Before entering into any negotiations, the President is required to consult with the Senate Finance Committee and the House Ways and Means Committee. Then, if he does proceed, the President is required to follow a newly devised congressional veto procedure. First of all, he must give at least 90 days advance notice of his intentions, along with an explanation of the likely effects on domestic laws and practices, thereby providing an opportunity for consultation and public hearing and any necessary modification. After entering into an agreement, the President must submit it to Congress along with any necessary implementing orders and justifications. The agreement and implementing orders will enter into force only if neither House adopts a disapproving resolution within another 90 days. This procedure does not, of course, preempt the use of the traditional procedures of negotiation on an *ad referendum* basis with submission subsequently for congressional

21. *See* [1968] 4 U.S.T. 4348, T.I.A.S. No. 6431.

approval, or by completion of an agreement and submission to the Senate as a treaty.

The Bill also provides novel arrangements for involving Congress in the negotiations themselves, which would further insure the credibility of the negotiators and the likelihood of congressional approval. Section 102(f)(1) provides for notification of the intent to enter into an agreement (presumably including the terms thereof) 90 days before its submission, and section 161 provides for the accreditation of five members of the House Ways and Means Committee and five members of the Senate Finance Committee as official advisers to any United States delegation to negotiations with respect to trade agreements. These provisions represent a creative attempt to resolve the inherent conflict between effective negotiations and the constitutional power of Congress over foreign commerce.

III. OBJECTIVES OF NEGOTIATIONS UNDER THE TRADE REFORM BILL

There are a number of identifiable objectives to which negotiations pursuant to the proposed authorities will be addressed. One is development of better rules and procedures for the international adjustment process, *i.e.* the measures that countries can or should take when they face serious trade and payments problems. Although both the IMF and GATT originally contained provisions for such eventualities when they were devised following World War II, the remedies contemplated proved inadequate in face of the pressures and circumstances of the 1970's. The basic, fixed parity-reserve currency system of the IMF was abandoned in 1971. The GATT's basic principle that restrictive trade measures could be taken only in the form of import quotas, and then under strict international surveillance, had been by-passed regularly by many nations for a decade, including the United States and more recently Italy and Denmark, whenever payments difficulties arose.[22]

In addition, the GATT provisions seeking common discipline over export subsidies, as well as over more covert forms of export stimulation, and attempting to confine import restrictions (other than for payments problems) to situations involving serious injury to a domestic industry were also eroded by nonobservance. National interests, including those of the United States,[23] repeatedly

22. *See* note 28 *infra*.

23. In Tokyo, ministers of the GATT members agreed that negotiations should include an examination of the adequacy of the multilateral safeguard

asserted themselves over the international rules. Both sets of principles, therefore, are in need of reform including more appropriate rules, more effective joint action, and better enforcement.

Emerging shortages in various commodities indicate another area in which the existing rules, both domestic and international, have proved deficient or ineffectual. The oil embargoes of winter 1973-74, echoed to a perhaps lesser extent by tightening supplies and skyrocketing prices of many other basic materials and commodities, dramatically brought home, in practical and often painful terms, the lesson behind the rhetoric of increasing interdependence in the world. Virtually everyone saw in a new light how economic welfare has come to depend on what happens in other countries and on the ability of others to supply those commodities on which modern societies have come to rely.

Commodity shortages, skyrocketing prices, and insecurity of supply make clear the great need for international cooperation on matters affecting many nations, including new rules and mechanisms to resolve disputes and prevent unilateral action. With inflation now a universally critical problem, most governments today face increasing pressure to shift the burden elsewhere, or to take domestic actions in a narrowly defined concept of national interest.

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system, particularly of article XIX of the GATT. (*See* note 46 *infra.*) The counterpart of article XIX in United States domestic law is basically the so-called escape clause provision in section 351 of the Trade Expansion Act of 1962, whereby industries can petition for relief from import pressures. The Trade Reform Bill as approved by the House would extensively revise existing United States laws and procedures, and result in making relief far more accessible to domestic interests.

Presently, relief may be provided if four conditions are met: (1) imports are increasing; (2) the major cause of the increase is found to be a past tariff concession; (3) serious injury is present or threatened; and (4) the major cause of the injury is the increased imports.

Under Chapter 1 of Title II of the Trade Reform Bill, imports still have to be increasing and injury or the threat thereof be present; but there would be no reference to past concessions. In addition, the increased imports would only have to be judged a "substantial" cause of the injury or threat. "Substantial" is defined as "a cause which is important and not less than any other cause," whereas "major" has been construed as the single cause greater than all other causes of injury combined. The change would constitute, in effect, a significant relaxation of the criterion. Moreover, the majority of petitions for relief filed under the present law have been rejected on the ground that no major causal relationship could be established to past concessions, the test the House would not eliminate completely.

The temptation is to control exports to improve domestic supply, to boost earnings on the controlled exports, or to gamble in the case of exhaustible commodities that future prices will be even higher.

The GATT rules, of course, were primarily directed to insuring fair competition for markets rather than fair competition for supplies, and its provisions with respect to shortage problems and trade controls are somewhat fragmentary and inadequately developed.[24] They were designed in a world of surpluses where the principal concern was with disposal of output and with prevention of shifting unemployment burdens by import restrictions. (It must be remembered, of course, that not all countries are parties to the GATT, and those that are not include a number that are very important from the standpoint of resource supply: Bolivia, China, Guinea, Iran, Libya, Saudi Arabia, the Soviet Union, and Venezuela, for example.)

Following the oil crisis, the Administration sought to add additional provisions to the Trade Reform Bill to provide greater leverage against unreasonable export controls and authority to negotiate new international rules on access to supply and use of export restraints. Coincidentally, the Export Administration Act of 1969,[25] which governs United States export controls to alleviate domestic shortages when caused by abnormal exports, expired June 30th. Both it and the Trade Reform Bill have become the focus of strong pressures to solve shortage and inflationary problems unilaterally. It is submitted that solutions, even from the standpoint of concrete United States interests, can be effected only through international arrangements.

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24. The principle provisions are found in article XI, which asserts: "No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures shall be instituted or maintained . . . on the exportation or sale for export of any product destined for the territory of any other contracting party." Articles XI and XII go on to provide for a number of exceptions, as, for example, to relieve critical food shortages or safeguard a party's balance of payments, although article XIII specifies that any restriction which is adopted must apply to like products of all third countries. If quotas are adopted, they are required to conform as closely as possible to the shares that would exist in the absence of the restrictions. The most significant exceptions occur in article XX, which exempts restrictions incident to a domestic program to conserve exhaustible natural resources, and in article XXI, which exempts restrictions adopted in time of war or national emergency in the interest of national security.

25. 50 U.S.C. APP. §§ 2401, 2413 (1969).

While negotiating objectives will clearly be affected by the extensive public hearings and by the collection of views of all interested parties as provided for by the Trade Reform Bill before the negotiations begin (as well as during their course),[26] it can be anticipated that the United States will have a very considerable interest in reducing the tariffs of the European Economic Community (EEC). Because of the absence of internal duties and its network of preferential arrangements with nonmembers, the EEC in effect has created substantial margins of trade preference for its own industries and barriers to the exports of nonmembers such as the United States. There will also be great interest in reducing the duties of countries that still have above-average tariff levels, such as Japan, Canada, and Australia. The United States, in all likelihood, will also be interested in liberalizing the above-average protective walls surrounding many of its potential agricultural export markets, of which the EEC is again a prime example.

In the nontariff area, restrictive government procurement practices abroad have long been a source of serious handicap to many American exporters. Similarly, the broad area of subsidies and other practices, which have the effect of subsidies, will be a major negotiating objective. It can also be anticipated that other countries will present demands for basic changes in many American trade practices, such as the American Selling Price rules. Successful negotiations may result in new international codes governing specific practices in certain areas such as export subsidies and broad new rules governing the general conduct of world trade.

IV. Other Provisions of the Trade Reform Bill of 1973

In addition to executive negotiating authority, there are other important provisions in the Trade Reform Bill, some of which are new to United States trade legislation. One is the explicit provision for authority to use tariffs and other import restrictions as elements of United States fiscal and monetary policy.[27] The right of countries to restrict imports to safeguard their balance of payments is recognized by article XII of the GATT. While, by its terms, article XII makes provision only for nondiscriminatory quotas, and does not extend to surcharges, there has evolved considerable practice in imposing a surcharge in the face of a balance of

26. Trade Reform Bill Title 1, Ch. 3.
27. Trade Reform Bill §§ 122-23.

payments crisis. By the time article XII came into play, most countries had dismantled the quota control systems, which they had established during World War II, so that when a balance-of-payments crisis occurred, the quota device appeared relatively impractical. Accordingly, Great Britain, France, and Canada, as well as the United States, have resorted at various times to measures other than those contemplated by article XII, such as the tariff surcharge.[28] Nevertheless, the domestic authority for the 1971[29] surcharge imposed by the United States is somewhat murky. In imposing the 1971 surcharge, the Administration had relied on section 255(b) of the Trade Expansion Act of 1962, which entitled the President to "terminate in whole or in part any proclamation made under this title."[30] In an action brought by an importer named Yoshida International, Inc.,[31] however, the Customs Court ruled that the power to "terminate" did not include power to impose a surcharge. While it is likely the case will be appealed, domestic authority will remain unsettled for some time to come.

This authority is substantially clarified by section 122 of the Trade Reform Bill, which authorizes the imposition of a temporary import surcharge of not more than fifteen per cent *ad valorem* and of temporary import quotas to deal with international payments problems.[32] The Bill goes on to provide that authority to impose quotas applies only to measures permitted by international agreements to which the United States is a party.[33] Similarly, the President is empowered to act to increase imports, if necessary to correct monetary problems, by proclaiming a temporary reduction of duties or a temporary modification or suspension of import restric-

28. JACKSON, *supra* note 19, at 711-14.

29. Presidential Proclamation No. 4074, 3 C.F.R. 80 (1971).

30. 19 U.S.C. § 1885(b). A quota would have been even more difficult to defend.

31. Yoshida International, Inc. v. United States, Civil No. 72-2-00314, 43 USLW 2048 (U.S. Customs Ct. 7/8/74).

32. The authority applies only when the President determines that special measures to restrict imports are required "(1) to deal with a large and serious United States balance-of-payments deficit, (2) to prevent an imminent and significant depreciation of the dollar in foreign exchange markets, or (3) to cooperate with other countries in correcting an international balance-of-payments disequilibrium." Trade Reform Bill § 122.

33. With respect to the surcharge, the Bill instructs the President to seek modifications in international agreements aimed at allowing the use of surcharges in place of quantitative restrictions, as well as rules to govern the use of such surcharges. Certainly a surcharge is less disruptive than a quota in that it permits market forces to operate, though at a uniformly different level than would otherwise exist.

tions.[34] Section 123 provides similar authority for the President to deal with domestic inflation by reducing or suspending duties or other import restrictions for not longer than 150 days when he determines that supplies are not adequate to meet domestic demand at reasonable prices.

Title III of the Bill would amend existing laws providing relief from unfair trade practices such as subsidized exports to the United States, dumping, and imports of articles infringing United States patents. The authority to retaliate against unfair trade practices by foreign countries has only been used once, to increase duties on brandy, trucks, and other items in retaliation for certain EEC restrictions on United States poultry in the so-called "chicken war." It has been useful, however, in trade negotiations. Section 301 of the Bill would make this authority co-equal for both nonagricultural and agricultural products, and extend the authority to cover unfair practices in third country markets.

With respect to anti-dumping actions, section 321 of the Bill contains a number of procedural amendments requiring detailed statements of reasons in Treasury and Tariff Commission determinations with respect to whether imports are being sold at less than fair value and whether United States industry is being injured, sets time limits for Treasury determinations, requires hearings, and makes technical amendments to definitions.

With respect to countervailing duties, which are imposed on imports receiving foreign bounties or grants, section 331 of the Bill would set time requirements for Treasury findings with respect to whether a bounty or grant exists, would extend its application to duty-free articles, would provide for discretion for the Secretary of the Treasury not to impose the duty, and would provide for judicial review.

As a means of furthering the economic development of nonindustrialized countries, the Bill contains provisions allowing the President to increase the access of products from those countries to United States markets by granting them duty-free treatment for a period not to exceed ten years.[35] The Bill specifies some of the

34. Trade Reform Bill § 122(b). The criteria for a temporary decrease in duties or suspension of import restrictions include (1) a large and persistent balance of payments surplus, or (2) significant appreciation of the dollar in foreign exchange markets.

35. Trade Reform Bill Title V.

factors to be considered by the President before extending duty-free treatment, including the effect of such treatment on the country's economic development, the efforts of other developed countries to grant similar preferences and the expected impact of such action on domestic United States producers. However, the Bill prohibits granting preferences (1) to a country that is granting preferences to the goods of any developed country other than the United States (unless it agrees to remove such preferences before January 1, 1976) or (2) to a country not presently entitled to most-favored-nation treatment. In addition, no article from a beneficiary developing country would be entitled to duty-free treatment if more than 25 million dollars worth of that article is imported into the United States in one year, if imports of that article from a single country account for more than 50 per cent of the total imports of that article, or if less than 35 per cent of the value of the materials in the article and the direct cost of processing the article are not attributable to the beneficiary developing country. Finally, a number of specified countries such as East Germany and Czechoslovakia are excluded from eligibility, and the President is further directed to take into consideration other factors such as foreign expropriations of American property without compensation.

V. EAST-WEST TRADE AND THE TRADE REFORM BILL OF 1973

With respect to the opening of new markets, the Trade Reform Act contains important initiatives. To date, United States exporters have been largely excluded from two of the largest economies in the world: the Soviet Union and mainland China.[36] While the Soviet economy has been heretofore dominated by the military and basic industry, there have been some indications of increased interest in consumer-type projects. For example, one of the first projects undertaken with major American participation was a tableware plant in Kiev. While American interest in military or basic

36. Prior to World War II, less than 200 million people lived under communist regimes. Today, more than 1.2 billion, or one-third of the world population, live under such regimes. They occupy some 26% of the world's populated area, and account for fully 28% of the world's economy. The Soviet Union occupies a territory 2.5 times larger than the United States and has a population of about 245 million, or 20% larger than the United States. SUTULOV, MINERALS IN WORLD AFFAIRS 121-23 (1972).

industrial projects is inhibited by security considerations, participation in consumer projects would seem to benefit United States exports and United States interests in reorienting Soviet society to whatever degree possible. Many analysts believe that Soviet social and foreign policy objectives could be substantially affected by a revolution in consumer habits. The United States might also benefit from the development of Soviet resources such as natural gas, either directly as a purchaser or indirectly by assuring adequate supplies in world markets.[37]

While the Soviet Union has turned increasingly to the West for various goods, it has not turned to the United States in any substantial degree, in part because of the unequal tariff treatment accorded Soviet goods exported to the United States. Section 231 of the Trade Expansion Act of 1962 bars the application to the Soviet Union and other communist countries of tariff concessions applied by the United States to all its other trading partners, so that imports from such countries are required to pay duties at the rates established by the Smoot-Hawley Tariff Act of 1930.[38] Even in the 1962 Act, the utility of trade as an instrument of ideological policy was recognized, inasmuch as provision was made for presidential exemption when it was determined that such exemption would "promote the independence of such country or area from domination or control by international communism,"[39] and that such determination is in the national interest. In fact, such determinations have been made only for Poland and Yugoslavia.

As passed by the House of Representatives, the Trade Reform Bill contains authority for the President to extend "most-favored-nation," that is, nondiscriminatory status through bilateral or multilateral agreements to countries whose products are now subject to 1930 rates of duty ("column two" rates, as amended) and to implement such agreements domestically by proclamation.[40]

37. The Soviet Union has abundant raw materials, and has in varying degrees expressed interest in developing its resources for world trade in exchange for capital, equipment, and technology. *Id.* at 122-23.

38. This provision was first enacted in 1951. The average tariff on dutiable goods under column 1, which reflects the Smoot-Hawley Tariff Act of 1930 as amended, is approximately 45%; the average column 2, or concessionary rate is approximately 8%. *See* Smoot-Hawley Tariff Act of 1930, *supra* note 9.

39. Trade Expansion Act of 1962 at § 1861(b).

40. Trade Reform Bill §§ 403-04.

That authority, however, is severely circumscribed. Bilateral agreements must be limited to an initial period of three years, but can be renewed if satisfactory concession balances and satisfactory reciprocation to reductions of United States barriers in multilateral negotiations are maintained. Agreements must be subject to suspension or termination at any time for national security reasons and must provide for bilateral review of the operation of the agreement and other aspects of relations between the countries. Congress may revoke the extension of such treatment through a resolution of disapproval, either at the time a proclamation extending such treatment is issued or within 90 days after the delivery of a required annual report on the emigration policies of the beneficiaries of nondiscriminatory treatment.[41]

The Bill also contains provisions making import relief against imports from countries receiving MFN treatment pursuant to the provisions of the Bill substantially more accessible. In lieu of the "substantial cause of serious injury" finding required by section 201(b), section 405 allows action by the President after a finding by the Tariff Commission merely that imports from such a country "are causing or are likely to cause market disruption and material injury to a domestic industry . . . ."[42] Furthermore, presidential action against imports from these countries may be taken in a discriminatory manner, that is, against imports from a particular country rather than across the board.

Unfortunately, the extension of nondiscriminatory tariff treatment to goods from the Soviet Union has become encumbered by congressional efforts to influence Soviet emigration policies. The

41. Trade Reform Bill §§ 404, 406.

42. Trade Reform Bill § 405. Agreement with the Union of Soviet Socialist Republics Regarding Trade, 67 DEP'T STATE BULL. 595 (1972), contains even more liberal rights for the United States to bar imports injurying its industry. Article 3 retained for each country the right to take measures to insure that imports from the other did not "cause, threaten or contribute to the disruption of its domestic market." The procedures to be followed include consultations, the establishment of quantities and conditions for imports of such products, and appropriate acts consistent with the countries' domestic laws to insure compliance with such restrictions on quantities and conditions. Of course, the Soviet Union, which plans and conducts all foreign trade through state organizations, is inherently protected from market disruption. On account of this system, United States exports to the Soviet Union can be reduced or eliminated at will. The provisions of article 3 and annex 1 were intended to provide reciprocity for the United States.

Bill makes eligibility for MFN treatment under this title, for participation in United States Government investment credit programs, and for conclusion of commercial agreements with nonmarket economy countries, dependent on a finding by the President that the country involved does not: (1) deny its citizens the right or opportunity to emigrate; (2) impose more than a nominal tax on emigration or on the visas or other documents required for emigration, for any purpose or cause whatsoever; or (3) impose more than a nominal tax, levy, fine, fee or other charge on any citizen as a consequence of the desire of such citizen to emigrate to the country of his choice.[43] These provisions are directly intended to disqualify the Soviet Union so long as it applies a substantial emigration tax on persons emigrating to Israel.

With respect to nondiscriminatory tariffs for the Soviet Union, the national interest in increased exports to and mutual understanding with the Soviet Union must be balanced against the national interest in bringing about a change in Soviet emigration policy. It must be remembered that detente and coexistence do not contemplate approval of every policy of one another, but forbearance. The use of the Trade Reform Bill to alter specific emigration policies of the Soviet Union is an undertaking far different from the encouragement of normal relations. One promotes understanding, the other enmity.

The Soviet policies at which such provisions are directed are not discriminatory *per se*; they apply to all citizens. The policies generally have greater effect on the Jewish population because the emigration tax is based on education, and there is a generally greater incidence of higher education among that population. It should also be pointed out that the moral suasion of the Bill is compromised by limiting its application to communist countries.

There is nothing new in the use of trade to affect the policies of a foreign country. The Arab oil embargo aimed at changing United States policy toward Israel and in 1967, the Soviet Union reneged on petroleum supply contracts to Israel on account of Israel's "aggression" against Egypt and Syria.[44] But, the interdiction of trade for political purposes constitutes a threat of major proportions to the United States, and the question arises whether it can afford to

43. Trade Reform Bill § 402.

44. *See* 14 WHITEMAN, DIGEST OF INTERNATIONAL LAW 861 (1972).

contribute to this body of precedent in view of its increasing dependence on foreign resources, and the increasing insecurity of such supplies. The proper policy for the United States to follow is clearly that of depoliticizing trade, and furthering the principle so frequently enunciated in the United Nations that bars the use of economic measures to affect domestic policies of another state.[45]

Whatever the substantive and policy implications, it appears that the fate of the Trade Reform Bill has come to depend on separation of the emigration issue. While it is unlikely that the strong congressional support for conditioning new trade authority upon changes in emigration policy will entirely recede, veto to the entire bill has been threatened if the present linkage remains.

VI. The Importance of Pending Trade Negotiations

The current international trade structure is exposed to challenges and pressures no less disruptive than those confronting the international monetary order in 1971. Indeed, the monetary factor is one of those factors contributing to the current trade situation, but there are other, equally basic problems in various stages of development. While the Organization of Petroleum Exporting Countries (OPEC) has proved its capacity to disrupt trade and raise prices through concerted action, the producers of a number of other products, such as bananas, bauxite, coffee, copper, and sugar, are only beginning to explore the possibilities.

Both the fight against inflation and the competition for increased foreign exchange earnings to pay the increased cost of imports are generating new pressures to subsidize exports and erect further import restrictions. Italy has imposed import deposit restrictions, even on imports from other members of the EEC, as a result of its staggering oil bill. Denmark has taken other measures to retard imports. As the full impact of higher costs for fuel and

45. The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, G.A. Res. 2625, 25 U.N. GAOR Supp. 28, at 121, 123, U.N. Doc. A/8082 (1970), provides: "No State may use or encourage the use of economic, political or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind." *See also* 65 Am. J. Int'l L. 244 (1971).

other necessary imports works its way into each nation's trade accounts and, finally, into balance-of-payments and foreign exchange calculations, the world's trading and monetary system will inexorably come under increasing tension. Against a background of widely experienced, common problems of unprecedented inflation, pressing domestic priorities, and often domestic political instability, the temptation will be great to resort to unilateral solutions in defense of national currencies and to shore up national payments accounts. Such nationalistic approaches might include defensive trade actions as those recently adopted by Denmark and Italy, production restrictions as those adopted by Middle Eastern oil producers, and export controls as those adopted by the United States.

Such responses might also include competitive currency devaluations, although with floating exchange rates now the norm rather than the exception, such devaluations could frequently be offset by similar devaluations by other countries. Moreover, as the recent experience in two devaluations of the United States dollar amply demonstrate, currency depreciation now accompanied by stringent domestic measures also generates powerful new inflationary stimuli. Exports are siphoned off to overseas markets because their prices are more attractive in terms of foreign currencies while the costs of necessary imports, including essential energy, mineral, and other raw and industrial materials, rise even faster.

Prospects such as these are ominous both for internal conditions in each country and for the world trading system. But the existing trading and monetary rules and institutions do not give the appearance of being able to prevent such actions. Reform and restructuring of the world economic system is, therefore, a matter of some urgency, and multilateral negotiations for such reforms should begin now.

Proposals for such negotiations under the auspices of the GATT, where all post-World War II multilateral trade negotiations have been conducted, date back to the fall of 1967. At that time, soon after completion of the Kennedy Round, there was Ministerial agreement that unless forward progress in trade liberalization could be maintained, there would be danger of reversion. GATT, therefore, began a study of the remaining trade problems in preparation for eventual new negotiations. This work concentrated upon identifying and examining nontariff barriers and exploring possible solutions. The program took on new urgency during the 1971

monetary crisis when nations were under increased pressure to use trade policies to help restore equilibrium in their balance of payments. In the context of the monetary settlement reached, most major nations agreed, if only in principle, that multilateral trade negotiations should be part of the effort to reform the world monetary system as well.

Multilateral negotiations were initially scheduled for the fall of 1973. In April, the Administration completed and submitted the Trade Reform Bill to the Congress, but by September of that year, when the GATT nations held a Ministerial level meeting in Tokyo, the Bill was still in the House Ways and Means Committee. As a result, the Ministers could only review the work of their Preparatory Committee, agree in very general terms on the scope and objectives of the negotiations, and declare them to be "officially open." Among other principles, they agreed that the monetary and trade negotiations would be considered as "one undertaking, the various elements of which shall move forward together."[46] They neither established a timetable for the actual conduct of the trade negotiations nor for the formal exchange of initial positions—largely, again, because the United States was still without specific authority to enter into any bargaining process.

Since then the trade preparations in Geneva have intensified. There has been work on nontariff barriers, augmented by other study on methods and programs for tariff reduction, the special problems of agriculture, the needs and role of the developing nations and other areas for negotiation. A Code to harmonize product standards requirements has recently been brought near to completion, but remaining issues have been referred to the pending general trade negotiations. Progress has lagged in other areas, however, such as subsidies and export incentives, and in developing better methods of handling adverse consequences of accelerated imports on domestic industries.

It is clear that further progress depends on congressional approval of the necessary presidential authorities. United States initiative with respect to trade liberalization has always been crucial. Indeed, the 1967 negotiations were so much the creature of United States initiative that they became known as the "Kennedy

46. Declaration of Ministers Approved at Tokyo, Sept. 14, 1973, GATT Press Release, MIN (73) 1.

Round," just as its immediate predecessor was known as the "Dillon Round" (after Secretary Douglas Dillon). Similarly, in all earlier multilateral efforts, as well as in the very creation of the GATT, United States initiative played an important role. Since the United States was long the world's single largest market, negotiations without it had little appeal to other countries, and during most of the formative period of the GATT, it was generally the only country with sufficient strength to exercise the economic and political leadership essential to sponsor trade negotiations. At the present time, however, there is little reason to expect initiatives from any other source. Since the days of its post-war occupation, Japan has never attempted to play a leadership role in trade affairs; the capacity of the European Economic Community to exercise such leadership is limited by its internal problems, aggravated by the recent enlargement of its membership and the absence of any cohesive political unity. The existence *vel non* of the Tokyo Round, therefore, devolves on United States authority not only to participate but to exercise a forceful and effective degree of leadership.