

1978

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Repository Citation

Whitney, Scott C., "The Trade Act of 1974 Revisited: The Need for Further Reform" (1978). *Faculty Publications*. 1009.
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THE TRADE ACT OF 1974 REVISITED: THE NEED FOR FURTHER REFORM

SCOTT C. WHITNEY*

Approximately four months after President Ford signed into law the Trade Act of 1974,¹ the first petition for import relief was filed invoking the "liberalized" provisions of Title II.² In the three years since the effective date of the 1974 Act, the United States International Trade Commission (ITC) has instituted investigations concerning a wide variety of commodities.³ Nonetheless, even though Congress by enacting the 1974 Act intended to minimize the President's control over trade policy and to make import relief more accessible to both industry and labor, the ITC's recommendations have rarely been followed. This article will analyze the ineffectiveness of the 1974 Act by outlining the background of this new statute, discussing the resolution of specific cases faced by the ITC since 1974, and considering reasons why the Act has not lived up to original expectations. Changes will be suggested which are necessary to achieve a viable international trade policy. Specifically, the article will focus on the critical issue of the extent to which the Executive has been responsive to the findings and recommendations of the ITC in those reports which have made affirmative determinations and have recommended import relief of various kinds.

I. INTRODUCTION TO THE TRADE ACT OF 1974

Under the Trade Act of 1974, import relief may take the form of offsetting duty increases, tariff rate quotas, quantitative restrictions, use of orderly marketing agreements with foreign countries, or any combination of these measures.⁴ Furthermore, adjustment assistance for workers, firms, and communities is available under the statute as a satisfactory alternative to import relief.⁵ This article, however, will not analyze which specific type

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¹ 19 U.S.C. §§ 2101-2487 (1976).

² *Id.* §§ 2251-2394. Title II of the Trade Act of 1974 deals with means of providing relief from injury caused by "fair" but injurious import competition. As will become clear later in this article, import relief is easier to obtain under Title II than under previous legislation.

³ The ITC will institute an investigation upon the filing of a petition for import relief by an industry, a firm, a labor group, the Senate Committee on Finance, the House Ways and Means Committee, the President, the Special Representative for Trade Negotiations, or upon the initiative of the ITC itself. *Id.* § 2251(a)(1), (b)(1).

⁴ *Id.* § 2253.

⁵ *Id.* § 2251(d)(1)(B). The available adjustment assistance provisions are set forth in *id.* §§ 2271-2374. Trade adjustment assistance for workers, administered by the Secretary of Labor, provides benefits up to 70 percent of a worker's average weekly wage for a period of 12 months, employment counseling, retraining, job search allowances, and advances to assist in relocating if necessary for reemployment. *Id.* §§ 2271-2322. Adjustment for firms, administered by the Secretary of Commerce, includes technical assistance and direct loans, or loan guarantees to assist such firms to modernize or convert to other manufacturing activities. *Id.* §§ 2341-2354. Adjustment assistance for communities, also administered by the Secretary of Commerce, includes technical assistance and loans or loan guarantees to help develop recovery

of relief may be the most appropriate remedy in a particular situation. Instead, the focus will be on what institutional decision-making structure is best suited to determine when import relief is warranted. In order to understand fully the problems related to trade policy and the allocation of decision-making responsibility, it is necessary to outline briefly the history and structure of the Trade Act of 1974.

Congress has the power to enact legislation concerning international trade policy under its plenary constitutional authority to "lay and collect Taxes, Duties, Imposts" and "to regulate Commerce with foreign Nations."⁶ Despite this power, Congress since 1934 has periodically delegated to the President specific and limited power to negotiate reciprocal tariff and trade concessions with foreign nations.⁷ Until the Trade Act of 1974 was passed, the most recent congressional delegation of authority to the President to negotiate trade agreements was the Trade Expansion Act of 1962.⁸ The President's authority under this Act terminated June 30, 1967.

Under the Trade Expansion Act of 1962, an industry was entitled to import relief only when the following four prerequisites were met:⁹

- (1) imports of an article similar to or competitive with one produced by the domestic industry were increasing;
- (2) the increased imports were the result of trade agreement concessions;
- (3) the domestic industry was suffering injury; and
- (4) the increased imports were the major factor causing or threatening to cause the serious injury.¹⁰

The President under the Act of 1962 was granted absolute discretion to accept or reject recommendations made by the United States Tariff Commission.¹¹ In short, the Tariff Commission's functions concerning import relief were investigatory and fact-finding in nature and the Commission lacked any effective decisional power.

Since ultimate power over trade policy was granted to the President and the role of the Tariff Commission was merely advisory, the statutory scheme of the 1962 Act was at variance with the long recognized view that "important advantages derive from congressional delegation of regulatory power to specialized agencies which can provide a continuity of surveillance and expertise over complex economic matters and that these advantages are normally unavailable in the three constitutional branches of govern-

plans, to attract new industry, or to convert existing plants to more economically viable activities. *Id.* §§ 2371-2374.

⁶ U.S. CONST. art. I, § 8.

⁷ See generally Whitney, *The Trade Act of 1974: Coping with Unequal Environmental Control Costs*, 16 B.C. IND. & COM. L. REV. 577 (1975).

⁸ Pub. L. No. 87-794, 76 Stat. 872 (1962) (formerly codified at 19 U.S.C. §§ 1801-1991 (1970)).

⁹ The prerequisites resulted from the United States Tariff Commission's interpretation of the Trade Expansion Act of 1962. Pub. L. No. 87-794, 76 Stat. 872 (1962) (formerly codified at 19 U.S.C. §§ 1801-1991 (1970)). The United States Tariff Commission has been changed to the International Trade Commission. Trade Act of 1974, 19 U.S.C. § 2231 (1976).

¹⁰ Pub. L. No. 87-794, § 302(b), 76 Stat. 883 (1962) (formerly codified at 19 U.S.C. § 1901(b)(1970)). See UNITED STATES TARIFF COMMISSION, REPORT TO THE PRESIDENT ON NONRUBBER FOOTWEAR, INVESTIGATION NO. 359 (1971).

¹¹ Pub. L. No. 87-794, § 302, 76 Stat. 885 (1962) (formerly codified at 19 U.S.C. § 1902 (1970)).

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ment.”¹² Accordingly, the 1962 Act was anomalous in that the special expert Commission was given the authority to evaluate complex trade issues and reach detailed conclusions, yet it was denied the power to implement these findings and conclusions.¹³ Congress dealt with this anomaly when it realigned decision-making responsibility concerning trade policy and tried to improve the worsening competitive position of American domestic business by enacting the 1974 legislation.

Under the 1974 Act, upon receiving an affirmative determination from the ITC and a recommendation as to remedies, the President is required to make his decision within 60 days after receiving the ITC report.¹⁴ In determining whether to provide import relief and what method and amount of import relief to provide, the President must take into account in addition to such other considerations as he may deem relevant:

- (1) information and advice from the Secretary of Labor on the extent to which workers in the industry have applied for, are receiving, or are likely to receive adjustment assistance under part 2 of this subchapter or benefits from other manpower programs;
- (2) information and advice from the Secretary of Commerce on the extent to which firms in the industry have applied for, are receiving, or are likely to receive adjustment assistance under parts 3 and 4 of this subchapter;
- (3) the probable effectiveness of import relief as a means to promote adjustment, the efforts being made or to be implemented by the industry concerned to adjust to import competition, and other considerations relative to the position of the industry in the Nation's economy;
- (4) the effect of import relief on consumers (including the price and availability of the imported article and the like or directly competitive article produced in the United States) and on competition in the domestic markets for such articles;
- (5) the effect of import relief on the international economic interests of the United States;
- (6) the impact on United States industries and firms as a consequence of any possible modification of duties or other import restrictions which may result from international obligations with respect to compensation;
- (7) the geographic concentration of imported products marketed in the United States;
- (8) the extent to which the United States market is the focal point for exports of such article by reason of restraints on exports of such article to, or on imports of such article into, third country markets; and
- (9) the economic and social costs which would be incurred by taxpayers, communities, and workers, if import relief were or were not provided.¹⁵

¹² Whitney, *The Trade Act of 1974: Coping with Unequal Environmental Control Costs*, 16 B.C. IND. & COM. L. REV. 577, 599 (1975).

¹³ *Id.*

¹⁴ 19 U.S.C. § 2252(b)(1976).

¹⁵ *Id.* § 2252(c).

Clearly the requirement that the President take into consideration the above factors is an important difference from the 1962 legislation which, as previously noted, granted the chief executive complete discretion in accepting or rejecting a Tariff Commission recommendation.

If the President determines not to proclaim the import relief recommended by the ITC, he must report this decision to Congress, which has the power to override the President's determination and to effectuate the ITC's recommendation by a simple majority vote taken within 90 days of the President's report to Congress.¹⁶ The provision of the Act giving Congress the power to override the President is one of the clearest indications that the legislature intended that the President not be given absolute authority in an area requiring special expertise.¹⁷

In addition to being procedurally different from the 1962 Act, the 1974 legislation also includes important substantive changes. Unlike the 1962 Act, the Trade Act of 1974 does not require establishment of a causal link between increased imports and grant of trade agreement concessions.¹⁸ Furthermore, the 1974 Act relaxes the criteria regarding the extent to which imports must have contributed to the injury to an industry. Accordingly, the ITC need only find that increased imports are or threaten to become a "substantial cause" of serious injury,¹⁹ a term defined by the Act to mean a cause that is "not less than any other cause."²⁰

¹⁶ 19 U.S.C. § 2253(c)(1)(1976).

¹⁷ Other changes in the new law are important: the term of office of the Commissioners was extended from six to nine years and the chairman and vice-chairman are to be appointed on the basis of seniority rather than by presidential designation. *Id.* § 1330(b)(c). Compensation for each member of the Commission was increased and, more importantly, the budget of the Commission is to be approved directly by Congress rather than by the Office of Management and Budget. *Id.* § 2232. The 1974 Act also gave the Commission authority to hire its own attorneys and to represent itself in all judicial proceedings whereas previously the Commission was required to request the Justice Department for such assistance. S. REP. NO. 1298, 93d Cong., 2d Sess. 18 (1974). Furthermore, Congress has also ensured that it will be well-informed when making decisions:

The Act increases from two to five the number of congressional advisors to be appointed from each house to oversee international trade negotiations. The Senate Finance Committee and the House Ways and Means Committee are to nominate the advisors from among their own respective members, and the nominees are to be appointed by the President pro tempore of the Senate and the Speaker of the House. In addition, the Act requires that the Private Advisory Committee for Trade Negotiations, a committee chaired by the Special Trade Representative and composed of 45 representatives of government, labor, industry, agriculture, consumer interests and the general public, be given full access to all data concerning negotiating objectives and the progress of negotiations. The Act further requires that the committee issue formal advisory opinions to Congress indicating whether pending trade agreements would achieve equity and reciprocity.

Whitney, *The Trade Act of 1974: Coping with Unequal Environmental Control Costs*, 16 B.C. IND. & COM. L. REV. 577, 598-99 (1975) (footnotes omitted). For an extended discussion of the Trade Act of 1974 and its background see Whitney, *supra*.

¹⁸ 19 U.S.C. § 2251 (1976).

¹⁹ *Id.* § 2251(b)(1).

²⁰ *Id.* § 2251(b)(4). As to workers, the Secretary of Labor must find

(1) that a significant number or proportion of the workers in such worker's firm or an appropriate subdivision of the firm have become totally or partially separated, or are threatened to become totally or partially separated,

(2) that sales or production, or both, of such firm or subdivision have decreased absolutely, and

(3) that increases of imports or articles like or directly competitive with articles produced by such worker's firm or an appropriate subdivision thereof "con-

II. CASE STUDIES OF ITC DECISIONS

In order to understand why the 1974 Act has not lived up to expectations, it is necessary to analyze case studies of ITC decisions and the presidential and congressional responses. It will become clear that Presidents have ignored ITC recommendations without good reason and that the Congress has failed to assert itself by overruling executive decisions. After the case studies have been presented, reforms will be suggested which would compel the President to give ITC recommendations proper consideration and would conclusively realign the decision-making responsibility concerning American import policy.

A. *Presidential Disposition of ITC Recommendations for Import Relief*

1. Specialty Steel

The earliest ITC investigation which resulted in an affirmative determination and a recommendation of import relief dealt with stainless steel and alloy tool steel.²¹ This investigation was instituted on August 5, 1975 upon receipt of a petition filed on July 16, 1975 by the Tool and Stainless Steel Industry Committee for Import Relief and the United Steelworkers of America, AFL-CIO.²² The investigation was undertaken to determine whether certain items of steel were being imported into the United States in such increased quantities as to be a substantial cause or threat of serious injury to the domestic industry producing articles of steel like or directly competitive with the imported articles.²³

After a public hearing and the receipt of briefs submitted by interested parties, the Commission recommended quantitative limitations beginning with calendar year 1976 through calendar year 1980 for the specified classes of articles for which affirmative determinations were made.²⁴ The quantitative limit was fixed at the amount of the average annual imports for each of the specified classes of articles—adjusted upward to the nearest 100 short tons—for the calendar years 1970 to 1974 inclusive.²⁵

tributed importantly" to such total or partial separation, or threat thereof, and to such decline in sales or production.

Id. § 2272. For individual firms the Secretary of Commerce must make the same findings as those required for relief of worker injury. *Id.* § 2341(c). The term "contributed importantly" is defined as "a cause which is important, but not necessarily more important than any other cause." *Id.* §§ 2272, 2341(c).

²¹ UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-5 (January 16, 1976) [hereinafter cited as TA-201-5].

²² *Id.* at 1.

²³ Specifically the investigation concerned:

ingots, blooms, billets, slabs and sheet bars; bars; wire rods; and plates, sheets and strip, not cut, not pressed, and not stamped to nonrectangular shape; all the foregoing of stainless steel, alloy tool steel, or silicon electrical steel, provided for in items 608.18, 608.52, 608.76, 608.78, 608.85, 608.88, 609.06, 609.07 and 609.08 of the Tariff Schedules of the United States (TSUS), and as additionally subject to duty under items 607.01 through 607.04, inclusive of the TSUS.

Id. Subsequently, on October 3, 1975, the Commission, at the request of the petitioner and for other reasons, amended the scope of the investigation by deleting silicon electrical steel provided for in TSUS items 608.88 and 609.07. 40 Fed. Reg. 47,580 (1975).

²⁴ TA-201-5, *supra* note 21, at 4-5.

²⁵ *Id.* at 4-6.

President Ford did not follow the ITC's recommendations and announced his intention to negotiate orderly marketing agreements with key supplying countries during the ensuing 90 days. However, the President indicated that if satisfactory agreements were not negotiated successfully, he intended to proclaim import quotas at the overall level recommended by the ITC for a period of three years to take effect on June 14, 1976.²⁶

The President presented two grounds justifying this action. First, he concluded that the ITC's five year recommendation was "too inflexible in view of the rapid expansions and contractions of the specialty steel market. During a recession period, imports would not be sufficiently constrained to prevent a recurrence of the problems encountered [in 1975]."²⁷ Second, the President asserted that the ITC's remedy "[did] not take into account special factors affecting certain foreign supplying countries."²⁸

The President's failure to follow the ITC's recommendations was ill-advised. As to the President's first basis for rejecting the ITC recommendation, it is difficult to understand how imposition of what is effectively lesser import relief (three years stability instead of five), would provide more protection in case of recession. Moreover, should a recession occur, the quantitative limitations recommended by the ITC could be expeditiously adjusted on a unilateral basis to meet current conditions. If "flexibility" is critical, as the President suggested, then orderly marketing agreements would be less appropriate because changes in such agreements would involve further bilateral negotiations. Finally, the second so-called "basis" for departing from the ITC remedy amounted to little more than preemptory dismissal of the ITC recommendation since the President did not disclose the special factors affecting certain foreign supplying countries which should have been taken into consideration.

On June 11, 1976, after failing to negotiate satisfactory orderly marketing agreements, President Ford imposed quantitative restrictions on the importation of the subject specialty steel items.²⁹ Subsequently, on the basis of advice from the ITC and the Secretaries of Commerce and Labor, and without reciting any substantive reason to justify his decision, President Carter announced "that the exclusion of alloy tool steel provided for in item 923.25 [of the Tariff Schedules of the United States] from such quantitative restrictions is in the national interest."³⁰ The President made no pretense of considering the criteria he is required to take into account under the 1974 Act, and made a unilateral decision which should have been made by the administrative agency possessing expertise in the area. Unfortunately, Congress failed to intervene in the controversy concerning steel and did not override the President's action.

2. Footwear

Upon receipt of a petition filed August 20, 1975 by the American Footwear Industries Association, the Boot and Shoe Worker's Union, and the United Shoe Workers of America, the ITC instituted an investigation

²⁶ The President also directed the Secretary of Labor to expedite processing of applications for trade adjustment assistance. President's Message to Congress Under Section 203(b)(1) of the Trade Act of 1974, H.R. Doc. No. 409, 94th Cong., 2d Sess. (1976).

²⁷ *Id.*

²⁸ *Id.*

²⁹ Pres. Proclamation No. 4445, 3 C.F.R. 35, 35 (1976).

³⁰ Pres. Proclamation No. 4509, 42 Fed. Reg. 30,829, 30,829 (1977).

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of footwear on September 17, 1975.³¹ After a public hearing and the receipt of briefs submitted by interested parties, the Commission determined that certain items of footwear were being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry or certain industries producing articles like or directly competitive with the imported articles.³²

While the Commission was unanimous concerning the need for import relief, there was no majority as to what kind of relief should be recommended.³³ Three members recommended that there be imposed a new table of rates of duty structured to prevent or remedy the injury.³⁴ Two members recommended the imposition of a tariff-rate quota system for a five year period under which existing rates of duty would apply to footwear within the quotas and higher rates of duty would be imposed for imports in excess of quotas.³⁵ Finally, one member suggested that adjustment assistance to workers, firms, and communities could remedy the serious injury suffered by the domestic footwear industry.³⁶

On April 16, 1976, President Ford transmitted to Congress his decision to provide adjustment assistance to the footwear industry producing footwear covered by the affirmative determination of the ITC.³⁷ In this instance, the President made a series of findings which included those required by section 203(c) of the 1974 Act:

- (1) import restraints would result in higher consumer prices;
- (2) import restraints would expose other industrial and agricultural trade to compensatory import concessions or retaliation against exports which would be detrimental to United States jobs and exports;

³¹ UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-7, 1 (February 20, 1976). The investigation was undertaken to determine whether "footwear, provided for in items 700.05 through 700.85, inclusive (except items 700.51, 700.52, 700.53, and 700.60), of the Tariff Schedules of the United States," was being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article. *Id.*

³² *Id.* at 3.

³³ *Id.* at 4.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 6. See UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-6 (February 18, 1976) [Slide Fasteners and Parts Thereof], in which the ITC was equally divided and made no determination whether imports were causing serious injury or a threat thereof. See also UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-24 (July 25, 1977) [Cast Iron Stoves], in which the ITC was equally divided (2-2, with one member abstaining and one vacancy on the Commission). In this case the two members making an affirmative determination recommended that the President should suspend designation of the subject stoves from eligibility for duty-free treatment under the General System of Preferences. The President did not act. See also UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-4 (January 12, 1976) [Asparagus] in which the ITC was equally divided and made no determination. The three members who voted for affirmative determination in fact recommended imposition of quantitative limitations but the President did not act.

³⁷ President's Message to Congress Under Section 203(b)(1) of the Trade Act of 1974, H.R. DOC. NO. 458, 94th Cong., 2d Sess. (1976).

- (3) import relief would disproportionately benefit 21 larger firms producing 50 percent of domestic output while not helping small businesses;
- (4) adjustment assistance would be less inflationary than import relief;
- (5) domestic production of footwear was already rising significantly without import relief;
- (6) domestic employment was showing signs of recovery;
- (7) imports of the subject footwear had been levelling off; and
- (8) import relief under these circumstances would be contrary to the policy of promoting the development of an open, nondiscriminatory and fair world economic system.³⁸

Accordingly, the President directed the Secretaries of Commerce and Labor to expedite action on petitions for adjustment assistance and directed the Special Representative for Trade Negotiations to monitor the United States footwear trade in collaboration with the Bureau of Census on a monthly basis.³⁹

In the year following President Ford's decision, conditions in the footwear manufacturing industry deteriorated and the efficacy of adjustment assistance was so effectively challenged that President Carter directed the Departments of Commerce and Labor, together with the Special Trade representative, to work out a new and effective Federal Trade Adjustment Assistance Program.⁴⁰

On October 5, 1976, the ITC, in response to a Senate Finance Committee resolution directing it to conduct another investigation of footwear, agreed that there was "good cause" within the meaning of the 1974 Act⁴¹ to reinvestigate the footwear industry within one year of reporting to the President on the results of a like investigation.⁴² After hearings, briefs and argument from all interested parties, the ITC unanimously reached an affirmative determination that the subject footwear was being imported into the United States in such increased quantities as to be a substantial cause of serious injury to domestic producers.⁴³

A majority of four Commission members agreed that to prevent or remedy the injury found to exist, it was necessary to impose a tariff-rate quota system on the subject footwear for the ensuing five year period.⁴⁴

³⁸ *Id.* See text at note 15 *supra* for the requirements of § 203(c) of the 1974 Act, 19 U.S.C. § 2252(c) (1976).

³⁹ President's Message to Congress under Section 203(b)(1) of the Trade Act of 1974, H.R. Doc. No. 458, 94th Cong., 2d Sess. (1976). See also Memorandum for Special Representative for Trade Negotiations, 3 C.F.R. 173 (1976).

⁴⁰ 13 WEEKLY COMP. OF PRES. DOC. 882, 883 (June 14, 1977).

⁴¹ 19 U.S.C. § 2251(e) (1976) provides:

Except for good cause determined by the Commission to exist, no investigation for the purposes of this section shall be made with respect to the same subject matter as a previous investigation under this section, unless 1 year has elapsed since the Commission made its report to the President of the results of such previous investigation.

⁴² UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-18, 1 (February 8, 1977) [hereinafter cited as TA-201-18].

⁴³ *Id.* at 4.

⁴⁴ *Id.*

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Under this system, the existing rates of duty would apply to footwear within the quotas which were established and allocated to countries on the basis of historic market participation.⁴⁵ Shipments in excess of this quota would be charged higher rates of duty.

Rejecting the ITC recommendation, President Carter announced his intention to negotiate orderly marketing agreements,⁴⁶ and on June 22, 1977 announced the signing of agreements with the Republic of China (Taiwan) and the Republic of Korea.⁴⁷ These agreements, effective June 28, 1977, permitted imports from these countries at a level of the "average annual quantity or value of such articles imported into the United States from the Republic of Korea, and from the Republic of China, in the 1974-76 period"⁴⁸ The President also delegated to the Special Representative for Trade Negotiations his authority under section 203(e) of the 1974 Act to negotiate orderly marketing agreements with other foreign suppliers after import relief was into effect against those countries which had not entered into an orderly marketing agreement.⁴⁹ The Special Representative was given the power to terminate any agreement in the event that the restraint levels specified in the agreements were exceeded, or in the event that imports from countries not parties to such agreements increased and disrupted the effectiveness of the agreements. In addition, if imports increased from other non-agreement countries and disrupted the agreements, the Special Representative, after initiating consultations with the disrupting country, could "prevent further entry of such articles for the remainder of that restraint period or may otherwise moderate or restrict imports of such articles from such countries pursuant to section 203(g)(2) of the Trade Act" after consultation with representatives of the member agencies of the Trade Policy Staff Committee.⁵⁰ As was the case with the steel investigation, the intent of the 1974 Act was frustrated since the recommendations of the ITC were ignored and decisions were instead made by the President and his staff.

⁴⁵ *Id.* at 5.

⁴⁶ Pres. Proclamation No. 4510, 42 Fed. Reg. 32,430, 32,430 (1977).

⁴⁷ *Id.* at 32,432. The "Big Five" of foreign producers exporting footwear to the United States are:

<i>Country</i>	<i>Quota Quantity (1,000 pairs)</i>
Republic of China (Taiwan)	88,284
Italy	62,603
Spain	35,033
Brazil	21,324
Republic of Korea	9,202

TA-201-18, *supra* note 42, at 5.

⁴⁸ Pres. Proclamation No. 4510, 42 Fed. Reg. 32,429, 32,431-32 (1977).

⁴⁹ *Id.*

⁵⁰ *Id.* Section 203(g)(2) of the 1974 Act provides that the President may "prescribe regulations governing the entry or withdrawal from warehouses of articles covered by such [orderly marketing] agreements." 19 U.S.C. § 2253(g)(2) (1976). Section 203(e)(1) requires import relief to be proclaimed and take effect 90 days after a presidential determination to negotiate orderly marketing agreements. *Id.* § 2253(e)(1). Thus, as to those countries not negotiating such agreements, the ITC tariff rate quotas would apply. Such countries can continue to export to the United States products in excess of the quotas despite incurring the higher tariff rate for the amount imported that exceeds their quota.

3. Flatware

This was another proceeding in which the ITC made an affirmative determination but could not muster a majority agreement as to what kind of import relief was appropriate.⁵¹ Three members recommended tariff-rate quota restrictions imposing higher tariffs on imports exceeding specified quotas, two members recommended trade adjustment assistance, and one member recommended continuation of existing tariff quotas but without country-by-country quota allocations.⁵²

President Ford decided to provide adjustment assistance to the United States stainless steel table flatware industry producing flatware covered by the affirmative determination of the ITC. He rejected import relief and recited in substantially abbreviated form the factors on which he had relied in the footwear investigation, that is, higher prices to consumers, inflationary impact, exposure of other United States industry and agriculture to retaliation, resulting adverse impacts on jobs, undue benefit to large manufacturers and negligible help to small enterprises, and what became the standard closing invocation—the United States policy of promoting the development of an open, nondiscriminatory and fair world economic system.⁵³ The reasons given by the President are as faulty as they were concerning footwear investigation, and American trade policy would have been better served had it been formulated by the experts working with the ITC.

4. Shrimp

The ITC instituted an investigation of shrimp on December 11, 1975, following receipt of a petition filed on November 17, 1975 by the National Shrimp Congress, to determine whether items of shrimp, fresh, chilled, frozen, prepared, or preserved (including pastes and sauces) were being imported into the United States in such increased quantities as to be a substantial cause or threat of serious injury to the shrimp industry of the United States.⁵⁴ This proceeding provided a further variation of possible Commission alignments. Two members determined that the shrimp in question was being imported into the United States in such increased quantities as to be a substantial cause of serious injury to the domestic industry; two members made a negative determination; one abstained; and one determined affirmatively as to the shrimp-fishing industry but determined negatively as to the shrimp-processing industry.⁵⁵ Thus, there was a majority—3 of the 5 members participating—for an affirmative determination as to the shrimp-fishing industry.

The majority recommended adjustment assistance under Chapters 2, 3, and 4 of Title II of the 1974 Act.⁵⁶ On May 17, 1977, in an unpublished directive, President Carter authorized the submission and processing of petitions for adjustment by the shrimp-fishing industry. As should be becoming clear from this case study analysis, the President's acceptance of the

⁵¹ UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-8, 1 (March 1, 1976).

⁵² *Id.* at 5-6.

⁵³ Pres. Proclamation No. 4436, 3 C.F.R. 26, 26-27 (1976).

⁵⁴ UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-12, 1 (May 21, 1976). Specifically the investigation concerned item 144.45 of the Tariff Schedules of the United States. *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 2. Chapters 2, 3 and 4 of Title II are codified as 19 U.S.C. §§ 2271-2374 (1976). See note 5 *supra*.

ITC recommendations without change is the exception rather than the rule.

5. Mushrooms

The ITC, pursuant to a petition filed by the Mushroom Canners Committee of the Pennsylvania Food Processors Association and the Mushroom Processors Tariff Committee on September 17, 1975, instituted an investigation concerning items of mushrooms.⁵⁷ After hearings, briefs, and arguments the Commission by a three to two vote with one absention made an affirmative determination and recommended adjustment assistance.⁵⁸

Despite the adjustment assistance recommended by the Commission, the Special Representative for Trade Negotiations pursuant to the direction of the President, requested the ITC in a letter to institute an expedited investigation of mushrooms under section 201(b)(1) of the 1974 Act.⁵⁹ The ITC determined that good cause existed for a reinvestigation within one year of the earlier report on mushrooms, and accordingly instituted the requested investigation on October 5, 1976.⁶⁰ The ITC held further hearings, received arguments and briefs from interested parties, and this time, by a vote of four to one with one abstention, again made an affirmative determination. A majority of three commissioners recommended that to prevent the injury it was necessary to impose a tariff-rate-quota system for a five year period for the subject mushrooms with existing rates of duty applying to imports within the designated tariff quotas and higher rates for imports in excess of quotas fixed on a country-by-country basis.⁶¹ Two members voted for adjustment assistance and one abstained.⁶²

On March 10, 1977, President Carter transmitted to Congress his decision not to impose the recommended import relief.⁶³ Apart from the now standard recital about price impact on consumers and potential retaliation, the proclamation cited recent unspecified "improvements" in the mushroom industry, the fact that only 100 jobs were at stake, the existence of voluntary export restraints by the two leading foreign suppliers (the Republics of China and Korea), and a determination to continue to monitor both the conditions in the industry and the availability of "consultations" with any foreign government that becomes a "disruptive factor" in the United States market.⁶⁴ Here again, the expertise of the ITC was ignored by the President who despite the changes in the 1974 legislation, was still able unilaterally to change import policy.

⁵⁷ UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-10, 1 (March 17, 1976). Specifically the investigation concerned item 144.20 of the Tariff Schedules of the United States. *Id.*

⁵⁸ *Id.* at 2. Curiously, two of the three members comprising the majority making the affirmative determination were joined by one member voting for a negative determination to constitute a majority of three favoring adjustment assistance. The other member comprising the original majority of three voting for an affirmative determination opted for a five year program of tariff-rate quotas. *Id.*

⁵⁹ UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-17, 1 (January 10, 1977) [hereinafter cited as TA-201-17].

⁶⁰ *Id.*

⁶¹ *Id.* at 3. Again, the member voting for negative determination joined the majority as to the recommendation of import relief. See note 58 *supra*.

⁶² TA-201-17, *supra* note 59, at 4.

⁶³ President's Message to Congress Under Section 203(b)(1) of Trade Act of 1974, H.R. Doc. No. 96, 95th Cong., 1st Sess. (1976).

⁶⁴ *Id.*

6. Honey

The ITC, as a result of a petition filed December 29, 1975 by the American Honey Producers Association, instituted an investigation on January 29, 1976 concerning honey.⁶⁵ Four public hearings were held in various parts of the United States and the case was briefed and argued. The ITC, by a vote of three to two, one member abstaining, made an affirmative determination that imports were a substantial cause or a threat of serious injury to the domestic honey industry.⁶⁶ The majority recommended that "whenever, in calendar year 1976, or in any of the four ensuing calendar years, the aggregate quantity of imports of honey, as provided for in item 155.70 of the Tariff Schedules of the United States, exceeds a tariff-rate quota of 30 million pounds, honey imported during the remainder of such calendar year shall be subject to rates of duty" which are additional to existing duties and are specified in an ensuing table which imposes an ad valorem schedule of duties.⁶⁷

On August 28, 1976, President Ford announced his intention to deny the recommended import relief and to provide adjustment assistance if the honey industry qualified.⁶⁸ In addition to the formulary recital of factors considered—higher consumer prices, inflation, possible trade retaliation, and the policy of development of an "open and fair world economic system"—the proclamation set forth two paragraphs of detailed economic data which purported to contradict the validity of the ITC's determination that imports were a substantial cause or a threat of serious injury to the commercial honey producers.⁶⁹ This was the first of the affirmative determination cases in which the presidential proclamation undertook more than formulary recital of findings or summary statement of conclusions.

Subsequently, on October 1, 1976, Senator Humphrey on behalf of himself and Senators Bentson, McGovern and Nelson submitted Senate Concurrent Resolution 210.⁷⁰ The proposed resolution, which was referred to the Committee on Finance, expressed disapproval of "the determination of the President under section 203 of the Trade Act of 1974 transmitted to the Congress on August 28, 1976."⁷¹ Senator Humphrey advanced detailed economic arguments in support of the resolution.⁷² However, on February 22, 1977, the Committee on Finance voted to report negatively on the resolution⁷³ and on March 10, 1977 voted to postpone further consideration of the matter indefinitely.⁷⁴ The House Ways and Means Committee likewise refused to override the President.⁷⁵

⁶⁵ UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-14, 1 (June 29, 1976) [hereinafter cited as TA-201-14]. Specifically the investigation concerned item 155.70 of the Tariff Schedules of the United States. *Id.* at 1.

⁶⁶ *Id.* at 3.

⁶⁷ *Id.* at 3-4.

⁶⁸ Memorandum for the Special Representative for Trade Negotiations, 3 C.F.R. 189, 189 (1976).

⁶⁹ *Id.* at 189-90.

⁷⁰ S. CON. RES. NO. 210, 94th Cong., 2d Sess., 122 CONG. REC. S17,871 (daily ed. Oct. 1, 1976).

⁷¹ *Id.*

⁷² *Id.* at S17,872.

⁷³ Minutes of Senate Finance Committee, February 22, 1977.

⁷⁴ *Id.*, March 10, 1977.

⁷⁵ *Import Relief to the Domestic Honey Industry: Hearings on H. Con. Res. 80 Before the Sub-Com. on Trade of the House Comm. on Ways and Means*, 95th Cong., 1st Sess. (1977). See also H.R. REP. NO. 95-25, 95th Cong., 1st Sess. (1977).

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The Congress' refusal to challenge the President's decision in the honey case is further evidence that the 1974 Act is not accomplishing its objectives. In most situations, there has been no serious effort to muster enough votes to override and, in this case where a serious effort was made by prominent senators, the effort failed. Unfortunately, the draftsmen of the 1974 Act were probably overly optimistic in expecting Congress to serve as an effective check on Presidential authority in the field of trade policy.

7. Sugar

On the basis of an investigation instituted on September 21, 1976 as the result of a resolution of the Committee on Finance of the United States Senate, the ITC determined that items of sugars, sirups, and molasses, derived from sugar cane or sugar beets were being imported in such increased quantities as to be a substantial threat of serious injury to the domestic industry.⁷⁶ Three members recommended a quantitative restriction of 4.275 million short tons for calendar year 1977 through calendar year 1981, to be allocated among supplying countries on a basis to be determined by the President as equitable; two members recommended a quota of 4.4 million short tons per year through 1979, to be allocated by auctioning non-transferable import licenses; and one member recommended a quota of 4.4 million short tons per year through 1981, to be allocated on the basis of a specified table of entitlement.⁷⁷

On May 4, 1977, President Carter announced his determination that import relief for the sugar industry was not in the national economic interest.⁷⁸ Apart from the ritual recital of undocumented ultimate "findings," the only additional reason given for the decision was that import relief might jeopardize the success of pending negotiations for an International Sugar Agreement.⁷⁹ This statement ignores the fact that the United States operated under a quota system for 30 years (1934-1974) which adequately protected domestic producers without jeopardizing the various international agreements negotiated during that period.⁸⁰ The efficacy of the "jeopardy" argument is further weakened by the President's subsequent

⁷⁶ UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-16, 1 (March 17, 1977). The ITC instituted the investigation to determine whether sugar beets and sugar cane; sugars, sirups, and molasses, derived from sugar cane or sugar beets; and sugars, sirups, and molasses, described in subpart of A of part 10 of schedule 1 of the Tariff Schedules of the United States (TSUS), flavored; and sirups, flavored or unflavored, consisting of blends of any of the products described in aforementioned subpart A; all the foregoing provided for in items 155.10 through 155.31, inclusive, and item 155.75 of the TSUS, [were] being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.

Id.

On the basis of its investigation the ITC determined that "sugars, sirups, and molasses, derived from sugar cane or sugar beets, provided for in items 155.20 and 155.30 of the TSUS were being imported in such increased quantities as to be a substantial threat of serious injury to the domestic industry." *Id.* at 3 (emphasis added). As to the other items encompassed on the investigation, the ITC either made no determination, or a negative determination.

⁷⁷ *Id.* at 5-7.

⁷⁸ 13 WEEKLY COMP. OF PRES. DOC. 658, 658 (May 4, 1977).

⁷⁹ *Id.*

⁸⁰ See 14 WEEKLY COMP. OF PRES. DOC. 219, 219 (Jan. 25, 1978).

imposition of a tariff rate increase and imposition of import fees during the pendency of these negotiations.⁸¹ Certainly this decision will have no less an impact on negotiations than would have a May 1977 decision to institute import relief. In lieu of import relief, the President directed the Secretary of Agriculture to institute an income support program for sugar producers to be effective with the 1977 crop, whereby supplemental payments of a maximum of two cents per pound would be paid whenever the market price falls below thirteen and one half cents per pound.⁸²

On September 29, 1977, Congress enacted legislation providing what it considered more effective price support to domestic sugar producers.⁸³ Neither the presidential nor congressional price support program was effective and on November 12, 1977 President Carter announced that the Secretary of Agriculture had advised him that the sugar items in question "are being, or are practically certain to be, imported into the United States under such conditions and in such quantities as to render or tend to render ineffective, or to materially interfere with, the price support operations now being conducted by the Department of Agriculture."⁸⁴ Accordingly, the President ordered both an increase in the rate of tariff and an import fee, "without awaiting the recommendations of the United States International Trade Commission with respect to such action."⁸⁵ Thereafter, on January 20, 1978, the President announced that the Secretary of Agriculture had once again advised him that sugar was still being imported in such quantities as to endanger the price support program.⁸⁶ Accordingly, the President ordered an increase in the import fees on sugar.⁸⁷

Finally, on January 25, 1978, the President announced the signing of an International Sugar Agreement which will undertake to stabilize world prices between 11 and 21 cents per pound by a world wide system of export quotas.⁸⁸ The President noted, "[o]nce in full operation, it should eliminate the need for the tariff and fee measures recently imposed to defend our domestic price support program."⁸⁹

8. Television

The ITC, as a result of a petition filed on September 22, 1976 by eleven labor unions and five manufacturers, instituted an investigation on October 21, 1976 to determine whether "items of television receivers, color and monochrome, assembled or not assembled, finished or not finished, and subassemblies thereof" were being imported in such increased quantities as to be a substantial cause or threat of serious injury.⁹⁰ Three commissioners determined affirmatively as to all of the television items in ques-

⁸¹ 13 WEEKLY COMP. OF PRES. DOC. 1773, 1773 (Nov. 11, 1977).

⁸² 13 WEEKLY COMP. OF PRES. DOC. 658, 658 (May 4, 1977).

⁸³ The Food and Agriculture Act of 1977, Pub. L. No. 95-113, 91 Stat. 913 (1977).

⁸⁴ Pres. Proclamation No. 4538, 42 Fed. Reg. 59,037, 59,037 (1977).

⁸⁵ *Id.* This increase is additional to a tariff rate increase imposed by Pres. Proclamation No. 4334, 3 C.F.R. 420 (1974). The President also directed the ITC to institute a further investigation. Pres. Proclamation No. 4538, 42 Fed. Reg. 59,037, 59,037 (1977).

⁸⁶ Pres. Proclamation No. 4539, 42 Fed. Reg. 59,039, 59,039 (1977).

⁸⁷ 14 WEEKLY COMP. OF PRES. DOC. 219, 219 (Jan. 25, 1978).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-19, 1 (March 22, 1977). Specifically the investigation concerned item 685.20 of the Tariff Schedules of the United States. *Id.* at 1.

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tion that substantial injury was resulting; two commissioners determined affirmatively that color television, complete and incomplete, was threatened with serious injury; and one member determined affirmatively that color television receivers, assembled or not assembled, finished or not finished, were being imported in such quantities as to be a substantial cause of serious injury to the domestic industry.⁹¹

The aforementioned three member bloc recommended imposition of additional rates of duty over the existing rate of duty for the next five years at the level of twenty percent the first two years, fifteen percent for the next two ensuing years, and ten percent the fifth year; the aforementioned two member bloc recommended identical relief but confined it to color television receivers, complete or incomplete; the aforementioned single member recommended imposition of a quantitative restriction of 1,272,000 units per annum on a global basis, with quarterly limitations, to be increased at the rate of five percent per year for each year in which the quota is in effect.⁹²

On June 24, 1977, President Carter announced that as to monochrome television he interpreted the ITC as being evenly divided and he opted "to accept the determination of those commissioners making no determination of injury to the monochrome television receiver industry as the determination of the Commission and to accept the determination of those commissioners finding serious injury to that portion of the industry producing subassemblies of color television receivers as the determination of the Commission."⁹³ However, the President rejected the recommended import relief and determined "to remedy the serious injury found to exist by the USITC through the negotiation of an orderly marketing agreement with Japan, the major supplier of color television receivers to the U.S. Market."⁹⁴ An orderly marketing agreement was concluded with Japan on May 20, 1977 restricting imports for a period of three years beginning July 1, 1977 to 1.75 million units in each annual restraint period.⁹⁵

9. Iron Blue Pigments

The ITC, as a result of a petition filed on October 2, 1975 by American Cyanamid Co., instituted an investigation on October 30 concerning the importation of ferrocyanide and ferrocyanide blue pigments.⁹⁶ On the basis of its investigation, three members of the ITC determined that increased imports were a threat of serious injury, two members found increased imports to be a substantial cause of serious injury and one member made a negative determination.⁹⁷ The five members reaching an affirmative determination recommended increased rates of tariff above existing rates for a five year period.⁹⁸

⁹¹ *Id.* at 3.

⁹² *Id.* at 4-5.

⁹³ Pres. Proclamation No. 4511, 42 Fed. Reg. 32,747, 32,748 (1977).

⁹⁴ *Id.*

⁹⁵ *Id.* at 32,748-49.

⁹⁶ UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-11, 1 (April 2, 1976). Specifically the investigation concerned item 473.28 of the Tariff Schedules of the United States. *Id.*

⁹⁷ *Id.* at 3.

⁹⁸ *Id.*

On May 31, 1976, President Ford announced that he had determined that the relief recommended by the ITC was not in the national interest.⁹⁹ One of the principal reasons for this decision, apart from the undocumented recitation of ultimate conclusions, was that "[t]he great bulk of domestic iron blue pigments production is accounted for by two large multi-product firms whose *overall* operations in recent years showed growing profits except in the 1975 recession With the resources available to such large producers, they should be able to finance any investment necessary to improve their competitive position vis-a-vis imports without tariff relief."¹⁰⁰ The President did provide for applications for adjustment assistance if necessary due to unemployment.¹⁰¹ Thus, the adverse impacts of foreign trade were to be jointly absorbed by industry and the American taxpayer. Once again it becomes clear that the 1974 Act accomplished little towards improving American trade policy and changing the allocation of decision-making responsibility.

10. Pending Cases

There are three ITC reports awaiting presidential action as of February 15, 1978.¹⁰² In each investigation the ITC has made an affirmative determination and in two of the three cases has mustered a majority of members in agreement as to the appropriate import relief.

B. *Need for Further Reform*

As can be seen by an analysis of the decided investigations, the Trade Act of 1974 unfortunately has not been very effective and there is need for further reform. Presidents have largely ignored ITC recommendations and have failed to explain and document their findings. Furthermore, the Congress has failed to exert a significant influence on United States import policy since the enactment of the 1974 Act.

Of the nine investigations completed since the enactment of the 1974 Act in which the ITC has made affirmative determinations and mustered a majority agreement on what import relief should be implemented, in only three cases, specialty steel, shrimp and footwear, did the President ultimately adopt the import relief recommended by the ITC. In two of the three cases, the presidential adoption was only part of the relief the ITC recommended. In the case of specialty steel, the President imposed quantitative restrictions only after he had failed to negotiate orderly marketing agreements, and since imposing the restrictions he has whittled away at the scope of the protection. In the footwear case, the President succeeded in

⁹⁹ Presidential Memorandum, 3 C.F.R. 181, 181 (1976).

¹⁰⁰ *Id.* (emphasis added).

¹⁰¹ *Id.*

¹⁰² The three cases are UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-28 (December 1, 1978) [High Carbon Ferrochromium], in which a majority made an affirmative determination and proposed additional rates of duty as the remedy; UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-27 (December 12, 1978) [Bolts, Nuts and Large Screws of Iron or Steel], in which a majority made an affirmative determination and proposed increased rates of duty as the remedy; and UNITED STATES INTERNATIONAL TRADE COMMISSION, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-29 (February 2, 1978) [Citizens Band (CB) Radio Transceivers], in which a majority made an affirmative determination but divided (3-3) as to what import relief should be adopted.

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negotiating orderly marketing agreements with two of the "Big Five" competitors. In the case of shrimp, the President and the ITC agreed that adjustment assistance was appropriate.

The case of sugar is unique. After originally rejecting quantitative restrictions recommended by the ITC, the President instead proposed adjustment assistance in the form of price supports. When price supports proved inadequate, the President was compelled to increase the tariff and to impose import fees. Thus, having initially rejected the sugar quotas recommended by the ITC, current presidential policy appears to rely on a system of world quotas bolstered by the congressional price support program authorized by the Food and Agriculture Act of 1977.¹⁰³

In the remaining six cases, the President has successfully ignored the ITC recommendations for import relief despite the provisions for accountability to Congress contained in the 1974 Act. In only one of these six cases, the honey investigation,¹⁰⁴ did the Congress sustain the President's position.¹⁰⁵

Equally disturbing is the *manner* in which the President has overridden the ITC. The proclamations announcing overrides contain mostly ritual recitals of the findings required by the 1974 Act with virtually no supporting documentation. In many instances the proclamations do not contain a complete recital of the required ultimate findings. In contrast, the ITC reports are extensively documented by evidence adduced at public hearings and informed by the filing of adversary briefs and argument. The ITC members are supported by an expert technical staff and by an accumulated expertise in dealing with the *substantive* aspects of trade disputes. The ITC reports are also supported by field work and interviews conducted by its staff, by information from other relevant federal agencies and by information obtained by systematic questionnaires. It is also important to note that in only one case, the honey investigation, has Congress even undertaken a resolution to override the President.¹⁰⁶ Given the overwhelming workload of the Congress, it is not remarkable that it has not exercised its override powers more frequently. The President's rejection of most ITC recommendations and Congress' inability to exert influence concerning trade policy strongly indicate the need for further reform if the objective of liberalized and effective import relief is to be realized. To this end, Congress should amend the 1974 Act to make the decision of the ITC granting import relief final *unless* the President assumes the burden of proof before the Congressional Oversight Committee¹⁰⁷ that another course of action should be adopted. This arrangement would offer several significant advantages. First, it would compel the President when he differs with the ITC to document his disagreement with probative, substantive evidence. Under the present system, the ITC produces a detailed factual exposition to support its determination and recommendations. Yet, the President has overruled these considered decisions in summary fashion supported in most cases only by formulary recitals of findings. Under the proposed system,

¹⁰³ Pub. L. No. 95-113, 91 Stat. 913 (1977).

¹⁰⁴ TA-201-14, *supra* note 65.

¹⁰⁵ H.R. REP. NO. 25, 95 Cong., 1st Sess. (1977).

¹⁰⁶ S. CON. RES. NO. 210, 94th Cong., 2d Sess., 122 CONG. REC. S17,871 (daily ed. Oct. 1, 1976).

¹⁰⁷ See note 17 *supra*.

when differences arise between the ITC and the President, the differences would be resolved on the basis of fully documented presentations from both the President and the ITC. Inescapably, the quality of analysis, both at the ITC and in the White House, would benefit from this proposed change in legislation.

The second major advantage of this proposal would be the elimination of the President's reliance on undisclosed foreign policy and political considerations which motivate the President in the discharge of his trade responsibilities. If the President were required to adduce and document persuasive, substantive reasons for his proposed override of an ITC decision, this would assure that the presidential position prevails only on the merits and not because of undisclosed political or foreign policy objectives that are not legally germane to trade policy decision-making.

A third advantage would be that this system would "de-politicize" the present process. When an industry receives an ITC recommendation for import relief and the President overrides the recommendation, the only recourse the industry currently has is to organize, if possible, political pressure, usually in the Congress. Normally the larger and more affluent industries are able to lobby effectively in Congress, and smaller, more vulnerable industries are less able to exert the pressure necessary to redress the situation.

Another, and perhaps more speculative, advantage would be that such a system, by requiring detailed substantive reasons, would probably reduce the number of attempted Presidential overrides and thereby reduce the workload of the Joint Congressional Oversight group.

CONCLUSION

The innovations in the 1974 Act which sought to liberalize access to import relief, to strengthen the ITC's independence, and to make the President more accountable by an increased congressional oversight of his disposition of ITC recommendations were inspired by the perception that the United States position in world trade was seriously deteriorating. After World War II, the United States premised its trade and monetary policies upon the assumption that it could sustain a balance of trade surplus. By 1966 this was no longer the case.¹⁰⁸ Moreover, during the decade of the 1960's United States worker productivity—output per man-hour for manufacturing employees—was declining, domestic prices and wages were increasing steeply, and by 1970 the effective rate of exchange of the United States dollar had declined.

In the period since enactment of the 1974 Act, the foregoing situation has worsened, chiefly as a result of the steeply increased cost of energy due to OPEC price increases, but also due to some extent to increased prices for basic commodities from "Third World" countries. Continued unacceptable levels of

¹⁰⁸ Until the 1974 Act, import statistics were collected and reported on a free on board (f.o.b.) basis which, because it excludes the cost of freight and insurance, produces an understatement of total costs actually incurred. Since the 1974 Act, import statistics must be reported on a cost, insurance and freight (c.i.f.) basis, bringing United States practice into harmony with the practice of most other industrialized nations and the International Monetary Fund. Thus, during the entire decade of the 1960s there *appeared* to be a surplus on the f.o.b. basis, whereas since 1966 there has *in fact* been a deficit. Moreover, United States export statistics have been further overstated because of the inclusion of exports that are more in the nature of aid rather than trade.

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inflation and unemployment aggravate the problem. Additionally, Congress has become increasingly concerned with the enormous cost of compliance with United States environmental laws and regulations,¹⁰⁹ and with the effect of this on the ability of United States producers to compete effectively with foreign producers.¹¹⁰

It is probable, therefore, that given these worsened conditions, Congress would be all the more eager to assure that the counterforces it attempted to set in play in 1974 should be effectively implemented at this time. Simply compelling the President to assume the burden of proof whenever he opposed an ITC recommendation would be the simplest and most effective means of correcting the deficiency in the present trade decision-making procedure. The objectives of Congress in the 1974 Act would no longer be thwarted and the quality of the substantive analysis on which United States trade policy is based would inevitably be enhanced.

¹⁰⁹ Congress enacted provisions in the Tax Reform Act of 1976 which provide for a special environmental investment tax credit. Pub. L. No. 94-455, § 2112, 90 Stat. 1521 (1976). President Carter has recognized the need for *doubling* this environment investment tax credit. Proposed Tax Reform, Message from the President, 124 CONG. REC. 5236 (1978). See also Whitney, *Capital Formation Options to Finance Pollution Control*, 3 COLUM. J. ENVTL L. 42 (1976).

¹¹⁰ See Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 6, 86 Stat. 816 (1972).