Presidential Authority under Section 337, Section 301, and the Escape Clause: The Case for Less Discretion

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In the field of foreign affairs, the President of the United States historically has exercised broad discretion in dealing with international emergencies and formulating United States foreign policy. The source of the Executive's power to conduct foreign affairs is Article II of the U.S. Constitution. Article II vests executive power in the President, empowering him to make treaties with the concurrence of two-

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1. See L. Henkin, FOREIGN AFFAIRS AND THE CONSTITUTION 37 (1972); see, e.g., Dames & Moore v. Regan, 453 U.S. 654 (1981) (President Carter's power to nullify United States attachment of Iranian assets held proper as within his foreign affairs power and under broad grant of authority by Congress).
2. U.S. Const. art. II.
thirds of the Senate, to appoint ambassadors, and to serve as Commander-in-Chief of the Armed Forces.\textsuperscript{4} In \textit{United States v. Curtiss-Wright Export Co.},\textsuperscript{5} a unanimous Supreme Court acknowledged the "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations . . . ."\textsuperscript{6}

Although the Constitution may vest the President with "plenary and exclusive" power in foreign affairs,\textsuperscript{7} no such power exists in international trade. The Commerce Clause of the Constitution explicitly vests the exclusive power to regulate foreign trade in Congress, not the President.\textsuperscript{8} Congress has from time to time delegated discretionary powers to the President as part of a larger legislative scheme regulating international trade. The congressional delegation of foreign trade power to the President, though frequently sweeping in scope,\textsuperscript{9} is subject to the "intelligible principle" test.\textsuperscript{10} This test obligates Congress to specify "an intelligible principle to which the [President] is directed

\begin{itemize}
  \item \textsuperscript{4} U.S. \textit{Const.} art. II, \textsection 2.
  \item \textsuperscript{5} 299 U.S. 304 (1936) (President's power to prohibit arms sales to foreign countries upheld as within his foreign affairs powers).
  \item \textsuperscript{6} \textit{Id.} at 320.
  \item \textsuperscript{7} \textit{Id.} But see Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 n.2 (1952) (Jackson, J., concurring) (The President may act in external affairs without congressional authorization, but he may not act contrary to an act of Congress). For a strong criticism of Justice Sutherland's theory of broad presidential power in the \textit{Curtiss-Wright}, see Berger, \textit{The Presidential Monopoly of Foreign Relations}, 71 \textit{Mich. L. Rev.} 1, 26-28 (1972); Levi- tan, \textit{The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory}, 55 \textit{Yale L.J.} 467 (1946).
  \item \textsuperscript{8} U.S. \textit{Const.} art. I, \textsection 8, cls. 1, 3. See United States v. Yoshida Int'l, Inc., 526 F.2d 560, 571 (C.C.P.A. 1975); R. \textit{Nowak}, R. \textit{Rotunda} & J. \textit{Young}, \textit{Constitutional Law} 140 (1983) ("The Court has always recognized a plenary power in Congress to deal with matters touching upon . . . foreign trade.") Notwithstanding this textual commitment of the foreign trade power to Congress, "[i]t is impossible to extricate the question of distribution of powers over foreign economic affairs from the general problem of distribution of powers over foreign affairs in United States governmental and constitutional practice." J. \textit{Jackson} & W. \textit{Davey}, \textit{Legal Problems of International Economic Relations} 77 (1986). In the area of international economic affairs, Congress holds the trump card of implementing legislation. Although the Executive Branch may enter into negotiations with foreign trading partners without congressional authorization, Congress may check the President's action by refusing to enact enabling and funding legislation. \textit{Id.} at 78. For a discussion of the exclusive nature of Congress's power to regulate foreign commerce, see United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), \textit{aff'd on other grounds}, 348 U.S. 296 (1955). The Fourth Circuit noted: [W]hile the President has certain inherent powers under the Constitution . . . , the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress.
  \item \textsuperscript{9} 204 F.2d at 659.
  \item \textsuperscript{10} See \textit{infra} notes 13-16.
  \item \textsuperscript{11} See Hampton & Co. v. United States, 276 U.S. 394, 409 (1928) (Congressional delegation of power to the President is not unconstitutional when accompanied by criteria directing the manner in which the delegated authority is to be exercised).
\end{itemize}
to conform.” Failure by Congress to provide an “intelligible principle” to guide presidential discretion is an unconstitutional delegation of legislative power to the President.

The focus of this Article is on the legislative wisdom of Congress in delegating discretionary authority to the President in the international trade field. This Article examines three international trade statutes where Congress has delegated trade power to the President: section 337 of the Tariff Act of 1930; section 301 of the Trade Act of 1974; and section 201 of the Trade Act of 1974, commonly known as “the escape clause.” After an overview of these statutes and Presidential authority under them, the Article examines the practical application of these statutes and critiques the Congressional delegation of authority to the President. The Article concludes that Congress’s desire for administrative flexibility has undermined the fundamental goal of protecting United States domestic industries from unfair and damaging foreign competition. In addition to the loss of credibility, the statute’s failure to adequately address trade problems has also resulted in a great deal of disenchanted and cynicism within the United States exporting, manufacturing, and production sectors. In the interests of ensuring predictability of results, the Article proposes


amendments to the statute that would eliminate most, if not all, of the President’s discretionary authority.

II. LEGISLATIVE BACKGROUND

A. SECTION 337 UNFAIR IMPORT PRACTICES

In the arsenal of laws available to United States manufacturers to protect them from the ravages of foreign imports, one of the most potent is section 337 of the Tariff Act of 1930. Section 337(a) of the Tariff Act of 1930 makes unlawful:

Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale . . . , the effect or tendency of which is to destroy or substantially injure an industry, efficiently and economically operated, in the United States, or to prevent the establishment of such an industry . . . .

The law directs the International Trade Commission (ITC) to conduct investigations involving alleged unfair import practices and
authorizes the ITC to exclude offending articles from the United States. Although a section 337 violation typically involves an imported article that infringes the rights of a United States patent holder, complaints lodged with the ITC have also alleged trademark infringement, false designation of goods, the passing off of goods, and the misappropriation of trade secrets.

There are two elements of a section 337 violation. The petitioner must prove the existence of (1) unfair methods of competition or unfair acts that (2) tend to injure or destroy a domestic industry. Section 337 remedies include temporary exclusion orders, permanent exclusion orders, and cease and desist orders.

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21. If a violation is found to exist, the Commission is authorized to exclude offending articles from entry into the United States under section 337(d) of the Tariff Act of 1930, 19 U.S.C. § 1337(d) (1982 & Supp. III 1985), as well as issue cease and desist orders under section 337(f). Id. § 1337(f).

22. See Massachusetts Inst. of Technology v. AB Fortia, 774 F.2d 1104 (Fed. Cir. 1985) (patent infringement and unauthorized importation of infringing products manufactured abroad are unfair acts or methods under section 337); Merck & Co. v. ITC, 774 F.2d 483 (Fed. Cir. 1985) (ITC should not summarily terminate investigations into allegedly patent-infringing foreign products); Am. Hosp. Supply Corp. v. Travenol Laboratories, Inc., 745 F.2d 1 (Fed. Cir. 1984) (affirming ITC's determination that petitioner's patent rights were not infringed by foreign products); see also S. REP. No. 1298, 93d Cong., 2d Sess. 34 (1974), reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7186.


29. Id. § 1337(d).

30. Id. § 1337(f)(1).
Proceedings before the ITC follow the procedures used in federal district court. The complaint must satisfy more than the bare notice requirements of the Federal Rules of Civil Procedure. All of the traditional discovery devices are available, as well as protective orders restricting distribution of confidential business and technical information. An administrative law judge ("ALJ") presides over evidentiary hearings. The ALJ allows the presentation of evidence in much the same manner as a federal district court judge. The ALJ also makes preliminary determinations regarding the existence of the alleged violation and transmits them to the Commission. The Commission then makes the final determination of whether there has been a section 337 violation.

Should the Commission determine that a section 337 violation exists, the ITC must forward a copy of its determination to the President, who then has sixty days to reject the ITC's affirmative determination "for policy reasons." Although the statute nowhere defines "policy reasons," the Court of Appeals for the Federal Circuit has stated that "policy reasons" do not include the merits of the ITC's determination.

Finally, to understand section 337's statutory framework, it is important to recognize that the Commission's 337 determinations are subject to judicial review, but the President's disapprovals are not. In considering the issue of judicial review of presidential disapprovals under section 337(g)(2), the Court of Appeals for the Federal Circuit ("CAFC" or "Federal Circuit") in Duracell Inc. v. U.S. International Trade Commission, 8 GA. J. INT'L & COMP. L. 27 (1978); Note, Section 337: An Activist ITC, 14 LAW & POL'Y INT'L BUS. 905 (1982); Note, Scope of Action Against Unfair Import Trade Practices Under Section 337 of the Tariff Act of 1930, 4 NW. J. INT'L L. & BUS. 234 (1982).


32. Id. § 210.20.
33. Id.
34. These discovery devices include depositions, id. § 210.31; interrogatories, id. § 210.32; requests for production of documents, id. § 210.33; and requests for admissions, id. § 210.34. The scope of discovery in section 337 tracks that of Rule 26(b) of the Federal Rules of Civil Procedure. Fed. R. Civ. P. 26(b). See 19 C.F.R. § 210.30(b).
35. 19 C.F.R. § 210.30(d).
38. Id. § 1337(g)(1) (1982).
39. Id. § 1337(g)(2).
41. Young Eng'r's Inc. v. ITC, 721 F.2d 1305, 1313 (Fed. Cir. 1983) ("The President may disapprove only for 'policy reasons,' not because of the merits of an investigation.").
Trade Commission,43 held that it lacked jurisdiction to review a decision of the President disapproving an ITC unfair trade practice determination44 under section 337(g)(2).45 As an alternative basis for its decision, the CAFC ruled that because the President had acted in full compliance with the provisions of section 337(g)(2), his decision was immune from further judicial inquiry.46

B. SECTION 301 RETALIATION AGAINST UNFAIR TRADE PRACTICES

While section 337 provides relief for United States manufacturers from unfair import practices, section 301 of the Trade Act of 1974, as amended,47 protects United States exporters from foreign import restrictions that prevent or restrict sales of U.S. products and goods abroad.48 Under section 302, the President is authorized to take "all appropriate and feasible action within his power."49 Section 301 grants relief for four broad categories of unfair trade practices.50 Trade practices that are (1) "inconsistent with the provisions of, or otherwise den[y] benefits to the United States under, any trade agreement";51 (2) "unjustifiable";52 (3) "unreasonable";53 or (4) "discrimi-

43. 778 F.2d 1578 (Fed. Cir. 1985). Duracell is one of only two reported opinions to consider the issue of judicial review of presidential disapprovals under section 337(g)(2). The other case is Young Eng'rs, 721 F.2d 1305.
44. Duracell, 778 F.2d at 1580-81.
45. 19 U.S.C. § 1337(g)(2) (1982 & Supp. III 1985). This section provides in part: If, before the close of the 60-day period beginning on the day after the day on which he receives a copy of such [ITC] determination, the President, for policy reasons, disapproves such determination and notifies the Commission of his disapproval, then, effective on the date of such notice, such determination and the action taken under subsection (d), (e), or (f) of this section [19 U.S.C. § 1337] with respect thereto shall have no force or effect.
46. Duracell, 778 F.2d at 1581-82.
50. Id.
51. Id. § 2411(a)(2)(B)(i).
52. Id. § 2411(a)(2)(B)(ii). The statute defines "unjustifiable" practices as "any act, policy, or practice which is in violation of, or inconsistent with, the international legal rights of the United States." Id. § 2411(a)(4)(A). Denial of most-favored-nation treatment to the United States or failure to protect intellectual property rights are examples of such practices. Id. § 2411(a)(4)(B).
53. Id. § 2411(a)(1)(B)(ii). The statute defines an "unreasonable" practice as one deemed to be "unfair and inequitable," although not necessarily in violation of the interna-
are subject to section 301 action. In addition to demonstrating the existence of one of the four unfair trade practices, a section 301 petitioner also must show injury. Injury occurs when the trade practice "burden[s] or restrict[s] United States commerce."55

The United States Trade Representative (USTR), the President, or interested persons may initiate a section 301 action. The President may act on his own motion,56 or when requested by a petition initiated by either the USTR57 or an interested person.58 If an individual files a petition, the USTR has forty-five days in which to review the petition and decide whether to initiate an investigation.59 Section 301 does not provide any standards regulating the USTR's decision to initiate an investigation. If the USTR decides to initiate an investigation, he must request consultations with the foreign government involved.60 However, if the USTR decides not to initiate an investigation, he must notify the petitioner and publish the decision and summary of reasons in the Federal Register.61

Upon completion of the investigation, the USTR must recommend what action, if any, the President should take. The statutorily prescribed deadline for this recommendation ranges from seven to twelve months after initiation of the investigation.62 The President, in turn, has twenty-one days from receipt of the USTR's recommendation to determine what action he will take.63

54. Id. § 2411(e)(3). Illustrative are practices that deny fair and equitable market opportunities or opportunities for the establishment of an enterprise. Id. § 2411(e)(3)(A)-(B).

55. Id. § 2411(a)(1)(B)(i). "Discriminatory" practices include practices that deny national or most-favored-nation treatment to United States goods, services, or investment. Id. § 2411(e)(5). The Trade and Tariff Act of 1984 for the first time expressly provided for protection of foreign investment. Id. § 2411(e)(1).

56. Id. § 2411(a)(1)(B). The injury standard under section 301 is less stringent than that provided in sections 337 and 201, both of which contain a substantial injury test. Compare 19 U.S.C. § 1337(a) (1982) (declaring unlawful unfair acts that have "the effect or tendency . . . to destroy or substantially injure an industry") and 19 U.S.C. § 2251(b)(1) (1982) (focusing on imports that are "a substantial cause of serious injury").


59. Id. §§ 2412(a)(2); 15 C.F.R. § 2006.3 (1985).

60. 19 U.S.C. § 2413(a) (Supp. III 1985); 15 C.F.R. § 2006.5(a) (1985). A request for consultations may be delayed for up to ninety days for the purpose of verifying the petition. 19 U.S.C. § 2413(b).


63. Id. § 2411(d)(2) (Supp. III 1985).
As part of the investigation, the USTR is required to provide an opportunity for comment on the matter from the petitioner and other private sector representatives.\textsuperscript{64} Also, the USTR may seek the ITC's advice\textsuperscript{65} regarding the probable impact on the economy of retaliatory restrictions on foreign imports.\textsuperscript{66}

The President has virtually unfettered discretion in determining whether to retaliate under section 301. Although the statute directs the President to "take all appropriate and feasible action"\textsuperscript{67} to enforce United States rights or to eliminate foreign restrictions, he is only required to do so if he determines that such action is appropriate.

If the President does elect to retaliate against an unfair trade practice pursuant to section 301, his range of discretion is extremely broad. The statute authorizes the President to take any "feasible action,"\textsuperscript{68} including, but not limited to, imposing duties or other import restrictions;\textsuperscript{69} suspending, withdrawing, or preventing the application of benefits of trade agreement concessions;\textsuperscript{70} and restricting service sector access authorization.\textsuperscript{71} No provision grants a right to judicial review of presidential action under section 301.

C. \textbf{SECTION 201 ESCAPE CLAUSE RELIEF}

Section 201 of the Trade Act of 1974,\textsuperscript{72} commonly referred to as the "escape clause," provides relief to United States industries suffering or threatened with serious injury substantially caused by increased imports of competing merchandise.\textsuperscript{73} The escape clause is unique

\begin{itemize}
\item \textsuperscript{64} Id. § 2414(b) (1982 & Supp. III 1985).
\item \textsuperscript{65} In this connection, the USTR must "seek information and advice from the petitioner and appropriate advisory representatives" from the private sector in preparing for consultations with the foreign government. 19 U.S.C. § 2413(a) (Supp. III 1985); 15 C.F.R. § 2006.5.
\item \textsuperscript{66} Id. § 2414(b)(3) (1982 & Supp. III 1985).
\item \textsuperscript{67} Id. § 2411(a)(1) (Supp. III 1985).
\item \textsuperscript{68} Id.
\item \textsuperscript{69} Id. § 2411(b)(2). The President is empowered to take such action either on a non-discriminatory basis or solely against the foreign government involved. Id. § 2411(a)(2).
\item \textsuperscript{70} Id. § 2411(b)(1).
\item \textsuperscript{71} Id. § 2411(c). The access provision was added pursuant to the Trade and Tariff Act of 1984. Id. § 2411(c)-(e). Access to the U.S. service sector, such as telecommunications, is regulated by the federal government through devices such as licenses. See 47 U.S.C. §§ 307-309 (1982 & Supp. III 1985).
\item \textsuperscript{73} Id. § 2251(b)(1) (1982 & Supp. III 1985). The relief available under section 201 includes increased tariffs on the imported articles causing injury, quotas on these articles, orderly marketing arrangements, or any combination of these actions. Id. § 2253(a) (1982). The duration of such relief can be for up to five years. Id.
\end{itemize}

An analogous statute dealing with imports from communist countries is section 406 of the Trade Act of 1974, 19 U.S.C. § 2436 (1982). Section 406 provides similar relief as section 201 with the exception of trade adjustment assistance. Id. § 2436(a)(3). Relief is available to an American industry if competing imports from communist countries cause
because it focuses on fairly traded imports that cause serious injury to a United States industry. An escape clause petitioner is therefore not required to show that imports are sold at less than fair market value,74 are subsidized by a foreign government75 or infringe upon an American patent or trademark holder's rights.76

The International Trade Commission must make three findings before recommending relief to the President.77 First, the ITC must find that imports of competitive merchandise have increased.78 Second, it must then determine whether the domestic industry under examination has been seriously injured or is threatened with serious injury.79 Finally, the ITC must find that such imports are a substantial cause of that injury or threat.80

Escape clause proceedings are a two-step process. After a petition is filed with the ITC, the Commission determines whether the increase in imports of competing merchandise substantially caused serious injury or the threat of serious injury.81 If the Commission makes an affirmative determination, it will then recommend to the President the relief it believes necessary to remedy the injury.82 In deciding whether to provide relief, the President takes into account several factors.83 These factors include: (1) the relief’s probable effec-
tiveness in promoting industry adjustment to import competition;\(^8\) (2) the relief’s effect on consumers;\(^8\) (3) the relief’s effect on United States international economic interests;\(^8\) and (4) the economic and social costs incurred by taxpayers, communities, and workers if import relief were granted.\(^8\) The President has the discretionary power to reject granting relief altogether if he determines that such relief “is not in the national economic interest of the United States.”\(^8\)

The escape clause does not provide for judicial review of either the ITC’s or President’s determinations. Nevertheless, the scope of relief following an affirmative section 201 determination has been challenged.\(^8\) In *Maple Leaf Fish Co. v. United States*,\(^9\) the Federal Circuit upheld the President’s relief determination concluding that it

\(^{8}\) Id. § 2252(c) (1982). The list is not exhaustive. See id. (the President is authorized to consider all relevant considerations).

\(^{84}\) Id. § 2252(c)(3).

\(^{85}\) Id. § 2252(c)(4).

\(^{86}\) Id. § 2252(c)(5).

\(^{87}\) Id. § 2252(c)(9). The rationale for granting section 201 relief was described in the Senate Finance Committee Report to the Trade Act of 1974: 

The rationale for the “escape clause” has been, and remains, that as barriers to international trade are lowered, some industries and workers inevitably face serious injury, dislocation and perhaps economic extinction. The “escape clause” is aimed at providing temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition.

\(^{88}\) S. REP. No. 1298, supra note 22, at 19.


\(^{90}\) See, e.g., *Maple Leaf Fish Co. v. United States*, 762 F.2d 86 (Fed. Cir. 1985) (importer challenged imposition of supplemental duties on its imports by contesting an ITC determination).
would be improper for a court to interfere with a section 201 decision unless the President’s action went beyond his delegated authority. The court observed that “the President’s findings of fact and the motivations for his action are not subject to review.”

This Article will now examine the results of the more significant cases brought under these three statutes. In particular, the analysis will focus on the role of presidential discretion and how such authority has frustrated the legislative intent of the statutes.

III. THE EXERCISE OF PRESIDENTIAL DISCRETION—THE EXPERIENCE

A. SECTION 337

The International Trade Commission has initiated over 200 section 337 investigations since enactment of the Trade Act of 1974. The President has disapproved the Commission’s final affirmative determination in only four cases. In a recent section 337 decision, Certain Alkaline Batteries, the Commission determined that the importation of “gray market” alkaline batteries violated section 337. The President rejected the Commission’s determination, stating that:

The Commission’s interpretation of section 42 of the Lanham Act (15 U.S.C. 1124), one of several grounds for the Commission’s determination, is at odds with the longstanding regulatory interpretation by the Department of the

91. Id. at 89 (quoting Florsheim Shoe Co. v. United States, 744 F.2d 787, 795 (Fed. Cir. 1984)).


93. See Certain Alkaline Batteries, 49 Fed. Reg. 45,275 (1984). The President’s disapproval was issued on January 4, 1985, pursuant to 19 U.S.C. § 1337(g)(2) (1982), and was based upon important policy reasons involved in the area of gray market goods. See 50 Fed. Reg. 1,655 (1985). That disapproval was unsuccessfully challenged in Duracell, Inc. v. ITC, 778 F.2d 1578 (Fed. Cir. 1985) (disapproval by the President was authorized because it was explicitly based on policy reasons).


95. Id. The Commission determined that certain imported alkaline batteries infringed a registered U.S. trademark and misappropriated the trade dress of the batteries on which the trademark was used. Id.; see supra note 93 and accompanying text. For a recent decision discussing the problem of “gray market” goods, see Vivitar Corp. v. United States, 761 F.2d 1552 (Fed. Cir. 1985), cert. denied, 106 S. Ct. 791 (1986).
Treasury, which is responsible for administering the provisions of that section. The Administration has advanced the Treasury Department's interpretation in a number of pending court cases. Recent decisions of the U.S. District Court for the District of Columbia and the Court of International Trade explicitly uphold the Treasury Department's interpretation. Allowing the Commission's determination in this case to stand could be viewed as an alteration of that interpretation. I, therefore, have decided to disapprove the Commission's determination.96

President Reagan concluded that the disapproval was based on policy concerns:97

The Departments of Treasury and Commerce, on behalf of the Cabinet Council on Commerce and Trade, have solicited data from the public concerning the issue of parallel market importation and are reviewing responses with a view toward formulating a cohesive policy in this area. Failure to disapprove the Commission's determination could be viewed as a change in the current policy prior to the completion of this process.98

In a court challenge to the President's disapproval, Duracell, Inc., the U.S. trademark holder, argued that the President's disapproval was for "legal," not "policy" reasons,99 and therefore was contrary to statutory authorization.100 The Federal Circuit disagreed with Duracell and observed that,

"Policy" is a broad concept which includes, but is not limited to: impact on United States foreign relations, economic and political . . . [and] upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and the United States consumers.101

The court concluded that its inquiry must end because the President acted in a timely fashion, based his decison on policy concerns and not the merits, and indicated what those non-merit based decisions were.102

In an earlier case, Certain Molded-In Sandwich Panel Inserts and Methods for Their Installation,103 the President disapproved an ITC determination because of the ITC's proposed remedy. After finding an unfair trade practice, the Commission issued exclusion and cease and desist orders stemming from process patent infringement.104 The orders directed three domestic purchasers not to use imported prod-

97. Id.
98. Id.
101. Duracell, 778 F.2d at 1581-82 (footnote omitted) (quoting S. REP. No. 1298, supra note 22).
102. Duracell, 778 F.2d at 1582; see also Young Eng'rs, Inc. v. ITC, 721 F.2d 1305, 1313 (Fed. Cir. 1983) ("The President may disapprove only 'for policy reasons,' not because of the merits of an investigation.").
ucts which used a process that infringed a United States process.105 The President rejected the cease and desist orders stating that such an order “may not be in compliance with U.S. international obligations.”106 The President explained:

The orders may result in less favorable treatment in requirements affecting purchase and use being accorded imported products than the treatment being accorded domestic products. . . . The discriminatory effect upon imported products of the three orders directed to the users of those products forms the basis of my decision to disapprove in this case.107

Recognizing his limited authority,108 the President had no alternative but to disapprove the entire determination. However, the President only objected to the Commission’s remedy, not its finding.109

In a section 337 determination reached a year earlier, Certain Headboxes and Papermaking Machine Forming Sections for the Continuous Production of Paper, and Components Thereof;110 the ITC’s remedy also triggered a presidential disapproval.111 In its determination, the Commission found that multi-ply headboxes of a single foreign manufacturer infringed a valid United States patent.112 The Commission issued an exclusion order that applied prospectively to the products of all foreign manufacturers of multi-ply headboxes.113 In his disapproval, the President concluded that since “[o]nly three or four multi-ply headboxes are sold each year in the United States . . . [t]he need for a broad exclusion order . . . [was] unnecessary to protect the patent assignee.”114 The President added, however, that an exclusion order directed only at the infringing foreign manufacturer’s products would be appropriate.115 He strongly urged the Commission to redraft its order accordingly,116 which the Commission subsequently did.117

The fourth section 337 presidential disapproval came in 1978 in

105. Id.
106. Id.
109. Id.
113. Id.
115. Id.
116. Id.
Certain Welded Stainless Steel Pipe and Tube. In that determination, the ITC ordered certain manufacturers and importers of Japanese welded stainless steel pipe and tube to cease and desist from selling such products in the United States at prices below the average variable cost of production without commercial justification. President Carter identified four policy considerations for his decision to disapprove the Commission’s determination:

1. The detrimental effect of the imposition of the remedy on the national economic interest;
2. The detrimental effect of the imposition of the remedy on the international economic relations of the United States;
3. The need to avoid duplication and conflicts in the administration of the unfair trade practice laws of the United States;
4. The probable lack of any significant benefit to U.S. producers or consumers to counterbalance the above considerations.

In his concern over administrative duplication, President Carter noted that the Treasury Department had already imposed sanctions on four firms that it determined had violated the antidumping duty laws. The President reasoned that this government action furnished adequate protection against the unfair trade practices at issue. Moreover, the President contended that the resulting duplication from overlapping ITC and Treasury determinations would be an irritant in relations between the United States and Japan. Accordingly, the President concluded that “the present use of Section 337 where other remedies are specifically provided for by law and are in fact utilized is not justified.”

The Commission’s General Counsel sent a letter to the President two weeks before his Stainless Steel disapproval explaining the ITC’s understanding of the scope of presidential review under section 337(g). The General Counsel stated that the policy reasons which

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121. Id. at 17,790.
122. Id.
123. Id. at 17,791. Section 337 was amended shortly thereafter under the Trade Agreements Act of 1979 to avoid a recurrence of this sort of dual action. See supra note 119.
124. Letter from the General Counsel of the ITC to Chairman, Section 337 Subcommittee, Trade Policy Staff Committee, Office of the Special Representative for Trade Negotiations (Apr. 7, 1978), noted in Easton & Neeley, supra note 27, at 233.
could properly form the basis for presidential disapproval were those factors that section 337 directed the Commission to consider when framing its orders.\textsuperscript{125} In particular, the General Counsel emphasized that the possible impact of the Commission’s determination on U.S. foreign relations should be the dominant policy consideration.\textsuperscript{126}

Notwithstanding the views of the ITC’s Office of General Counsel, the foregoing cases illustrate that the President retains virtually unlimited discretion in exercising his power of disapproval under section 337(g). The President exercises similarly broad discretion in section 301 presidential retaliation cases.

B. SECTION 301

Section 301 of the Trade Act of 1974 ensures that United States exporters’ access to foreign markets is not unfairly, unreasonably, or discriminatorily restricted or closed to them because of a foreign government’s action.\textsuperscript{127} Section 301 grants the President broad retaliatory authority to respond to such unfair foreign trade practices.\textsuperscript{128} Between 1975 and 1985, United States companies filed fifty section 301 petitions.\textsuperscript{129} Before 1985, the self-initiating mechanism had never been utilized.\textsuperscript{130} During the period of September to October 1985, however, the USTR self-initiated five section 301 investigations.\textsuperscript{131} The results of section 301 actions have been generally mixed.

The USTR rarely declines to initiate a section 301 investigation,\textsuperscript{132} but he has terminated ongoing investigations for a variety of

\textsuperscript{125} Those factors are "the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers." 19 U.S.C. § 1337(d)-(f) (1982).

\textsuperscript{126} See supra note 124.

\textsuperscript{127} See supra notes 47-71 and accompanying text.

\textsuperscript{128} See supra notes 49-55, 68-71 and accompanying text.


\textsuperscript{130} See 2 Int’l Trade Rep. (BNA) 1414-22 (1985); see also supra note 58 and accompanying text.

\textsuperscript{131} These investigations involved Korean restrictions on access to the Korean insurance market; Korean restrictions on Korean intellectual property rights protection; Japanese barriers to exports of U.S. tobacco products; and Brazilian restrictions on foreign investments, subsidies, and imports. 2 Int’l Trade Rep. (BNA) 1422 (1985). In addition, on Oct. 16, 1985, the President directed the USTR to initiate proceedings against European Economic Community (“EEC”) wheat subsidies. Id.

\textsuperscript{132} Only once was a determination made not to initiate an investigation. See Roses, Inc., 50 Fed. Reg. 40,250 (1985). In Roses, the petition alleged that several countries had erected barriers to imports of fresh-cut roses from the United States. Id. The USTR gave four reasons for not initiating an investigation:

1. Several of the alleged unfair practices named in the petition had been terminated or were found not to exist; 2. several of the practices had already been dealt
reasons. For example, on one occasion the USTR cited a pending countervailing duty proceeding where the Department of Commerce was already investigating the allegations made in the section 301 petition case as his justification for terminating the investigation. The USTR concluded that the termination was necessary "as a matter of policy to avoid redundant remedies and the waste of limited government resources. . . ."

In another determination, the USTR discontinued an investigation into allegations that the EEC and Japan had engaged in an unfair trade practice by agreeing to divert Japanese steel exports to the United States. The USTR did so on the basis of the fourth factor discussed in the Roses case, finding insufficient substantiation for the claim that the EEC-Japan agreement unfairly burdened United States commerce.

The foregoing reflects just some of the ways of disposing of section 301 petitions at the preliminary stages. The mere filing of a petition and initiation of an investigation have at times had a sufficient in terrorem effect that the foreign country has ceased the offending trade practice. At other times, the President has concluded that practices which are allegedly unfair or unreasonable are neither. Typically, however, the United States and the foreign country involved enter into bilateral negotiations that often substantially modify or remove the offending restrictions. If the negotiations fail, the President may

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Id. The Federal Register notice added that "[w]here the decision not to initiate is based on the latter two factors, it is without prejudice to the right of the petitioner to re-file when adequate information is developed." Id.

134. See supra note 132 and accompanying text.
136. See supra note 132 and accompanying text.
140. See, e.g., 50 Fed. Reg. 29,631 (1985) (practices of the member states of the European Space Agency not a violation of section 301). This section 301 action involved allegations of government inducements and assistance in the commercial phase of the European Space Agency ("ESA"). Id. Since there is no international reasonableness standard for launch services, the President compared the ESA practices with NASA's, and concluded that "[t]he ESA practices are not sufficiently different from those of the U.S. to be actionable under Section 301." Id.
141. See, e.g., 49 Fed. Reg. 10,761 (1984) (petition alleged that Taiwan subsidies on rice exports restricted U.S. commerce). In lieu of bilateral negotiations and consultations, formal consultations are sometimes held under the auspices of the General Agreement on
order the imposition of appropriate sanctions. Nevertheless, political considerations may cause the President to postpone retaliatory action pending further negotiations.

With the few exceptions noted, the USTR has not outright rejected a section 301 petitioner. Yet, substantial doubts linger whether the section 301 relief has satisfied the petitioner.

C. SECTION 201 ESCAPE CLAUSE RELIEF

In the eleven-year period from 1974 through February 1986, the International Trade Commission instituted sixty section 201 escape clause investigations. In that time the Commission issued twenty-


The negotiation and consultation process can drag on interminably. For example, a petition filed October 25, 1982 see 47 Fed. Reg. 56,428 (1982), alleging Japanese import restrictions on leather footwear was finally resolved through negotiations in December 1985. See 3 Int'l Trade Rep. (BNA) 4 (1986). Similarly, resolution of a petition filed October 29, 1981, alleging that the EEC gave unlawful production subsidies to its canned fruit industry was still pending as of November 1985. See 46 Fed. Reg. 61,358 (1981); see also 2 Int'l Trade Rep. (BNA) 1482 (1985).

In connection with the dispute over Mediterranean citrus imports to the EEC and the proposed duty increase on imports of EEC pasta to the United States in retaliation, supra note 142, President Reagan suspended the effective date of the increased duties pending further negotiations. 50 Fed. Reg. 33,711 (1985); see also 49 Fed. Reg. 45,733 (1984) (the President postponed taking retaliatory action against Argentina for its restrictive mail carrier practices pending further negotiations); 2 Int'l Trade Rep. (BNA) 1421 (1985) (Argentina's restrictive practices permanently lifted following the President's postponement of action).

See supra notes 132-38 and accompanying text.

See, e.g., Coffield, supra note 47, at 384, where the author notes that prior to the Trade Agreements Act of 1979, the majority of section 301 cases were never satisfactorily resolved from the U.S. point of view. The author goes on to note:

[N]o section 301 case to date has led to retaliation by the U.S. Government against the complained of act, practice, or policy of the foreign government. Nor have several of the cases been resolved successfully or even partially from the point of view of the petitioner. Many cases with a partial action on the part of the foreign government, were terminated because of the de minimis nature of the harm suffered, or were rather unsatisfactorily resolved through the GATT dispute settlement mechanism.

Id. at 399.

nine affirmative determinations, three split decisions, and twenty-three negative determinations. After making an affirmative escape clause determination, the Commission recommends to the President the relief that it believes appropriate under the circumstances. Such relief can take the form of increased duties, tariff rate quotas, and quotas, as well as trade adjustment assistance to the affected industry and workers.

The President may accept or reject in whole or in part any of the ITC's relief recommendations, as well as attempt to negotiate orderly marketing arrangements with the country or countries involved. Beyond the overarching consideration of U.S. national economic interest, Congress has enumerated nine factors that the President must consider—in addition to such other considerations as he may deem relevant—in determining whether to grant import relief under section 201. Of the Commission's thirty-two affirmative and split determinations, the President has granted some form of import relief in eleven cases. Such relief may last for up to five years. In addition, the President may reduce or terminate the relief at any time if he considers it in the national interest to do so.

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147. See Kennedy, supra note 146, at 93.
148. See supra notes 82-88 and accompanying text.
149. The provision for tariff-rate quotas appears at 19 U.S.C. § 2253(a)(3) (1982 & Supp. III 1985). A tariff-rate quota is a mechanism "whereby a given amount of the product per year may enter at one tariff rate and all in excess of that amount will enter at a higher rate." J. Jackson, World Trade and the Law of GATT 202 (1969) (footnote omitted). Such quotas should not reduce the amount of volume of the article allowed into the United States from that which was imported in the most recent representative period.
151. See id. §§ 2251(d)(1)(B), 2341.
152. See id. §§ 2251(d)(1)(B), 2271.
153. Id. §§ 2252(a), 2253(a).
154. Id. § 2253(a)(4).
155. Id. § 2252(a)(1)(A); see also supra notes 83-88 and accompanying text.
157. See supra note 83.
158. See Applebaum, Section 201 (The Escape Clause), and Section 406 of the Trade Act of 1974, in United States Import Relief Laws, Current Developments in Law and Policy 137, 158 (PLI 1985).
160. Id. § 2253(h)(4). For an example of early termination by the President of section 201 import relief, see Proclamation No. 4904, 47 Fed. Reg. 8753 (1982) (prematurely terminating, for certain segments of the mushroom industry, three-year import relief granted to the entire mushroom industry pursuant to Proclamation No. 4801, 45 Fed. Reg. 70,361 (1980)).
following discussion examines six cases, three in which the President granted section 201 import relief,\textsuperscript{161} and three in which he refused to grant such relief.\textsuperscript{162}

In a recent case, \textit{Certain Stainless Steel and Alloy Tool Steel},\textsuperscript{163} the President granted industry escape clause relief to a U.S. industry. The Commission recommended that the President impose “quantitative restrictions”—the statutory euphemism for quotas.\textsuperscript{164} Stating that he had taken into consideration the nine factors contained in section 202(c) of the Trade Act of 1974,\textsuperscript{165} President Reagan decided to impose the quantitative restrictions recommended by the ITC, as well as additional tariffs.\textsuperscript{166} The President also directed the USTR to negotiate orderly marketing arrangements with the affected countries.\textsuperscript{167} Yet, the Presidential Proclamation offered no explanation for this unusual import relief decision.\textsuperscript{168}

Three months prior to the \textit{Stainless Steel} case, President Reagan ordered increased duties and a tariff-rate quota\textsuperscript{169} following the Commission’s \textit{Heavyweight Motorcycles} determination.\textsuperscript{170} The ITC recommended the imposition of additional duties on imports of heavyweight motorcycles over a five-year period beginning with a 45 percent ad valorem duty increase the first year, declining to 10 percent in the fifth year.\textsuperscript{171} President Reagan agreed with the Commission’s recommendation, “with tariff-rate quotas to assure small volume producers which have not contributed to the threat of injury continued access to the United States market.”\textsuperscript{172}

In the third case, \textit{Mushrooms}, the Commission recommended the

\begin{itemize}
  \item \textsuperscript{164} 48 Fed. Reg. 33,233 (1983).
  \item \textsuperscript{165} 19 U.S.C. § 2252(c) (1982); \textit{see also supra} note 83.
  \item \textsuperscript{166} In accordance with 19 U.S.C. § 2253(b)(1), the President submitted a report to Congress explaining why his decision differed from the recommendations of the ITC. 48 Fed. Reg. 33,233 (1983).
  \item \textsuperscript{167} \textit{Id}.
  \item \textsuperscript{168} \textit{See id}.
  \item \textsuperscript{169} 48 Fed. Reg. 6043 (1983).
  \item \textsuperscript{170} Certain Heavyweight Motorcycles, \textit{supra} note 161. For an explanation of tariff-rate quotas, see \textit{supra} note 149.
  \item \textsuperscript{171} 48 Fed. Reg. 6043 (1983).
  \item \textsuperscript{172} 48 Fed. Reg. 16,639 (1983). The President also provided for a tariff-rate quota for articles from Japan. \textit{Id}.
\end{itemize}
imposition of import quotas.\textsuperscript{173} Although President Carter decided to grant import relief, he rejected the ITC's quota recommendation, opting instead for the imposition of increased duties.\textsuperscript{174} The President also created a White House task force to assist the mushroom industry in adjusting to import competition.\textsuperscript{175} In support of his decision to substitute tariff relief for the ITC-recommended quota relief, the President gave the following explanation:

Increased tariffs will enable the canning industry to become more profitable . . . . Tariffs are also preferable in this case because, unlike quotas, they allow the natural market forces to continue to work, thus providing relatively more incentive to the industry to adjust to foreign competition. Finally, tariffs are preferred because of the difficulty of equitably allocating quotas among countries when they are highly competitive new suppliers entering a market dominated by traditional suppliers.\textsuperscript{176}

No clear pattern emerges from these affirmative presidential relief determinations. In situations where United States industries were similarly harmed, the President responded in a seemingly \textit{ad hoc} fashion. In one case, tariffs were the only form of relief.\textsuperscript{177} In another determination, the President imposed both tariffs and quotas.\textsuperscript{178} Finally, as this Article will next discuss, the President may deny all forms of relief.\textsuperscript{179} The most recent of the three presidential section 201 decisions denying import relief is \textit{Nonrubber Footwear}.\textsuperscript{180} The ITC instituted its investigation in \textit{Nonrubber Footwear}\textsuperscript{181} after the Senate Finance Committee passed a resolution requesting an investigation under section 201(b)(1) of the Trade Act of 1974.\textsuperscript{182} After the Commission made its recommendation for relief,\textsuperscript{183} the President concluded that import relief would not be in the national economic interest.\textsuperscript{184} The President cited the following factors in support of his decision:

First, import relief would place a costly and unjustifiable burden on U.S. consumers and the U.S. economy. . . .

\textsuperscript{175} 45 Fed. Reg. 70,361 (1980).
\textsuperscript{176} Id.
\textsuperscript{177} See \textit{id}.
\textsuperscript{179} See, \textit{e.g.}, \textit{Nonrubber Footwear}, 50 Fed. Reg. 35,205 (1985) (final determination).
\textsuperscript{180} Id.
\textsuperscript{182} 19 U.S.C. § 2251(b)(1) (1982 & Supp. III 1985); see also 50 Fed. Reg. 30,245 (1985). Section 201(b)(1) directs the Commission to promptly make an investigation upon request of the President or the USTR, or upon receipt of a resolution of either the House Ways and Means Committee or the Senate Finance Committee. 19 U.S.C. § 2251(b)(1).
Second, import relief would result in serious damage to U.S. trade in two ways. If the ITC global remedy were imposed U.S. trade would stand to suffer as much as $2.1 billion in trade damage either through compensatory tariff reductions or retaliatory actions by foreign suppliers. This would mean a loss of U.S. jobs and a reduction in U.S. exports. U.S. trade would also suffer because of the adverse impact import relief would have on major foreign suppliers, such as Brazil, who are heavily indebted and highly dependent on footwear exports. Import relief would lessen the ability of these foreign footwear suppliers to import goods from the United States and thus cause an additional decline in U.S. exports.

Third, I do not believe that providing relief in this case would promote industry adjustment to increased import competition. . . . I believe that the industry has been and is in the process of successfully adjusting to increased import competition.\textsuperscript{185}

President Reagan, in a politically courageous move,\textsuperscript{186} denied import relief to the domestic nonrubber footwear industry because of the adverse effect import relief would have on U.S. export performance in other sectors of the economy.

Similarly, the second most recent escape clause determination resulted in the President denying relief to the domestic industry.\textsuperscript{187} In \textit{Carbon and Certain Alloy Steel Products},\textsuperscript{188} President Reagan again concluded that granting relief to a domestic industry that import relief would not be in the national economic interest.\textsuperscript{189} He gave the following reasons for his conclusion:

1. In responding to this pressing import problem, we must do all we can to avoid protectionism, to keep our market open to free and fair competition, and to provide certainty of access for our trading partners.

2. It is not in the national economic interest to take actions which put at risk thousands of jobs in steel fabricating and other consuming industries or in the other sectors of the U.S. economy that might be affected by compensation or retaliation measures to which our trading partners would be entitled.

3. This Administration has already taken many steps to deal with the steel import problem. In 1982, a comprehensive arrangement restraining steel imports from the European Community was negotiated. This Administration has also conducted an unprecedented number of antidumping and countervailing duty investigations of steel imports, in most cases resulting in the impo-

\textsuperscript{185} \textit{Id.}
\textsuperscript{186} \textit{Id.} See 2 Int'l Trade Rep. (BNA) 1107 (1985) (noting the hostile reception that the President's decision in the Footwear case received):

\textit{The President's announcement prompted outrage from the industry/labor coalition which brought the original Section 201 (escape clause) petition before the ITC. Speaking for the Footwear Industries of America, George Langstaff said the decision to do nothing "is crystal clear evidence of the bankruptcy of this Administration's international trade policy, and a slap in the face to the U.S. Congress, American workers, and domestic manufacturers."}

\textit{Id.}

\textsuperscript{187} \textit{Steel Import Relief Determination, 49 Fed. Reg. 36,813 (1984).}

\textsuperscript{188} \textit{Id.; see also Kennedy, supra note 146, at 189-90.}

\textsuperscript{189} \textit{49 Fed. Reg. 36,813 (1984).}
In an effort to defuse a politically explosive situation, the President went on to announce that he had decided to establish a government policy for the steel industry to be coordinated by the USTR. In this case, the President focused primarily on the adverse impact import relief would have on U.S. export industries resulting from GATT compensation to affected countries. The President recognized that if the United States elected to restrict fairly traded steel imports, export trade in an unrelated sector of the economy would be adversely affected.

Finally, the President denied section 201 import relief in Unwrought Copper. In that determination, a unanimous Commission found that imports of copper were a substantial cause of serious injury to the domestic copper mining industry. Despite this affirmative determination, President Reagan was unreceptive to the Commission's recommendation to grant import relief, finding that such relief would not be in the national economic interest. He gave two reasons for his conclusion: (1) the potentially adverse effect import relief would have on the domestic copper-fabricating industry, which in turn would have a backlash effect on the domestic copper producers; and (2) the adverse effect import relief would have on the

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190. Id.
191. Id.
192. See 19 U.S.C. § 2252(c)(6) (1982). For example, under GATT if escape clause relief is granted by the United States to a domestic industry, and if trade concession made to the United States by other GATT signatories are nullified or impaired as a result of this relief, then the other GATT signatories are entitled to compensatory trade concessions. General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194, arts. XIX, XXIII. Article XIX provides in part: Emergency Action on Imports of Particular Products 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 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 parties 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. 

3.(a) ... [I]f such action is taken or continued, the affected contracting parties shall then be free, ... to suspend ... the application to the trade of the contracting party taking such action ... of such substantially equivalent concessions or other obligations under this Agreement ... .

Id. art. XIX; see also J. JACKSON, supra note 149, at 553-73.
193. The unique feature of section 201 escape clause relief, is its focus on fairly traded imports. See supra notes 73-76 and accompanying text.
195. Id. For a discussion of this determination, see Kennedy, supra note 146, at 190-91.
197. Id.
198. Id.
export earnings of foreign copper producers. The President explained:

The imposition of import restrictions—either in the form of quotas, tariffs, or orderly marketing agreements—would create a differential between U.S. and world copper prices. Consequently, it would seriously disadvantage the copper-fabricating industry in the United States, which employed an estimated 106,000 workers in 1983, vis-a-vis foreign competitors. Such a result would, over time, shrink domestic demand for copper and add to the serious problems faced by U.S. copper producers.

Import relief would also adversely affect the export earnings of the foreign copper-producing countries, many of which are heavily indebted and highly dependent on copper exports. It would, therefore, complicate our efforts to maintain the stability of foreign countries to import goods from the United States...

Unlike the President's Steel Import Relief Determination, which focused on compensation to affected foreign countries and their possible retaliation, the President's Copper Import Relief Determination emphasized the effects on domestic fabricators of copper products and on the ability of less developed countries to meet their international debt obligations.

The President's determination was a great disappointment to the U.S. copper industry. That disappointment was expressed through a bill introduced in the Senate shortly after the President's Unwrought Copper determination. The bill would have eliminated the President's discretion to withhold relief under section 201 following an affirmative Commission determination.

Comparing these six cases, a possible explanation for the President's different treatment is the size of the industry in question, both domestically and worldwide. The President is more likely to withhold relief when a larger industry is involved. Although this conclusion may seem counterintuitive, the larger the industry, the more substantial will be the impact of any relief accorded that industry. Therefore, it is more probable that relief will be denied to larger industries because of the serious threat from retaliatory action or GATT compensation such relief presents to unrelated sectors of the U.S.

199. Id.
200. Id. President Reagan also noted that there were signs that the world price of copper, which had been severely depressed, was beginning to rise. Id.
202. See supra text accompanying note 190.
203. This concern for Third World debt obligations was also among the factors cited for denying relief in Nonrubber Footwear, supra note 179. See supra text accompanying note 185.
The results of section 337, section 301 and section 201 proceedings provide an excellent backdrop for analyzing the policy bases of these statutes. These laws currently promise more relief than they deliver. They raise unreasonable expectations on the part of domestic parties, expectations that are all too often dashed. The source of this failure lies in the provisions for presidential discretion.207 Once a proper statutory showing of injury and causation is made, the need for predictable mandatory relief, as well as the interest in maintaining respect for and confidence in democratically-created dispute resolution processes, outweighs the President's desire for flexibility in international trade. Unfortunately, the current statutes' broad grant of presidential discretionary power frustrates the policy reasons for their existence, i.e., to provide relief to injured U.S. industries. The following discussion suggests that eliminating presidential discretionary authority under each of the three statutes would restore their potential vigor.

IV. THE CASE FOR LESS DISCRETION AND MORE PREDICTABILITY

In examining U.S. international trade legislation and possible ways to improve it, it is necessary to keep in mind that Congress has the power to regulate international trade under the Constitution.208 Although the legal framework of international commerce should be changed, repealing sections 337, 301, or 201 would be not only politically unwise and impractical, but would not ease the problems of U.S. manufacturers caused by foreign imports. These statutes are critical tools in combating foreign unfair trade practices and remedying injury caused by foreign trade competition.

Experience has shown that these three statutes are flawed. For example, section 301 has promised far more relief for the U.S. exporting community than it can deliver because of the exercise of presidential discretion.209 Although the President has disapproved section 337 determinations only four times,210 such disapproval can only create feelings of uncertainty and loss of faith within U.S. industries for democratic process, particularly when such disapprovals follow an administrative determination that is the product of a regularized evidentiary and adversarial proceeding. Similarly, the disappointing experience

206. See supra note 192 and accompanying text.
208. See supra notes 8-12 and accompanying text.
209. See supra note 145 and accompanying text.
210. See supra note 93.
under the section 201 escape clause has led domestic manufacturing, production, and exporting sectors to call for trade law reform.\textsuperscript{211}

Expectations have not been frustrated because the object and goals of sections 337, 301 and 201 are unrealistic or conceptually flawed. Rather, the problem lies in the legislative grant of discretion to the President under these statutes, allowing him to deny import and other trade relief\textsuperscript{212} following affirmative ITC determinations. While today the wiser course would seem to be for Congress to amend sections 337, 301, and 201 to eliminate most, if not all, Executive Branch discretion, the legislative history to the Trade Act of 1974 in part explains why Congress delegated to the President discretionary authority to grant and withhold relief under sections 337, 301, and 201 in the first place.\textsuperscript{213}

Despite the adjudicative nature of a section 337 hearing,\textsuperscript{214} Congress nevertheless delegated authority to the President to disapprove affirmative section 337 determinations “for policy reasons.”\textsuperscript{215} The Senate Finance Committee’s Report on the Trade Act of 1974 explained why Congress granted the President discretionary disapproval authority:

[T]he President would often be able to best see the impact which the relief ordered by the Commission may have upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.

Therefore, it was deemed appropriate by the Committee to permit the President to intervene before such determination and relief become final, when he determines that policy reasons require it. The President’s power to intervene would not be for the purpose of reversing a Commission finding of a violation of section 337; such finding is determined solely by the Commission, subject to judicial review.\textsuperscript{216}

Implicit in the Senate’s evaluation of the need for presidential disapproval power was a distrust of the Commission’s ability to evaluate the economic and political implications of its section 337 determinations. Whether such criticism of the Commission is warranted is questionable, considering the tremendous staff and resources at the ITC’s disposal.\textsuperscript{217} Furthermore, the ITC Commissioners are called upon

\textsuperscript{211} See, e.g., New Omnibus Bill Introduced by Democrats in House, Senate, Protectionism Averted, 3 Int’l Trade Rep. (BNA) 186 (1986); see also supra text accompanying notes 204-06.

\textsuperscript{212} See supra notes 131-143 and accompanying text.

\textsuperscript{213} See supra note 40.

\textsuperscript{214} See supra notes 31-37 and accompanying text.

\textsuperscript{215} See supra notes 39-41 and accompanying text.

\textsuperscript{216} S. REP. No. 1298, supra note 22, at 199, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7211, 7331-32.

\textsuperscript{217} See Berg, supra note 81, at 409: “The Commission has at its disposal a sizable staff composed of trained commodity analysts, attorneys, accountants, statisticians, economists, and clerical personnel.” Id. Moreover, in the context of antidumping and countervailing
regularly to consider economic effects in their escape clause determinations. The Commission has made sophisticated and complex economic analyses in its injury determinations under the antidumping duty and countervailing duty laws for a number of years.

If Congress is concerned about the international political effects of section 337 determinations, it could amend section 337 to require the Commission, rather than the President, to take into account the potential political effects of a section 337 remedial order. Such determinations would then be subject to judicial review and reversal if they were arbitrary, capricious, or an abuse of discretion. The President could voice his views to the Commission either through participation as an intervenor or an *amicus* at the remedy stage of the proceeding. In this way, Congress and the Executive Branch would have some assurances that all of the political and economic factors they deem important would be considered by the Commission when it frames a remedial order. Alternatively, Congress could entirely eliminate political considerations in section 337. Section 337 proceedings could be modeled after countervailing duty or antidumping duty proceedings, which do not impose a statutory requirement to consider foreign affairs concerns. Indeed, it would be logical to take foreign affairs into account in countervailing duty cases because unlike section 337, which involves private parties, countervailing duty proceedings focus on the trade practices of our foreign trading partners. Addressing the trade practices of foreign countries implicates extremely delicate foreign affairs matters. Yet the countervailing and antidumping duty laws do not mandate agency consideration of foreign relations concerns, nor do they grant any discretionary power to the President like that found in section 337.

By shifting to the ITC the responsibility of weighing political considerations, and allowing the President to be part of the calculus, the Executive Branch would not only be assured that its views had been heard, but the quasi-judicial nature of section 337 proceedings at the

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218. See supra notes 77-80 and accompanying text.


administrative level would be preserved.\textsuperscript{222} Respect for and trust in section 337 proceedings would improve with the removal of the President's disapproval "wild card". It is indeed anomalous that after a full evidentiary hearing that satisfies due process requirements,\textsuperscript{223} and where the issues are heard in a trial-like setting,\textsuperscript{224} the President can unilaterally set aside the results of the proceeding.\textsuperscript{225} Although the President cannot reverse affirmative section 337 determinations on the merits,\textsuperscript{226} it is a legal fiction to say that presidential disapproval does not affect the validity of the Commission's determination.\textsuperscript{227} Disapproval may not render the ITC's determination void. Nevertheless, disapproval does render those determinations of "no force or effect."\textsuperscript{228} In legal contemplation it is difficult to discern a difference. Although the President has disapproved ITC section 337 determinations only four times,\textsuperscript{229} it is cold comfort to U.S. firms that have successfully prosecuted section 337 actions only to have victory snatched away "for policy reasons." Such practices can only have an insidious effect on respect for democratically sanctioned administrative processes.

By comparison, section 201 escape clause proceedings are not adversarial;\textsuperscript{230} any interested party is free to submit information to the Commission.\textsuperscript{231} Neither the rules of evidence nor the rules of procedure are applicable.\textsuperscript{232} Moreover, under the present statutory scheme, there is no provision for judicial review, probably owing in large measure to the comparatively informal and advisory nature of escape clause cases.\textsuperscript{233} In a section 201 case, the ITC makes recommendations, not determinations, to the President on import relief. Based on these recommendations, the President has granted import relief in

\begin{enumerate}
\item Administrative proceedings are subject to judicial review. 19 U.S.C. § 1337(c) (1982 & Supp. III 1985). The exercise of presidential disapproval authority, however, is insulated from judicial scrutiny. See Duracell v. ITC, 778 F.2d 1578, 1580-81 (Fed. Cir. 1985).
\item See supra notes 31-37 and accompanying text.
\item Id.
\item See, e.g., Duracell, 778 F.2d at 1579-80.
\item See id. at 1581-82; Young Engineers, Inc. v. ITC, 721 F.2d 1305, 1313 (Fed. Cir. 1983); see also supra note 216 and accompanying text.
\item See, e.g., Young Engineers, 721 F.2d at 1313.
\item 19 U.S.C. § 1337(g)(2) (1982 & Supp. III 1985). The fact that presidential disapproval renders an ITC determination "of no force or effect" rather than void becomes important when the scope of the ITC's remedy has motivated the disapproval. In such a case, the Commission could amend its order to accommodate the reservations of the President without being put to the burden of conducting a new hearing on the merits. See Young Eng'r's, Inc. v. ITC, 721 F.2d 1305, 1313 (Fed. Cir. 1983).
\item See supra note 93 and accompanying text.
\item See Berg, supra note 81, at 409.
\item Id.
\item Id.
\item Id.
\item Id. at 410.
\end{enumerate}
only eleven of the thirty-two affirmative and split Commission escape clause determinations.\textsuperscript{234} Under section 201, Congress has retained the power to override any decision by the President,\textsuperscript{235} but Congress has never exercised this prerogative.

Despite the procedural differences between section 337 and section 201 proceedings, a sound argument also can be made for eliminating Executive Branch discretion in section 201 cases and vesting the ITC with sole responsibility for import relief decisions.

The escape clause's purpose is to provide temporary relief to an industry so that it can adjust to international competition.\textsuperscript{236} This purpose lessens the need for political considerations because section 201 proceedings are case-specific and temporary.\textsuperscript{237} Moreover, section 201(b)(6) further reduces the likelihood that political considerations would come into play.\textsuperscript{238} Section 201(b)(6) instructs the ITC to notify the appropriate agency if it believes the case should be considered under the antidumping or countervailing laws or unfair import practices statutes.\textsuperscript{239} This requirement is "to assure that the United States will not needlessly invoke the escape-clause . . . and will not become involved in . . . inviting retaliation in situations where the appropriate remedy may be action under one or more United States laws against unfair competition."\textsuperscript{240} Consequently, the cases that fall under section 201 are less likely to entail complex international political considerations.

The statute's structure also supports the argument that Congress did not intend political considerations to figure into section 201 proceedings. According to section 201(b)(2), "the Commission shall take into account all economic factors it considers relevant."\textsuperscript{241} The stat-

\textsuperscript{234} See supra note 158 and accompanying text. By comparison, there have been only four section 337 presidential approvals out of fifty-one affirmative section 337 determinations. See supra notes 92-93 and accompanying text.

\textsuperscript{235} 19 U.S.C. § 2253(c) (Supp. III 1985).

\textsuperscript{236} See S. REP. No. 1298, supra note 22, at 119, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7211, 7263.

\textsuperscript{237} The Trade Reform Act of 1973: Hearings on H.R. 10,710 Before the Senate Comm. on Finance, 93d Cong., 2d Sess. 262 (1974) (Statement of William D. Eberle, Special Representative for Trade Negotiations, Executive Office of the President). In defending the import relief portions of the Act, Mr. Eberle stated:

In other countries, if they respond by an automatic quota it can react against all of our other exports. Whereas if we have this product-by-product approach, we do not risk that kind of reaction against the United States. That is why we think we can solve the same problem when there is injury without having our other exports—12 percent of our productive capacity—attacked and precluded from the world markets. It is a two-way street.

\textit{Id}.


\textsuperscript{239} \textit{Id}.


ute mandates no consideration of political factors; indeed, the President is only authorized to deny section 201 relief if to do so is “in the national economic interest of the United States.”\(^{242}\) Congress could not have intended the President to make his determination based on political considerations when the ITC's recommendation, which should be the major factor in his decision, is based solely on economic factors. Furthermore, Congress intended the Commission's recommendation to clearly identify the factors on which it is based so as to provide adequate guidance to the President.\(^{243}\) Because Congress has not given the President explicit power to consider political factors in the determinations, it is logical to conclude that the President should base his decision on the same economic factors that the Commission could have considered.\(^{244}\)

Congress's intent to exclude political factors from section 201 cases is further supported by the Senate Finance Committee report on the act which stated:

[T]hat relief ought not to be denied for reasons that have nothing whatever to do with the merits of the case as determined under U.S. law. In particular, the Committee feels that no U.S. industry which has suffered serious injury should be cut off from relief for foreign policy reasons.\(^{245}\)

This explicit statement, along with the purpose and structure of the statute, presents a compelling argument that Congress intended the decision-making process involved in granting escape clause relief to be economic, not political. Thus, the “for policy reasons” ground

\(^{242}\) Id. § 2252(a)(1)(A) (1982) (emphasis added).

\(^{243}\) H.R. REP. No. 1298, supra note 22, at 121, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7211, 7265. The report stated that:

The Committee believes strongly that Commission determinations under this and other statutes ought to be clear, well documented, and, as nearly as possible, decisive. The Committee is disturbed by the frequency of tie votes on cases before the Commission, particularly when not all Commissioners have voted. In all cases the Commission should seek to reach a majority vote on the matter before it. The effect of a “no decision” tie vote in an escape clause case is to give the President complete discretion without much guidance about the case.

\(^{244}\) Id. (emphasis added).

\(^{245}\) 19 U.S.C. § 2252(c) (1982); see also S. REP. No. 1298, supra note 22, at 124, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7211, 7268. A counter argument exists here, however. Subsection (c), which lists a number of factors that the President must consider before providing import relief, states that “the President shall take into account [such enumerated factors], in addition to such other considerations as he may deem relevant.” 19 U.S.C. § 2252(c). Such language can be interpreted as giving the President wide discretion to consider political concerns; however, a more plausible reading, one based on an examination of the statute as a whole, suggests that the President's considerations are limited to economic factors. None of the enumerated factors encompasses political considerations. Furthermore, in section 201(b)(2), 19 U.S.C. § 2251(b)(2) (1982 & Supp. III 1985), Congress allows the ITC to consider all “relevant” economic factors, suggesting that subsequent references to “relevant considerations” are to economic factors only.

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for disapproving relief under section 337\textsuperscript{246} is not a valid basis for denying import relief under section 201. The tenor of the Senate Finance Committee's report is that relief should be granted ordinarily following an affirmative ITC determination, the only question being the form and amount of such import relief.\textsuperscript{247}

The legislative history of section 201 strongly suggest that Congress intended to make section 201 escape-clause relief virtually automatic following proof of injury and the requisite causal nexus.\textsuperscript{248} Actual experience under section 201, however, does not fully match legislative intent.\textsuperscript{249} Consequently, the decision to give the President the power to withhold relief seems unfortunate. What Congress intended to be a depoliticized import relief statute has developed into one of the most politically charged trade laws.\textsuperscript{250}

The Commission is fully capable of evaluating the factors that the President is to consider in making his escape-clause relief decisions.\textsuperscript{251} Under such an approach, the White House could present its views as an amicus regarding the wisdom of granting section 201 import relief and the nature of such relief.\textsuperscript{252}

As an alternative to the foregoing proposal, the predicament in which domestic parties find themselves could be remedied if the President no longer had the option of withholding section 201 relief from injured parties. Following an affirmative section 201 determination by the Commission, some form of relief to the affected domestic industry should be statutorily mandated. Under such an automatic approach, the ITC would have exclusive authority to decide whether to grant relief.\textsuperscript{253} Once the ITC makes an affirmative section 201 determination, it would be the responsibility of the President to grant appropriate and meaningful relief. Under no circumstances would withholding section 201 relief be one of the President's options following an affirmative ITC determination. Moreover, in the absence of some compelling foreign affairs concern, the President should be obligated to adopt

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\textsuperscript{246} 19 U.S.C. § 1337(g)(2) (1982); see also supra notes 39-41 and accompanying text.


\textsuperscript{248} See supra notes 236-47 and accompanying text.

\textsuperscript{249} See supra notes 146-207 and accompanying text.

\textsuperscript{250} See supra note 186 and accompanying text.

\textsuperscript{251} See supra notes 83-88, 156-57 and accompanying text.

\textsuperscript{252} See supra text accompanying notes 220-21.

\textsuperscript{253} It would be naive to assume that the Commissioners, who are political appointees, are completely neutral politically; nevertheless, the ITC is an independent federal agency and its Commissioners are largely insulated from political pressure. See 19 U.S.C. § 1330(a) (1982). Thus, ITC section 201 relief recommendations are likely more dispassionate than the President's section 201 relief decisions.
the relief recommended by the Commission.\textsuperscript{254}

Of the three statutes under review, section 301's legal regime is most in need of repair. This statute provides domestic exporters with relief from unreasonable foreign import practices that restrict or bar market access to U.S. exporters.\textsuperscript{255} As the Senate Finance Committee noted in its report on the Trade Act of 1974:

If diplomatic efforts and trade negotiations fail to bring about equity and reciprocity for U.S. commerce, the acts and barriers described above should be subject to retaliation. . . .

Foreign trading partners should know that we are willing to do business with them on a fair and free basis, but if they insist on maintaining unfair advantages, swift and certain retaliation against their commerce will occur. . . . The authority in this section should not be used frivolously or without justification. The Committee feels, however, that there must be a credible threat of retaliation whenever a foreign nation treats the commerce of the United States unfairly.\textsuperscript{256}

Experience shows that retaliation under section 301 has been anything but swift, credible, or certain.\textsuperscript{257} Many section 301 cases have dragged on interminably.\textsuperscript{258} Although the President has frequently threatened retaliation, compromise has more often obviated the need for such action.\textsuperscript{259} It is thus open to serious question whether section 301 in its present form is a statute with any teeth.

Section 301 could be amended to provide a more regularized, nondiscriminatory administrative process that would afford interested domestic parties a more predictable and certain remedy. Because the import practices of foreign governments are at issue, responding to domestic grievances flowing from those practices in an adversarial, regularized administrative proceeding would pose a formidable obstacle; however, it would not be insurmountable. The countervailing

\textsuperscript{254} The difficulty with this proposal lies primarily in affording interested parties with some form of meaningful judicial review. Since section 201 proceedings are non-adversarial, the kind of evidentiary record needed to properly apply the substantial evidence standard of review does not exist. Nevertheless, the arbitrary, capricious, or abuse of discretion standard could be applied by a reviewing court, as is currently done in certain administrative determinations by the Department of Commerce in antidumping and countervailing duty cases. The factors contained in section 201(b), 19 U.S.C. § 2251(b) (1982 & Supp. III 1985), and section 202(c), 19 U.S.C. § 2252(c) (1982), could serve as criteria for determining whether the Commission has acted in an arbitrary or capricious manner.

\textsuperscript{255} See supra notes 47-71 and accompanying text.

\textsuperscript{256} S. REP. NO. 1298, supra note 22, at 164, reprinted in 1974 U.S. CODE CONG. & ADMIN. NEWS 7211, 7302-03.

\textsuperscript{257} \textit{Id.}; see also Coffield, supra note 47, at 395: "To date, the United States has never taken any final retaliatory action under section 301 against any foreign government whose acts, practices, or policies have been the subject of a formal section 301 complaint." \textit{Id.}

\textsuperscript{258} See supra notes 149-53 and accompanying text.

\textsuperscript{259} See 49 Fed. Reg. 45,733 (1984) (notice postponing retaliatory action against Argentina pending further round of negotiations); Coffield, supra note 47, at 399 ("it is important to realize that the USTR considers retaliation a tool of very last resort") (emphasis in original).
duty remedy for foreign unfair trade practices provides one model of how a statute might meet this challenge.\textsuperscript{260} Under that statute, regularized administrative procedures preclude assessment of countervailing duties on imported merchandise illegally subsidized by a foreign government.\textsuperscript{261} A comparable amendment to section 301 might include presentation of evidence of allegedly unfair foreign trade practices in an administrative hearing before the ITC. The current section 301 practice of government-to-government consultation\textsuperscript{262} could continue with the suspension agreement provisions of the countervailing duty law\textsuperscript{263} serving as a model, and with bilateral negotiations serving as the method for informal dispute resolution.

Countervailing duty ("CVD") cases and section 301 cases, however, are not perfectly analogous. In a CVD proceeding, the articles imported into the United States are the only subject of the CVD case and are the target of the countervailing duties upon entry.\textsuperscript{264} In imposing additional duties or quotas on imports from offending countries under the proposed amendments to section 301, major questions remain as to which products to assess, length of the quota period, amount of additional duties, and the level of quotas. These highly discretionary matters entail politically sensitive resolutions. Therefore, the President should continue to play a part in the relief stage by shaping the scope and nature of that relief following an affirmative section 301 determination. Section 301 relief, however, should be mandatory and swift.

The need for a statute such as section 301 is undeniable. It is equally clear that from the domestic parties' viewpoint section 301 has been a complete failure. If for no other reason than this, section 301 proceedings should be regularized and conducted in the same manner as CVD cases. The statute should contain a mechanism for informal settlement, followed by the mandatory imposition of retaliatory measures by the President if negotiations fail. With the added leverage of

\begin{footnotesize}
\textsuperscript{260} 19 U.S.C. §§ 1303, 1671 (1982 & Supp. III 1985). Section 1303 provides for the imposition of countervailing duties where export subsidies are paid by foreign governments, and section 1671 details the administrative procedures used in imposing those duties.


\textsuperscript{263} 19 U.S.C. § 1671c (1982 & Supp. III 1985). This section provides that investigations may not be suspended unless the foreign country agrees to eliminate the subsidy completely or to offset completely the amount of the net subsidy or cease exports to the United States within six months. \textit{Id.} § 1671c(b).

\textsuperscript{264} 19 U.S.C. § 1671(a).
\end{footnotesize}
mandatory relief, petitioners and recalcitrant foreign countries might take section 301 more seriously. The President would still have the discretion to decide the nature of the retaliatory measures. However, the measures would be mandatory if a settlement were not reached, and the President would no longer have the option of denying relief.

In summary, considerations of administrative efficiency might favor giving the ITC the ultimate and exclusive responsibility for deciding whether to grant relief under sections 337, 301, and 201. The Commission, however, does have some problems in resolving the myriad political and foreign affairs issues inherent in all three statutes.

First, the six Commissioners, as members of an independent federal agency, are insulated from outside political pressures. Consequently, the Commissioners are neither politically accountable nor accessible through diplomatic channels.

Second, although foreign affairs is not the exclusive province of the Executive Branch, one must seriously question whether the delicate balancing required in foreign affairs should be entrusted to an independent federal agency.

As an alternative to granting the ITC the authority to resolve the political and foreign affairs issues raised in section 337, 301, and 201 proceedings, Congress could eliminate all such considerations from those statutes to the extent that such considerations affect the decision to grant or deny relief. Thus, if the Commission were designated as the factfinding and adjudicative body under sections 337, 301, and 201, and if it found that a petitioner was entitled to relief under any of those statutes, without regard to political or foreign affairs factors, Congress could then direct the White House to grant relief or impose sanctions. Discretion would be reserved solely to structure, not withhold, relief. This alternative best accommodates the competing need for certain and predictable relief, on the one hand, and for flexible foreign policy responses, on the other.

V. CONCLUSION

Sections 337, 301, and 201 are indispensable parts of a comprehensive U.S. scheme regarding domestic and international trade legislation. The statutes protect U.S. manufacturers, producers, and exporters from injurious foreign imports and from unfair foreign trade practices. Their effectiveness has been substantially limited, however, by the President's discretion to withhold relief under sections 301 and 201, and to disapprove the ITC's section 337 determinations. Domestic firms have become increasingly disenchanted with these laws

265. See supra notes 8-10 and accompanying text.
because of the unpredictable results of presidential discretion. As foreign parties easily flout the rules of foreign trade without retribution, sections 337 and 301 have become less attractive to U.S. industry as viable forms of legal redress.

For sections 337, 301, and 201 to remain effective legal remedies for injurious foreign trade and foreign trade practices, Congress must make the outcome of these statutes predictable. Sections 337, 301, and 201 must bite hard. By limiting presidential discretion under each law, by making relief mandatory upon the requisite statutory showing, by regularizing the administrative process under section 301 using the CVD law as a model, and by providing for judicial review under all three statutes, Congress can put teeth and predictability into section 337, 301, and 201. Less presidential discretion will restore credibility in the statutes, make them potent tools for ensuring free and fair trade, and restore confidence in democratically-created adjudicative processes.