International Lawyer

Volume 6 | Number 4 | Article 7

1972

A Legal and Economic Analysis of the Quota Provisions of the Proposed Foreign Trade and Investment Act of 1972

Terrence R. Colvin

Donald E. deKieffer

TERRENCE R. COLVIN*
and DONALD E. deKIEFFER†

A Legal and Economic Analysis of the Quota Provisions of the Proposed Foreign Trade and Investment Act of 1972†

I. Introduction

Content of the Bill

The Foreign Trade and Investment Act has been variously labeled as "potentially the most disastrous legislation since the Smoot-Hawley Tariff"[1] and "(a) final step toward restoring America's economic health."[2] The Burke-Hartke bill, as it is usually called, has probably inspired more spirited discussion among American businessmen than any international trade legislation since the 1930's.[3] It is taken seriously by many groups and it merits a comprehensive analysis for this reason alone.

Solidly backed by the AFL-CIO,[4] the bill is strongly opposed by most multinational firms,[5] and the Nixon Administration.[6] This legislation sig-

*Terrance R. Colvin is President of Synergy, Inc., a consulting firm with headquarters in Washington, D.C. After receiving his Ph.D. from the Massachusetts Institute of Technology in economics, Mr. Colvin has recently worked for the Department of Defense, the Maritime Administration and the Price Commission.

†Donald E. deKieffer is a graduate of Georgetown University Law Center, served for two years with the Senate Republican Policy Committee and is now an associate with the firm Collier, Shannon, Rill & Edwards in Washington.

[1]Rep. Abzug, November 16, 1971, CONG REC. p. 11133; *See also*, Bergsten, C. Fred, *The Cost of Import Restrictions to American Consumers*, American Importers Association 1971.

[2]*See, e.g.*, Washington Post, 23 March 1971, C-1, *Foreign Trade and U.S. Jobs 1971 Fact Sheet*, AFL-CIO Legislative Dep't.

[3]For an excellent summary of the political implications of the Burke-Hartke bill, see Vol. 4, No. 3, NAT, J. p. 108, *Economic Report/Labor and Industry Gear for Major Battle over Bill to Curb Imports, Multinationals.*

[4]*See, e.g.*, Remarks by Ray Dennison, *Legislative Representative, AFL-CIO to National Association of Manufacturers Conference on Import and Export of Technology*, November 12, 1971, Washington, D.C.

[5]The Emergency Committee on American Trade, and the National Association of Manufacturers which together represent about 90 percent of American multinational corporations have consistantly opposed S. 2592.

[6]*See* Note 3, *supra*.

nals a collapse of organized labor's free trade position,[7] and has forced many heretofore protectionist industries onto the free-trade bandwagon.

The reasons for these polar positions become evident upon a cursory examination of the bill's provisions. Briefly, the Burke-Hartke Act would:

- Establish quotas on imports of virtually all products which are not already subject to restraint under quotas or government agreements; and,
- Sharply increase taxes on corporate profits from overseas operations;
- Impose strict time limits for anti-dumping investigations;
- Allow the President to control American capital transfers abroad if he concludes they are injuring the domestic job market; and,
- Set up a three member commission with broad powers "to regulate U.S. foreign trade."

Along with Title I of the bill, which contains stringent new rules on taxation of multinational enterprises (MNEs), the most hotly contested section is Title III, which relates to import quotas. To date, much heat but little light has been directed towards Title III, Quantitative Restrictions on Imports. This paper provides an analysis of this section.

The bill's sponsors contend this legislation is an all-or-nothing proposition. The AFL-CIO claims it is unwilling to compromise "even a single comma."[8] It is clear, however, that the quota restrictions can, and indeed should, be considered separately from sections dealing with United States investment abroad.

Under Title III quotas would be established both on a "country" and "commodity" basis. "Base" quotas would be promulgated which limited imports for each item of the Tariff Schedules of the United States (TSUS).[9]

Each exporting country would then be assigned shares of the overall quota which could not exceed that country's average annual exports of that product to the United States during a 1965-1969 base period. Thereafter, yearly quotas would be adjusted by a new Foreign Trade and Investment Commission [hereinafter Commission] representing industry, labor and the public sector.[10]

Annual quotas for both commodities and "country shares" could be

[7]Organized Labor's advocacy of free trade dates at least from 1946. As late as 1961, delegates to the AFL-CIO convention overwhelmingly endorsed lower tariffs and expanded foreign trade. The first cracks in labor's position appeared in 1967 when the AFL-CIO urged the Johnson Administration to negotiate voluntary restraint agreements to stem the tide of imports.

[8]Unpublished speech of Ray Dennison, Legislative Representative, AFL-CIO before the Nation-wide Committee on Import-Export Policy, January 17, 1972.

[9]19 U.S.C. 1202; S. 2592 §303(e)

[10]S. 2592, Title II, §201.

The Commission would have three members, not more than two of whom could be members of the same political party. Presidential appointees, the Commissioners would eventually serve six-year terms.

increased or decreased by the amount the Commission estimated to be necessary to make the total quantity of imports in each category bear the same relationship to United States production of goods in that category as existed in the base period.[11] The Commission could lower quota levels if it determined that United States production of a commodity was inhibited by imports. Conversely, quotas might be raised if the Commission felt United States industry could withstand the impact.

The Commission could grant exemptions from quota restrictions when:

a – Effective limitation currently exists through voluntary bilateral or multilateral government agreements.[12]
b – Quotas exist pursuant to some other law.[13]
c – Long-term disruption of the United States market would occur.
d – Domestic industry has consistently failed to make technological innovations required to remain competitive with imports.

Increases and decreases in quota amounts would be the same percentage for all countries.[14] If a country did not fill its quota, the Commission would inform the President and distribute the unfilled quota among new or existing suppliers as he directed.

Under Title III, not only are quotas mandatory for each and every imported product, but sources of supply are frozen to the countries which entered specific products in the 1965-1969 base period. New suppliers would be awarded quotas only when existing suppliers failed to meet their quotas. The Title does not require any showing of injury to domestic industry as a "trigger"[15] but would shift the burden of proof to importers to demonstrate additional imports would not injure domestic producers.

Objectives of the Legislation

One must look to the sponsors and proponents of this bill, S. 2592, for the objectives they have in mind. Introducing S. 2592, Senator Hartke proclaimed that "domestic industry would be gainsaved (sic) from unfair competition" by the quota provisions.[16] The AFL-CIO was somewhat more strident: "We serve notice on the (Nixon) Administration," says one labor pamphlet, "that we will not rest until the United States Government

[11] S. 2592, Title 3, §301.
[12] *Id.* §301(d)(2)

This provision probably does *not* include voluntary restraint agreements, for *e.g.*, steel and textiles which were negotiated between the United States Government and foreign *industry*.

[13] *Id.*
[14] S. 2592, §301(b)(2)(c).
[15] *Compare* S. 2592 with 19 U.S.C. 160(a) (antidumping).
[16] CONG. REC., S. 15135, September 28, 1971.

effectively and adequately protects the interests of American workers and the American economy, by curbing the mounting displacement of United States production and export of American jobs . . . by enacting quota legislation."[17]

Proponents of Title III have labeled it a "sliding door" approach to imports. This is contrasted with the "wide-open door" that is said currently to peril (the) United States as a manufacturing nation. "This section," claims the AFL-CIO, "would insure production of United States goods by the guarantee of a share of the United States market. United States-based manufacturers could recover from the heavy import onslaughts of recent years. . . . The concept of the bill is to save threatened industries and eventually enable hard-hit producers to regain domestic production and re-employ workers idled by imports."[18]

Although this language mixes means and ends, the honest concern for unemployment, for the American standard of living, and for the balance-of-payments position of the United States is apparent. The concerns are valid. United States unemployment levels of 6% are unacceptable.[19] The 1971 official-settlement balance-of-payments deficit of almost $30 billion is unacceptable.[20]

The logic of solving United States employment and balance-of-payments problems at the same time by limiting imports seems straightforward: cut imports and let normal American spending on imports be used to purchase similar American-made products. This policy would lead to higher employment. By initially cutting and then severely regulating imports, even minimal United States exports would return the United States to full balance-of-payments health.

The Approach to an Analysis of the Bill

This logic is not as convincing when the goal of avoiding inflation is added to the employment and balance-of-payments goals for the United States economy, discussed by the proponents of the Burke-Hartke Bill. Nor is it as convincing when the consequences of S. 2592 are added to consequences of conventional monetary, fiscal and balance-of-payments policies already undertaken or planned.

---

[17]IUD SAVE OUR JOBS Rally pamphlet, October 4, 1971. *See, e.g.*, THE FEDERATIONIST, August 1971, for similar statements.

[18]*Id.*

[19]President Nixon said ". . . 6% unemployment is too much," and adds " . . .and I am determined to reduce that number significantly in 1972." *Economic Report of the President*, January, 1972, p. 6.

[20]The Official-Settlement deficit of $29.6 billion for 1971 was nearly $20 billion larger than the previous record deficit in U.S. history of $9.8 billion in 1970. Washington Post, February 16, 1972.

This analysis starts by reviewing traditional United States economy goals, and by identifying the economic policies which will probably be used to pursue these goals. Next, a conservative prediction of the consequences of these policies is made. Because the impact of the Foreign Trade and Investment Act will not be felt until some point in the future, a view of the environment in which the bill would operate is required.

At this point, in the analysis, predictions of the consequences of S. 2592 are introduced, and added to the predicted results of the traditional policies, so the marginal benefits and costs of the bill for the United States economy can be ascertained. Several major administrative problems posed by this bill are reviewed next. The final section of this paper consists of an analysis of the legal consequences of the bill, in which violations of the General Agreement on Tariffs and Trade (GATT) and American commercial treaties are outlined.

II. Economic Impact

Traditional Goals of United States Economy

The proponents of this bill undoubtedly subscribe to many of the goals generally agreed to be desirable for the United States. In addition to high employment and a reasonable foreign payments balance, these objectives include low inflation, healthy competition, and progressive income distribution.

To isolate the marginal impact of the Burke-Hartke Bill on all of these goals, a forecast of the presently planned major economic policies and their consequences must be made. Once this has been completed, the additional results of putting into effect the Title III quota provisions can be set out and their costs and benefits discussed.

The traditional method of meeting all the major objectives for the United States economy, simultaneously can be found in the practice of both Democratic and Republican administrations over the last two decades. Economic policy makers have attempted to maximize employment, while minimizing inflation and maintaining equilibrium in United States foreign trade and the United States balance-of-payments. They have done this with monetary and fiscal policy instruments and with capital controls and direct foreign negotiations.[21] Recently, a devaluation was added to the list of more traditional policies as a means of restoring the United States trade balance.

[21]The record of the uses and goals of these policies can be found in THE ANNUAL ECONOMIC REPORTS OF THE COUNCIL OF ECONOMIC ADVISERS between 1950 and 1972.

Prediction of Traditional Policies

The current use of these monetary, fiscal and balance-of-payments policy tools is known and plans, for their future use can be projected. This information can be used to forecast the state of United States economy without S. 2592. The Federal Reserve Board will probably allow the United States money supply to grow at a fairly steady and moderately high rate for the next year or two;[22] the Nixon Administration will probably provide a moderate amount of fiscal stimulus to the economy in the form of budget deficits,[23] and the next administration will probably pursue a similar policy.

The adoption of the Smithsonian Accord devaluations of December 17-18, 1972, whose average size for major United States trading partners is about 12½%, is expected to remain as the major United States balance-of-payments policy action for the next several years if S. 2592 does not pass.[24] In addition, the United States has obtained a commitment from its major trading partners to begin discussions to reduce trade barriers, including some of the ones most harmful to the United States,[25] and these may come to fruition.

A Prediction of the Results of Traditional Policies

Although it is generally agreed that mistakes have been made in the use of conventional monetary, fiscal and balance-of-payments tools, particularly since 1966,[26] most economists agree that the 1960-1966 experience of high employment with moderate inflation and reasonable balance-of-payments equilibrium, shows it should be possible to return to this condition with the use of conventional policies. If the policy plans outlined above are put into effect, the following forecast of their effects can be made.

Unemployment will probably fall to about 5% during the beginning of

[22]ECONOMIC REPORT OF THE PRESIDENT, January, 1972, p. 26. (Hereinafter ECONOMIC REPORT).

[23]A deficit of $25 billion is projected by the Nixon Administration for FY 1973, Washington Post, January 23, 1972.

[24]ECONOMIC REPORT, p. 4.

[25]*Id.* p. 5.

[26]Hindsight shows traditional policy instruments have not always been used properly. Indeed, the concerns of the Burke-Hartke sponsors with regard to high unemployment and the U.S. balance of payments are valid, because of costly decisions regarding their use. The decision of the Johnson Administration to increase Government expenditures to support both the Viet Nam War and domestic programs, without decreasing total demand in the United States by increased taxes, was one initial cause of these problems. The Nixon Administration's decision to curb the resulting inflation by accepting relatively high unemployment may have paid a higher price for the inflation control than was required.

1973, and to about 4% by the end of 1973.[27] The effects of the anti-inflationary policies undertaken by the Nixon Administration should be felt, and annual inflation rates should fall to about 3% at an annual rate in the beginning of 1973, and below that by the end of 1973.[28]

The Smithsonian Accord devaluations will probably not have a substantial impact in 1972, and a large balance-of-payments deficit will probably occur even though United States exports should increase relative to United States imports.[29] Price changes including devaluations generally take several years to take full effect in the international trade.[30] Because of this, equilibrium or a modest trade surplus should be reestablished in the United States trade balance by 1973 or 1974. If foreign barriers that are particularly harmful to the United States are removed as a result of negotiations, this result should be guaranteed.

The Impact of This Bill

Suppose the Burke-Hartke Bill were passed expeditiously, and became law in January, 1973. Further, assume the bill's passage had been properly anticipated by the United States producers of commodities that would replace goods previously imported and, by some administrative miracle, initial quotas were set, allocated and regulated efficiently early in 1973.

Since the initial quotas would be set at the average of 1965 to 1969 import levels, there would be an immediate average rollback of imports to around the 1967 level.[31] By the end of 1972, a cutback of at least 30% would be required immediately, as United States imports will have been growing at the rate of well over 8% per year for five years.[32]

---

[27] *Economic Report*, p. 26. The unemployment rate of around 5.9% that has persisted through the first quarter of 1972 should be reduced sharply as the 5.3% increase in real GNP (an 11.8% money increase) has an import on job markets. Washington Post, April 20, 1970, pp. A1, A6.

[28] *Economic Report*, p. 25. The continuation of price and wage controls appears to be planned until this result is achieved. The 6.2% rise in the GNP deflator in the first quarter of 1972, suggests that this forecast may be on the low side. Washington Post, *supra*, note 27.

[29] *Id.*, p. 27.

[30] Rhomberg and Juntz estimate that it takes about three years, PRICES AND EXPORT PERFORMANCE XII, I.M.F. STAFF PAPERS, 1965.

[31] Imports were $21.4 billion in 1965, $25.4 billion in 1966, $26.8 billion in 1967, $32.9 billion in 1968 and $35.8 billion in 1969. These average to $28.4 billion, which is near the 1967 value. It should be noted that the quotas refer to quantities rather than values, however.

[32] This calculation implies a 40% increase over 1967 levels occurred. Using a 1967 base of 100 and a 1973 level of 140, a rollback of about 30% with respect to the 1973 base results. In fact, Table B-87 *U.S. Balance of Payments, 1946-1971* in the 1972 ECONOMIC REPORT at 246 shows U.S. imports rose from $26.821 billion in 1967 to an estimated $46.052 billion in 1971, *a growth of 72% in four years*. The use of the more conservative 30% figure for five years of growth allows for the possibility that quantities of imports did not rise as fast as values.

To put this cutback in perspective, if imports were roughly 4% of Gross National Product in 1973,[33] a cutback in imports would mean that roughly 1.3% of GNP in new orders suddenly would be available for United States producers. One and one-third percent of GNP sounds like a modest change in demand for all domestically produced goods in United States economy. But because an unduly large portion of the increase in demand would fall on a narrow band of industries, it would have a huge impact on them. The consequence would be that the apparel, steel, electronics and similar import-competing industries would quickly reach full capacity, make investments to expand capacity, and hire more workers.

By 1973, 1⅓% of the GNP will probably be about $15 billion. This would be a huge stimulus. If the normal GNP multiplier of 3-4 were allowed to operate, GNP would increase by $45-60 billion over what it would otherwise be without the Burke-Hartke bill over a three- to four-year period. The magnitude of this increase can be put in perspective by observing that United States GNP is expected to rise by the large amount of $93-100 billion from all sources in 1972.[34]

The Federal Government has the ability to provide a fiscal stimulus of this magnitude at the present time. It could maximize the employment and minimize the inflationary effects of the stimulus by spreading it over most commodities and regions of economy. The reason why the Federal Government has not chosen to provide such a large fiscal stimulus, is well known and compelling. The United States economy is recovering from a major inflation. The Administration has carefully avoided sudden fiscal stimuli to the economy lest the high price it has paid to slow inflation be in vain.

If current policy plans are implemented by 1973, unemployment is expected to be in the range of 5% and going down. Real GNP should be growing at the high rate of approximately 6%.[35] Suddenly, as the result of the Burke-Hartke quotas, there would be a drastic increase in the demand for products from the United States import-competing industries and the capital-goods industry.

The Burke-Hartke stimulus to the American economy would generate much more inflation than a normal fiscal stimulus of equal magnitude, because of its isolated sectoral impact. The huge jump in demand for United States products that compete with imports would go beyond the

[33]$46 billion in imports over $1047 billion GNP in 1971 equals 4.3%.

[34]*Id.* at 25. The Time magazine board of economists forecast a $91 to $100 billion increase, TIME, February 14, 1972.

[35]*Id.*

production levels that existing capacity could supply. There would be excess demand for these products; and their prices would probably rise dramatically.

Because these products are used as inputs to other United States industries, and because the import competing industries would tend to raise the prices they pay for factors of production, a wage price spiral of substantial magnitude would probably result over the 1973-1975 period. It has been estimated that the effects of Title III quotas could, by themselves, completely offset the impact of Phase 2 of the Nixon Administration's inflation control program—a reduction of United States inflation by 1½ to 2 percentage points— and require tightening and prolonged expansion of the entire price and wage control program.[36]

In addition to the short-run inflationary impact this quota system would probably have on the United States economy, the prospects for increased inflation in the long run would also be increased. With quotas for every major product, the probability of responses to unwarranted price rises by United States firms in the form of increased imports would no longer exist. Once the threat of foreign competition is removed, the probability of the spiraling of any initial price rise into and economy-wide inflation in the manner discussed above, is enormously increased. There are many well-known instances where the threat of foreign imports kept United States prices down during the past decade, instances where initial cost push or demand increases would otherwise have resulted in higher prices.

Suppose administrators of the United States economy continued to maintain the preferences they have shown in the past for the acceptable trade-off between inflation and unemployment, because of the greater probability of the economy-wide transmittal of any initial stimulus to inflation, they would have no choice but to maintain more severe inflation controls, and to accept greater amounts of unemployment in the future than they have in the past. The fulfillment of this conjecture would, of course, defeat the major goal of the sponsors of this bill, namely higher long-run employment in the United States.

No consideration has yet been given to the possibility of retaliation. However, it is useful to summarize the preliminary marginal costs and benefits of the Burke-Hartke quotas calculated to this point. It appears that these quotas would provide a modest increase in employment at a time when the unemployment rate would probably be around 5%. However, the unemployment rate would probably fall to an acceptable 4% in about one

[36]C. Fred Bergsten, The Cost of Import Restrictions to American Consumers, New York, American Importers Association, 1972, p. 5.

year. Hence, the preliminary marginal benefit of the bill appears to be an average reduction of the unemployment rate of ½% for one year. The preliminary costs appear to be a 1½ to 2% increase in inflation for several years, the maintenance of wage and price controls for a substantial period of time, and a probable increase in the unemployment rate in the long run.

The Possibility of Retaliation

Suppose, for the moment, no formal retaliation consisting of the setting of countervailing trade powers was undertaken by foreign countries, and that only indirect retaliation consisting of maintaining formal foreign trade behavior occurred. Foreign countries' imports are determined by their foreign exchange reserves as well as their incomes. The projected reduction in their sales to the United States of at least 30% caused by the quotas would severely affect both these variables.[37]

These countries would probably behave as they have in the past and continue to be bound by their foreign exchange earnings and reserves.[38] They would have to restrict their imports from all sources and United States exports would suffer as world trade declined. If an inflation of the magnitude foreseen above took place in the United States due to Title III quotas, the benefits of the recent dollar devaluation would be reduced, and the price-competiveness of the remaining United States exports would be severely burdened.

In this case reductions in United States exports would be higher than they would be as the result of foreign countries' normal behavior. Thus, even without formal retaliation, United States exports can be expected to decline substantially over a three to four year period after the passage of S. 2592.

It is difficult to believe, however, that there would not be any formal retaliation for the imposition of quotas of the magnitude of those proposed in Title III. If countervailing trade barriers were set, they would probably be directed at the United States and its most competitive exports. They would cut United States exports faster than the above scenario indicates. Since they would probably be designed to insure that foreign countries

[37]United States imports are a major element in world trade. A substantial portion of foreign countries' foreign exchange earnings come from these sales. Because most foreign countries have a larger foreign trade sector in their domestic economies than the United States has, a major drop in export sales will affect their incomes. As this process would swing from country to country, world trade and world income would continue to decline.

[38]Piekarz and Stekler conclude "The findings (of this study) show that, aside from the United States, all major industrial countries adjust their imports to changes in export earnings." as a matter of normal behavior and without countervailing barriers. *Review of Economics and Statistics*, November, 1967.

were keeping absolutely within their foreign exchange earnings, this would guarantee that the United States would receive little or no trade surplus.

Although this result is likely even without formal retaliation, the imposition of countervailing trade barriers by foreign countries would probably provide the *coup de grace* to an already terminally ill export foreign sector of the United States economy. If foreign countries chose to push retaliation to the point at which United States exports dropped more than United States imports, all-out trade war might result.

The marginal cost of the Burke-Hartke quotas is sufficiently dear without threatening the probability of this disaster. Although the probability is positive and the resulting cost high, the assumption that foreign behavior, whether involving formal retaliation or not, would cause sales of United States export industries to be cut by roughly the same amount as United States imports, within a year or two of the passage of the bill, will be allowed to rest for the cost benefit calculus of this paper.

Because imports would be cut immediately under the Title III quotas, the United States would probably have a small trade surplus for 1973 if the bill were passed. However, since this result is expected from the pursuit of conventional policies, no marginal benefit can be added to the bill's credit.

On the other hand, costs do accrue to the projected cuts in United States exports due to the bill. Many United States export industries would severely curtail production and employment. Many firms would go out of business. These events would offset some of the economic stimulus to the United States economy, caused by adoption of S. 2592. Because many of those who would be unemployed by United States export industries live in different regions, and would have different skills from those required by new jobs in the newly expanded import competing industries, the modest employment benefits of the bill would be reduced.

On balance, the direct employment gains in the import competing industries would probably be more than offset by the equal dollar sales losses in the export industries, because United States exports are more labor intensive than United States imports.[39] In addition, demand for domestic production and jobs would be reduced because the higher prices for United States import competing products would reduce the overall purchasing power of Americans; in addition an increased share of their incomes would have to be used to buy the quota-restricted goods.[40]

When the probability of retaliation is considered, the preliminary benefit

[39]*See* BERGSTEN, op. cit., *supra*, p. 5 and note 19, p. 12. *Also see* Krause, *How Much of Current Unemployment Did We Import?* 2 BROOKINGS PAPERS ON ECONOMIC ACTIVITY, 1971, pp. 421-425.

[40]*Id.* at p. 12 note 20.

of this bill of a modest reduction in unemployment for a year would probably be reduced slightly. However, increases in unemployment would mount in the following years as direct or indirect retaliation occurred. This would probably increase the size of United States unemployment in the long run—projected as a preliminary cost above. Unemployment in the export industries would, to some degree, be isolated by skills and region, and little of the inflationary cost of the quotas would be neutralized.[41] Thus, the preliminary conclusion that a 1½% to 2% inflation would occur, and that price and wage controls would have to be retained and tightened, is not changed.

The Gains from Trade and Income Distribution Effects

In addition to the consequences of the Title III quotas just outlined, the long-run gains that would be obtained from increased United States foreign trade would be lost should this legislation be adopted. United States consumers would lose by having fewer products to choose from, and by having to pay more for available products. If the bill passed, incomes in the United States would be lower relative to what they would have been if highly productive and high wage United States industries were producing exportable products in exchange for a wide variety of standardized, and low-productivity foreign products that are currently imported. The prices of similar United States produced commodities would be much higher even though they are produced by relatively low-wage industries in the United States.[42]

The change in income distribution resulting from the passage of the S. 2592 quotas can be set out fairly simply as a result of previous discussions. Owners, officers and workers in import competing industries and the surrounding regions would benefit substantially. Because of the enormous short-run increases in demand, the owners of these industries would probably obtain substantial profits. Most export industries would take short-run losses and the owners, officers and workers would be hurt.[43]

[41]The supplies of exported United States products would become available for consumption on the United States economy. Temporary oversupply in these markets should lead to short term price declines for these items. Companies which formerly exported commodities in volume may accept losses for a period of several years, or until they either go out of business or are reduced to proper size. At this time prices would probably jump back to levels close to where they would normally have been, as the general level of inflation in costs of production would require it.

[42]Branson and Juntz, *Trends in U.S. Trade and Comparative Advantage*, BROOKINGS PAPERS ON ECONOMIC ACTIVITY, 2, 1971.

[43]A firm with a fixed capital investment, will generally remain in business as long as its marginal revenues exceed its marginal costs. This means firms in the export industries will probably be willing to take the loss of their fixed capital and remain in business until that fixed capital is worn out.

United States farmers who export large amounts of agricultural products would probably suffer in the long run. This bill would also have a heavy impact on poor consumers who are the major buyers of the more inexpensive foreign imports such as apparel and meat.

III. The Administration of the Quotas

The Distribution of the Quotas

The full effects on income distribution arising from the Title III quotas, cannot be determined until an analysis of how the quotas are to be distributed is made. Although the bill proposes quantitative restrictions, it makes no formal mention as to who will be allowed to import the goods which would be allowed into the United States under the quota provisions.

Under the quota system, the prices of the foreign products allowed to be imported would, in most cases, rise close to those of competing United States products.[44] Only the question of who would get the profit resulting from the difference between the United States selling price and the foreign cost remains.

If the United States Government gave the quotas to individual United States importers, it must be assumed that they would reap the profits. For example, the holders of United States oil import quotas often simply sell the quota determined right to import for substantial gains.

If the sponsors of this bill took a more enlightened approach and permitted the United States Government to sell the quotas to the highest bidder, the United States taxpayer might be able temporarily to regain some of the profits generated by quotas. United States taxpayers would have created these profits by paying the higher prices for the allowed imports and the United States produced import competing products.

Such benefits would probably not last long. Ultimately, many of the profits generated by these quotas would probably go to the suppliers of the imports in foreign countries, and neither the United States taxpayer nor the United States importers would benefit. These suppliers would soon realize that they could reap the profits resulting from the quotas, if they formed a cartel to set prices of their exports at levels near those at which they were being sold in the United States. Since quotas would be set for each country as well as for each commodity in S. 2592, the ability to form small cartels would be facilitated.

[44]Holders of the severely restricted quota-allowed imports would probably find it advantageous, to raise prices of these goods to the point at which all the imported goods just barely sell. Buyers, whose alternative would be U.S. made competing products, would probably bid the prices of the relatively scarce quota-allowed imports up to the prices of the competing U.S. made products.

Many examples of this sort of foreign cartel formation can be found at the present time. Even in the oil industry, where the foreign producers do not have the advantage of having a commodity-by-country monopoly structure provided for them as does this bill, suppliers have joined together to obtain ever increasing shares of the monopoly profits generated by the United States oil-import quota.

The Determination of Initial and Subsequent Quotas

The scenarios of the effects on the United States economy from the Burke-Hartke quotas in this analysis look rather bleak. They have assumed that the administration of these quotas could be performed correctly, smoothly and immediately upon passage of the bill. This assumption is open to question.

If the Foreign Trade and Investment Act is to be administered equitably in accordance with the language of the bill, many analysts will probably be required to make initial decisions about quantities of imports in each five and seven digit category from each country during the 1965 to 1969 period. There are severe problems in measuring the quantity of imports accurately.[45] Imported commodities are not all homogenous, even by five and seven digit categories.

These problems might be assumed away when the bill was first put into effect by some arbitrary requirement, such as one that historical data, regardless of its quality, be used to set the initial quotas in each five and seven digit commodity category. However, the bill appears to demand that many analysts engage in a continuing study of the relations of the initial quotas to production in each five and seven digit industry in the United States, after the initial quotas are set. Even if these analysts are made available, the likelihood that numerous subjective judgments will be required by the Commission seems high.

The Neutrality of the Commission

The supposed neutrality of the proposed three-man Commission in the

[45]One indication of these measurement problems can be seen from continuing efforts by the United States Commerce Department, to develop a reasonable price index for United States imports. Such an index would show how the values of United States imports which, in most cases, and declared on tarriff vouchers could be broken down into the prices paid and quantity of goods imported. These efforts have provided only a "unit value index." This measure assumes that the quantities of United States traded commodities remain moderately homogeneous and that, if one divides the value of imports listed on tariff vouchers by the quantity of them listed, a measure of price will result. The enormous instability of these "unit price" measures for many of the individual commodities gives witness to the current inability to identify homogeneous traded commodities clearly, as well as to the invalidity of the values of imports declared for tariff collection purposes, and obtained by other methods when tariff declarations are not available.

arbitration of all of the inevitable disputes that would arise in the course of the Commission's regulation of United States foreign trade is subject to question. An example of a five- or six-man structure, that might represent al! of the interested parties more equitably, lends some perspective to the proposed three-man board: one member representing export industries, one member representing import competing industries, one member representing consumers, one member representing employees of importing competing industries, and one member representing employees of export industries. A sixth public member might also be considered.

Legal Problems

In addition to the economic consequences of the Foreign Trade and Investment Act of 1972, there exist many incongruities between this bill and American treaty commitments. It appears that the authors of this bill either have not considered, or are willing to pay the costs of violating United States international obligation.

The legal implications of the Burke-Hartke bill are reasonably clear. The Act would simply violate a score of treaties and executive agreements. The real domestic issue does not lie in a challange to the legality of violating these treaties. It appears reasonably well-settled that subsequent inconsistent legislation can constitutionally obviate our prior international agreements.[46] The question to be considered is how and to what extent the General Agreement on Tariffs and Trade (GATT), and the Friendship, Commerce and Navigation (FCN) treaties, would be made moot by the adoption of this legislation, and, if so, whether the inplications for the traditional United States foreign policy stance is desired.

It should be noted at the outset that many supporters of S. 2592 regard breach of United States commercial treaties with equanimity. A "so what" attitude pervades most of the arguments of adherants to blanket quotas. This philosophy is understandable, if myopic. The "so what" of Title III portends a dramatic reversal in the trade policy the United States has advocated—and cajoled its trading partners to accept—for over a quarter of a century.[47] Much concern has been voiced in recent years about the

[46]Chae Chan Ping v. U.S., 130 U.S. 581 (1889); Geofroy v. Riggs, 133 U.S. 258; Raid v. Covert, 354 U.S. 1 (1957) held *inter alia:*

> This court has . . . repeatedly taken the position that an act of Congress which must comply with the Constitution is on full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null.

[47]At the first preparatory session of the GATT in 1947, the United States made its position clear:

> Of all forms of restrictionism ever devised by the mind of man, Quantitative Restriction is the worst [U.N.Doc. EPCT/A/PV. 22 at 16 (1947)] . . . the charter should prohibit the

credibility of American treaty commitments. Indeed, one of the ostensible reasons for the United States involvement in Vietnam has been to reassure its allies that the United States will honor its international obligations.

American policy toward world trade has been rélatively consistent since World War II. The United States has been an outspoken advocate of low tariffs, reduced Non-Tariff Barriers (NTBs) and orderly international monetary policy. In many cases, it has been American insistence which persuaded other countries to adopt free trade policies. The attitude of the United States, while not eleemosynary, was couched in philosophic terms, touting the philosophical and economic virtues of liberal trade standards.[48]

From legal and policy perspective, the Burke-Hartke proposal represents not only an abandoment of principle which the United States has proselyted for twenty-five years, but a repudiation of pacts that the United States has insisted other countries accept. Perhaps "adjustments" to American objectives would be accepted by our trading partners as an overdue recognition of reality; but a wholesale breach of treaty commitments, cannot, and should not, be taken lightly.

That S. 2592 does represent American policy is undisputed; the extent to which it would violate present United States commitments has not been adequately considered to date. The "so what" of some Burke-Hartke proponents can best be answered by analyzing the effect Title III would have on the GATT and on the Friendship, Commerce and Navigation treaties.

The question of whether mere passage of legislation inconsistent with prior treaties constitutes an automatic violation of those treaties has long inspired spirited discussion. Whatever the merits of arguments advanced on this issue, consideration of the impact of the Burke-Hartke bill need not be conditioned upon the predilections of the reader vis à vis the "automatic violation" question.

---

use of quantitative restrictions except under specified conditions. In special cases where quantitative restrictions were permitted, they should be administered in a non-discriminatory manner [U.N.Doc. EPCT/C.II/3, at 2(1947)].

[48]*E.g.*, one of the chief United States negotiators for the GATT regarded Q.R.s as follows:

> Quantitative restrictions . . . impose rigid limits on the volume of trade. They insulate domestic prices and production against the changing requirements of the world economy. They freeze trade into established channels. They are likely to be discriminatory in purpose and effect. They give the guidance of trade to public officials; they cannot be divorced from politics. They require public allocation of imports and exports among private traders and necessitate increasing regulation of domestic business. Quantitative restrictions are among the most effective methods that have been devised for the purpose of restricting trade. They make for bilateralism, discrimination, and the regimentation of private enterprise.

CLAIR WILCOX, A CHARTER FOR WORLD TRADE, (New York; MacMillan, 1949) pp. 81-92.

Potential violations of the GATT and our FCN treaties are so likely to occur should the provisions of S. 2592 be placed in operation, that the authors concede the auto-violative argument. Whether the bill would violate the treaties at the time it is signed into law, or when it is applied is inconsequential. It is important that many sections of the bill are prima facie antagonistic to the GATT, and the treaties of Friendship, Commerce and Navigation.

Further, because the bill has yet to be tempered by committee action, the rule *de minimis non curat lex* has been observed. This survey is intended to demonstrate only the most significant potential breaches of United States commitments.

Violation of GATT

The longest and most detailed provisions of the GATT deal with quantitative restrictions. Indeed, dismantling of the Quantitative Restriction (Q.R.) system has been billed as the prime *raison d'etre* of the GATT.[49] Despite almost twenty years of effort, many industrial goods' quotas remain, even though they cannot be justified under any GATT exception.[50] Although imperfect,[51] the GATT imposes rather far-reaching prohibitions on imposition of new quotas.

The GATT articles containing the central obligations regarding Q.R.s are the following:

XI: Prohibition on the use of quotas;
XII: Execption to Article XI for balance-of-payment reasons;
XIII: Requirement for Most Favored Nation (MFN) treatment when quotas are imposed;
XIV: Exception to Article XIII in certain balance-of-payment cases;
XV, XVIII: Balance-of-payment rules.

Article XI states the basic position of the GATT relative to Q.R.s:

> No prohibitions or other 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 by any contracting party on the importation of any product of the territory of any other contracting party or

[49]GATT, *The Use of Quantitative Restrictions for Protective and Other Commercial Purposes*, (Sales No. GATT/1950-3); GATT, Review of Import Restrictions under Articles XII; 4(b) and XVIII: 12(b) (GATT doc. MGT(59)(76)(1959); *See also* G. CURZOH, MULTILATERAL COMMERCIAL DIPLOMACY: THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND ITS IMPACT ON NATIONAL COMMERCIAL POLICIES AND TECHNIQUES (1965).

[50]*E.g.*, "Residual lists," waivers and reservations continue to be used to circumvent the GATT prohibition on Q.R.s; *see* GATT Docs. L/2336/Corr. 1-3, Add. 1-5 (1965); L/2568/Add. 1-15 (1966) (revisions of L/2366); L/2749/Add. 1-8 (1967) (restrictions of newly independent nations).

[51]*E.g.*, agricultural products are largely exempted from Q.R. restrictions of the GATT; *see* GATT, TRENDS IN INTERNATIONAL TRADE, 87 (Sales No. GATT/(19583) GATT Doc. K?2614 at 4-5 (1966).

on the exportation or sale for export of any product destined for the territory of any other contracting party.[52]

Although several sections provide exceptions to the broad policy banning Q.R.'s,[53] those recognizing monetary problems are the most significant. The balance-of-payment exceptions contained in Articles XII and XIV have been used to justify American non-compliance with Article XI by some supporters of S. 2592. This argument requires a strained interpretation of the relevant GATT provisions.

Article XII provides that Q.R.s may be employed:

1. To safeguard a country's external financial position and balance of payments;
2. But only to the extent necessary:
   (i) to forestall the imminent threat of, or to stop, a serious decline in its monetary reserves, or
   (ii) In the case of a contracting party with very low monetary reserves, to achieve a reasonable rate of increase in its reserves.[54]

Proponents of S. 2592 have construed these sections in their broadest terms. They contend that the United States may be legitimately viewed as requiring Q.R.'s to safeguard its external financial position and balance of payments in light of the huge 1971 balance-of-payment deficit. A serious decline in United States monetary reserves has occurred and, with United States reserves at a post-war low,[55] it appears that quotas might be legally invoked under this article to achieve a reasonable rate of increase in United States reserves.

This argument, however, ignores the clear rules of construction contained in the General Agreement. With regard to the above criteria, the GATT lists two factors which would be analyzed before invocation of the Article: 1. "Special factors" affecting reserves;[56] 2. Availability of special external credits or other resources.

---

[52]This language is similar to the United States proposal; *see* U.S. Suggested Charter, Dept. of State, Pub. 2598 at 12 (1946).

[53]Article XI:2 provides exceptions for:

(1) Export restrictions to relieve food shortage;

(2) Restrictions necessary to the application of standards for grading, classification or marking

(3) Import restrictions on "any agricultural or fisheries product" under certain circumstances.

[54]*E.g.*, what constitutes "low monetary reserves" or a "serious decline" in such reserve is determined through consultation with the International Monetary Fund: Gatt Article XV:2.

[55]Total United States reserve assets were $12.2 billion at the end of 1971, culminating a steady decline from a post-war peak of $26.0 billion at the end of 1949. Total reserve assets were $20.7 billion at the end of 1946, *U.S. Reserve Assets, 1946-71*, ECONOMIC REPORT, *op. cit.*, p. 302..

[56]Such "special factors" might include "special non-recurrent movements of funds . . . (or) high future commitments or probable drains upon its resources:, LONDON REPORT, First Session of the Preparatory Committee, at 13 (1946).

The United States appears to have no "special factors" affecting its reserves, and the availability of special external credits or other resources appears to be severely limited at the present time, as a result of having drawn on them for the past several years.

Even where Q.R.'s might be justified under these circumstances, contracting parties may maintain such restrictions only to the extent necessary to correct the imbalance, and must progressively relax them as conditions improve.[57] The Smithsonian Accord of December 18-19, 1972, which provides a devaluation for the dollar and removal of temporary quotas of August 15, 1971, arguably meets the relaxation requirement. The Title III quota provisions, however, allow for progressive relaxation of the quotas related to United States production but say nothing about the balance-of-payments criteria for quota relaxation required by this article.

Not only is the use of the Title III quotas and their criteria for relaxation in question, but also most of these guidelines are incongruent with the Burke-Hartke bill: Title III contains no assurance United States quotas would be lowered as "conditions" permit. The GATT speaks to balance-of-payment conditions, while Burke-Hartke deals primarily with the relative health of American industry. While these may be complementary considerations, they are certainly not equivalent. In light of the recent devaluation, the burden of proof is on the sponsors of S. 2592 to show the contrary.

Article XII further provides that, once imposed, quotas must:

1. Avoid uneconomic employment of resources;[58]
2. As far as possible, expand rather than contract international trade;[59]
3. Avoid unnecessary damage to commercial or economic interests of any other contracting parties;[60]
4. Allow minimum commericla quantities of each description of goods to avoid impairing regular channels of trade;[61]
5. Allon imports of commercial samples;[62]
6. Avoid restrictions that prevent compliance with patent, trademark, copyright or similar procedures;[63]
7. But, structure and imports of certain products deemed more essential may be preferred over other imports.[64]

[57]GATT Article XII:2(a).
[58]GATT Article XII:3(a).
[59]*Id.*
[60]GATT Article XII:3(c)(i).
[61]GATT Article XII:3(c)(ii).
[62]GATT Article XII:3(c)(iii).
[63]*Id.*
[64]GATT Article XII:3(b).

Article XIII contains the further requirement that Q.R.'s, including those imposed for balance-of-payment purposes, be administered on a nondiscriminatory (MFN) basis.

As previously discussed, the effect of the Burke-Hartke bill would discourage rather than encourage the economic employment of resources as envisioned by Article XII:3(a). The Title III blanket quotas would stimulate development of high-cost domestic industry, and create artificially domestic high capital flows to areas now only marginally productive.

Whether the quotas provided in S. 2592 would "avoid unnecessary damage to commercial or economic interests of any other contracting parties"[65] must be interpreted with reference to Ad Article XII:3(c)(i) which provides "contracting parties applying restrictions shall endeavor to avoid causing serious prejudice to exports of a commodity on which the economy of a contracting party is largely dependent." The Burke-Hartke bill contains no provision for such considerations. It seeks to ameliorate the problems of American industry, whether the effects of such actions destroy overseas producers or not.

In practice, the Burke-Hartke bill would probably not violate the GATT requirement of allowing minimum commercial quantities of goods and commercial samples to be imported.[66] The wording of the bill, however, does not provide such a guarantee. Newly developed products could be all but excluded under the quota proposal, if they happened to be produced in certain countries. It is also possible that Title III would cause wide-spread disruption of patent, trademark and copyright licensing agreements.[67]

Such contracts are often conditioned upon geographic considerations which would be severely distorted should the United States limit entrance of goods on a commodity and country basis. Assume, for example, an American firm granted licenses to a firm in country A to manufacture products in 1970. The foreign licensee entered the licensing agreement with the understanding its primary market would be the United States. Further, assume that prior to this agreement, a supplier in the country B provided the United States market with this product during the 1965-1969 base period.

Under Title III the country B supplier would get the lion's share of the quotas; the manufacturer in country A would be locked out, his license rendered worthless. Moreover, if the firm in country B no longer held a valid license, it would not be able to take advantage of its quota.

[65]GATT Article XII: 3(c)(i).
[66]*See* GATT Article XII: 3(c)(ii).
[67]*See* GATT Article XII: 3(c)(iii).

The general balance-of-payments exception of Article XII is thus conditioned upon several requirements nearly all of which would be violated or unsatisfied by the Burke-Hartke bill. The other major balance-of-payment exception to GATT obligations is Article XIV, but this section provides no greater "escape clause" to United States commitments than does Article XII. Article XIV provides an exception to the MFN requirements of Article XIII, not to the standards of Article XII previously discussed. Even if the United States could qualify for Article XIV treatment, it would still be bound by the qualifications of Article XII.

The assumption that the United States *could* qualify under Article XIV of the GATT is itself a dubious proposition. The status of the United States under Article XIV of the GATT is directly related to its obligations under the Articles of Agreement of the International Monetary Fund (IMF).[68]

As an Article VIII country under the IMF, the United States is prohibited from imposing "restrictions on the making of payments and transfers for current international transactions."[69] Because the eligibility of the United States to qualify for invocation of GATT Article XIV is directly dependent upon its qualifications to impose monetary controls under the IMF, and since it cannot fulfill the IMF standards at the present time, it is ineligible for GATT Article XIV exceptions.

Whatever proponents of the Burke-Hartke bill think of the merits of the General Agreement, it seems incumbent upon the United States to seriously consider the foreign policy implications reneging on its historical commitments.

Violation of Friendship, Commerce and Navigation Treaties

Since the implementation of the GATT, many American Friendship, Commerce and Navigation treaties have adopted the Agreement's language with relation to quantitative restrictions. In such cases, the same issues are present with the treaties as they were with the previously discussed Articles in the GATT, and the previous analysis by and large applies to them. However, the "traditional" FCN treaties enacted before addition of the GATT provisions, and that remain in force at the present time, should be

[68]GATT Article XIV provides *inter alia:*

A contracting party which applies restrictions under Article XII or under Section B of Article XVIII may in the application of such restrictions deviate from the provisions of Article XIII in a manner having equivalent effect to restrictions on payments and transfers for current international transactions which that contracting party may at that time apply under Article VIII or XIV of the Articles of Agreement of the International Monetary Fund . . .

[69]Articles of Agreement of the International Monetary Fund VIII.

considered separately. The 1954 FCN treaty with Japan provides a representative example.[70]

Article XIV of that treaty contains the basic agreement with regard to quantitative restrictions:

> "2 – Neither party shall impose restrictions or prohibitions on the importation of any product of the other party or on the exportation of any product to the territories of the other party, unless the importation of the like product of, or the exportation of the like product to all third countries is similarly restricted or prohibited.
> "3 – If either party imposes quantitative restrictions on the importation or exportation of any product in which the other party has an important interest:
> "a – It shall as a general rule give prior public notice of the total amount of the product, by quantity or value, that may be imported or exported during a specified period, and of any change in such amount or period; and
> "b – It is makes allotments to any third country, it shall afford such other party a share proportionate to the amount of the product by quantity or value, supplied by or to it during a *previous representative period, due consideration being given to any special factors affecting the trade in such product.*" [Emphasis supplied]

The standards of this FCN treaty are clearly more generous than those of the GATT. Where the General Agreement allows quantitative restrictions only when justified by balance-of-payment difficulties, the bilateral treaty basically requires that once imposed, quotas be alloted on an MFN basis. Though more liberal than the GATT, this FCN treaty would still conflict with the terms of the Burke-Hartke bill. Although S. 2592 appears to meet the criteria of Articles 2, 3 and 3a, at least four potential violations are immediately evident in Article 3b.

First, the "representative period" requirement of Article XIV (3)(b) of the MFN treaty is directly challenged by Section 302 of S. 2592. This provision provides an exception to the blanket quotas of Section 301 of S. 2592 but contains alternatives which, if taken by the President, would constitute a violation.

Section 302 *Arrangements of Agreements Regulating Imports*

> "a – The President is authorized to conclude bilateral or multilateral arrangements or agreements with the governments of foreign countries regulating, by category, the quantities of articles produced in such foreign countries which may be exported to the United States or entered and to issue regulations necessary to carry out the terms of such arrangements. In concluding any arrangement or agreement under the subsection, the President shall take into account conditions in the United States market, the need to avoid disruption of that market, and such other factors he deems appropriate in the national interest.
> "b – Whenever a multilateral arrangement or agreement concluded under subsection (a) in effect among the countries, including the United States,

[70]Treaty of Friendship, Commerce and Navigation between the United States of America and Japan (TIAS 2863).

> which account for a significant part of world trade in the article concerned, and such arrangement or agreement contemplates the establishment of limitations on the trade in the article produced in countries not parties to such arrangement or agreement, the Commission may by regulation prescribe the total quantity of the article produced in each country not a party to such arrangement or agreement which may be entered."

No "representative period" for determining quotas is provided in this section as required by the Japanese FCN treaty. A serious treaty violation could occur in a number of ways should Title III of S. 2592 be adopted. For example, assume the President entered negotiated quantitative restrictions with European automobile manufacturers on compact cars entering the United States Customs territory. Assume further that the Europeans insisted, and the President agreed, that severe, but unspecified restrictions would be placed on the entry of Japanese compacts into the American market. Acting under Section 302, the Burke-Hartke bill Commission could lower the Japanese quota to zero, ignoring the "representative period" test.

A second potential violation of the Japan Trade treaty lies in the absence of any reference to "special factors" affecting trade in certain products. The primary Burke-Hartke test for altering quotas, once established, is the relative health of a competing American industry.[71] While the "special factors" clause in the Japanese FCN treaty might be interpreted as referring to the prospective production of individual domestic industries, it is doubtful the treaty contemplates *carte blanche* authority to impose quotas geared only to American production.

A more reasonable interpretation would posit that the "special factors" clause modifies the "representative period" provision, with additional leeway for prospective adjustments to be given when availability of supplies returns to normal. Because the Commission could simply ignore any base period requirements, looking only to American manufacturing capacity in appplying quantitative restrictions, the "special factors" test is not an effective escape clause for such a policy.

---

[71]S. 2592, § 301 provides two basic criteria for determining quotas:

a—The total quantity of each category of goods ... produced in any foreign country which may be entered ... shall not exceed the average annual quantity as determined by the Commission of such category produced in such country and entered during the calendar years 1965 to 1969; but

b—The Commission *shall* increase or decrease the total quantity of each category of goods produced in any foreign country which may be entered ... by an amount which the Commission estimates is necessary in order to make the total quantity of imports in each category bear the same relationship to production of goods in such category as existed during the period 1965 to 1969 [Emphasis supplied]

Since (b) above is mandatory, it clearly controls the first test, and in effect is the essential factor governing imports.

A third possible violation is related to that discussed above. The FCN treaty stipulates a "previous representative period" would be used in establishing Q.R.'s for each product. Even if it is assumed the 1965-1969 base period suggested in S. 2592 is "representative" for the corpus of American imports (a dubious proposition at best), the FCN treaty speaks to individual products, not overall-import trade.

To ask if 1965-1969 is "representative" of inports for *each* product is rhetorical. For hundreds of items United States import patterns have changed dramatically from the median year, 1967. Chromium, bicycles, compact cars, petroleum and television sets are among the most striking examples. Enforcement of Title III quotas based upon a non-representative 1965-1969 period for individual commodities would be clear breach of the FCN treaty.

A fourth potential conflict between S. 2592 and the Japanese FCN treaty arises in the case of unfilled quotas. The President would be authorized to distribute the unfilled portion of a quota among new or existing suppliers as he saw fit under Title III provision. No base period, "special factors" requirement or any other guideline is incorporated in the law. Although the treaty would probably not be violated until the President actually distributed the quota in an unfair manner, the bill clearly allows the President to ignore this treaty commitment of the United States.

This summary of potential violations of the Japanese FCN treaty should not be regarded as inclusive either for this or other FCN treaties. It is all but certain that a thorough review of all treaty commitments of the United States would reveal literally hundreds of conflicts with the Burke-Hartke bill.

However, the Japanese FCN treaty illustrates representative problems. The effect that adoption of this legislation would have on our foreign trade policy is manifest. While it is certain that many of the most blatant violations of United States commitments could be avoided were the bill to be more carefully worded, the essential principle remains: Adoption of tough quantitative restrictions is more than a shift in domestic economic policy; it would represent rejection of the international legal obligations that the United States fought so long to create.

Conclusion

The proponents of the Burke-Hartke bill correctly point out that there are employment and balance-of-payment problems in the United States economy at the present time. When alternative methods of meeting these and other goals of the United States economy are considered and the

results of traditional policy tools are examined, the marginal benefits of this legislation are small even if the bill is passed expeditiously, administered efficiently and foreign countries do not retaliate.

The short-run inflationary costs incurred by this bill, the long-run losses of the gains from trade and a higher unemployment rate for the United States appear to exceed by far the modest short-run gains in employment, and the temporary balance in United States foreign trade which it might provide. If foreign countries do retaliate, the prospects for still higher costs in the form of a deficit in the United States balance of payments, and higher long-term unemployment are likely.

It must be concluded that the use of blanket quotas to increase employment in the United States is not cost effective. Much more employment could be gained at a lower inflationary cost, by the use of a normal tax cut or expenditure increase as a fiscal stimulus to the United States economy. Although the quota provisions would probably lead to a temporary trade balance or trade surplus in the absence of foreign retaliation, such retaliation is likely and the possibilities of a resulting trade war are strong.

Although steps beyond the recent devaluation may be required to restore the United States' balance-of-payments health, the adoption of these quota provisions is far too stringent an approach for the correction of this problem. While one may agree with the authors of this bill that further steps may be required to return the United States trade balance to equilibrium, the arguments clearly favor doing this in a context of expanding United States foreign trade rather than contracting it.

S. 2592 is badly conceived from an administrative and legal viewpoint. Questions of the allocation and the periodic changing of quotas, would require the Foreign Trade and Investment Commission to make numerous judgments based on vague or inadequate criteria. The bill violates many major provisions of the existing United States treaty structure, and does severe damage to the traditional United States' foreign policy.

In short, it is submitted that the costs of this bill, as it presently stands, heavily outweigh its benefits.