CURRENT DEVELOPMENTS

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The 1988 Trade Bill: Savior or Scourge of the International Trading System?†

In 1985 over three hundred trade bills were introduced in a Congress frustrated in general over the skyrocketing U.S. trade deficit and in particular about the President's decision in August of that year not to provide import relief to U.S. footwear producers, even though they were seriously injured by imports.[1]

In 1986 the House of Representatives passed an omnibus trade bill that the President characterized as "Rambo," "kamikaze" legislation.[2] In 1987 both the House[3] and Senate[4] passed separate bills, either of which the President's senior

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1. Nonrubber Footwear Import Relief Determination, 50 Fed. Reg. 35,205 (1985).
2. H.R. 4800, 132 CONG. REC. H3225 (daily ed. May 22, 1986).
3. H.R. 3, 133 CONG. REC. H2981 (daily ed. Apr. 30, 1987).
4. S. 1420 as a complete substitute for H.R. 3, 133 CONG. REC. S10,372 (daily ed. July 21, 1987).

economic advisers would have recommended vetoing. Numerous foreign governments submitted démarches, notes, and memoranda detailing their concerns about and opposition to many provisions in one or both of those bills. Many governments argued that various provisions were inconsistent with obligations of the United States under international agreements, would provoke demands for compensation or retaliation against U.S. exports, would hurt the credibility of the United States in ongoing multilateral trade negotiations, and could jeopardize the prospects for success in those negotiations.

Then, in the spring of 1988, a mammoth trade conference of 199 House and Senate conferees forged a bill that ultimately was enacted in August 1988 as the Omnibus Trade and Competitiveness Act of 1988.[5] In the Administration's view, the trade bill had been transformed because the congressional conference had jettisoned many protectionist provisions and substantially modified others. While the Administration still did not like everything in the final bill, overall it was a constructive, procompetitive, market-opening bill that warranted the President's signature. The bill clearly continues rather than contorts traditional U.S. trade policy, and renews rather than reneges on the U.S. commitment to the multilateral trading system. It does not legislate barriers at our borders to close the U.S. market, but simply provides better trade remedy tools to use judiciously to open foreign markets. The bipartisan leadership of the House and Senate trade committees deserve enormous credit for this positive outcome.

Foreign governments, however, remained seriously concerned about the bill's direction, purpose, and effect on international trade. In the fall of 1988 the Office of the U.S. Trade Representative (USTR) was besieged by inquiries, complaints, and expressions of continued concern by many foreign governments. This article describes USTR's response to these communications from foreign governments.

I. What the Bill Does Not Do

Before reviewing the bill's principal trade provisions, it is important to note what this bill does *not* do. Earlier omnibus trade bills warranted the derogatory names they were called by including provisions that would have:

- established quotas on imports of lamb and steel products,
- unilaterally revoked most-favored-nation treatment for Romania and Angola,
- created a private right of action in U.S. courts for customs fraud, in addition to current administrative remedies,

5. H.R. 3 as modified in conference was passed by the Congress (134 CONG. REC. H2375 (daily ed. Apr. 21, 1988), S4926–4927 (daily ed. Apr. 27, 1988)), but vetoed by the President (134 CONG. REC. H3531 (daily ed. May 24, 1988)). The House voted to override the President's veto (134 CONG. REC. H3552 (daily ed. May 24, 1988)), but the Senate sustained it (134 CONG. REC. S7385 (daily ed. June 8, 1988)). The Congress then passed H.R. 4848, identical to H.R. 3 except for the deletion of two provisions (134 CONG. REC. 5694 (daily ed. July 13, 1988), S10,731 (daily ed. Aug. 3, 1988)), and the President signed the Omnibus Trade and Competitiveness Act on Aug. 23, 1988.

- provided a draconian remedy—exclusion from the U.S. market—for "scofflaw" (i.e., repeat) offenders of U.S. customs laws,
- included requirements for the carriage of automobiles on U.S. vessels,
- required the President to provide relief automatically in safeguards actions in which the U.S. International Trade Commission found injury to U.S. producers,
- broadly mandated retaliation in section 301 cases and required the "self-initiation" annually of such investigations (even when U.S. industry did not seek such an action),
- redefined the term "subsidy" in the countervailing duty law to expand its application,
- provided a private right of action in U.S. courts for dumping in addition to the antidumping law,
- provided relief against diversionary ("upstream" or "downstream") dumping, in violation of existing international rules,
- required application of the countervailing duty law to nonmarket economies,
- amended the dumping law to make it vastly more likely that the U.S. Department of Commerce (Commerce) would find dumping where foreign producers and exporters sold in the United States through a related company,
- amended the dumping law to make it more likely that Commerce would find dumping in any case involving imports from a nonmarket economy, and
- required the imposition of sweeping trade sanctions against "terrorist" nations.

In response to strong objections from the Administration (many of which were echoed by the business community), the Congress simply dropped these and many other protectionist provisions.

In part this accomplishment was possible because the two bills passed by the House of Representatives and the Senate differed so substantially. In the Administration's view, the Senate bill was more objectionable on sections 201 and 301, telecommunications, and a host of foreign relations-type amendments. The House bill was more problematic on amendments to the antidumping and countervailing duty laws and other nontrade provisions, such as the Bryant amendment (requiring the registration and disclosure of foreign investment in the United States). This was no accident. Those in the Congress and the Administration who wanted a pro-trade bill worked diligently at early stages of the process to ensure it was legislatively possible for the conferees to choose a "pro-trade" course. In virtually every instance where the conferees had a choice, they chose the pro-trade alternative.

In addition, some precisely or nearly identical provisions included in both bills were dropped by the 199-member trade conference in response to Administration objections. Although the conference's mandate was limited to resolving differences between the two bills, conferees nonetheless deleted provisions from both bills on, for example, Romanian most-favored-nation treatment, the carriage of automobiles on U.S. vessels, and sugar duty drawback. Even when the trade conferees declined to eliminate provisions altogether, time and again they agreed to modify them acceptably. Some provisions that originally had a protectionist bent were recast into acceptable trade remedies with sufficient executive discretion to enable their judicious, trade-liberalizing use.

All of this is not to say that the bill is perfect. A number of provisions remained objectionable to the Administration. Indeed, as President Reagan said when he signed the bill on August 23, 1988, "There are some things in this bill I don't like." But the President also noted that the emphasis and thrust of the bill are to open markets and ensure fair play around the world, as the following analysis shows.

II. Trade Agreements Authority

The centerpiece of the trade provisions of the 1988 Trade Act is the renewal of authority for trade agreements. While the President's constitutional powers to conduct the foreign affairs of the United States enable him to negotiate trade agreements without Congress's blessing, the Congress's constitutional powers to regulate commerce require an effective executive-congressional partnership to make the trade agreements program work.

In 1967 the Executive, without Congress's blessing, negotiated agreements relating to dumping and the American selling price system—but Congress subsequently refused to implement them. To prevent such a recurrence, Congress and the President invented the so-called "fast track" procedures in the Trade Act of 1974. These procedures do not guarantee that Congress will approve and implement trade agreements that the President negotiates. However, they do ensure that Congress will review such agreements on an expedited, nonamendable basis, thereby greatly enhancing the prospects for congressional implementation.

The principal achievement of the 1988 Act, like the 1974 Act, is its enactment of fast track procedures. Until May 31, 1991—five months after the Uruguay Round is scheduled to conclude—the President has access to congressional fast track procedures for any trade agreements he concludes. And just in case the Uruguay Round continues a bit longer, the President's access can be continued for two additional years—until May 31, 1993—if only he certifies to the Congress that, despite progress in the negotiations, more time is needed to conclude them.

These provisions renew the U.S. commitment to the multilateral trading system that has dominated U.S. trade policy since the establishment of the GATT in 1947. The United States continues to believe that peace and prosperity for all nations are best served by agreement on, and observance of, fair multilateral rules by the international community. Today's global economy requires multilateral solutions to what are inevitably, increasingly, multilateral problems defying merely unilateral—and often even bilateral—responses.

It was this abiding faith in the efficacy of the international trading system that led the United States in September 1986 to spearhead the launch of the current Uruguay Round of multilateral trade negotiations. The United States wants to modernize the GATT by improving existing but inadequate rules, as with respect to agriculture and dispute settlement, and by extending GATT discipline to frontier trade areas such as services, investment, and intellectual property. The 1988 Act expresses strong, bipartisan support for the Administration's negotiating objectives in these areas. And the tariff authority is the broadest provided to any Administration in decades.

To endure and prosper, the GATT must both shore up and extend its foundations. In the dynamic twentieth (and in the doubtless even more dynamic twenty-first) century, the GATT must go forward and revitalize or it will surely fall back and decline. Merely treading water is neither possible nor acceptable.

Early in the process of the 1988 Act (in 1985 and 1986), it seemed to the authors that arguing to a congressional committee that a provision violated the GATT was perceived by some members of Congress as a reason to *support* the provision. At least one senator called the GATT the "Gentleman's Agreement to Talk and Talk." But all that had changed by 1988. The leadership of the trade committees decided to rid the bill of all GATT-illegal provisions. They were uniformly successful. No GATT-illegal provisions remain in the 1988 Act.

This, then, is the central message of the 1988 Act: the United States wishes not only to maintain freer trade to the extent it now exists, but also to extend freer trade, to open more markets, and to increase the predictability of international rules for businessmen. In this direction lie the best prospects for enhancing world wealth, peace, and prosperity.

III. Section 301

While our principal objective is to achieve multilateral trade liberalization, sometimes this goal can be stimulated through bilateral or even unilateral initiatives. Section 301 was enacted in 1974 as the domestic trade remedy designed to help reach and enforce trade agreements, by providing for unilateral measures in response to foreign government unfair trade practices. Unilateral action—retaliation—was never conceived as the objective of section 301; rather, the credible threat of retaliation was intended to serve as a stick that, in combination with the carrot of an open U.S. market, could pry open foreign markets and thus further liberalize trade.

The United States has been criticized for its aggressive use of section 301. Yet on net, the results of this program in the last three years have been substantially more open, freer trade, widely benefiting producers and exporters in third countries as well as in the United States. For example:

- The settlement we reached with *Japan* on its treatment of *beef and citrus* imports[6] will benefit cattlemen in Australia and New Zealand as well as Montana and Texas, and citrus growers in the Mediterranean and South America as well as Florida and California.
- The nondiscriminatory tariff reductions *Japan* made to compensate for its GATT-illegal *leather and leather footwear* import quotas improve access to Japanese markets for producers and exporters around the globe.
- The section 301 investigation of *Korean intellectual property practices* resulted in an agreement under which intellectual property rights—U.S. and third country—are more effectively protected, to the benefit of patent and copyright holders around the globe.
- By enacting mirror quotas under section 301 against GATT-illegal imports quotas established in Portugal during the *ECC "enlargement"* to include Portugal and Spain, the United States helped preserve freer trade in Portugal, to the benefit of all nations exporting to the EEC.
- In the *Japan semiconductors* case, the United States sought to obtain more equal access to the Japanese "chip" market for all foreign producers of semiconductors. Japanese observance of this commitment would have benefited both U.S. and third country chip producers.
- U.S. investigations of Taiwanese practices resulted in Taiwan's application of practices consistent with the *Customs Valuation Code* and improved access for exporters of all nationalities to the Taiwan markets for *beer, wine, and tobacco products.*

These efforts by the United States, then, illustrate how bilateral agreements—achieved in part to avoid the unilateral imposition of sanctions—often have a multilateral, trade liberalizing effect that complements rather than detracts from the GATT system.

The 1988 Trade Act does amend section 301 significantly. It is intended to make it harder for the Executive Branch to sit on its hands and do nothing (or next to nothing) in response to a foreign government's unfair trade practices. But although it increases pressure on the Executive to act (and act decisively), it preserves sufficient discretion to ensure that such action can be judicious and trade liberalizing. For example:

- *Transfer of authority:* The Trade Act specifically authorizes the Trade Representative to determine whether a foreign practice is unfair and to act in response. Yet this alleged "transfer" of authority is more symbolic than real. The Trade Representative serves at the pleasure of the President, who retains constitutional authority to direct the actions of his subordinates.
- *Mandatory retaliation:* The Act requires retaliation in response to violations of trade agreements, and other agreements if such violations burden or

6. The beef negotiation was not actually a section 301 case, but failure to achieve a satisfactory result almost certainly would have provoked action under section 301.

restrict U.S. commerce. Yet the scope of this requirement is limited to breaches of agreements, and even then reasonable exceptions are provided—i.e., if:

- a GATT dispute settlement panel finds that U.S. rights under the trade agreement have not been denied,
- a foreign government eliminates or agrees to phase out the practice complained of or its burden or restriction on U.S. commerce,
- a foreign government provides compensatory trade benefits,
- the Trade Representative determines that action under section 301 would cause serious harm to the national security, or
- the Trade Representative determines (in extraordinary cases) that action under section 301 would cause harm to the economy substantially out of proportion to its benefits (taking into account the effect of inaction on the credibility of the section 301 program).

- *Illustrative Unfair Practices:* The Act specifies export targeting, denial of worker rights, and governmental toleration of systematic private anticompetitive activities as practices that can be actionable under section 301, if they burden or restrict U.S. commerce. No responsive action is required, however, even if these criteria are satisfied. Furthermore, the statute underscores the discretion of the Trade Representative not to initiate a section 301 investigation if he finds it would not be effective in addressing the practice.

The effect of these amendments is essentially to ensure the perpetuation of the aggressive, effective use of the section 301 program by the second Reagan Administration. They do *not* require protectionist actions, as they allow ample discretion with respect to their application. But they sharpen and hone this particular trade remedy tool so that it can be used effectively to promote open markets and thus to further liberalize trade.

Clearly the most effective action that can be taken by a foreign country that fears the "sting" of section 301 would be (1) to ensure that its market is truly open to imports, and (2) to join the United States and other trading partners in pushing for meaningful progress in the Uruguay Round. This is the U.S. market-opening objective, which section 301 can help achieve.

IV. "Super 301"

So-called "super 301" requires the Trade Representative to self-initiate some (number unspecified) section 301 investigations in 1989 and 1990. Based on the annual National Trade Estimates Report identifying foreign barriers to trade and investment, the Trade Representative is to identify "priority trade liberalizing practices and countries" and then seek to negotiate elimination of these unfair practices.

Self-initiated investigations or actions were unprecedented until 1985, when the Trade Representative and President began resorting to them as appropriate responses to priority trade problems. The Trade Representative self-initiated investigations of Korean insurance and intellectual property practices, and of Japanese tobacco and Brazilian informatics policies. The President took self-initiated action in response to EEC agricultural practices in connection with Portugal's and Spain's accession to the European Community, the EEC hormone directive, and Taiwanese customs valuation and beer/wine/tobacco practices.

Some consider "super 301" as requiring investigations of "generic" or "bundled" foreign practices rather than traditional, more narrowly circumscribed practices (such as Japanese tobacco or Brazilian pharmaceuticals practices). The Act certainly permits, but does not require, this approach. The extensive debate on this provision in the Senate stresses that "super 301" is *not* the son of the Gephardt amendment (which would have required draconian trade sanctions unless "excessive and unwarranted" bilateral trade surpluses of other nations with the United States were reduced at least 10 percent each year).

V. Self-Initiated Intellectual Property Section 301 Cases

Another self-initiation requirement is to begin investigations each year—to be conducted on an expedited basis—of denials of adequate and effective protection of intellectual property rights by "priority" countries. The Act gives the Trade Representative substantial discretion with respect to this exercise. First, the Trade Representative must identify those countries:

- that have the *most* onerous or egregious practices that deny adequate protection of intellectual property rights, or deny fair and equitable market access to U.S. persons that rely on the protection of intellectual property rights;
- whose practices in this regard have the greatest adverse impact on the relevant U.S. products, *and*
- that are not already entering into good faith negotiations, or making significant progress in negotiations already underway.

The Act also expressly exempts the Trade Representative from the self-initiation requirement if he determines that such initiation would be detrimental to the United States economic interests.

VI. Antidumping and Countervailing Duty Laws

Trade experts have widely pronounced the 1988 Act as the "cleanest" package of antidumping and countervailing duty (AD/CVD) amendments in decades. As already noted, a host of GATT-illegal AD/CVD provisions was either dropped from the bill or completely transformed into GATT-consistent provisions (such as replacing a diversionary dumping provision in violation of article VI of the GATT and the GATT Antidumping Code, with domestic authority to implement article 12 of the GATT Antidumping Code).

Perhaps the most interesting—albeit still modest—amendment in this regard is enhanced authority for Commerce (after taking into account any advice offered by the U.S. International Trade Commission (ITC)) to prevent circumvention of antidumping and countervailing duty orders through:

- only minor alteration of affected merchandise, or
- limited further assembly in the United States or third countries.

This anticircumvention authority applies only to products already subject to AD/CVD orders. Moreover, this change is quite conservative compared to, for example, recently adopted and implemented antidumping practices of the European Economic Community with respect to "screwdriver assembly" operations within the EEC.

The AD/CVD amendments in the 1988 Act include one quite innovative provision clearly intended to retain consistency with international trade rules. On the one hand, the Congress has defined in the Act what constitutes an industry in cases involving processed agricultural products. On the other hand, it simultaneously provides that this definition shall cease to have any effect if, "the Trade Representative notifies the [Department of Commerce] and the [International Trade] Commission that the application of this [provision] is inconsistent with the international obligations of the United States."[7] This express congressional deference to the international obligations of the United States signals a marked respect for and a renewed commitment to the multilateral trading system. This amendment reflects the Congress's desire, wherever possible, to formulate U.S. trade policy and to make and apply new U.S. trade law to complement rather than thwart the GATT and multilateral trade liberalization.

VII. Section 201

Section 201 is the trade remedy through which the United States exercises its rights under article XIX of the GATT temporarily to restrict increasing imports that are injuring a U.S. industry. Article XIX bestows this right but establishes a corresponding obligation: to compensate affected trading partners for such temporary "escape" from normal GATT obligations.

Section 201—past, present, and future—is the vehicle for exercising this right and meeting this obligation. The 1988 amendments do not change it substantially. Relief may be provided by the President only if the ITC finds that increasing imports are a substantial cause of serious injury. Even if the ITC finds such injury, the President is not required to provide relief if he believes that the costs of such action outweigh its benefits. In this respect, the Congress specifically rejected recommendations that the President be required to provide

7. Omnibus Trade and Competitiveness Act of 1988, § 1326(a), 102 Stat. 1203–04; Tariff Act of 1930, *as amended*, § 771(4)(E)(v), 19 U.S.C. § 1677(4)(E)(v).

import relief if recommended by the ITC. Thus the fundamental parameters of this remedy remain unchanged.

The theme of some section 201 amendments is nonetheless significant, because it stresses that the purpose of section 201 relief is to promote adjustment by U.S. producers to import competition. Petitioners are not required to file adjustment plans, nor are individual firms required to make commitments about their plans for any adjustment. Most importantly, government officials do not determine for the industry and firms concerned how they should adjust to import competition.

Plans may be filed and commitments may be made, however, and the ITC is required to take this information into account in shaping its recommendation about relief (if it finds the requisite injury to U.S. industry). The ITC is required to recommend those actions that will not only address the injury, but also be most effective in facilitating the domestic industry's positive adjustment to import competition. The President likewise must take into account the industry's adjustment efforts (including any adjustment plan or commitment submitted to the ITC).

The amendments to section 201 expand the options for the President beyond traditional import relief, such as international negotiations or submission of legislative proposals. In addition, if an industry has received relief under section 201 for some time period, it cannot submit a new petition until an equivalent time period has elapsed.

The Act's amendments to section 201, then, essentially underscore the reason GATT article XIX permits temporary safeguards measures (subject to the obligation to provide compensation): that is, to allow producers seriously harmed by increasing imports a respite in which to adjust to import competition.

VIII. Conclusion

The overall thrust of the trade provisions of the Omnibus Trade and Competitiveness Act is to open markets and liberalize trade, not to protect U.S. businesses and workers or to close the American market. Procedurally it does increase the pressure on the President, and the U.S. Trade Representative in particular, to achieve desired and desirable trade liberalization. But it does not violate the international obligations of the United States, nor force the Administration down a protectionist path. It provides the Executive with tools with which to achieve trade liberalization, and gives it substantial discretion to exercise in deciding how to use them in particular cases.

Yes, the Act *could* theoretically be administered by a future Administration in a protectionist way. But that is true of prior law as well; and it is equally true that the Act can be administered in a way that promotes rather than undermines multilateral trade liberalization. For these reasons, those who are concerned about the Act should withhold judgment pending its actual administration.