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Congressional Quota Legislation in the Light of U.S. Legal Obligations Under Article XI of the GATT

Background

On August 21, 1970 the House Ways and Means Committee reported favorably to the House of Representatives its Bill H. R. 18970.¹ Title II of the Bill² placed quotas on certain textile and footwear articles to commence in 1971. The President was authorized to exempt from quotas imports (1) which he determined were not disrupting the U.S. market, (2) when he determined that the national interest required such action, or (3) when he found that the supply of such articles in the domestic market was insufficient to meet demand at reasonable prices. In addition, the President was authorized to negotiate agreements under which imports of textiles and footwear would be controlled. Imports covered by such agreements would also be exempt from quantitative limitations as are imports of cotton textile articles as a result of the existing Long Term Arrangements on Cotton Textiles.³

Nowhere in its Report did the Committee attempt to justify the proposed quotas as coming under any of the GATT⁴ exceptions to the prohibition of quotas set forth in Article XI of the GATT.

On October 8, 1970, the Senate Finance Committee announced two

*Member, District of Columbia Bar; Chairman, Committee on Tariffs, Customs and the GATT, Section of International and Comparative Law, American Bar Association.

¹House Report No. 91-1435 (1970), U.S. Government Printing Office, (hereinafter referred to as "GPO").

²H. R. 18970, 91st Congress, 2d Session, GPO.

³House Report No. 91-1435, *op. cit.*, p. 5.

⁴GATT is the abbreviation for the General Agreement on Tariffs and Trade, a multilateral agreement between governments concerned with international trade. It has been in operation for some 22 years, since January 1, 1948, pursuant to a Protocol of Provisional Application. Approximately 80 countries are full contracting parties, others acceded to it provisionally, some apply it on a *de facto* basis and some participate under special arrangements. Thus, in one way or another, almost 100 countries are concerned with the application of GATT in their international trading relations. The GATT is administered by a secretariat under a Director-General. It has offices at Villa Le Bodge, Palais des Nations, 1211 Geneva 10, Switzerland. Its numerous publications, including the GATT agreement itself, are available through that office. The GATT agreement is also available at the GPO. It would be most helpful in reading this article to have a copy of the agreement at hand.

days of hearings on H. R. 18970, commencing the following day and concluding on Monday, October 12, 1970. Only a few witnesses, including top Administration spokesmen, were allowed to testify. A number of such spokesmen objected to various provisions of H. R. 18970, including the quota provisions for footwear, but reluctantly supported the textile quotas on the grounds that other solutions had thus far proved unsuccessful.⁵ In neither their opposition to, nor reluctant support of, quotas did any of them point out the inconsistency of such quota provisions with the international legal obligations of the United States under Article XI of the GATT. Nor did the supporters of textile quotas attempt to claim that such quotas came under any exception to Article XI.

The House passed H. R. 18970 on November 19, 1970 by a vote of 215 for, 165 against, and 54 not voting.⁶

The Senate Finance Committee attached a somewhat altered H. R. 18970, but with the quota provisions intact, as an amendment to H. R. 17550, a bill to amend the Social Security Act.⁷ In its Report of December 11, 1970, the Senate Finance Committee made no mention of the inconsistency of the quota provisions with the international legal obligations of the United States, nor, again, was there any attempt to claim an exception for such quotas.⁸

When asked about the quota provisions in his news conference on December 10, 1970, the President stated:

It should be limited to the textile quotas. . . . The key question is jobs, and it is all well and good to apply a quota that is going to save jobs in America, but it doesn't make sense if it is going to cost us more jobs in America because of cutting down the exports that we make abroad.⁹

Again, no mention was made of the inconsistency of such a quota with our international legal obligations under GATT, nor was an exception claimed.

Due to extended debate and complicated parliamentary procedures on the Senate Floor, the Trade Bill never came to a vote and died when the 91st Congress adjourned on January 2, 1971. It was immediately rumored that the President would lose no time in resubmitting his trade proposals, including textile quotas, in the 92nd Congress when it convened on January 23, 1971.¹⁰ Later it was suggested that the Administration would

⁵*Hearings and Informal Proceedings before the Committee on Finance*, U.S. Senate, 91st Congress, 2d Session, on Amendments 925 and 1009 to H. R. 17550, October 9 and 12, 1970 (2 Parts), GPO, pp. 1-292 (hereinafter referred to as *Hearings*).

⁶116 CONGRESSIONAL RECORD H 10603 (1970).

⁷H. R. 17550, 91st Congress, 2d Session, GPO.

⁸Senate Report No. 91-1431, 91st Congress, 2d Session, GPO.

⁹The Washington Post, Friday, December 11, 1970, p. A14.

¹⁰The Journal of Commerce, Thursday, December 24, 1970, p. 1.

probably not send a trade bill to Congress until mid-1971, after the President had had an opportunity to consider the recommendations of his recently appointed Commission on International Trade and Investment Policy, due in May.¹¹ Thus, presumably, there is time for a fresh look at the U.S. legal commitments under the GATT.

Scope of Inquiry

It is not the purpose of this short article to argue or comment upon the pros and cons of the particular quota legislation in question.¹² This has been accomplished *ad nauseam* by commentators, lobbyists, economists, lawyer-advocates, etc. Nor is it the purpose to discuss the legal obligations and procedures of the GATT in general. This has been most adequately accomplished very recently by a number of legal scholars.¹³ Their works should do a great deal toward improving and developing a GATT jurisprudence, which, hopefully, will provide a higher degree of certainty as to GATT obligations in the future, notwithstanding the rather ambiguous and uncertain enforcement or dispute settlement procedures of the GATT.¹⁴ Moreover, these works will be most helpful to those bodies presently advocating a review of the GATT with a view to improving its structure.¹⁵

Rather, the specific and narrow purpose of this article is to inquire into the reasons why neither the Congress nor the Executive felt obliged to exhaust the remedies available to the United States within the GATT structure to solve the import problem before taking action which, if carried

¹¹The Journal of Commerce, Wednesday, January 13, 1971, p. 1. See White House Press Release of May 21, 1970 for a complete list of membership of the Commission, chaired by Albert L. Williams, Chairman of the Executive Committee of the board of directors of IBM, and for a summary of the scope of the Commission's mandate.

¹²For an excellent and well-balanced analysis of the pros and cons of restrictions on imports, see Foreign Trade Bills, Analysis No. 8, July 10, 1970, American Enterprise Institute, Washington, D. C.

¹³In the author's opinion, the most comprehensive and authoritative work on the subject to date is the recently published book by Professor JOHN H. JACKSON of the University of Michigan Law School, *WORLD TRADE AND THE LAW OF GATT*, Bobbs-Merrill Company, Inc., New York, 1969, pp. 698 plus appendices including text of GATT and other relevant documents. Another interesting work with an emphasis on international economic organization is DAM, KENNETH W., *THE GATT LAW AND INTERNATIONAL ECONOMIC ORGANIZATION*, University of Chicago Press, Chicago, 1970, pp. 389 plus appendix containing text of GATT. See also Hudec, Robert E., *The GATT Legal System: A Diplomat's Jurisprudence*, 4 J. WORLD TRADE LAW 615 (1970).

¹⁴As to this problem, see particularly Hudec, *ibid.*

¹⁵For example, Senate Report No. 91-1431, *op. cit.*, pp. 284-286. See also, when released, a report of the Staff of the Senate Finance Committee which asserts that the GATT is "deficient, discriminatory and obsolete." The Journal of Commerce, Tuesday, December 22, 1970, p. 1.

out, would have, on its face, violated one of the fundamental legal commitments of the GATT, namely Article XI.¹⁶

The Article XI Obligation and Exceptions Thereto

Article XI, Paragraph 1, provides:

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licenses or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.

Thus, Article XI, Paragraph 1, sets forth a clear prohibition as to the use of quotas. However, there are a number of exceptions to that prohibition and some procedures which may allow the suspension of this obligation.

Article XI, Paragraph 2, provides certain specific exceptions to the obligation of Paragraph 1, namely, (1) export restrictions to relieve food shortages, (2) restrictions necessary to the application of standards for grading or classification, and (3) import restrictions on "any agricultural or fisheries product" under certain circumstances.

Articles XII and XIV contain elaborate exception clauses for balance-of-payment cases.

Article XIX authorizes the suspension of a GATT obligation by a contracting party, including the quota obligation of Article XI, "if, as a result of unforeseen developments and of the effect of the obligations incurred" (herein the prohibition of quotas obligation of Article XI) a product is being imported "in such increased quantities and under such conditions as to cause or threaten serious injury."

Article XX provides general exceptions as to all GATT obligations, which have been traditional in commercial treaties, permitting a contracting party to adopt or enforce measures for some ten specifically designated purposes, such as those "necessary to protect human, animal or plant life or health," and including measures "undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the Contracting Parties and not disapproved by them or which is itself so submitted and not so disapproved."

Article XXI provides that nothing in the GATT will be construed to prevent a contracting party from taking any action which it considers necessary for the protection of its essential security interests.

¹⁶It is now generally recognized that the United States has accepted the GATT obligations. See Jackson, John H., *The General Agreement on Tariffs and Trade In U.S. Domestic Law*, 66 MICH. L. REV. 249 (1967). See also House Report No. 91-1435, *op. cit.*, p. 51.

Following an investigation of a complaint by a contracting party that a benefit accruing to it under the GATT is being nullified or impaired, the Contracting Parties may authorize, pursuant to Article XXIII, the complainant to suspend the application to any other contracting party of such GATT obligations (including the quota prohibition of Article XI) as they determine to be appropriate.

Under Article XXV, Paragraph 5, the Contracting Parties, "in exceptional circumstances not elsewhere provided for," may waive an obligation imposed on a contracting party, provided the decision is approved by a two-thirds majority of the votes cast and the majority comprises more than half of the contracting parties.

It probably should be added, realistically, that to the degree any GATT obligation can be avoided without consequences, the avoidance operates in effect as an exception.¹⁷ A noteworthy example is the case of the "residual quotas," that is, quotas which were originally allowed as balance-of-payment exceptions but which are no longer justified. Fortunately, the list of such residuals is getting shorter and should soon be eliminated.

Note should also be taken of the argument that a mere departure from a GATT obligation is not a breach of an international obligation unless it also entails "nullification and impairment" under Article XXIII.¹⁸

There are a few other GATT exceptions which are not applicable to the United States in the circumstances under review.

It is now appropriate to analyze, in the light of the Article XI obligation and relevant exceptions, the actions taken by the United States Congress and the Executive, and the rationale therefor, and perhaps to close with some modest suggestions for future efforts in this area.

Congressional Action

It seems quite clear that, in the absence of the applicability of any of the above-enumerated exceptions, the enactment of the provisions of Title II of H. R. 18970, namely, the quota provisions, would have violated Article XI of the GATT. It also seems clear that the Congress was aware of this fact. Yet, the legislative history, both in the House and Senate, nowhere reveals an effort to justify such quota action in terms of the GATT exceptions.¹⁹ In other words, it appears that Congress was willing to violate the GATT flagrantly. Is this the case and was this necessary?

¹⁷See Jackson, *World Trade and the Law of GATT*, *op. cit.*, p. 539 (hereinafter referred to as Jackson).

¹⁸*Id.*, p. 539.

¹⁹*Hearings before the Committee on Ways and Means*, House of Representatives, 91st Congress, 2d Session, on Tariff and Trade Proposals, 16 Parts, 1970, GPO; H. Rpt. No. 91-1435, *op. cit.*; Senate Hearings, *op. cit.*; S. Rpt. 91-1431, *op. cit.*; and comments on the

Realistically speaking, none of the above listed "exceptions" would have been appropriate for consideration by the Congress had it desired so to frame its action as to be consistent with the GATT, with the possible exception of Articles XIX and XXV.

Article XIX provides in pertinent part:

1. (a) If, *as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.* [Emphasis supplied.]

This GATT "escape clause" has been subject to interpretation within the GATT. The key words relevant to this inquiry are "as a result of unforeseen developments and of the effect of the obligations incurred" and the words "serious injury." In discussing the meaning of the former words, Professor Jackson has stated:

Taking up the question of 'GATT obligation,' what does this encompass? It seems to be as broad as the GATT itself. The preparatory work clearly indicates that not only were tariff concessions intended by this phrase but the elimination or reduction of quantitative restrictions was also included. The language seems even broader. Since the obligation not to use quantitative restrictions applies to almost all products, and since other obligations of GATT do apply to all products, it appears that any product imported in 'increased' quantities could occasion the use of article XIX. That is to say, *coincidence* of GATT obligation appears to be established for virtually all products. But that still leaves open the question of cause.

One way to appraise 'cause' is to see what changes in governmental trade barriers have occurred as a result of joining GATT or accepting some GATT obligation. If no change has occurred after the GATT applied to a party, i.e., if it had no quantitative restrictions on widgets before it joined GATT, and after it applied GATT to its trade imports in widgets increased, then arguably one must look elsewhere for an obligation that *caused* the increase. One subtle argument, however, might be simply that GATT has added to the probability that future barriers will not be imposed and this increased security of trade conditions caused increased imports. This would probably be hard to prove as a 'cause' of increased imports.

The other cause requirement, that of 'unforeseen developments,' is much more difficult to appraise. Here, not only is the casual relationship difficult to measure, but the definition of 'unforeseen development' is hazy. This term, drawn directly from United States treaty practice, was apparently little discussed in the preparatory work.

One of the earliest and most significant Article XIX invocations was made by the United States with respect to hatters' furs. One controversial issue in

floors of the respective Houses of Congress appearing in various volumes of the CONGRESSIONAL RECORD.

the GATT proceedings on this case was 'unforeseen developments.' In 1950, the United States, through its Tariff Commission procedures, found that increased imports of this product fulfilled the criteria of the escape clause, so it withdrew a concession negotiated at Geneva in 1947. This action was challenged by Czechoslovakia, and the GATT set up a Working Party to review the matter. The increased imports had resulted from a change of ladies' hat styles and the United States contended that this was an 'unforeseen development.' The Working Party trod a fine line. All members except the United States agreed that 'unforeseen development' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated. These members also agreed with the Czechoslovakian argument that 'it is universally known that fashions are subject to constant changes' and that the United States negotiators should have known that fashions might change. But all members of the Working Party except Czechoslovakia felt that 'the degree to which the change in fashion affected the competitive situation, could not reasonably be expected to have been foreseen by the United States' authorities in 1947,' and therefore the Article XIX prerequisite of 'unforeseen developments' was fulfilled. This conclusion, of course, very much weakened the stringency of the prerequisites to Article XIX. Indeed, one can almost conclude that an increase in imports can *itself* be an unforeseen development. If the nature of the development can be foreseen and yet the degree of its impact on imports is that which fulfills the 'unforeseen development' prerequisite, can this not be the case in every substantial increase in imports? If so, there may be built into GATT obligations through the escape clause, a limit to the allowable increase of imports of any product.²⁰

As regards the "serious injury" requirement, Professor Jackson again refers to the *Hatters' Fur Case*, quoting the Working Party Report and commenting on same as follows:

Finally, the Working Party inconclusively said:

[T]he available data support the view that increased imports had caused or threatened some adverse effect to United States producers. Whether such a degree of adverse effect should be considered to amount to 'serious injury' is another question on which the data cannot be said to point convincingly in either direction, and any view on which is essentially a matter of economic and social judgment involving a considerable subjective element!

Since the Working Party was of the view that the party invoking Article XIX was 'entitled to the benefit of any reasonable doubt,' it finally concluded that the complainant (Czechoslovakia) had 'failed to establish that no serious injury has been sustained or threatened.'

As one reviews this remarkable GATT report on Article XIX, it appears quite clear that the result of the findings made was to greatly extend the scope of the escape clause and render it available for invocation in a wide variety of situations. It almost appears that a mere rapid increase in the proportion of imports to the domestic production would make invocation of Article XIX justifiable, especially when all benefit of doubt goes to the party invoking it. The net result is to render tariff concessions and other GATT obligations less

²⁰Jackson, *op. cit.*, pp. 559-561.

stable. The need to re-examine Article XIX with a view to obtaining greater stability of trade concessions was mentioned in a 1963 GATT report, but no follow-up occurred.²¹

Thus, it would appear that Congress could at least have argued that, as a result of the Article XI obligation of the United States not to impose quotas and the increased security of trade conditions flowing therefrom, imports of certain goods have been entering the United States in such increasing quantities and at such low prices as to cause or threaten to cause serious injury to domestic producers, and that Congress was therefore justified, consistent with GATT, in suspending the Article XI obligation and imposing the quota provisions of H. R. 18970.²²

Such an argument would be weakened by the fact that Congress had previously delegated the domestic United States determination of escape-clause relief to the United States Tariff Commission in the Trade Expansion Act of 1962²³ and, arguably, it should not now circumvent that delegation without first exhausting the remedy provided in that delegation.

²¹*Id.*, pp. 562-563.

²²Obviously, the Congress itself would not present this argument to the GATT. It would be presented by the President's Special Representative for Trade Negotiations. However, Congress could have laid the groundwork for this argument in its legislative history. Quite likely other contracting parties would challenge this argument and perhaps, retaliate. Then it would be up to the CONTRACTING PARTIES (when stated in the upper case, indicating that the contracting parties are acting as a single body, i.e., GATT-the-organization, as distinguished from GATT-the-agreement) to resolve the dispute. See Article XIX, para. 3. By following such a procedure, even though its argument may have been weak, the United States would have been acting within the GATT procedures.

²³76 Stat. 872; 19 U.S.C.A. 1801. The domestic escape clause provides in pertinent part at 19 U.S.C. 1901(b)(1) and (3): "(b) (1) . . . the Tariff Commission shall promptly make an investigation to determine whether, as a result in major part of concessions granted under trade agreements, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry producing an article which is like or directly competitive with the imported article." "(3) For purposes of paragraph (1), increased imports shall be considered to cause, or threaten to cause, serious injury to the domestic industry concerned when the Tariff Commission finds that *such increased imports have been the major factor in causing, or threatening to cause, such injury.*" [Emphasis supplied.]

A comparison of these domestic criteria of causation with the criteria of Article XIX of GATT reveals significant differences in language which, through interpretation and practice, have led to results which allow one to conclude that the domestic escape clause is much less useful to domestic industry than would be Article XIX. Most significantly, it can be argued that Article XIX allows a finding of injury where articles are imported in increased quantities, not only as a result of tariff concessions, but also as a result of the obligation not to put on quotas.

Since the enactment of the Trade Expansion Act of 1962 to date, there have been 19 escape-clause cases instituted under 19 U.S.C. 1901. No injury was found in the first 13 cases through December 1969, primarily because the Tariff Commission could not find serious injury "as a result in major part of concessions granted under trade agreements." In 1969, some of the Commissioners adopted the "but for" rule to satisfy this criteria (but for the concessions, imports would not be at substantially these present levels). Three of the next four cases were decided in favor of injury, but often with evenly divided determinations, 3-3 or 2-2. The 19th case is still pending.

Congress could respond that the GATT does not dictate how a contracting party internally makes its determination under Article XIX and that it has the authority, whether it is good practice or not, to circumvent its delegation to the United States Tariff Commission, particularly where the standards for escape-clause relief which it established domestically were much more stringent than the GATT standards. However, its failure to exhaust the remedy provided in the domestic escape clause, even though more stringent than required by GATT, before acting outside that remedy, may be considered unjustifiable on the international level.²⁴

Accordingly, the Congress itself, through the Committee on Ways and Means of the House or the Committee on Finance of the Senate, should have initiated a domestic escape-clause action, even if the industry in question felt this remedy futile.²⁵ Then, after a Tariff Commission determination, either favorable or unfavorable and, if favorable, after action by the President, the Congress could have determined if the relief, if any, to the industry were considered adequate. If it were not considered adequate, Congress would have been in a stronger position internationally to take direct action which it could argue was justified under the more liberal standards of Article XIX, and/or it could have amended the domestic escape clause more closely to approach the more liberal standards of Article XIX and brought a new action under the more liberal procedures.

This leads us to a consideration of the waiver power contained in Article XXV, Paragraph 5, referred to above.

Quite clearly, Congress may enact legislation violative of the GATT obligations which will be enforceable in the United States—even though a breach of an international obligation.²⁶ In fact, Congress has enacted statutes which required the United States either to breach its obligation under GATT or to obtain a waiver from GATT under circumstances in which the grant of the waiver was more a recognition of a *fait accompli* than a voluntary undertaking by the contracting parties. The most significant example of such legislation was the amendment, in 1951, of Section 22 of the Agricultural Adjustment Act²⁷ which authorized the President to in-

²⁴An analogy may be made to the general rule of international law (exhaustion of local remedies) that a State (herein the GATT) is not required to make reparation (herein authorize the use of Article XIX) on a claim of an injured alien (herein the domestic industry) if the alien has not exhausted the remedies made available to it (herein, the domestic-escape clause). See *Restatement of the Law, Second*, "Foreign Relations Law of the United States." AMERICAN LAW INSTITUTE, 1965, § 206. But see exception § 208(b).

²⁵In view of the record set forth in Footnote 23, above, it is understandable that a number of domestic industries have considered the domestic remedy futile.

²⁶See *Restatement, op. cit.* § 145.

²⁷U.S.C. 624(a) and (b) provide in pertinent part: "(a) Whenever the Secretary of Agriculture has reason to believe that any article or articles are being or are practically certain

voke quotas in situations which did not satisfy any of the exceptions of GATT, thus potentially violating Article XI.

Apparently, the Executive avoided any actions under this legislation which would violate GATT until it obtained the GATT waiver under Article XXV in 1955. At that time, it was pointed out that a situation in which the United States would have to carry out the Congressional enactment in violation of the GATT was bound to arise in the near future, in which case damage to the legal principles and structure of GATT would ensue and possibly even lead to the withdrawal of the United States from the GATT. Under the circumstances, the waiver was granted without any time limits or any provision for reconsideration. However, the other contracting parties reserved their right of consultation and action under Article XXIII and conduct an annual review of the United States' use of the waiver.²⁸

Apparently, in the instant case, the Congress was willing to enact a quota provision in violation of GATT, and then let the Executive seek a waiver under Article XXV from the other contracting parties, relying on the Section-22 case as a precedent for such action. However, there is a significant difference between the Section-22 case and the quotas of H. R. 18970. There was no possibility of the use of Article XIX (the escape clause procedure) to alleviate the problems which were to be remedied by the Section-22 enactment, whereas there was such a possibility, as pointed out above, in the case of the quotas proposed in H. R. 18970. Under the circumstances (in the light of the conditioning language of Article XXV, Paragraph 5, namely, "exceptional circumstances not elsewhere provided for in this Agreement"), the Executive would have a difficult time arguing for a waiver when it had not exhausted an appropriate remedy elsewhere provided for in the Agreement, namely, the escape-clause procedure of Article XIX. This analysis is supported by a survey of those cases in which the Article-XXV waiver has been granted. Such survey does not appear to include a case appropriate for the escape-clause procedure.²⁹

Executive Action

It seems clear that the Executive also realized the quota provisions of

to be imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, any program or operation undertaken under this chapter . . . he shall so advise the President . . ." and "(b) If . . . the President finds the existence of such facts, he shall by proclamation impose such fees not in excess of 50 per centum ad valorem or such quantitative limitations on any article or articles which may be entered . . . as he finds and declares shown by such investigation to be necessary . . ." Note that there is no "injury to an industry" requirement so that an escape-clause procedure would not first have to be exhausted.

²⁸See Jackson, *op. cit.*, pp. 735-736.

²⁹*Id.*, pp. 545-552.

H. R. 18970 would have violated GATT. Perhaps for this, among other reasons, the Executive opposed the quotas on non-rubber footwear and only reluctantly supported the textile quotas.³⁰ The rationale for such support appears to have been political and pragmatic, saving jobs in America. The argument was also made that the Executive sought an international agreement, particularly with Japan, and only because those efforts were unsuccessful did it support the textile quotas.³¹

Unlike the Congress, which is not structured to conduct international negotiations, the Executive had a greater flexibility not only to consider the "exceptions" to Article XI, but also actively to pursue them if appropriate. However, in one respect it was more restricted than the Congress. It could not advocate in GATT, without Congressional authorization, escape clause relief beyond that found under the domestic escape clause procedure. However, it could actively pursue the domestic escape clause procedure. It could seek a waiver under Article XXV, as pointed out above,³² and in addition it could seek relief under Article XXIII, citing the failure of other contracting parties to carry out their obligations and asking as relief the suspension of its obligations as regards such parties under Article XI.

What in fact has the Executive been doing in these areas? We will first consider escape-clause action in the non-rubber footwear area, then action in the textile area and finally under Article XXIII.

Non-rubber Footwear

As early as April 1968, at the request of President Johnson, the United States Tariff Commission investigated the economic condition of the domestic producers of non-rubber footwear and submitted its Report on January 15, 1969.³³ Meanwhile, President Nixon had created an Interagency Task Force to make a comprehensive inquiry into economic conditions in the domestic non-rubber footwear industry, with particular reference to the effect of imports upon that industry. In view of the President's probable need for a current assessment of the trends in imports, the Tariff Commission on its own motion initiated another investigation to

³⁰Senate Hearings, *op. cit.*, pp. 1-12.

³¹*Id.*, p. 267.

³²Obviously, the Executive should not again be put in the position of seeking a waiver after the legislation requiring the waiver has already become effective, as in the Section-22 case. The Congress should, at the very least, in cases in which a waiver will be necessary, write into the legislation an effective date far enough into the future to allow the Executive to negotiate same and perhaps to come back with some compromise acceptable to the Congress which can then be written into the legislation before the effective date.

³³Non-rubber Footwear, Inv. No. 332-56, TC Pub. 276 (1969).

supplement the Report of January 15, 1969 and came out with another Report in December 1969.³⁴

During this entire period the domestic non-rubber footwear industry did not seek escape-clause relief but did seek quota legislation from the Congress. This was also true of the textile industry. This reluctance to use the escape-clause procedure most likely stems from the fact that the possibility of finding injury under the stringent standards was very remote and, even if found, the domestic industry did not consider the likely relief adequate.

Nonetheless, President Nixon considered it appropriate to exhaust this possible remedy before supporting quota legislation and, accordingly, on July 15, 1970, requested the United States Tariff Commission to conduct an escape-clause investigation. On January 15, 1971, the Commission submitted its Report to the President, two Commissioners finding injury in certain types of footwear and recommending increases in tariff rates, two other Commissioners finding no injury, and the recently appointed Commissioner not participating in the decision.³⁵ In such an evenly divided vote, the President may consider the affirmative recommendation as the recommendation of the Commission.³⁶

Under the statute, the President has the authority to accept the Tariff Commission recommendation, in this case in increase in tariff rates, or to invoke, on his own initiative, a lesser or greater remedy, such as a higher or lower increase in duty, a tariff-quota or absolute quota,³⁷ or even an international agreement limiting exports from foreign countries.³⁸ However, if he proposes to take any action other than that recommended by the Tariff Commission he must submit a report to the House of Representatives and the Senate stating why he has not followed the Tariff Commission recommendation. Those respective Houses of Congress may then by vote require him to carry out the Tariff Commission recommendation.³⁹

If the President were to invoke a remedy approved by the Congress but which one of the contracting parties to the GATT felt exceeded the standards of Article XIX of the GATT, that party could, under the circumstances, protest such remedy in the GATT and proceed to suspend, as against the United States, substantially equivalent concessions or other GATT obligations not disapproved by the Contracting Parties.

³⁴Non-rubber Footwear, Inv. No. 332-62, TC Pub. 307 (1969).

³⁵Non-rubber Footwear, Inv. No. TEA-1-18, TC Pub. 359 (1971).

³⁶19 U.S.C. 1330(d) (1).

³⁷19 U.S.C. 1981(a) (1).

³⁸19 U.S.C. 1982.

³⁹19 U.S.C. 1981(a) (2).

Textiles

The textile problem has been with, not only the United States, but with the world for some time.⁴⁰ It is apparently unique in the United States because of the number of people affected and—it follows—the high degree of political leverage which the industry, including labor, can muster. Initially, efforts were made to solve this problem by international agreement.⁴¹ These efforts have been to a degree successful—and they continue.

On October 4, 1967, the President requested the Tariff Commission to undertake “a comprehensive investigation of the economic condition of the United States textile and apparel industries, especially the present and prospective impact of imports upon those industries.” A report thereon was submitted to the President on January 15, 1968.⁴² In the meantime, the textile industry has continually sought quota protection from the Congress. Neither the industry nor labor, nor the President, nor either House of Congress, nor the Tariff Commission itself, appear willing to use the escape-clause procedures as a possible remedy for the textile problem. Also, the Executive continues its efforts to negotiate another international textile agreement.

Article XXIII

A very understandable complaint from large segments of U.S. industry has been directed at the so-called “residual quotas” maintained by other nations, particularly Japan, long after they can be justified under the GATT exceptions to Article XI. Members of this industry at times feel their Government has let them down in not pursuing vigorously the remedies available to the United States under Article XXIII. It should be pointed out that the Executive has, on a number of occasions, used the threat of invoking its rights under Article XXIII and as a result thereof has succeeded in convincing other contracting parties to eliminate “residual quotas” and other impediments to trade inconsistent with GATT obligations. It has had a particular problem in this regard with Japan, and accordingly in 1968 the United States decided that it would have to obtain substantial elimination of the remaining quantitative restrictions or consider taking retaliatory action under Article XXIII.⁴³ This decision was

⁴⁰For a very good legal analysis of the textile problem and the international agreements resulting therefrom, see DAM, *op. cit.*, Chapter 17—“Market Disruption and Cotton Textiles,” pp. 296–315.

⁴¹*Id.*

⁴²Textiles and Apparel, Inv. No. 332–55 (2 Vols.), TC Pub. 226 (1968).

⁴³See “Written Statements and Other Material Submitted by Administration Witnesses to

apparently temporarily shelved while efforts to negotiate an international agreement on textiles were taking place.

Some Modest Proposals

The difficult problem which domestic industry is asking the Congress and the Executive to solve is that of market disruption. This has been the subject of investigation in GATT. However, GATT's general work in this area suffered from the fact that the contracting parties spent most of their time attempting to solve the one most acute market disruption problem, namely, that of textiles, with special committees and international arrangements.⁴⁴

Obviously, a reasonable escape-clause procedure with tariff or quota relief is a temporary solution for a market disruption problem of modest magnitude.⁴⁵ Long-term solutions for problems of larger magnitude seem to be taking the form of international agreements. But here, again, there must be care not so to over-protect as to find yourself implementing an international trade policy running directly counter to an anti-trust policy which is attempting to maintain free competition.⁴⁶

Admitting the need to maintain free competition, including the free competition of imports, it is still true that a number of domestic businesses have costs of production differing considerably from those of their foreign competitors in the areas of labor, capital, taxation, credit, pollution control, governmental assistance, etc., and accordingly it is only just that they,

the Committee on Ways and Means," Committee Print, 91st Congress, 2d Session, (May 1970) pp. 185-190.

⁴⁴Jackson, *op. cit.*, pp. 570-573. In 1960, the Contracting Parties adopted a description of market disruption as follows: "These situations generally contain the following elements in combination: (i) a sharp and substantial increase or potential increase of imports of particular products from particular sources; (ii) these products are offered at prices which are substantially below those prevailing for similar goods of comparable quality in the market of the importing country; (iii) there is serious damage to domestic producers or threat thereof; and (iv) the price differentials referred to in paragraph (ii) above do not arise from governmental intervention in the fixing or formation of prices or from dumping practices. "In some situations other elements are also present and the enumeration above is not, therefore, intended as an exhaustive definition of market disruption." (GATT, 9th Supp. BISD 26 (1961).) - As quoted in Jackson, *id.*, pp. 571-572.

⁴⁵Another solution for a modest market disruption problem is available under Article XXVIII of GATT. Paragraphs 1-3 allow a contracting party, as a matter of right every three years, to modify or withdraw a tariff concession. Paragraph 4 allows a contracting party in special circumstances to negotiate the modification or withdrawal of a tariff concession at any time. The U.S. Customs Court has recently ruled in *Star Industries, Inc. v. U.S.*, C.D. 4155, decided December 23, 1970 that Article XXVIII does not require suspension of trade agreement concessions on a most-favored-nation basis.

⁴⁶In this connection, see the statement of Richard W. McLaren, Assistant Attorney General, Antitrust Division, Department of Justice, in the Hearing before the U.S. Tariff Commission in the Competitive Position of U.S. Industries, November 25, 1970, Inv. No. 332-65, Official Report of Proceedings, Vol. 15.

including their employees, be given some form of protection from sudden serious injury. The further question is, who should bear the cost of the protection and for how long? Further, what form should this protection take to minimize its domino effect on free trade? These are longer-range questions to be tackled by the President's Commission on International Trade and Investment Policy.

However, perhaps we can glean some modest interim proposals from the above commentary. Presumably, all would agree that the United States Government—both the Congress and the Executive—should always act, if at all possible, in a manner consistent with the GATT obligations. In the present context, this means that they should first exhaust established domestic procedures and then all available GATT procedures before violating Article XI.

If the domestic escape-clause procedure is so stringent that neither the aggrieved industry nor the Government choose to use it and also is more stringent than required by GATT, then it should be liberalized within the limits of the GATT to make it an effective procedure. It should be noted that the stringent aspects of the domestic escape clause are the standards for finding injury, not the remedies available to the President once the injury has been found by the Tariff Commission. The remedies available to the President include, in addition to tariff adjustment, both of the remedies written into H. R. 18970, namely, quotas and international agreements.

Secondly, perhaps the Executive should use Article XXIII more vigorously against other contracting parties who are not living up to their GATT obligations, and request the Contracting Parties to authorize the United States to suspend the Article-XI obligation as against those particular offenders.

Thirdly, the Executive should use the already existing statutory remedies more vigorously, consistent with GATT, namely, dumping duties and counter-vailing duties, both of which are more focused remedies and less offensive than quotas.

Finally, it would be well if Congress and the Executive could work more closely together in the future, the Congress being more sympathetic to our international-trade obligations, and the Executive being more vigorous in pursuing our international trade rights.

Perhaps this effort may be one of the first orders of business for the President's newly established Council on International Economic Policy.

[Editorial Note: The following Resolution relating to the matters discussed in Mr. Coerper's article was adopted by the House of Delegates of the American Bar Association on February 8, 1971, after consideration of a report of the Section of International and Comparative Law.]

Be it resolved, that the American Bar Association urges the President and the Congress of the United States to recognize the conflict which appears to exist between the import quota provisions of proposed legislation such as H.R. 18970 (91st Congress) and existing obligations of the United States under the General Agreement on Tariffs and Trade (GATT) and, if such conflict is found to exist in fact, to evaluate carefully the impact of such proposed import quota legislation upon the international obligations of the United States under the GATT; and

Be it further resolved, that the appropriate Officers of the Association advise the President and the Congress of the Association's concern as expressed in this resolution.