Suspending the Investment Tax Credit: The Tolerance of International Cartels Standard

Claudia J. Dumas

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Section 38 and sections 46 through 48 of the Internal Revenue Code provide a credit against income tax of a specified percentage of amounts invested in qualified depreciable property.\(^1\) Section 48(a)(7)(D) authorizes the President of the United States to deny the investment tax credit to purchasers of property that is wholly or substantially produced in a foreign country if he determines that that country "engages in discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce."\(^2\)

In May 1982, Houdaille Industries, Inc. (Houdaille)\(^3\) filed a petition to the President with the Office of the United States Trade

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2. Section 48(a)(7)(D) provides:
   If, on or after the date of the termination of Proclamation 4074 [Dec. 19, 1971], the President determines that a foreign country—
   (i) maintains nontariff trade restrictions, including variable import fees, which substantially burden United States commerce in a manner inconsistent with provisions of trade agreements, or
   (ii) engages in discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce, he may provide by Executive order for the application of subparagraph (A) [section 48(a)(7)(A)] [excluding foreign produced property from the investment tax credit] to any article or class of articles manufactured or produced in such foreign country for such period as may be provided by Executive order.

Section 48(a)(7)(A) provides:
Property (other than pre-termination property) shall not be treated as Section 38 property [entitled to investment tax credit] if—
   (i) such property was completed outside the United States, or
   (ii) less than 50 percent of the basis of such property is attributable to value added within the United States.

For purposes of this subparagraph, the term "United States" includes the Commonwealth of Puerto Rico and the possessions of the United States.

Except for the equipment to which the President denies the tax credit pursuant to section 48(a)(7)(D), subparagraph (A) denies section 38 property status to property described in section 50 (i.e., major capital investment property) that was ordered, or the construction, reconstruction, or erection of which was begun after August 15, 1971, and on or before December 19, 1971, the termination date of Proclamation 4074. Id. § 48(a)(7)(D). For an explanation of the temporary denial of the credit to foreign produced property, see infra text accompanying notes 50-57.

3. See infra text accompanying note 58.
Representative requesting that President Reagan invoke his authority under section 48(a)(7)(D) and suspend the investment tax credit to United States purchasers of Japanese-made numerically controlled machining centers and numerically controlled punching machines.\(^4\) The Reagan Administration rejected the petition in April 1983.\(^5\)

The petition remains important because no precedent exists for suspension of the investment tax credit. This Note examines whether President Reagan should have exercised his authority under section 48(a)(7)(D) and denied the tax credit to purchasers of the Japanese machine tools. The Note first reviews the legislative history of section 48(a)(7)(D) and the statutes upon which the section is based. The Note then analyzes the applicability of the section to Houdaille's allegations. Next, the Note examines the importance of section 48(a)(7)(D) in the context of existing statutory responses to unfair import and export trade practices. The Note concludes that the Congress should retain section 48(a)(7)(D) in its current scope because the section provides a limited retaliatory response to unfair foreign export policies that is not available in other federal statutes.

I

HISTORICAL BACKGROUND

The Revenue Act of 1971 added section 48(a)(7)(D) to the Internal Revenue Code.\(^6\) The Ninety-second Congress based the section on section 252(b) of the Trade Expansion Act of 1962.\(^7\) The Eighty-seventh Congress had derived section 252(b) from section 350(a)(5)

\(^4\) Petition to the President of the United States through the Office of the United States Trade Representative for the Exercise of Presidential Discretion Authorized by Section 103 of the Revenue Act of 1971, 26 U.S.C. § 48(a)(7)(D), filed May 3, 1982, at 1-2, 15-16 [hereinafter cited as Petition to the President].

\(^5\) N.Y. Times, Apr. 27, 1983, at D5, col. 1. In rejecting the petition, the Office of the United States Trade Representative nonetheless stated that Houdaille Industries “did raise questions concerning possible effects of certain Japanese practices.” \emph{Id}.


of the Tariff Act of 1930. Because the Ninety-second Congress defined the discriminatory acts and policies referred to in section 48(a)(7)(D) as the same acts and policies encompassed by section 252(b) of the 1962 Act, an examination of section 350(a)(5) of the Tariff Act of 1930 and section 252(b) of the Trade Expansion Act of 1962 facilitates an understanding of section 48(a)(7)(D).

A. SECTION 350(a)(5) OF THE TARIFF ACT OF 1930

The Trade Agreements Act of 1934 added section 350 to the Tariff Act of 1930 to promote the recovery of the United States economy. Congress anticipated that the section would achieve this result by reversing both the world-wide decline in foreign trade and the national depressions that had been precipitated by tariffs and other trade barriers erected by almost every country engaged in foreign trade since the 1920's. Thus, the purpose of section 350 was "to expand foreign markets for the products of the United States."

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9. Although it did not expressly state so, the conference committee for the Revenue Act of 1971 adopted section 48(a)(7)(D) as a compromise measure. See infra notes 55-57 and accompanying text. In explaining the new section, the conference committee report stated, "[t]he trade restrictions and discriminatory acts referred to by this provision are the same as those contained in section 252(b) of the Trade Expansion Act of 1962." H.R. REP. No. 708, 92d Cong., 1st Sess. 36 (1971).


13. The stated purpose of section 350(a) was:
Section 350 empowered the President to negotiate with foreign countries to obtain a reciprocal reduction of American and foreign tariffs and import restrictions. The President could so act whenever he found that "any existing duties or other import restrictions of the United States or any foreign country [were] unduly burdening and restricting the foreign trade of the United States . . . ."\textsuperscript{14} Congress expected that the reciprocal reduction of trade barriers would increase the level of American exports in two ways. First, the access of American products to foreign markets would directly increase foreign trade in American goods. Second, American import purchases would raise the income of foreign countries, thereby increasing the foreign demand for American products.\textsuperscript{15} Congress thus believed that the reciprocal reduction would produce a net expansion in the American economy as the additional domestic activity generated by the increased level of exports would exceed any decrease in activity caused by the influx of imports.\textsuperscript{16}

Section 350 also incorporated the most-favored-nation princi-
ple by requiring that the United States extend any trade barrier concessions it had granted one foreign country to all other foreign countries importing products into the United States. But the expansion of United States trade would be curtailed if the United States extended most-favored-nation treatment to a foreign country that discriminatorily applied trade restrictions against United States exports. Section 350(a)(2) therefore provided an exception to the most-favored-nation policy. The section authorized the President to “suspend the application [of negotiated trade barrier modifications] to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or . . . other acts . . . or policies which in his opinion tended to defeat the purposes set forth in . . . section [350]; . . .”

Because section 350 limited the President’s authority to negotiate and proclaim reciprocal trade barrier reductions to a three year period, Congress renewed the President’s authority in 1937 and again in 1940. While deciding to renew the President’s authority for a third time in 1943, the House Ways and Means Committee amended section 350(a)(2). The amendment responded to Representative Charles Dewey’s concern that international cartels would undermine the trade expansion that would otherwise flow from negotiated reductions in trade barriers. House Joint Resolution 111 thus provided for the insertion in section 350(a)(2) of the phrase “(including the operations of international cartels)” to clarify the scope of “other acts” allowing suspension of the credit. The final

17. The most-favored-nation principle extends a reduction in a duty on the product of one country automatically to the similar products of any other country. Every country trading with the state that has imposed the particular duty thus receives the trade benefits accorded to the most-favored-nation, whether or not a particular state has negotiated any trade agreements with the importing country. See The Most-Favored-Nation Clause, 2 J. WORLD TRADE L. 581, 582-83 (1968).

18. After授权 the President to negotiate for the reduction of duties and other import restrictions, section 350(a) continued: “The proclaimed duties and other import restrictions shall apply to articles the growth, produce, or manufacture of all foreign countries, whether imported directly or indirectly . . . .” Tariff Act of 1930 § 350(a)(3), amended by Trade Agreements Act of 1934, ch. 474, 48 Stat. 943.

19. President Roosevelt also stated in his message to Congress requesting the authority to enter into international trade agreements: “[O]ther governments are to an ever-increasing extent winning their share of international trade by negotiated reciprocal trade agreements . . . . If the American government is not in a position to make fair offers for fair opportunities, its trade will be superseded.” H.R. Doc. No. 273, 73d Cong., 2d Sess. 3 (1934). See also H. TASCA, supra note 12, at 42-43.


21. Trade Agreements Act of 1934 § 2(c).


24. See infra notes 87-94 and accompanying text.

clause of section 350(a)(2) (which clause Congress subsequently incorporated into section 350(a)(5)), as amended by the resolution, read:

Provided, That the President may suspend the application [of negotiated trade barrier modifications] to articles the growth, produce, or manufacture of any country because of its discriminatory treatment of American commerce or because of other acts (including the operations of international cartels) or policies which in his opinion tend to defeat the purposes set forth in this section . . . .

B. THE TRADE EXPANSION ACT OF 1962

Congress passed the Trade Expansion Act of 1962 in compliance with President Kennedy's request for a new instrument in lieu of a twelfth renewal of the President's negotiating powers under the Trade Agreements Act. The Kennedy Administration's proposal,
H.R. 9900, reflected the view embodied in section 350 that the American economy could be expanded most effectively by lowering tariff and nontariff barriers to trade. Thus, the express purposes of H.R. 9900 were: "to stimulate the economic growth of the United States, maintain and enlarge foreign markets for the products of United States industry and agriculture . . . ; [and] to strengthen economic and political relations with . . . foreign countries through the development of an open and nondiscriminatory trading system in the free world." Although the bill repealed section 350(a)(5) of the Tariff Act of 1930, section 242 of the Administration's proposal was virtually identical to that section.

After concluding that the Kennedy Administration's proposal was poorly drafted, the House Ways and Means Committee rewrote H.R. 9900. The new bill, H.R. 11,970, expanded the President's authority to negotiate tariff reductions and trade agreements, other than a country-by-country and item-by-item basis. In support of the need for increased economic growth President Kennedy noted that America had experienced three recessions since 1955. H.R. Doc. No. 314, 87th Cong., 2d Sess., reprinted in Hearings on H.R. 9900, supra note 28, at 2.


30. H.R. 9900 authorized the President to "enter into trade agreements with foreign countries or instrumentalities thereof; and . . . [to] proclaim . . . such continuance, reduction, or elimination of any existing duty or any other import restriction, or such continuance of existing duty-free or excise treatment, as he determine[d] to be . . . appropriate to carry out such trade agreements." Id. § 201(a), reprinted in Hearings on H.R. 9900, supra note 28, at 13-14. In response to the President's perceived need to have additional flexibility to deal with the Common Market, H.R. 9900 permitted him to negotiate tariff reductions below the 50% of existing duties limit to which he was otherwise restricted when the Common Market countries and the United States accounted for greater than eighty percent of the export world value of all such commodities, and when the negotiations applied to specified commodities. H.R. 9900, §§ 211-213, reprinted in Hearings on H.R. 9900, supra note 28, at 14-15.


32. Id. § 248(a), reprinted in Hearings on H.R. 9900, supra note 28, at 18.

33. Section 242, entitled "Suspension of Benefits," provided:

The President shall, when he determines that the purposes of this Act will be promoted thereby, suspend the reduction or elimination of any duty or other import restriction provided in any proclamation issued in carrying out any trade agreement under this title or any predecessor Act to products of any foreign country which engages in discriminatory treatment of United States commerce or engages in other acts, including the operations of international cartels, or policies which in his opinion tend to defeat such purposes. Id. § 242, reprinted in Hearings on H.R. 9900, supra note 28, at 16. See supra note 26 for the relevant text of section 350(a)(5).

34. Representative Jackson Betts explained that the House of Representatives redrafted the proposal because "H.R. 9900 was such a hopeless text that regardless of the liberal or conservative persuasion of the committee members, a decent regard for their own sense of craftsmanship compelled them all to join in a virtual complete rewrite of the bill from a technical point of view." 108 CONG. REC. 12,009 (1962) (statement of Rep. Jackson Betts).

35. Section 350 of the Tariff Act of 1930 prohibited the President from increasing or decreasing any duty by more than fifty percent of its rate at the time of the enactment of
authorized the Tariff Commission to report the economic effects of the reductions on domestic industry, and instituted an adjustment assistance program to help any firms and workers harmed by the increased flow of imports. H.R. 11,970 retained the same general purposes as H.R. 990 and similarly repealed section 350(a)(5). Section 252(b) of the bill, however, narrowed the President's discretion to suspend negotiated trade reductions. Instead of using his power whenever the purposes of the Act would be promoted, the Trade Agreements Act of 1934 (June 12, 1934) and from transferring any article between the dutiable and free lists. Tariff Act of 1930 (Hawley-Smoot Act), ch. 497, § 350(a)(2), 46 Stat. 590, amended by Trade Agreements Act of 1934, ch. 474, 48 Stat. 943. H.R. 11,970 increased the President's authority to negotiate trade barrier reductions in four principal areas. First, the President could negotiate any rate of duty to a level fifty percent below that existing on July 1, 1962. This was the widest margin given to the President since 1945. Second, the President could reduce down to zero any duty on articles in any category where the Common Market and the United States accounted for a total of at least eighty percent of the world export value of all the articles in that category. Third, when negotiating with the Common Market, the President could reduce to zero the tariff on specified agricultural commodities, and, under certain circumstances, tropical agricultural or forestry commodities. Fourth, except in a trade agreement with a Communist-dominated country, the President could reduce the duty rate to zero where the existing rate on July 1, 1962 did not exceed five percent ad valorem or equivalent. Trade Expansion Act of 1962 §§ 201-220, 231. See generally S. Metzger, Trade Agreements and the Kennedy Round 19-29 (1964).

36. Section 301(b)(1) authorized the Tariff Commission, upon request of the President, resolution of either the House Ways and Means Committee or the Senate Finance Committee, motion of the Tariff Commission, or filing of a petition by a trade association, an allegedly injured firm, a certified or recognized union, or another industry representative, to conduct an investigation:

... to determine whether, as a result in major part of concessions granted under trade agreements, an article is being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry producing an article which is like or directly competitive with the imported article.

Trade Expansion Act of 1962 § 301(b)(1). If the Tariff Commission discovered injury, the President could adjust the relevant tariffs, could allow the industry to apply for adjustment assistance, and could allow the industry's employees to apply for adjustment assistance. Trade Expansion Act of 1962 § 302(a).


38. The Act states:

The purposes of this Act are, through trade agreements affording mutual trade benefits—

(1) to stimulate the economic growth of the United States and maintain and enlarge foreign markets for the products of the United States agriculture, industry, mining, and commerce;

(2) to strengthen economic relations with foreign countries through the development of open and nondiscriminatory trading in the free world; and

(3) to prevent Communist economic penetration.


40. See supra note 33.
President could suspend the American trade concessions only when foreign trade restrictions "substantially burden[ed]" or "unjustifiably restrict[ed]" United States commerce.41

C. The Revenue Act of 1971

On August 15, 1971, President Nixon imposed a ten percent surcharge on all imported goods, suspended the convertibility of the dollar into gold, and announced a wage and price freeze in response to growing unemployment, increased inflation, and the weakening position of the dollar abroad.42 The President attributed the United States' economic problems primarily to an overvaluation of the dollar.43 This overvaluation had produced balance of trade and balance of payments deficits,44 as domestic and world demand for the higher-

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41. Section 252(b) provided in full:
Whenever a foreign country or instrumentality the products of which receive benefits of trade agreement concessions made by the United States—

(1) maintains nontariff trade restrictions, including variable import fees, which substantially burden United States commerce in a manner inconsistent with provisions of trade agreements, or

(2) engages in discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce, the President shall, to the extent such action is consistent with the purposes of section 102—

(A) suspend, withdraw, or prevent the application of benefits of trade agreement concessions to products of such country or instrumentality, or

(B) refrain from proclaiming benefits of trade agreement concessions to carry out a trade agreement with such country or instrumentality.

Trade Expansion Act of 1962 § 252(b).


43. The President explained on nationwide television:

The third indispensable element in building the new prosperity is closely related to creating new jobs and halting inflation [the first two elements]. We must protect the position of the American dollar as a pillar of monetary stability around the world.

In the past 7 years, there has been an average of one international monetary crisis every year . . . . The gainers are international money speculators. Because they thrive on crises, they help to create them.

In recent weeks, the speculators have been waging an all-out war on the American dollar . . . . Accordingly, I have directed the Secretary of the Treasury to take the action necessary to defend the dollar against speculators.

I have directed Secretary Connally to suspend temporarily the convertibility of the dollar into gold or other reserve assets, except in amounts and conditions determined to be in the interest of monetary stability and in the best interests of the United States.

Remarks of the President, supra note 42, reprinted in Ways and Means Hearings, supra note 42, at 3.

44. The United States balance of payments deficit in the second quarter of 1971 was equivalent to an annual rate of $23 billion. The United States had a balance of trade
priced American products had declined. President Nixon sought to alleviate these deficits through the suspension of the convertibility of the dollar and the ten percent surcharge on imported goods. By suspending the convertibility of the dollar until favorable exchange rates could be reestablished, President Nixon intended to stabilize the valuation of the dollar. The surcharge was designed to encourage Americans to buy domestic products by making imported goods relatively more expensive. By suspending the convertibility of the dollar and imposing the surcharge, the Nixon Administration aimed to make “the product of American labor . . . more competitive, and [to remove] the unfair edge that some of our foreign competition has had.”

In conjunction with these actions, the President submitted a legislative proposal to Congress that later became the Revenue Act of 1971. One of the principal provisions of the Act was a seven percent income tax credit for manufacturers who purchased new capital equipment. The House Ways and Means Committee identified three purposes for this credit: to create additional jobs by encouraging expenditures on machinery and equipment; to combat inflation by providing an increased flow of goods into the market; and “by making our productive facilities more efficient . . . [to] help our exporters to compete for foreign markets and improve our balance of payments.”

Section 103 of the 1971 Act amended the Internal Revenue Code of 1954 to deny the application of the tax credit to


45. See H.R. REP. No. 533, 92d Cong., 1st Sess. 4 (1971); Remarks of the President, supra note 42, reprinted in Ways and Means Hearings, supra note 42, at 3.

46. After stating in a television address that he had ordered the temporary suspension of the convertibility of the dollar, Remarks of the President, supra note 42, President Nixon continued: “In full cooperation with the International Monetary Fund and those who trade with us, we will press for the necessary reforms to set up an urgently needed new international monetary system. Stability and equal treatment is in everybody’s best interest.” Id., reprinted in Ways and Means Hearings, supra note 42, at 3.

47. Id.

48. The President stated:

As a temporary measure, I am today imposing an additional tax of 10 percent on goods imported into the United States. This is a better solution for international trade than direct controls on the amount of imports.

This import tax is a temporary action . . . . It is an action to make certain that American products will not be at a disadvantage because of unfair exchange rates. When the unfair treatment is ended, the import tax will end as well.

Id.

49. Id.


51. H.R. REP. No. 533, 92d Cong., 1st Sess. 5-6 (1971).
foreign produced goods\textsuperscript{52} constructed or acquired before the termination of the ten percent surcharge.\textsuperscript{53} Without this prohibition, Congress feared that the "Buy American" emphasis of the surcharge would be undermined.\textsuperscript{54}

The House version of section 103 did not authorize the President to deny the application of the credit to foreign produced goods after the expiration of the surcharge. The Senate Finance Committee, however, amended section 103 of the House bill to permit the President to continue the suspension of the credit if he determined that such action would be "in the public interest."\textsuperscript{55} The conference committee compromise, which ultimately became section 48(a)(7)(D) of the Internal Revenue Code, authorized the President to provide, by Executive Order, for the suspension of the credit to any article produced in a foreign country that:

\begin{itemize}
  \item[(i)] maintains nontariff trade restrictions, including variable import fees, which substantially burden United States commerce in a manner inconsistent with the provisions of trade agreements, or
  \item[(ii)] engages in discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce.\textsuperscript{56}
\end{itemize}

Subsections 48(a)(7)(D)(i) and 48(a)(7)(D)(ii) reproduced verbatim subsections 252(b)(1) and 252(b)(2) of the Trade Expansion Act of 1962. The conference committee's explanation of 48(a)(7)(D) stated: "[t]he trade restrictions and discriminatory acts referred to ... are the same as those contained in section 252(b) of the Trade Expansion Act of 1962."\textsuperscript{57}

\textsuperscript{52} Section 103 defined goods as foreign produced if "(i) such property was completed outside the United States, or (ii) less than 50 percent of the basis of such property [was] attributable to value added within the United States." Revenue Act of 1971 § 103.

\textsuperscript{53} Id. The surcharge expired on December 19, 1971. Proclamation No. 4074, 3 C.F.R. 60 (1971).


\textsuperscript{56} Revenue Act of 1971 § 103.

\textsuperscript{57} The conference committee's Joint Explanatory Statement for section 48(a)(7)(D) stated:

The Senate amendment authorizes the President to continue the application of the foreign property provision of the bill, when he terminates Presidential proclamation 4074 [imposing the ten percent surcharge on imports], to any article or class of articles, or to any article or class of articles manufactured or produced in any foreign country, if he determines such action to be in the public interest.

The House recedes with an amendment. Under the conference agreement, if on or after the date of the termination of Proclamation 4074, the President determines that a foreign country maintains nontariff trade restrictions, including variable import fees, which substantially burden United States commerce in a manner inconsistent with provisions of trade agreements, or engages in discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce, he may by Executive order apply the foreign property provision of the bill to any article or class of articles manufactured or produced in such foreign country for such period as may be
II
HOUDAILLE INDUSTRIES, INC.'S PETITION FOR SUSPENSION OF THE INVESTMENT TAX CREDIT

On May 3, 1982, Houdaille Industries, Inc., a Florida corporation and manufacturer of numerically controlled machining centers and numerically controlled punching machines, filed a petition with the Office of the United States Trade Representative. The petition requested the President to suspend the investment tax credit for Japanese-made numerically controlled machining centers and numerically controlled punching machines, based on the "tolerance of international cartels" criteria of section 48(a)(7)(D)(ii).

Houdaille specifically alleged that the Japanese Government has encouraged and subsequently tolerated the formation of a cartel among Japanese machine tool manufacturers. Houdaille further contended that the manufacturers formed the Japanese machine tool cartel in compliance with three "Extraordinary Measures" laws enacted to promote the "rationalization" of the machine tool industry. Pursuant to these laws, which have been consecutively in force

provided by Executive order. The trade restrictions and discriminatory acts referred to by this provision are the same as those contained in section 252(b) of the Trade Expansion Act of 1962.


58. Petition to the President, supra note 4.
59. The petition specifically stated that:

The petitioner Houdaille Industries, Inc. [hereinafter 'Houdaille'], has uncovered conclusive evidence that the Japanese Government instigated the formation of this [machine-tool] cartel and continues to shield its members from competition by sanctioning market allocation and other anticompetitive agreements and practices. This is exactly the situation for which Congress provided a remedy in Section 103 of the Revenue Act of 1971. Section 103 delegates to the President authority to suspend eligibility of foreign-made products for the investment tax credit when he determines that a foreign government has unjustifiably restricted United States commerce by its 'tolerance of international cartels.'

Id. at 1-2. The petition asked the President to deny the credit for an indefinite period of time, and to review the desirability of continuing the denial in five years. Id. at 15-16.
60. Id. at 2-13, 53-115.
61. Id. at 54-87. These three laws are the Extraordinary Measures Law for the Promotion of Machinery Industry (Law No. 154 of 1956) [hereinafter cited as Extraordinary Measures Law No. 1], reprinted in Petition to the President, supra note 4, at D1 (Appendix); Extraordinary Measures Law for Promotion of Specific Electronics Industries and Specific Machine Industries (Law No. 17 of 1971) [hereinafter cited as Extraordinary Measures Law No. 2], reprinted in Petition to the President, supra note 4, at D67 (Appendix); and Extraordinary Measures Law for Promotion of Specific Machinery and Information Industries (Law No. 84 of 1978) [hereinafter cited as Extraordinary Measures Law No. 3], reprinted in Petition to the President, supra note 4, at D109 (Appendix). Each law authorizes the Japanese Minister of International Trade and Industry to issue ordinances establishing rationalization plans to implement the goals of the Acts. These goals include concerted action by machine tool manufacturers to restrict the kinds of products, to establish quotas for the products produced, to coordinate the purchase of
since 1956, the Japanese Ministry of International Trade and Industry has issued a series of ordinances requiring machine tool manufacturers to coordinate the types and quantity of the products that they manufacture, to allocate production among themselves in order to "promote joint undertakings within the group," and to "make efforts to normalize terms and conditions of export transactions and to seek to establish . . . [an] exporting system." Houdaille also

parts and materials, to improve quality, and to develop new production technologies. See, e.g., Extraordinary Measures Law No. 1, Art. 6 (The Minister of International Trade and Industry may instruct manufacturers to restrict kinds of products, impose manufacturing quotas on types of products, restrict technology, and follow particular purchasing methods for parts and materials); Extraordinary Measures Law No. 2, Art. 3 (The Minister of International Trade and Industry shall formulate an "Elevation Plan" stipulating contents of industry experimentation and research, production goals for target fiscal years, and types and quantity of equipment to be installed); Extraordinary Measures Law No. 3, Art. 3 (The Minister of International Trade and Industry shall formulate an "Elevation Plan" specifying performance, quality and production cost targets, appropriate production scale, joint operation of enterprises, or specialization of types of goods to be manufactured; and experimentation, research, and technique improvement targets.)

62. Petition to the President, supra note 4, at 60-68, 80-81, 84-87.

63. See, e.g., Notification No. 346 of the Ministry of International Trade and Industry § 3(1) (1971), reprinted in Petition to the President, supra note 4, at D98, D99 (Appendix) (instructing the machine tool manufacturing industry to "try to increase the degree of specialization so that the production share of numerically controlled cutting machine tools and computer controlled metal cutting machine tools in each manufacturing enterprise is increased to approximately 50 percent of the total production of the . . . tools manufactured"); Ministry of International Trade and Industry Notification No. 112 § 4(1) (1957), reprinted in Petition to the President, supra note 4, at D26, D28 (Appendix) (requiring machine tool manufacturers "to promote specialization of the manufacturing of product[s] by kind and to seek . . . centralization of manufacturing by such product[s] ")

64. See, e.g., Notification No. 346 § 3(1), supra note 63; Notification No. 305 of Ministry of International Trade and Industry § 4(1) (1968), reprinted in Petition to the President, supra note 4, at D61, D62-63 (Appendix) (requiring machine tool manufacturers "to promote adjustment of product types . . . and in case the appropriate production size can not be attained even by adjustment within the group to prepare concrete plans for promoting adjustment with other groups or other enterprises, or reorganization of the groups, and to expedite implementation of such plans")

65. Notification No. 304 of Ministry of International Trade and Industry § 6(2) (1968), reprinted in Petition to the President, supra note 4, at D41, D45 (Appendix) (instructing firms "[t]o promote joint activities within the group in the field of production marketing, exportation, technical development, etc."). See also Notification No. 305 § 8(2), supra note 64 (instructing firms "[t]o promote joint undertaking within the group in ways of production, marketing, technological development, etc.").

66. Notification No. 304 § 6(4), supra note 65. See also Notification No. 305 § 8(4), supra note 64 (authorizing machine tool manufacturers "[t]o make efforts in normalizing the terms and conditions to export trades and to seek to establish earnest exporting system")

The ordinances promulgated by the Ministry for International Trade and Industry pursuant to Extraordinary Measures Law No. 3, supra note 61, focused on promoting joint research and on standardizing manufacturing components in order to increase the production level of numerically controlled machine tool parts and to increase the industrialization of the industry. See, e.g., Ministry of International Trade and Industry Ordinance No. 608 (1978), reprinted in Petition to the President, supra note 4, at D145 (Appendix) (setting forth subject matter of experimentation and research to be conducted within the industry); Ministry of International Trade and Finance Ordinance No. 614
alleged that the Japanese Government has encouraged and tolerated the machine tool cartel through governmental promotion of cartels in order to advance exports, exemption of the cartel from the Japanese Anti-Monopoly laws, and utilization of a variety of political and tax favors. These favors include subsidies to the Japanese machine tool industry that are derived from the proceeds of bicycle and motorcycle races, loan authorizations to the industry on concessionary terms not available to foreign competitors, and income tax deductions to the companies in the industry based upon each company's gross export income and income realized from revenues.

§ 4(4) (1978), reprinted in Petition to the President, supra note 4, at D169, D171 (Appendix) (instructing manufacturers of numerically controlled metal cutting machine tool devices “to promote standardization of numerically controlled metal cutting machine tool devices, such as tooling, pallet, etc.”); Ministry of International Trade and Industry Ordinance No. 615 § 4(3) (1978), reprinted in Petition to the President, supra note 4, at D177, D179 (Appendix) (requiring machine tool manufacturers “to improve joint research system with manufacturers of safety equipment, electric devices and other related equipment in order to help seek automatic control, expansion of functions, promotion of safety and decrease in pollution . . . ”).

67. Petition to the President, supra note 4, at 87-96. Article 5 of the Export and Import Trading Law, Law No. 299, August 5, 1952, allows exporters to enter into an agreement determining “price, quantity, quality, design, or any other matter” concerning the export trading of a commodity. Article 11 of the Export and Import Trading Law authorizes the creation of an export association to establish agreements among members relating to “price, quality, quantity, design, or any other matter in the export trading of commodities [of] the particular kind to be exported to [a] specific destination.” See id. at 88-89.

68. The Japanese Government has provided the machine tool industry with two types of antitrust immunity. Machine tool manufacturers receive de jure immunity under the Extraordinary Measures Laws for conduct that complies with Ministry of International Trade and Industry ordinances. In addition, the manufacturers allegedly receive de facto immunity for activities pursued in response to the Ministry's basic rationalization plans. Petition to the President, supra note 4, at 57-60, 89-90.

69. See Petition to the President, supra note 4, at 95-115; Petition to the President of the United States through the Office of the United States Trade Representative for the Exercise of Presidential Discretion Authorized by Section 103 of the Revenue Act of 1971, 26 U.S.C. § 48(a)(7)(D): Comments by the Petitioner, filed July 31, 1982, 1-33 [hereinafter cited as Comments by the Petitioner]. See also infra notes 70-73 and accompanying text.

70. Comments by the Petitioner, supra note 69, at 2-21; Petition to the President, supra note 4, at 109-15. Houdaille alleged that the Japan Bicycle Rehabilitation Association and the Japan Motorcycle Rehabilitation Association distribute a portion of the proceeds generated through bicycle and motorcycle race wagering to machine tool manufacturers. Although the Japanese Government regulates motorcycle and bicycle racing, the racing associations do retain a portion of the wagers. In 1980, the subsidy to the machinery industry from these combined sources was allegedly $105 million. Comments by the Petitioner, supra note 69, at 19.

71. The petition stated that the Japanese Government has made long-term, low interest loans available to the machinery industry since 1956 through the Japan Development Bank and the Small Business Finance Corporation. The loans are not available to other industries nor to foreign machine tool manufacturers. Houdaille contended that these loans have been “significant tools of industrial policy” in promoting the machine tool industry. Petition to the President, supra note 4, at 102-07.

72. Houdaille argued that from 1964 to 1974 the Japanese Government gave manufacturers “special additional depreciation” by increasing standard depreciation deduc-
received in foreign currencies for industrial property rights.\footnote{73}

Houdaille contended that a suspension of the investment tax credit would return a significant share of the domestic market to American machine tool manufacturers.\footnote{74} In particular, Houdaille calculated that the cartel members would have to decrease the price of their machine tool parts by 15.18 percent in order to offset the loss that American purchasers would realize from the parts’ ineligibility for the tax credit.\footnote{75} Because the existing average profit margin of Japanese machine tool manufacturers is less than fifteen percent,\footnote{76} Houdaille alleged that the cartel would be unable to maintain this price decrease for an extended period of time and would consequently relinquish its competitive position to American machine tool manufacturers.\footnote{77}

\footnote{73. \textit{Petition to the President, supra} note 4, at 99.}

\footnote{74. \textit{Petition to the President, supra} note 4, at 150-56.}

\footnote{75. \textit{Id.} at 150-54. \\ Houdaille based its calculation on the benefits accruing to the purchaser of a $100,000 machine tool. Houdaille assumed that the purchase would generate a 3.75\% depreciation deduction and a $2500 investment tax credit in each quarter of the year of purchase. If the purchaser calculates his income tax at the maximum corporate rate of forty-six percent, the net cash return to the purchaser after depreciation and deducting the credit is $4,225 for each quarter of the purchase year. After the net cash return is discounted at an eight percent interest rate to establish the present value of the future benefits, the purchaser’s net after-tax payment for a machine tool eligible for the credit is $53,000. In contrast, the purchaser of a machine tool ineligible for the credit can reduce his tax liability only by deducting the depreciation to which he is entitled. At an interest rate of eight percent, the manufacturer of a machine tool ineligible for the credit would have to lower the price of a $100,000 machine tool to $84,825 to provide the purchaser with the same after tax cost. This reduction is a 15.175\% decrease in price. \textit{Id.}}

\footnote{76. The petition stated that the average pre-tax profit margin for the seven leading Japanese manufacturers of machine tools in 1981 was 14.75\%. \textit{Id.} at 155 n.1 (citing \textit{JAPAN ECONOMIC JOURNAL}, Mar. 23, 1982, at 16).}

\footnote{77. \textit{Petition to the President, supra} note 4, at 155. \\ Houdaille assumed that the inability of the Japanese producer to absorb the price decrease over an extended period of time would result in the Japanese manufacturers withdrawing their machine tools from the American market. \textit{Id.} Houdaille acknowledged that the Japanese machine-tool manufacturers might have shifted their production to the United States to qualify for the credit, but did not object to this possible change of production sites because the relocation would have increased the employment rate of American machine tool industry employees. \textit{Id.} at 155-56. Houdaille’s analysis did not consider the possibility, however, that the members of the cartel could have used their control in the Japanese market to increase the price of the machine tools they sold in Japan. A sufficiently high price increase in the Japanese market would have raised the manufacturers’ average profit
The petition presented two major arguments to support the application of section 48(a)(7)(D)'s denial of the investment tax credit to American purchasers of Japanese machine tools. First, the Japanese cartel is an “international cartel” because section 48(a)(7)(D)(ii) applies both to cartels that have an international membership and cartels that have an international effect. Second, the displacement of American machine tool manufacturers by Japanese producers supplying the American market unjustifiably restricts “United States commerce,” because, as used in section 48(a)(7)(D)(ii), that term includes domestic commerce as well as foreign trade.

III
ANALYSIS

In enacting the Revenue Act of 1971, Congress specified that the trade restrictions and discriminatory acts in response to which the President could deny the investment tax credit were the same policies and acts contained in section 252(b) of the Trade Expansion Act of 1962. As discussed below, the meanings Congress assigned to these policies and acts in section 103 of the Revenue Act of 1971 and its predecessor statutes prohibited the President from suspending the credit to American purchasers of Japanese machine tools. In particular, a suspension of the investment tax credit would have expanded the scope of section 48(a)(7)(D)(ii) beyond that intended by the Ninety-second Congress. That expansion was unwarranted because existing trade legislation currently provides retaliatory measures to respond to the influx of imports into the United States when such an influx is attributable to a foreign country’s tolerance of international cartels.

margin above 15.175% and enabled them to maintain over an extended period of time the 15.175% price decrease necessary to offset the loss of the tax credit.

78. Id. at 38-42.
79. Id. at 19-34. From 1976 to 1981 the American manufacturers’ share of the domestic market for numerically controlled machining centers declined from 95.1% to 48.7%. During the same period, the portion of the domestic market supplied by Japanese manufacturers increased from 3.7% to 50.1%. The American manufacturers’ share of the domestic market for numerically controlled punching machines was 87.6% in 1976 and 53.9% in 1981. The Japanese manufacturers’ share increased from 4.7% in 1976 to 37.6% in 1981. Id. at 117. Houdaille alleged that the changes in the American and Japanese manufacturers’ market shares resulted from the Japanese Government’s rationalization program and its attendant political and tax policies. Id. at 115-37.
80. See supra note 57 and accompanying text.
A. "TOLERANCE OF INTERNATIONAL CARTELS"

Congress's insertion of the phrase "including tolerance of international cartels" after "discriminatory or other acts" in section 48(a)(7)(D)(ii) of the Revenue Act of 1971 indicates that a government's tolerance of international cartels constitutes an act that would justify the President's suspension of the investment tax credit. Nevertheless, the legislative history of the Revenue Act of 1971 does not define "international cartel." The conference committee's reference to section 252(b) of the Trade Expansion Act of 1962, however, requires that "international cartel" be defined in accordance with the Eighty-seventh Congress's construction of that term in the 1962 Act.

The legislative history of the Trade Expansion Act of 1962 indicates that "international cartel," as used in section 252(b), retained the same meaning that the Seventy-eighth Congress assigned to it in the 1943 amendment to section 350 of the Tariff Act of 1930. The House Ways and Means Committee patterned section 252(b) of the 1962 Act after section 242 of H.R. 9900, the Kennedy Administration's proposal. The Kennedy Administration, however, had deliberately drafted section 242 in accordance with section 350(a)(5) of the Tariff Act of 1930. The Administration's analysis of H.R. 9900 thus stated that "this section [section 242] is substantially identical to the provision of section 350(a)(5) of the Trade Agreements Act of 1934, as amended." In addition, by authorizing the President to negotiate reciprocal trade concessions, the Eighty-seventh Con-
gress retained section 350's trade expansion policy in the Trade Expansion Act of 1962. 86 Therefore, in the absence of a contrary legislative intent, section 252(b) and section 350(a)(5) should be construed consistently.

The hearings and debates conducted prior to the adoption of House Joint Resolution 111 87 indicate that the Seventy-eighth Congress was concerned only with cartels possessing a multinational membership. During the hearings, members of Congress, particularly Representative Charles Dewey, the drafter of the amendment, repeatedly questioned witnesses as to the ability of multinational cartels to upset or undercut the tariff rates established by trade agreements. 88 Significantly, no member of Congress discussed the ability

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(1) after June 30, 1962, and before July 1, 1967, enter into trade agreements with foreign countries or instrumentalities thereof; and
(2) proclaim such modification or continuance of any existing duty or other import restriction, such continuance of existing duty-free or excise treatment, or such additional import restrictions, as he determines to be required or appropriate to carry out any such trade agreement.


86. Luther Hodges, Secretary of Commerce, explained the need to allow the President to negotiate reciprocal reductions in trade barriers as follows:

The only way to meet these targets [increased economic growth and decreased unemployment] is to sell more products, to expand the markets in which the goods of American industry, farms, mines and fisheries are sold . . . . The Trade Expansion Act will pave the way for greater growth of the U.S. economy by providing access to new expanding world markets.

Hearings on H.R. 9900, supra note 28, at 31 (statement of Luther Hodges, U.S. Secretary of Commerce).


88. For example, Representative Dewey stated:

I was wondering if the cartels as they were developed in Europe, where industry, we will say, in Germany, France, and Great Britain, or whatever other countries, are so combined that they could offset the provisions of a trade agreement made with any one of those three countries. In other words, if we had a high-tariff arrangement with one of them, could the cartel so operate that they could put their trade through that country that had a favorable rate, which would not be extended to the other countries that did not have such favorable rates for one reason or another? That is what I have been trying to find out from practical people, what were the effects of international cartels in regard to our trade agreements, not so much as regards monopolistic practices that might be carried on between them.

Hearings Before the Committee on Ways and Means on H.J. Res. 111: A Joint Resolution to Extend the Authority of the President Under Section 350 of the Tariff Act of 1930, as Amended, 78th Cong., 1st Sess. 626 (1943) (statement of Rep. Charles Dewey) [hereinafter referred to as Hearings on H.J. Res. 111].

Earlier in the hearings, Dewey defined international cartels in the same manner:

Mr. Dewey: There are informal, bilateral, and sometimes multilateral agreements in various lines of products, are there not?
Mr. Crowther: Yes.
Mr. Dewey: That could completely offset any trade agreements, formal trade agreements, between the countries—
Mr. Crowther: Completely.
of a national cartel to hinder the expansion of world trade. Furthermore, in explaining the purpose of the amendment, Representative Dewey traced the development of the cartel movement and specifically distinguished between national and international cartels. To illustrate the effects of international cartels upon reciprocal trade agreements, Dewey cited the International Tin Committee, a cartel composed of British, Bolivian, Belgian and Dutch firms.

The Seventy-eighth Congress's findings about the manner in which international cartels inhibit trade expansion suggests that the term "international cartel" should not be construed to include cartels of a single nationality. Congress was not concerned with a national

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Mr. Dewey: Who are participants in the cartels. Is that true?

Id. at 468.

In addition, Representative Harold Knutzen asked Francis Sayre, Assistant Secretary of State: "Who put the price of rubber up in the skies? It was a cartel—was it not—made up of Dutch and British rubber producers?" Id. at 191.

89. Dewey and other members of Congress recognized that national and international cartels "allocate fields of production and maintain monopolistic price levels." 89 Cong. Rec. 4180 (1943) (statement of Rep. Charles Dewey). Congress's focus, however, was not on an individual cartel's monopolistic practices, but on the ability of international cartels to coordinate their activities and control the introduction of products throughout the world. See, e.g., Hearings on H.J. Res. 111, supra note 88, at 625-26 (statement of Rep. Charles Dewey); 89 Cong. Rec. 4180-81 (1943) (statement of Rep. Charles Dewey). The focus by Dewey and the other members of Congress on the effects of international cartels suggests that Congress did not consider the impact of national cartels in reducing the level of world trade to be sufficiently significant to merit statutory attention. See infra notes 92-95 and accompanying text.

90. Representative Dewey stated:

Cartels are not in their inception a product of the twentieth century. . . . In general, the cartel movement in Europe paralleled the development of trusts in this country, with the difference that, particularly in Germany, national cartels have enjoyed the protection and subsidy of government.

. . . .

The industries and markets in which cartels and cartel arrangements exist are too numerous to analyze in detail . . . . Trade policies which endeavor to adjust tariffs in order to stimulate the interchange of commodities between the United States and other nations can be completely nullified by the existence of international cartels.

Take one of many possible examples: For many years the production, price, and international trade in tin have been controlled by a British-dominated cartel known as the International Tin Committee. In 1938 this international cartel renewed for a period of 5 years its control scheme limiting tin output . . . .

. . . .

On September 9, 1942, an agreement was signed by representatives of Great Britain, Bolivia, Belgium, the Netherlands and the International Tin Committee to preserve the machinery for post-war control of the production and price of tin . . . .

. . . .

That is only one of many examples that could be presented as to the operations of international cartels and the manner in which they tend to defeat the very purposes of reciprocal trade agreements.


91. See id.
cartel's monopolistic ability to restrict output and raise prices. Although Congress acknowledged that such cartels could reduce the level of foreign trade, it did not consider the harm serious enough to require remedial legislation. Rather, Congress sought to restrain the activities of cartels that can control the world market for particular products and shift their products among member nations in order to take advantage of varying tariff rates. The inability of a cartel within a single country to select the nations within which it will market its products consequently excludes the Japanese machine tool cartel from the phrase "international cartel."

B. UNITED STATES COMMERCE

The Ninety-second Congress added section 48(a)(7)(D) to the Revenue Act of 1971 to protect the United States' balance of payments. Although the Nixon Administration intended the ten percent import surcharge and the suspension of the convertibility of the dollar to help check the balance of payments deficit, Congress found that these methods by themselves would prove insufficient because foreign trade barriers had also contributed to the deficit. Congress

92. For example, Representative Dewey terminated the discussion of a German optical company's agreement with Bausch & Lomb not to import their products to America by saying:

"It seems to me that your illustration points more to monopolistic practices here in the United States than it does to any matter of trade treaty, because you say that in this case the German optical companies agreed not to come into this market. Now, that leaves a monopoly here in this market, which is outside of our present consideration . . . . What I have been attempting to do is to find if national cartels were effective in upsetting or undercutting the provisions of the rates established by those various trade agreements."


93. See, e.g., 89 Cong. Rec. 4180 (1943). In discussing the general effect of cartels, Representative Dewey recognized that "[c]artels are usually based on the efforts of small groups of powerful monopolies to corner supplies of raw materials, to amass huge patent structures and to employ their financial strength to 'regulate' output, divide markets, allocate fields of protection and maintain monopolistic price levels." 89 Cong. Rec. 4180 (1943) (statement of Rep. Charles Dewey).

94. Although Dewey acknowledged the effect that national cartels have on trade, see id., his focus on the effects of international cartels suggests that he and the other members of Congress did not believe that the impact of national cartels in reducing the level of world trade was sufficiently significant to merit Congressional action. See supra notes 88-90.

95. See supra notes 88-92. In his explanation Dewey focused on the international cartels which "interfered with the free operation of our foreign trade both export and import by dividing up world markets, limiting output and preventing the introduction of new materials and processes." 89 Cong. Rec. 4180 (1943) (statement of Rep. Charles Dewey) (emphasis added).

96. See supra notes 43-49 and accompanying text.

97. The Ways and Means Committee report explained: "These difficulties in our balance of payments are, of course, a result of a number of complex factors including inflation at home and discriminatory trade practices abroad." H. Rep. No. 533, 92d Cong., 1st Sess. 4 (1971).
viewed the establishment and continued availability of the investment tax credit as a long-term method of enhancing the United States' competitive position in foreign markets and of ultimately improving the balance of payments. Moreover, Congress found that a denial of the credit would restrain the otherwise resultant decline in the balance of payments when foreign trade practices produced declines in American export trade. The increase in the effective cost of and subsequent decrease in the demand for imported goods would provide the President with the leverage necessary to persuade the discriminating country to discontinue its restrictive practice. In view of this expressed purpose of the credit, Congress intended the term “United States commerce” in subsection 48(a)(7)(D)(i) and subsection 48(a)(7)(D)(ii) to connote United States foreign commerce.

The events surrounding the conference committee's formulation of section 48(a)(7)(D) further substantiate the preceding interpretation of “United States commerce.” The Senate proposal, which authorized the President to suspend the credit whenever he deemed such action to be “in the public interest,” would have allowed the President to deny the credit when a high level of imports threatened the balance of payments. The conference committee's bill, however, proposed to allow the President to deny selectively the credit to restrain the increased level of imports that the Senate feared would result from the simultaneous termination of the surcharge and allowance of the credit for foreign produced goods. This proposed amendment was rejected in favor of section 48(a)(7)(D). See supra text accompanying notes 55-56.

98. The Ways and Means Committee report explained: “[Bly making our productive facilities more efficient the new credit will help our exporters to compete for foreign markets and improve our balance of payments.” H. REP. No. 533, 92d Cong., 1st Sess. 6 (1971). Secretary of the Treasury John Connally's statement before the Finance Committee illustrates the emphasis placed on the credit as a long-term instrument for improving the United States balance of payments. Connally stated that “the really clinching argument for a long-run credit of at least 7 percent stems from the well recognized need for the United States to enhance its competitive position in world trade.” Revenue Act of 1971: Hearings on H.R. 10947 Before the Senate Committee on Finance, 92d Cong., 1st Sess. 6 (1971) (statement of John Connally, Secretary of the Treasury).

99. The Finance Committee recognized that a denial of the credit would discourage the purchase of goods not qualifying for the favorable tax treatment. The committee proposed to allow the President to deny selectively the credit to restrain the increased level of imports that the Senate feared would result from the simultaneous termination of the surcharge and allowance of the credit for foreign produced goods. S. REP. No. 437, 92d Cong., 1st Sess. 26 (1971). This proposed amendment was rejected in favor of section 48(a)(7)(D). See supra text accompanying notes 55-56.

100. Senators Robert Packwood and Jacob Javits unsuccessfully attempted to remove section 103 from the Revenue Act of 1971 when the Act was before the Senate. 117 CONG. REC. 42, 663-65 (1971). In defending the provision, Senator Russell Long stated: “This is one of the tools we think should be in the hands of the President to protect this Nation's interest and assist him to negotiate a bargain for the removal of barriers against American products.” Id. at 42,664 (statement of Sen. Russell Long). Senator Wallace Bennet supported Senator Long's assertion, stating: “The denial of the tax credit . . . is another blue chip in his negotiating process. It is something he can give up when he feels he has been given an adequate quid pro quo . . . . I think this provision strengthens his hand.” Id. (statement of Sen. Wallace Bennet).

101. Indeed, the Senate Finance Committee explained that it proposed the amendment because the committee was “concerned that the combined price effect of automatically reinstating the credit for foreign property at the same time as the 10 percent import
ever, rejected this approach. Senator Russell Long, the chairman of the Senate Finance Committee, noted that the conference amendment provided a method of "offsetting . . . discriminations imposed by foreign countries with respect to U.S. products." Moreover, Representative Wilbur Mills, in explaining the conference committee bill, emphasized that both subsection 48(a)(7)(D)(i) and subsection 48(a)(7)(D)(ii) referred to restrictions against American exports. His summary of the changes made by the conference committee in the House and Senate bills highlighted the President's authority to suspend the investment tax credit "with respect to an article (or class of articles) manufactured in a foreign country if he determines that the country maintains burdensome non-tariff trade restrictions against U.S. exports or engages in discriminatory actions or policies which unjustifiably restrict U.S. exports."  

Although the Eighty-seventh Congress did not define the term "United States commerce" in either the legislative history or the text of the 1962 Trade Expansion Act, several concomitant factors support the interpretation of the term as United States foreign commerce. First, the 1962 Act relied on the expansion of American export trade as the means of promoting the expansion of the American economy. Second, the members of Congress consistently discussed subsection 252(b) of the Act in terms of the authority it gave


103. 117 Cong. Rec. 45,855 (1971) (emphasis added). The summary of section 48(a)(7)(D) provided in full:

As a further means of aiding the achievement of more equitable international trading conditions and the restriction of the U.S. balance-of-trade position, the President is given authority to continue the exclusion from the investment [tax] credit for foreign produced property after the termination of the temporary additional import duty. He may exercise this authority with respect to an article (or class of articles) manufactured in a foreign country if he determines that the country maintains burdensome non-tariff trade restrictions against U.S. exports or engages in discriminatory actions or policies which unjustifiably restrict U.S. exports.

104. The conference committee's statement that "[the] trade restrictions and discriminatory acts referred to by this provision are the same as those contained in section 252(b) of the Trade Expansion Act of 1962" includes the Eighty-seventh Congress's interpretation of United States commerce. The phrase "unjustifiably restricting United States commerce" modifies "discriminatory and other acts." Section 48(a)(7)(D) was not intended to apply to any acts a foreign country engaged in, but only to those that had the result of "unjustifiably restricting United States commerce."

105. Luther Hodges, the Secretary of State, testified before the Senate Committee on Finance:

The only way to meet those targets [increase the growth rate of the gross national product, establish full production capacity, and reduce unemployment] is to sell more products, to expand the markets in which the goods of American industry, farms, mines and fisheries are sold . . . . The Trade Expansion Act will pave
the President to suspend tariff concessions in response to foreign trade barriers. In particular, the reports of both the House Ways and Means Committee and the Senate Finance Committee analyzed subsection 252(b) in this manner. The Senate Finance Committee report specifically stated: "subsections (a) and (b) of section 252 of the bill together authorize action against burdensome foreign import restrictions." Third, the Eighty-seventh Congress was not concerned with the level of imports. The United States' balance of trade surplus had increased from $4592 billion in 1960 to $5344 billion in 1961.

The language and structure of the Trade Expansion Act of 1962 confirm the interpretation of "United States commerce," as used throughout the Act, as United States export trade. The Finance Committee's statement that "subsections (a) and (b) . . . together authorize action against burdensome foreign import restrictions" indicates that Congress intended the subsections to work in conjunction with each other. The phrase "United States commerce" must therefore have the same meaning in both subsections.

Subsection (a) of section 252 authorized the President to refrain from negotiating the reduction of foreign import restrictions whenever he found that "unjustifiable foreign import restrictions impair[ed] the value of tariff commitments made to the United States, oppress[ed] the commerce of the United States, or prevent[ed] the expansion of trade on a mutually advantageous basis." The way for greater growth by providing access to new expanding world markets.


106. Senator Paul Douglas was particularly concerned whether section 252 should give the President the power to proclaim increases in tariffs or import restrictions in addition to authorizing him to suspend the benefits of concessions. His comments demonstrate Congress's understanding that section 252 applied to American exports. He stated to Charles Shuman, President of the American Farm Bureau Association: "I am very glad that you have endorsed section 252 which authorizes the President to suspend decreases in our tariffs to the European countries if they use levies, import licenses or the like, or impede the movement into the Common Market of American farm products."


107. The House Ways and Means Committee Report's explanation of subsection 252(b) stated:

Your committee does not believe that there can be effective use of the trade agreement process to lower trade barriers if unjustifiable restrictions of a tariff or nontariff nature are maintained or erected, or other actions are taken which are inconsistent with trade agreement commitments. When such barriers are placed in the way of trade, trade agreements cannot fully attain the objective sought.


109. Senate Hearings, supra note 105, at 173.


111. Section 252(a) provided in full:
“value” of tariff commitments would be impaired by foreign import restrictions when a foreign country’s import restrictions caused its exports to the United States to be so disproportionate to its admission of American exports as to harm American industry. If the phrase “oppress the commerce of the United States” in subsection 252(a) is to have any independent meaning, the phrase must be construed to refer to burdens on United States export trade and not burdens on domestic industry. The subsection 252(b)(1) burden on “United States commerce in a manner inconsistent with provisions of trade agreements” likewise refers to United States foreign trade. The provisions of a trade agreement under the reciprocal trade policy would require a foreign country to accept increased American exports in return for American concessions. Foreign import restrictions could correspondingly burden American commerce in an inconsistent manner only if a foreign country decreased its admission of American exports. The restrictions on United States commerce in section 252(b)(2) thus must be construed to refer to United States foreign trade in order that subsections 252(a) and 252(b)(1) may be applied consistently.

In addition, Congress provided protection for American industry harmed by an increased level of imports in Title III of the 1962 Act. Sections 301 and 302 specifically authorized the Tariff Commission to determine whether foreign products were “being imported into the United States in such increased quantities as to cause, or threaten to cause, serious injury to the domestic industry

\[
\text{(a) Whenever unjustifiable foreign import restrictions impair the value of tariff commitments made to the United States, oppress the commerce of the United States, or prevent the expansion of trade on a mutually advantageous basis, the President shall—}
\]
\[
(1) \text{take all appropriate and feasible steps within his power to eliminate such restrictions,}
\]
\[
(2) \text{refrain from negotiating the reduction or elimination of any United States import restriction under section 201(a) in order to obtain the reduction or elimination of any such restrictions, and}
\]
\[
(3) \text{notwithstanding any provision of any trade agreement under this Act and to the extent he deems necessary and appropriate, impose duties or other import restrictions on the products of any foreign country or instrumentality establishing or maintaining such foreign import restrictions against United States agricultural products, when he deems such duties and other import restrictions necessary and appropriate to prevent the establishment or obtain the removal of such foreign import restrictions and to provide access for United States agricultural products to the markets of such country or instrumentality on an equitable basis.}
\]


112. A basic rule of statutory construction is that a statute should be interpreted to give effect to all its provisions, such that no part renders another part superfluous or redundant. See 2A C. Sands, Statutes and Statutory Construction § 46.06, at 63 (1973).
If Congress had thus intended to authorize the President to suspend tariff reductions when increased imports harmed American industry, such a provision would have been found in Title III. Furthermore, Congress used the term “domestic industry” throughout Title III. This use illustrates Congress’ intent to distinguish between domestic commerce and “United States commerce’s” exclusive scope of foreign trade in subsections 252(a) and 252(b)(1).

Even if President Reagan had chosen to abandon the distinction between United States export trade and United States domestic commerce, Houdaille’s petition would still fail to establish that the Japanese Government’s policies have restricted United States commerce. The subsection 48(a)(7)(D)(ii) language “other acts (including tolerance of international cartels) or policies” would have included the Japanese Government’s promotion of the national cartel, if such action were found to “restrict” commerce. A car-

113. See supra note 36.
115. The reading of “United States commerce” as “United States export trade” is also consistent with the meaning Congress ascribed to “American commerce” in section 350(a) of the Tariff Act of 1930, as amended. As with the phrase “international cartel,” the Administration’s intent that section 242 of H.R. 9900 have the same effect as section 350(a), as amended, and the House’s use of H.R. 9900 as a model for H.R. 11970 suggest that the terms of section 350 and 252(b) should be construed consistently. See supra text accompanying notes 81-84. Although the 1934 Act never defined “American commerce,” the purpose of the amendment, like the purpose of the Trade Expansion Act of 1962, was to increase American export trade. See supra notes 10-20 and accompanying text. In addition, the House Ways and Means Committee used “commerce” to refer to American export trade only in its report. See H. REP. No. 1000, 73d Cong., 2d Sess. 8-9 (1934).
116. Section 48 authorizes the President to deny the tax credit to any goods imported from a country that has restricted United States commerce by pursuing the acts and policies contained in subsections 48(a)(7)(D)(i) and 48(a)(7)(D)(ii). See infra note 126 and accompanying text. The petition assumes that the President can deny the credit only to goods like or similar to the restricted products.
117. See supra note 2.
118. A “national cartel” is a cartel composed of companies of a single nationality. See supra note 90 and accompanying text.
119. Section 48(a)(7)(D) authorizes the President to deny the tax credit to the products of any country that engages in “discriminatory or other acts (including tolerance of international cartels) or policies unjustifiably restricting United States commerce.” I.R.C. § 48(a)(7)(D)(ii). See supra note 2. No member of Congress or administration official specifically defined the acts and policies included in the phrase “discriminatory or other acts, or policies” at any stage of the passage of the Trade Agreement Act of 1934, House Joint Resolution 111, the Trade Expansion Act of 1962, or the Revenue Act of 1971. The hearings and debates indicate, however, that “discriminatory acts” refers to the imposition of any duty, nontariff barrier to trade, or other policy that disadvantages American products more than it burdens other imports or the domestic goods of the country adopting the policy. See, e.g., Senate Hearings, supra note 105, at 168 (statement of Sen. Carl Curtis); Hearings Before the Committee on Finance on H.J. Resolution 111, 78th Cong., 1st Sess. 37 (1943) (statement of Francis Sayre, Assistant to the Secretary of State); 117 CONG. REc. 42,664 (1971) (statement of Sen. Russell Long). The petition does not allege that the Japanese Government has taxed American machine tools more heavily than any other machine tools, has placed import restrictions on American
tel "restricts" commerce by using its control over the market for a particular product to restrict output and to charge a high price for that product.\footnote{120} Pursuant to the ordinances of the Japanese Government that promoted the formation of the cartel, however, the Japanese machine tool manufacturers have increased production\footnote{121} and decreased the prices\footnote{122} of exported machine tool parts.\footnote{123} The cartel

machine tools, or has pursued any other policy that burdens United States products more than the products of any other country. A denial of the accelerated depreciation deduction, see \textit{supra} note 72, to any American owned companies manufacturing machine tools in Japan would be a "discriminatory policy." The petition, however, presents no evidence that any American manufacturers would be eligible for the deduction. Although the Japanese Government denies loans at concessionary interest rates, see \textit{supra} note 71, and subsidies, see \textit{supra} note 70, to the American manufacturers, these benefits lack the burdensome effect on American \textit{products} that "discriminatory acts" seems to require. This Note therefore analyzes the ability of the President to deny the investment tax credit pursuant to the "other acts . . . or policies" criteria of section 48(a)(7)(D)(ii).

\footnote{120} As Representative Dewey explained to the House of Representatives:

\begin{quote}
Cartels are usually based upon the efforts of small groups of powerful monopolies to corner supplies of raw materials, to amass huge patent structures and to employ their financial strength to "regulate" output, divide markets, allocate fields of production and maintain monopolistic price levels . . . .

. . . International monopolies which restrict production, maintain artificial and exorbitant price levels, and attempt to segregate spheres of influence among themselves can effectively defeat the best intentions [to stabilize the world economy].
\end{quote}

\footnote{89} \textit{CONG. REC.} 4180-81 (1943) (statement of Rep. Charles Dewey).

\footnote{121} The Japanese production of numerically controlled machining centers increased from 526 units in 1976 to 5,231 units in 1980. Petition to the President, \textit{supra} note 4, at 119-20, 128 (citing \textit{JAPAN, MINISTRY OF INTERNATIONAL TRADE AND INDUSTRY, YEARBOOK OF FINANCIAL STATISTICS; JAPAN, MINISTRY OF FINANCE, JAPAN EXPORTS AND IMPORTS: COMMODITY BY COUNTRY}). The petition implied that the production goals established by the Ministry of International Trade and Industry for the production of machine cutting tools pursuant to its authority under the Extraordinary Measures Laws, see \textit{supra} note 61, have permitted the Japanese manufacturers to expand their total production sufficiently to increase their exports of machine cutting tools to the United States. Petition to the President, \textit{supra} note 4, at 129-38.

\footnote{122} Every Japanese exporter of numerically controlled machining centers and numerically controlled lathes must obtain approval from the Ministry of International Trade and Industry for the price of each shipment of these machine tools to the United States. \textit{See} Ministerial Ordinance Concerning Export Approval Pursuant to the Export and Import Trading Law, Ministerial Ordinance of the Ministry of International Trade and Industry No. 54 (as amended effective Mar. 27, 1978) Art. 1, Sched. I (1955), \textit{reprinted in} Petition to the President, \textit{supra} note 4, at D208, D211; Enforcement Order of the Export and Import Trading Law, Cabinet Order No. 244 (as amended effective Mar. 27, 1978) Art. 1(8), \textit{reprinted in} Petition to the President, \textit{supra} note 4, at D196, D197 (1955); Petition to the President, \textit{supra} note 4, at 92-96. Houdaille alleged that the price agreed upon by the Japanese Government and the exporters is based upon a government ceiling price. Petition to the President, \textit{supra} note 4, at 94-95.

\footnote{123} Houdaille could have alleged that the cartel had unjustifiably restricted United States commerce if the cartel used its control over the Japanese markets to restrict the sales of American-made machine tool parts. Apart from establishing export pricing policies, however, none of the ordinances passed by the Ministry of International Trade and Industry establish different production and quality standards for exported machine tools and machine tools produced for the Japanese market. Extraordinary Measures Law No. 3 indicates that the cartel does not use its control over the Japanese market to restrict
has displaced the sales of Houdaille and the other machine tool manufacturers by price competition rather than by restricting sales through decreasing its members' output. Although cartels may engage in predatory pricing to gain control of a market,\textsuperscript{124} Houdaille's petition presented no evidence that the Japanese manufacturers have priced the machine tools at a level calculated to force American machine tool manufacturers out of the United States market.\textsuperscript{125}

C. CURRENT TRADE STATUTES

Houdaille's failure to establish that the Japanese Government's promotion of the machine tool cartel has restricted the sales of American-made machine tools did not preclude President Reagan from suspending the investment tax credit for purchasers of Japanese machine tools. Section 48(a)(7)(D) does not require that the products ineligible for the investment tax credit be identical or similar to the products whose sale the offending country has restricted. Rather, the section authorizes the President to suspend the tax credit "to any article or class of articles manufactured or produced in [the] foreign country" maintaining the nontariff trade restrictions or engaging in "discriminatory or other acts."\textsuperscript{126} Section 48(a)(7)(D) thus permits the President to deny the application of the tax credit to purchasers of the Japanese machine tools if the Japanese Government has burdened or restricted any American exports by pursuing the policies or acts specified in subsection 48(a)(7)(D)(i) or subsection 48(a)(7)(D)(ii).

A suspension of the tax credit by President Reagan would have constituted a retaliation against the particular restrictive practices of
the Japanese Government found to have triggered the applicability of section 48(a)(7)(D). Section 48(a)(7)(D), like its predecessor statutes, is a retaliatory measure\(^{127}\) designed to pressure a country to remove its tariff or nontariff trade barriers, or to discontinue other policies that restrict United States exports.\(^{128}\) Houdaille, however, proposed to use section 48(a)(7)(D) as a remedial measure. In particular, Houdaille contended that section 48(a)(7)(D) constituted an appropriate response to the displacement of American machine tool sales because the denial of the credit would have forced the Japanese manufacturers to withdraw their products from the American market.\(^{129}\)

Section 48(a)(7)(D) is not a remedial measure. The section lacks the cause and effect relationship, characteristic of remedial measures, between the importing practice the section attempts to offset and the injury suffered by the industry receiving relief. The countervailing duty,\(^{130}\) anti-dumping\(^{131}\) and escape clause\(^{132}\) remedies all require that the burdened imports be of the same type as the

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127. United States remedial policies assist domestic producers injured by increased imports by placing duties or import restrictions on the competitive imported goods. See infra text accompanying notes 130-39. The purpose of section 48(a)(7)(D), however, is to persuade foreign governments to discontinue practices that restrict United States commerce. See supra note 100. Senator Jacob Javits' characterization of the denial of the credit to purchasers of foreign equipment for the duration of the surcharge as a "weapon" confirms the retaliatory nature of section 48. 117 CONG. REC. 42,663 (statement of Sen. Jacob Javits). Similarly the 1962 Congress viewed section 252 as a negotiating chip and a means of "punishing" countries who violated section 252. See, e.g., Senate Hearings, supra note 105, at 54, 308-09.

128. See supra note 100.

129. Petition to the President, supra note 4, at 50-56. See also supra notes 74-77 and accompanying text. Houdaille's request for the suspension of the tax credit for an indefinite period of time and for a review of the desirability of continuing the denial of the credit five years after the suspension emphasizes the remedial characterization of Houdaille's proposed use of the surcharge. The review "should assess the health of the United States NC [i.e., numerically controlled] machining center and NC punching machine industry, including its ability to satisfy current and anticipated defense requirements." Petition to the President, supra note 4, at 16.

130. 19 U.S.C. §§ 1303, 1671-1671f (1982). Countervailing duties may be imposed when any country provides any "bounty or grant" or "subsidy" to the production, manufacture, or export of merchandise imported into the United States. Id. §§ 1303(a), 1671(a). If the foreign country is a party to the GATT Subsidies and Countervailing Duties Code, GATT Doc. MTN/NTM/W/232, reprinted in H.R. Doc. No. 153, 96th Cong., 1st Sess. 257 (1979), as is Japan, the subsidy must also materially injure, threaten with material injury, or materially retard the establishment of an industry in the United States. 19 U.S.C. § 1671(a) (1982).

131. 19 U.S.C. §§ 1673-1676i (1982). Anti-dumping duties are available where "a class or kind of foreign merchandise is being, or is likely to be, sold in the United States at less than its fair value." Id. § 1673. The importation of the goods must materially injure, threaten with material injury, or retard the establishment of an industry in the United States. Id.

132. Id. §§ 2251-2394. The escape clause sections provide for the imposition of duties or a limit on imports and adjustment assistance, if "an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or
goods assisted by the American response, and that the increased import flow be the cause of the injury to the domestic industry benefitted by the American response.\textsuperscript{133} The President’s use of section 48(a)(7)(D) as a remedial measure in response to Houdaille’s petition would have produced the anomalous result of providing competitive assistance to American manufacturers while disadvantaging related foreign imports not primarily responsible for the depressed sales of the manufacturer’s products.\textsuperscript{134} The danger of retaliatory action by the foreign country whose goods are disadvantaged by a remedial measure requires that the United States impose remedial measures only when they address the cause of the injury to the domestic concern.\textsuperscript{135}

The President’s inability to vary the amount by which the denial of the tax credit burdens foreign imports also militates against use of the suspension of the tax credit as a remedial measure. American remedial trade policies seek to offset the burden the offending government’s practice places on American goods. Anti-dumping and countervailing duties enable a domestic producer to compete with similar foreign goods by placing duties on the foreign goods equal to the amount by which the foreign market value of the products exceeds the United States price of the merchandise\textsuperscript{136} and by imposing duties equal to the net subsidies to the imports.\textsuperscript{137} Furthermore, the escape clause section authorizes the President to impose import

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\textsuperscript{133} See id. § 1671 (countervailing duties imposed on parties to the GATT Subsidies and Countervailing Duties Code); § 1673 (anti-dumping duties); §§ 2251-2253 (escape clause proceeding). The imposition of countervailing duties on countries that are not parties to the GATT Subsidies and Countervailing Duties Codes provides the only exception to the requirement that the goods imported must be found to be a cause of injury to the domestic industry. The article imported into the United States simply must be the recipient of a bounty or grant. \textit{Id.} § 1303(a)(1).

\textsuperscript{134} An industry’s depressed sales may be due primarily to factors other than import competition. For example, the poor quality of the product produced or high prices generated by an inefficient production process may be the primary cause of low domestic demand for the good.

\textsuperscript{135} The escape clause sections provide the most explicit congressional recognition of this potential problem. Prior to the President’s provision of import relief, the International Trade Commission must determine that an article is 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.” 19 U.S.C. § 2251(b)(1) (1982). In subsequently determining whether to provide import relief to the industry, the President must consider “the efforts being made or to be implemented by the industry concerned to adjust to import competition” and “the effect of import relief on the international economic interests of the United States.” \textit{Id.} §§ 2252(c)(3), 2251(c)(5).

\textsuperscript{136} \textit{Id.} §§ 1673, 1673e.

\textsuperscript{137} \textit{Id.} §§ 1303(a), 1671(a), 1671e.
\end{flushright}
restrictions to the extent such restrictions are necessary both to prevent or alleviate the injury to a domestic industry and to facilitate the adjustment of the industry to the increased import competition. Section 48(a)(7)(D) only provides the President with the choice of denying the credit or of allowing foreign imports to remain eligible for favorable tax treatment. The denial of the credit will always effectively increase the price of the imported good proportionately to the amount of the investment tax credit to which a producer would otherwise be entitled. The loss of the credit may therefore be an ineffective remedy if the increased effective cost of imported products is insufficient to restore American products to a competitive position. Thus, President Reagan correctly refused to suspend the investment tax credit to provide remedial relief to the machine tool industry.

The retaliatory measures authorized by section 301 of the Trade Act of 1974 obviate any need to expand the meaning of United States commerce in section 48(a)(7)(D) to encompass United States domestic commerce. A foreign country can harm the domestic sale of American products primarily by providing subsidies and other fiscal favors that enable the foreign producers to sell products at an artificially depressed price, or by promoting or tolerating the formation of a cartel that eventually acquires control over the American market. Section 301 authorizes the President to retaliate

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138. If the President decides to provide import relief under the sections, the Act authorizes him to:
(1) proclaim an increase in, or imposition of, any duty on the article causing or threatening to cause serious injury to such industry;
(2) proclaim a tariff-rate quota on such article;
(3) proclaim a modification of, or imposition of, any quantitative restriction on the import into the United States of such article;
(4) negotiate, conclude, and carry out orderly marketing agreements with foreign countries limiting the export from foreign countries and the import into the United States of such articles; or
(5) take any combination of such actions.

Id. § 2253(a).

139. Id.


141. The sale of American-made products in the domestic market can be harmed either by the displacement of their sales by sales of foreign goods or by the total inability of the American producers to manufacture the product because of a cartel's monopolistic control of a market. Foreign governments enable their industries to sell goods imported to the United States at low prices or prices which are less than the fair market value of the goods primarily through the use of subsidies. Subsidies may take the form of cash payments, reduction of specific tax liability, loans at preferential interest rates, provisions of goods and services at prices below market value, and government purchases of goods and services at prices above market price. S. REP. No. 1298, 92d Cong., 2d Sess. 164 (1974). Cartels may use their control over a particular market to engage in predatory pricing, to maintain a monopolistic market to engage in predatory pricing, or to maintain monopolistic restraints on the production, and to charge high prices. See supra note 120.

142. Section 301, as amended, provides in pertinent part:
against any act or policy of a foreign country that "is unjust, unreasonable, or discriminatory and burdens or restricts United States commerce." Although section 301 generally addresses only restrictions or burdens on United States exports, the section does encompass export subsidies and other incentives having the effect of subsidies on foreign exports that substantially reduce sales of competitive American products in the United States. The section specifically requires the President to "take all appropriate and feasible action within his power to . . . obtain the elimination of such act, policy or practice." Under this section, the President may suspend or refrain from proclaiming the benefits of trade agreement concessions.

(a) Determinations requiring action
If the President determines that action by the United States is appropriate—
(1) to enforce the rights of the United States under any trade agreement; or
(2) to respond to any act, policy, or practice of a foreign country or instrumentality that—
(A) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or
(B) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce;
the President shall take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of such act, policy, or practice. Action under this section may be taken on a nondiscriminatory basis or solely against the products or services of the foreign country or instrumentality involved.

(b) Other action
Upon making a determination described in subsection (a) of this section, the President, in addition to taking action referred to in such subsection, may—
(1) suspend, withdraw, or prevent the application of, or refrain from proclaiming, benefits of trade agreement concessions to carry out a trade agreement with the foreign country or instrumentality involved; and
(2) impose duties or other import restrictions on the products of, and fees or restrictions on the services of, such foreign country or instrumentality for such time as he determines appropriate.

19 U.S.C. §§ 2411(a)-2411(b) (1982).


144. The Trade Agreements Act of 1979 replaced section 301 of the Trade Act of 1974 with a new section 301. Trade Agreements Act of 1979, Pub. L. No. 96-39, § 901, 93 Stat. 144, 295. Section 301(a)(3) of the 1974 Trade Act authorized the President to take action to halt the policies of a foreign country when that country "provide[d] subsidies (or other incentives having the effects of subsidies) on its exports of one or more products to the United States or to other foreign markets which have[d] the effect of substantially reducing sales of the competitive U.S. product or products." Trade Act of 1974 § 301(a)(3). The new section 301 eliminated this subsection. See supra note 142. Nevertheless, all acts, policies, or practices covered by the 1974 version of section 301 are covered by section 301 as revised. S. REP. No. 249, 96th Cong. 1st Sess. 236-37 (1979). For an illustrative list of recognized export subsidies, see GATT Subsidies and Countervailing Duties Code, supra note 130, at 295 (Annex).

sions, impose duties on the products of the foreign country, or impose other import restrictions. Although section 301 applies only to those subsidies and other policies having the effect of export subsidies, the scope of section 301 is still broader than would be an expansion of section 48(a)(7)(D) to include domestic commerce. As previously stated, section 48(a)(7)(D) applies only to those foreign acts and policies that “restrict” United States commerce. Foreign subsidies are consequently excluded from section 48(a)(7)(D)’s protection because they do not impede the manufacturers’ marketing of the product and thus do not restrict domestic product sales. Subsidies displace similar products by enabling the foreign manufacturer or importer to set a price below the prevailing market price.

The President’s section 301 power to retaliate against export subsidies that result in the displacement of American products implicitly includes the power to retaliate against a cartel’s control of a particular product, to the extent that the cartel receives export subsidies. If a cartel that is not the recipient of export subsidies institutes pricing policies that displace or restrict American industry's domestic sales, the cartel would still be subject to governmental retaliation under section 337 of the Tariff Act of 1930. Section 337 prohibits unfair methods of competition and unfair acts in the importation or sale of articles to the United States that tend to “destroy or substantially injure an industry . . . or to prevent the establishment of . . . an industry, or to restrain or monopolize trade and commerce in the United States . . . .” The section authorizes the International Trade Commission to prohibit the entry into the United States of articles imported in violation of the section, or to issue an order directing the importers to cease and desist from

146. Id. § 2411(b)(1).
147. Id. § 2411(b)(2).
148. Id.
149. See supra note 144.
152. Section 337(a), as amended, provides:
(a) Unfair methods of competition and unfair acts in the importation of articles into the United States, or in their sale by the owner, importer, consignee, or agent of either, 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, or to restrain or monopolize trade and commerce in the United States, are declared unlawful, and when found by the Commission to exist shall be dealt with, in addition to any other provision of law, as provided in this section.
153. Id. § 1337(d).
engaging in the unfair acts.\textsuperscript{154}

Section 301 does encompass all of the acts and policies affecting United States exports against which section 48(a)(7)(D) authorizes the President to deny the investment tax credit.\textsuperscript{155} Section 48(a)(7)(D) nevertheless remains an essential instrument in United States foreign trade policy. Section 48(a)(7)(D) permits the United States to respond to foreign trade practices when other alternatives would present a greater risk of retaliation by the foreign country whose goods are disadvantaged.\textsuperscript{156} The actions authorized by section 301, specifically the denial of trade concessions and the levy of duties and import restrictions, may severely reduce the sales of foreign products in the American market. The serious impact of these actions consequently invites foreign retaliation against American exports rather than foreign removal of the offending practice. Conversely, the availability of the suspension of the tax credit under section 48(a)(7)(D) permits the United States to respond to offending foreign trade practices with a minimal risk of retaliation. The denial of the investment tax credit increases the effective cost of foreign products only by the amount lost due to the unavailability of the credit. The consequent decline in foreign import sales is thus likely to be less severe than the decline caused by the imposition of section 301 sanctions or alternative measures.\textsuperscript{157} The accompanying low risk

\textsuperscript{154} Id. § 1337(f). Section 337 has historically been applied primarily in patent infringement cases. Garfinkel, Guide to Import Relief and Unfair Trade Actions Available Under United States International Trade Law, 15 Int'l Law. 240, 245 (1980); Jacobs & Hove, supra note 143, at 19. There is no statutory restriction, however, on the use of section 337 in response to other trade policies.

In addition to a section 337 proceeding and a section 301 proceeding, an injured American producer may bring a private action against a cartel for damages resulting from unfair import competition. An injured party can also obtain injunctive relief under the Wilson Tariff Act of 1894 or the Clayton Act. 15 U.S.C. §§ 12, 26 (1982).

\textsuperscript{155} The Trade Act of 1974 repealed section 252 of the Trade Expansion Act of 1962. Trade Act of 1974 § 602(d). Section 301 incorporates and expands the acts and policies encompassed in section 252. H. REP. No. 571, 93d Cong., 1st Sess. 64-65 (1973). The scope of section 301 is therefore inclusive of section 48(a)(7)(D) as the acts and policies contained in section 48(a)(7)(D) are the same as those in section 252(b) of the Trade Expansion Act of 1962. See supra note 57.

\textsuperscript{156} The Ninety-second Congress partially based its decision to give the President the authority to suspend the tax credit on the low danger of retaliation. Senator Russell Long explained to the Senate, "This is a small power compared with the power to impose a 15 percent tax which is in this bill." 117 CONG. REC. 42,664 (1971) (statement of Sen. Russell Long).

\textsuperscript{157} The Trade Act of 1974, as amended, places no limit on the size of the duty or the severity of the import restriction the President may impose on the products of a foreign country pursuant to section 301. The withdrawal of the benefit of trade agreement concessions, also authorized by section 301, similarly allows the President to disadvantage a foreign product severely, by subjecting imports to the restrictions imposed on them prior to the trade negotiations conducted with the United States. The loss of the credit, in contrast, may often increase the effective cost of imports by a small percentage of their purchase price. Moreover, the denial of the credit may not produce a large decline in
of retaliation against more minimal losses enables the United States government to use section 48(a)(7)(D) to respond to foreign trade practices when the United States would otherwise abstain from imposing more restrictive retaliatory measures or would prefer to use a less severe retaliatory response.

Section 48(a)(7)(D) is the only statutory response to foreign trade practices that does not require an administrative determination or recommendation. Congress has traditionally required administrative agencies to conduct investigations and often to hold public hearings as a prerequisite to governmental decisions to apply remedial or retaliatory trade measures.\textsuperscript{158} Congress has recognized the importance of determining the precise nature of a country's trade practice prior to invoking any trade statute. The information gathering procedures serve two primary purposes. First, they promote a determination of whether the country is indeed pursuing the policy and causing the apparent effects to which the United States is contemplating a response.\textsuperscript{159} Second, they allow the administrative body gathering the information to evaluate the economic interests of the United States in adopting the response in issue.\textsuperscript{160}

Because of the relatively small danger of retaliation posed by the denial of the investment tax credit under section 48(a)(7)(D), it is feasible to provide the President with exclusive discretion to decide whether or not to suspend the credit.\textsuperscript{161} Nevertheless, the vesting of exclusive discretion to make this determination in the President poses two dangers. First, the President may deny the credit when a foreign country is not restricting United States commerce and may thus produce political strains between the two countries. Such strained relations might prompt the foreign country to impose reciprocal trade sanctions against the United States. Second, the President's unilateral discretion precludes consideration of whether the alleged restrictive policy would be capable of resolution by consultation or by various international dispute mechanisms.\textsuperscript{162} The detri-

\textsuperscript{158} See, e.g., 19 U.S.C. § 1337(c) (1982) (section 337 proceeding); \textit{id.} § 2251(c) (escape clause proceeding); \textit{id.} § 2412(b)(2) (section 301 action).

\textsuperscript{159} See, e.g., 19 U.S.C. § 1337(c) (section 337 proceeding); \textit{id.} § 2251(d) (escape clause proceeding); \textit{id.} § 2414 (section 301 action). \textit{See also} S. REP. No. 249, 96th Cong., 1st Sess. 238-39 (1979).

\textsuperscript{160} See, e.g., 19 U.S.C. § 2252(c) (1982) (escape clause proceeding); \textit{id.} § 2413 (section 301 proceeding).

\textsuperscript{161} See supra note 157.

\textsuperscript{162} The amendments to section 301 of the 1974 Trade Act require use of international dispute settlement mechanisms in various instances. The amendments, which were passed primarily to implement the 1979 Multilateral Trade Negotiations, require
mental effects of such preclusion become evident when the use of such mechanisms would more effectively eliminate a particular trade practice than would retaliatory action. Consultations and dispute mechanisms specifically provide for an immediate discussion of the controversy. Retaliation, on the other hand, may produce negotiations only after the actualization of the economic effects of the sanction.

The possibility that the President may deny the tax credit to a foreign country whose policies do not restrict United States commerce and that a period of undue delay may elapse prior to the commencement of negotiations suggests that Congress should amend section 48(a)(7)(D). In particular, Congress should provide for an administrative body to investigate the apparently discriminatory practice and to evaluate the desirability and potential effectiveness of suspending the investment tax credit. Due to the minimal financial burden and the low risk of retaliation associated with the denial of the application of the tax credit, relative to the imposition of duties and other measures, public hearings are not necessary to evaluate a prospective suspension. Furthermore, the need for a retaliatory policy which responds quickly to an offending foreign trade practice and which communicates the United States' displeasure requires that such an amended section 48(a)(7)(D) authorize the President to act in his sole discretion, thus bypassing the administrative investigation stage, in cases demanding expeditious action.

CONCLUSION

President Reagan properly rejected Houdaille Industries' petition that he deny the investment tax credit to purchasers of Japanese...
machine tools pursuant to his authority under section 48(a)(7)(D) of the Internal Revenue Code. Congressional intent and the statutory scheme of the United States trade laws establish that the President of the United States should deny the investment tax credit only when he wishes to retaliate against foreign trade practices that affect United States export trade. Moreover, when basing his authority to deny the investment tax credit on the acts of an international cartel, the President should ensure that the members of the cartel in issue are of more than one nationality. The President's authority to deny the investment tax credit under section 48(a)(7)(D), when construed in this manner and when subjected to appropriate procedural safeguards, will provide the United States with a valuable means of responding to unfair foreign trade practices against United States exports.

Claudia J. Dumas