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The United States Specialty Steel Industry

An Examination of the Failure of Domestic and International Trade Legislation and a Proposal for Change

Michael H. Leb*

On July 19, 1983, President Reagan increased the existing tariffs, and imposed quantitative limitations on imports of specialty steel.[1] The President imposed these measures pursuant to section 202 of the Trade Act of 1974 which permits him to grant import relief in certain carefully defined circumstances.[2] This action angered foreign specialty steel producers, particularly those in the European Economic Community (EEC). The EEC claimed that the United States (U.S.) had violated its international trade obligations under the General Agreement on Tariffs and Trade (GATT),[3] and reneged on its promise to halt protectionism as

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1. Proclamation No. 5074, 3 C.F.R. 68 (1983).

Specialty steel differs from ordinary carbon steel in three important areas: alloy content, quantity manufactured, and price. The alloys give the specialty steel those characteristics that make it suitable for application in extreme environments demanding special hardness or resistance to heat, corrosion, or abrasion. Certain stainless steels require up to 30 percent chromium and 26 percent nickel, while many high temperature products are up to 100 percent alloy. Manufacturers use specialty steel in products ranging from ultra-high strength landing gear assemblies to seamless tubing for nuclear power plants. Builders also employ specialty steel in the construction of modern skyscrapers.

Since the chemical composition of particular specialty steels depends on their individual uses, the steel is often produced in small quantities, measured in pounds rather than tons. This small-scale production, combined with high labor content and low yields, makes specialty steel far more costly than carbon steel. For example, carbon steel averages $160 per ton, while stainless steel prices average $1200 per ton, with prices for some high-temperature alloys reaching $10,000 per ton. *See generally* 5 W. Hogan, Economic History of the Iron and Steel Industry in the United States 2048–81 (1971).

2. Trade Act of 1974, § 202, 19 U.S.C. § 2252 (1983) allows the President to provide import relief if the International Trade Commission determines that "increased imports have been a substantial cause of serious injury or the threat thereof with respect to an industry."

3. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187, *reprinted in* J. Jackson, World Trade and the Law of Gatt at 802–84 (1969) (hereinafter cited as GATT). Under Article XIX of GATT, before a country can impose quotas, it must show that "any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers." GATT at Art. XIX(1)(a).

announced in the Williamsburg Summit Declaration on Economic Recovery.[4] The United States subsequently entered into negotiations with the EEC in an effort to resolve their differences.[5]

The continuing problems of domestic specialty steel producers highlight the need for the United States to reexamine its commitment to the GATT system. The specialty steel industry is particularly appropriate for analyzing the effectiveness of United States trade policy as it has developed within the GATT system for three reasons. First, the industry is vital to American society.[6] Second, despite evidence depicting the troubled state of the industry, advocates for the industry repeatedly assert that it is a competitive, efficient, and technologically advanced industry.[7] Third, U.S. efforts to revive the specialty steel industry have involved both domestic trade legislation, and procedures governed by international law.

Part I of this note briefly describes the problems of the specialty steel industry and traces the attempts to deal with those problems from 1968 through the imposition of the relief measures which spawned the current negotiations. After discussing the trade history of the specialty steel industry, the note examines the effectiveness of two domestic import relief statutes through which the government has attempted to assist the industry. The note then analyzes U.S. attempts to aid the specialty steel industry through measures which violate the fundamental principles of the GATT system. The note concludes that since the GATT system cannot effectively handle the problems of the specialty steel industry, the U.S. should lobby for the formation of a new international system to govern the specialty steel industry similar to that within which the textile industry now operates.

The EEC claimed that the injury to the specialty steel industry "'is not due to steel imports . . . but on the contrary due to the overall economic situation which led to a severe slump in steel consumption worldwide.'" 8 U.S. IMPORT WEEKLY (BNA) 585 (July 13, 1983).

4. The Commission of the EEC claimed that President Reagan's decision to impose quotas and higher tariffs on specialty steel imports "does not reflect the Williamsburg commitment to 'halt protectionism and as recovery proceeds to reverse it by dismantling trade barriers.'" 8 U.S. IMPORT WEEKLY, *supra* note 3, at 585.

The Williamsburg Summit Conference was held in Williamsburg, Virginia on May 28–31, 1983. Participants in the conference included the United States, Canada, Great Britain, France, West Germany, Japan, Italy, and the EEC. The entire text of the Williamsburg Declaration on Economic Recovery is reprinted in 8 U.S. IMPORT WEEKLY (BNA) 354 (June 1, 1983) [hereinafter cited as Williamsburg Summit Declaration].

5. GATT, *supra* note 3, allows a party to take provisional remedial action, like that ordered by President Reagan, without consulting the affected parties where delay would cause damage which would be difficult to repair, provided that party begins consultation immediately after taking such action. Consultations between the United States and the EEC began on July 28, 1983, and ended on February 18, 1984. 8 U.S. IMPORT WEEKLY (BNA) 683 (Aug. 3, 1983).

6. *See Import Relief for the Specialty Steel Industry: Hearing Before the Subcomm. on International Trade of the Comm. on Finance*, 97th Cong., 2d Sess. 3 (1982) (hereinafter cited as *Import Relief*). Senator H.J. Heinz III of Pennsylvania called the specialty steel industry "a uniquely critical industry," and noted, "its products form the most basic elements of our national defense and our industrial society." *Id.*

7. *See id.* at 41 (statement of Adolph J. Lena, Chairman of the Board, Altech Specialty Steel Corp., Dunkirk, N.Y.); *see also* Presidential Documents, 47 Fed. Reg. 51,717 (1982). President Reagan described the industry as "efficient, technologically up-to-date, and export-oriented" in a memorandum to the U.S. Trade Representative. *Id.*

I

The specialty steel industry suffers from the same symptoms of industrial malaise seen throughout the United States steel industry. These problems, which include high unemployment,[8] plant closings,[9] lost revenue due to an inability to expand production,[10] and underutilization of existing plant facilities,[11] have plagued the specialty steel industry since 1968, when the entire steel industry first sought import relief.

Imports first posed a threat to the specialty steel producers beginning in 1968–70. Total steel imports had increased ten-fold from 1958 to 68.[12] The steel industry responded by petitioning the Johnson administration for quotas.[13] To comply with this request, the administration initiated negotiations with steel producers in Japan and the EEC. The administration sought to avoid congressionally-imposed quotas.[14] In addition, the government believed that negotiating with foreign governments for a reduction in their steel exports would be useless since those governments were not likely to consent voluntarily to any reduction.[15]

8. *See Import Relief, supra* note 6, at 4. Senator Heinz began the hearing by noting that the unemployment rate in the specialty steel sector exceeded 30 percent. *Id.*

9. *See id.* Heinz cited examples including: Guterl Specialty Steel and McLouth Steel filing for bankruptcy, Crucible Steel almost completely shutting down its plant, and Bethlehem Steel phasing out its tool steel production. *Id.*

10. *See Economic Conditions in the Specialty Steel Industry: Hearing Before the Senate Comm. on Banking, Housing and Urban Affairs,* 97th Cong., 2d Sess. 22–23 (1982). Richard P. Simmons, President and CEO of Allegheny Ludlum Steel Corp. stated: "Using the most conservative assumptions, if U.S. producers had not lost this market [to imported specialty steel] we would have had to build a plant employing conservatively 2,500 to 3,000 employees. We would have additional sales of $480 million. We would have had a payroll of $80–100 million. We would have paid Federal income taxes of $25–30 million." *Id.*

11. *See Import Relief, supra* note 6, at 4. Heinz stated that capacity utilization in the industry hovered around 40 percent for much of 1982.

12. In 1958, the United States imported 1.707 million tons of steel. By 1968, imports totalled 17.960 million tons. By contrast, exports fluctutated slightly, but stayed about the same over the decade: 2.823 million tons in 1958 and 2.170 million tons in 1969. *See* 5 W. Hogan, *supra* note 1, at 2035.

13. Frank, *Consumer Union Attack on Steel Quotas Could Release Protectionist Pressure,* 4 Nat'l J. 1229, 1230 (1972).

14. *Id.* at 1230–31. Leading steel producers lobbied intensely for legislated quotas. *See* N.Y. Times, Sept. 8, 1968, § 3, p. 1, col. 6. The American Iron and Steel Institute, which represented producers of 95 percent of all U.S. made steel, led the fight for quota legislation along with the United Steelworkers of America. Bills imposing quotas on imported steel included S. 2357, introduced by Senator Vance Hartke of Indiana with 335 co-sponsors. 24 Cong. Q. Almanac 732–33 (1968).

The Executive Branch did not want congressionally mandated quotas for three reasons. First, quotas posed a danger of retaliation under GATT. Second, they are inflexible and difficult to terminate. Third, the administration worried that other domestic industries would demand similar protection, thereby making the legislation more restrictive than necessary to cope with the problems of the steel industry. *See* affidavit of defendant Julius L. Katz, Consumers Union of U.S., Inc. v. Rogers, Civil No. 1029-72 (D.D.C. Jan. 8, 1973), *discussed in* Casenote, *The Protection of the Steel Industry By Voluntary Restraint Arrangements in Steel Exports into the U.S.:* Consumers Union of U.S., Inc. v. Rogers (D.D.C. 1973), 13 Colum. J. Transnat'l L. 316, 319–20 (1974) (hereinafter cited as Katz aff.)

15. *See* Katz aff., *supra* note 14. The State Department believed that foreign governments feared

Thus, the United States Government approached foreign steel manufacturers directly and asked for voluntary reductions in exports.

The Department of State conducted negotiations which, in late 1968, culminated in the first voluntary quota arrangements. The foreign steel producers spelled out the terms of the agreements in several letters of intent sent to the Secretary of State.[16] These agreements called for the United States to reduce total steel imports from approximately 18 million tons to 14 million tons in 1969, and provided for five percent annual growth in 1970 and 1971.[17] Unfortunately for domestic specialty steel producers, these voluntary limitations on total steel imports increased the penetration of foreign specialty steel into the domestic market.[18] In 1971, the last year of the agreement, the steel industry pressured Congress to impose quotas unless the government could work out new, more favorable agreements.[19]

The Nixon administration overcame resistance from foreign producers[20] and successfully procured extensions of the voluntary restraint agreements through December 31, 1974. The new agreements restricted the growth of specialty steel imports to 2.5 percent annually. More important for the specialty steel producers, the new agreements established specific quantitative limitations on each of the three grades of specialty steel: stainless, tool, and other alloy steels.[21] Domestic producers of specialty steel worried, however, that countries not covered by the voluntary agreements would upset the balance which producers in Japan and the EEC had worked out with the United States Government.[22]

The voluntary agreements lapsed at the end of 1974. Import penetration for the

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the precedential effects and possible adverse political consequences of voluntary reductions in exports.

16. In 1972, the Consumers Union of the United States, Inc. sued the State Department and foreign and domestic steel producers challenging the legality of the voluntary agreements. The agreements challenged were not those entered into in 1968, but a second round, agreed to in 1972, which extended the original agreements with some changes. *See infra* text accompanying notes 20–21.

Consumers Union claimed that the defendants had violated the law by negotiating the agreements without conforming to the requirements of the Trade Expansion Act of 1962. The D.C. Circuit Court acknowledged that the President had to conform with the procedures set forth in the Act in order to invoke the legislative power which Congress had delegated to him. The court stated, however, that the agreements were merely a statement of intent by the foreign steel producers which did not purport to be enforceable. Since the agreements were not binding, the court held that the President did not have to comply with the requirements of the Trade Expansion Act. *See* Consumers Union of U.S., Inc. v. Kissinger, 506 F.2d 136, 143 (D.C. Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

17. Frank, *supra* note 13, at 1231 (summarizing the terms of the voluntary agreements).

18. "In terms of where the import levels should have been had the restraint agreement been adhered to, the AISI calculates that total shipments were higher by 18.6 percent, while stainless imports were 33.6 percent over the mark: tool, 21.7 percent over, and other alloys 61 percent over the limits." *Id.* at 1232.

19. *Id.*

20. Foreign producers opposed extensions because even under the existing restrictions, they had been able to exploit the U.S. market at a time when demand for steel in other areas of the world was declining. When forced to confront the possibility of much stricter legislative quotas, however, they acquiesced and voluntarily extended the restraints on steel exports. *Id.* at 1233.

21. *Id.* at 1234.

22. Frank, *Consumer Movement Shifts Tactics Not Goals in Legal Attack on Steel Quotas*, 4 NAT'L J. 1258, 1263 (1972); *see also* Frank, *supra* note 13, at 1236. Roger Ahlbrant, chairman and CEO of

first quarter of 1975 rose from 11.4 percent to 19.9 percent.[23] Since that time, the United States has provided import relief to the specialty steel industry under the provisions of the Trade Act of 1974.[24] Nonetheless, during the third quarter of 1981, imports constituted 17 percent of all specialty steel purchased in the United States market. For some types of specialty steel, penetration ran as high as 47 percent.[25] When import penetration reached these levels in 1976, President Ford imposed quotas which successfully curbed the influx. On December 2, 1981, the specialty steel producers called for President Reagan to take similar action.[26]

II

Congress adopted the Trade Act of 1974, including sections 201[27] and 301[28], to improve the effectiveness of United States trade legislation.[29] The legislative history of the act, citing the decline in the United States' share of world trade, indicates that U.S. trade policy has lacked coherence and consistency.[30] The Senate Finance Committee claimed that the United States, through misguided trade policies, permitted and encouraged discriminatory trading arrangements among the U.S. and its trading partners.[31] Through the Trade Act of 1974, Congress hoped to "promote the development of an open, nondiscriminatory and fair world economic system, (and) to stimulate the economic growth of the United States."[32]

Prior to the adoption of section 201, the United States relied on the Trade Expansion Act of 1962 as its "escape clause."[33] An escape clause allows a country to temporarily suspend international trade obligations in order to aid an industry facing serious injury or the threat thereof because of increased imports of foreign products.[34] Under the provisions of the 1962 Act, American industries,

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Allegheny Ludlum stated, "Our problem, plainly, in this matter has not been solved by the recent extension and improvement of the voluntary limitation agreement." *Id.*

23. Notices, 47 Fed. Reg. 10,107, 10,114 (1982).

24. For a discussion of these provisions, see *infra* notes 27–86 and accompanying text. President Ford imposed quantitative limitations on imports of specialty steel in June 1976. 41 Fed. Reg. 24,101 (1976). These quotas expired on June 13, 1979, but President Carter extended them until February 1980, at which time they lapsed. 44 Fed. Reg. 40,873 (1979).

25. *See* Notices, *supra* note 23, at 10,128.

26. *Id.* at 10,107.

27. This note uses § 201 to refer generally to sections 201–203 of the Trade Act of 1974, 19 U.S.C. §§ 2251–2253 (1982) (amended 1979).

28. Section 301 will refer to Trade Act of 1974, §§ 301–304, 19 U.S.C. §§ 2411–2414 (1982). The note will discuss the substance of the amendments when central to the analysis.

29. *See* S. Rep. No. 1298, 93rd Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 7186, 7196–7200.

30. *Id.* at 7188.

31. *See id.* at 7193.

32. *Id.* at 7196.

33. Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872.

34. *See* S. Rep. No. 1298, *supra* note 29, at 7263. This provision is similar to the GATT escape clause in Article XIX which permits a party to suspend obligations incurred under GATT when "unforseen developments and GATT obligations cause or threaten serious injury to domestic producers. . . ." GATT, supra note 3, at Art. XIX.

firms, and workers had difficulty obtaining adequate relief.[35] By adopting section 201, Congress sought to correct two central problems with the escape clause provision. First, Congress eased the requirements for determining when an industry had suffered an injury meriting import relief.[36] Second, section 201 removed the causal link formerly required between trade concessions and injury to an industry.[37] By removing the causation requirement, Congress broadened the escape clause so that coverage was no longer limited to those items upon which the United States had made tariff concessions.[38] Through these changes, Congress hoped "[t]o provide greater access and more effective delivery of import relief to industries which are seriously injured. . . by increased imports."[39]

In contrast to the section 201 goal of providing temporary relief from foreign competition, Congress enacted section 301 to respond specifically to foreign unfair trade practices[40] by providing a credible threat of retaliation.[41] Although Congress viewed retaliation as a measure of last resort, it indicated a willingness to retaliate if diplomacy and negotiation did not work.[42] By 1979, when Congress

35. Adams & Dirlam, *Import Competition and the Trade Act of 1974: A Case Study of Section 201 and its Interpretation by the International Trade Commission*, 52 IND. L.J. 535, 537–38 (1977).

36. Under the Trade Expansion Act of 1962, increased imports had to be a "major cause" of serious injury (defined as a cause greater than all other causes combined). Section 201 requires only that increased imports be a "substantial cause" of serious injury. Substantial cause is defined as a cause which is no less important than any other cause. *See* S. REP. NO. 1298, *supra* note 29, at 7264.

37. The legislative history of § 201 noted that the requirement that "increased imports result in major part from trade concessions has been very difficult to satisfy in the past and has become a major barrier to import relief." *Id.*

The removal of this requirement departs from the causation requirements of the GATT Article XIX escape clause. *See supra* note 34. Under Article XIX, increased imports must result from both unforeseen developments and GATT obligations. According to Professor Jackson, "one can almost conclude that an increase in imports can *itself* be an unforeseen development." J. JACKSON, *supra* note 3, at 561 (emphasis in original). On the question of GATT obligations, Jackson states, "coincidence of GATT obligation appears to be established for virtually all products." *Id.* at 559. Such broad interpretations imply that the absence of these terms from the U.S. escape clause provision will not be viewed as a *per se* violation of GATT. Thus the changes from the GATT language are relatively insignificant.

38. *See* Campbell, *The Foreign Trade Aspects of the Trade Act of 1974 (pt. 2)*, 33 WASH. & LEE L. REV. 639, 643 (1976).

39. *See* S. REP. NO. 1298, *supra* note 29, at 7187.

40. The difference between § 201 and § 301 is noted in the legislative history which states, "Whereas Title II of the Bill provides relief from injury to industries, firms, workers and communities caused by 'fair' albeit injurious competition, Title III deals with 'unfair' and 'illegal' trade practices adversely affecting U.S. commerce." *Id.* at 7301.

41. Congress enumerated specific types of practices against which the President could take retaliatory measures under the Trade Act of 1974. *Id.* at 7301–02. Under the broader language in the 1979 amendments, unfair trade practices include any act, policy or practice 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.

Trade Act of 1974, § 301, 19 U.S.C. § 2411(a)(2)(A–B).

42. S. REP. NO. 1298, *supra* note 29, at 7302. Some of the practices cited by Congress as unfairly burdening U.S. commerce included licensing systems, quotas, exchange controls, subsidies, and standards. *Id.*

broadened the retaliatory power under section 301, the legislature still feared that without vigorous U.S. enforcement of its rights under international trade agreements, "[the agreements] will become largely one-way streets whereby the United States assumes obligations without reciprocity. . . ."[43] Originally, Congress did not intend for industries to use section 301 to relieve the burdens caused by imports into domestic markets. Instead, Congress enacted this section primarily to aid exporters who were being closed out of foreign markets because of unfair trade practices.[44] Only recently has section 301 become an alternative source of import relief.

Advocates for the specialty steel industry believe that the United States has failed to use its trade legislation effectively.[45] Legislators have responded by introducing more than 30 congressional bills urging government retaliation against foreign trade barriers and subsidies.[46] The introduction of so many similar proposals reflects pressure from the powerful steel-industry lobbyists who believe that the trade laws have failed to meet the needs of the industry. The operation of the statutes in the most recent grant of import relief to the specialty steel industry supports this perception.

The Tool and Stainless Steel Industry Committee (TSSIC), an organization representing sixteen United States producers of stainless and tool steel, filed the industry's latest request for import relief under section 301.[47] In their petition, the producers alleged that the increase in import penetration of specialty steel products from manufacturers in the EEC and other countries has burdened or restricted commerce and has caused or threatened to cause serious injury to the

43. S. REP. NO. 249, 96th Cong., 1st Sess., *reprinted in* 1979 U.S. CODE CONG. & AD. NEWS 381, 622.

44. "[T]he right which is protected [by § 301] is the right to petition the U.S. government . . . to address the problems faced by U.S. citizens in gaining access to foreign markets." Fischer & Steinhardt, *Section 301 of the Trade Act of 1974: Protection for U.S. Exporters of Goods, Services and Capital,* 14 L. & POL'Y INT'L BUS. 569, 579 (1982).

The Senate Finance Committee did note that § 301 could be used to counteract foreign subsidies on exports to the United States but only after a determination that other remedies could not adequately deter subsidization. S. REP. NO. 1298, *supra* note 29, at 7304.

45. *See, e.g., Import Relief, supra* note 6, at 5. Senator Heinz stated, "In the case of specialty steel . . . the government lacks the will to use the [trade law] as we intended." *Id.* Commenting on the process of petitioning for § 201 relief, Heinz stated, "If one is a petitioner, he gets the idea that there is someone somewhere in the administration that infallibly [sic] tells the President: Mr. President, if you agree to this recommendation to give this industry a quota or a tariff, even though it is perfectly consistent with GATT, this will cause all kinds of international repercussions." *Id.* at 37–38. The Reagan Administration, through U.S. Trade Representative William Brock, has indicated that the United States must be circumspect in the application of its trade laws. Brock, responding to a letter, stated, "[T]he United States must exercise care in its application of U.S. trade laws, otherwise we cannot expect foreign governments to play fair and follow international rules when they face problems with U.S. exports." *Id.* at 64.

46. Reich, *Beyond Free Trade,* 61 FOREIGN AFF. 773, 773 (1983). Senator Heinz sponsored two bills designed to by-pass procedures required under the import relief statutes and provide relief to the specialty steel industry. The bills, S. 2770 and S. 2771, would have established quotas for at least five years on stainless and alloy tool steel, and substituted an affirmative congressional determination of injury for that normally made by the International Trade Commission. *See* S. 2770 & S. 2771, 97th Cong., 2d Sess., 128 CONG. REC. S. 9121 (daily ed. March 24, 1982).

47. Notices, *supra* note 23, at 10,107.

United States industry.[48] The petitioners contended that the increase in imports resulted from unreasonable government subsidies.[49] The United States Trade Representative (USTR) initiated an investigation based on the charges delineated in the TSSIC petition on March 9, 1982.[50]

Before the USTR issued his report, President Reagan intervened and directed the USTR to request a section 201 investigation. The President felt that section 201 would provide better relief for the specialty steel industry.[51] He ordered the USTR to include in the investigation the five specialty steel products already subject to the section 301 investigation. Additionally, President Reagan asked the USTR to initiate multilateral or bilateral discussions aimed at the elimination of all trade distortion in the specialty steel industry, and to monitor imports of those specialty steel products subject to the section 201 proceeding.[52]

In accordance with the President's memorandum, the USTR requested the International Trade Commission (Commission) to begin a section 201 investigation.[53] In contrast to a section 301 investigation, a section 201 investigation does not require the Commission to look for unreasonable, unjustifiable, or discrimi-

48. *See id.* at 10,108.

49. Petitioners alleged that the practices of foreign governments violate the provisions of GATT and the Agreement on the Interpretation and Application of Articles VI, XVI, and XXIII (Subsidies Code). *Id.* As the petitioners note, the showing of injury required under § 301 is less than that required under the Subsidies Code (or the U.S. Countervailing Duty Statute). *Id.* at 10,112.

The President's retaliatory authority under the original version of § 301 extended to "unreasonable" and "unjustifiable" import restrictions which affected U.S. commerce. Unjustifiable referred to restrictions "which are illegal under international law or inconsistent with international obligations." S. REP. NO. 1298, *supra* note 29, at 7301. Unreasonable referred to restrictions "which are not necessarily illegal, but which nullify or impair benefits accruing to the United States under trade agreements or which otherwise discriminate against or burden U.S. commerce." *Id.*

Congress emphasized that subsidies were subject to retaliation under § 301 stating, "[a]ll acts, policies or practices covered by [original] section 301 are also covered by section 301 as revised. In particular, the specific provisions under [original] section 301 relating to foreign export subsidies are covered under new section 301 . . . ." S. REP. NO. 249, *supra* note 43, at 622.

50. Notices, *supra* note 23, at 10,107.

51. *See* Presidential Documents, 47 Fed. Reg. 51,717–51,718 (1982).

52. *Id.* The President realized that his action would cause further delays in granting import relief to the specialty steel industry so he instructed the USTR that if, during the investigation, increased imports caused damage which would be difficult to repair, consideration would be given to possible emergency relief action under § 301.

53. Notices, 47 Fed. Reg. 56,218 (1982). The International Trade Commission (ITC) is responsible for conducting an investigation to determine whether § 201 relief is appropriate. Under § 201, the investigation may be initiated through a petition from industry representatives upon request of the President or U.S. Trade Representative, through a resolution of the House Committee on Ways and Means or the Senate Finance Committee, or by the ITC itself. The ITC must then hold public hearings at which all interested parties may present evidence. The ITC must issue a report to the President within six months of receiving the request or petition to begin an investigation and must publish a summary of the report in the Federal Register. The President must grant import relief if the ITC report indicates that such relief is required unless the President determines that granting such relief would be against the national interest. Upon making his decision, the President must send to Congress a document setting forth his actions under the statute. If the President's action differs from the ITC's recommendations, or if the President decides not to grant import relief, Congress can implement the recommendations of the ITC through a majority vote of the House and Senate within 90 days following receipt of the document outlining the President's actions. *See generally Trade Act of 1974, § 201,* 19 U.S.C. § 2252.

natory trade practices.[54] Instead, the Commission seeks to determine "[W]hether a product 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."[55]

The International Trade Commission conducted its investigation, and on the basis of its findings, recommended relief to the specialty steel industry.[56] The Commission cited data showing that aggregate imports of stainless and alloy tool steel rose from about 163,000 tons in 1978, to almost 203,000 tons in 1982.[57] Next, the Commission considered the statutory guidelines for serious injury[58] and concluded that four domestic industries composed of the producers of stainless steel sheet and strip, stainless steel plate, stainless steel bar and wire rod, and alloy tool steel had suffered serious injury.[59] To determine whether the increase in imports caused the serious injury, the Commission again relied on the statutory guidelines and other factors like price changes and the displacement of domestic sales by imports.[60] The Commission concluded that increased imports were a substantial cause of serious injury to the industries being investigated, and recommended the granting of import relief for three years.[61]

The specialty steel industry criticized the recommendations of the Commission on four issues: duration, starting date, degree of restrictiveness, and product coverage.[62] The industry claimed that it needed five years of import relief. The producers cited excess production capacity throughout the world as a serious problem for the U.S. industry. The producers asserted that a restructuring program designed by the EEC to reduce this excess capacity needs at least this long to develop. Moreover, the industry claimed that any investment by domestic manufacturers requires five years to realize its potential. The producers claimed that import relief would force inefficient European producers out of the market,

54. This distinction is pointed out in Grzybowski, Rud, & Stepanyenko, *Towards Integrated Management of International Trade—The U.S. Trade Act of 1974*, 26 INT'L & COMP. L.Q. 283, 312 (1977) [hereinafter cited as Grzybowski].

55. Trade Act of 1974, § 201, 19 U.S.C. § 2251(b)(1).

56. STAINLESS STEEL AND ALLOY TOOL STEEL U.S. INT'L TRADE COMM'N, PUB. NO. 1377, REPORT TO THE PRESIDENT ON INVESTIGATION NO. TA-201-48 UNDER § 201 OF THE TRADE ACT OF 1974: (1983) (hereinafter cited as ITC 1377).

57. *Id.* at A-96. Even if one only looks at the period after the previous quotas expired in 1980, specialty steel imports still jumped 15 percent.

58. *See* Trade Act of 1974, § 201, 19 U.S.C. § 2251(2)(b)(2)(A). Factors to be taken into account with respect to serious injury are: the significant idling of production facilities in the industry, the inability of a significant number of firms to operate at a reasonable level of profit, and significant unemployment or underemployment within the industry.

59. *See* ITC 1377, *supra* note 56, at 18.

60. *See* Trade Act of 1974, § 201, 19 U.S.C. § 2251(b)(2)(C). Factors to be taken into account with respect to substantial cause are: an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers.

61. *See* ITC 1377, *supra* note 56, at 25–26. The Commission noted that imports would affect each of the different sectors of the specialty steel industry differently. Thus it often examined different criteria for each sector.

62. Certain Stainless Steel and Alloy Tool Steel Products, Brief of the Specialty Steel Industry of the United States and the United Steel Workers of America Before the Office of the United States Trade Representative 3 (May 31, 1983) [hereinafter cited as Brief].

thereby encouraging more rapid implementation of the EEC restructuring program.[63] The producers also argued that three years of import relief would not create the incentive to undertake capital investment projects because imports would once again flood the domestic market before the producers completed such projects.[64] The industry also contested the idea of a retroactive starting date for the restrictions.[65] This argument follows from the desire of the manufacturers to extend the duration of the restrictions.

In addition, the industry argued that the Commission's proposals were not sufficiently restrictive. The specialty steel manufacturers claimed that the Commission proposed excessively high floor levels and allowable import penetration rates. The producers maintained that the floor levels proposed by the Commission would not substantially reduce imports from the current injurious levels.[66] They also contended that the import penetration rate allowed by the Commission is based on injurious rates of import penetration and that the allowable market share should be based on 1962 levels.[67] Finally, the producers contended that the Commission's proposed relief did not extend to certain products, the continued, unrestricted import of which would cause injury to the domestic industry.[68]

President Reagan essentially adopted the recommendations of the Commission, but extended the relief for four years.[69] The suggestions of the Commission, the proposals of the specialty steel producers, and the President's compromise position differed only quantitatively. Each proposal relied on traditional import relief measures, quotas and tariffs, which have failed to provide long-term relief.[70] Notwithstanding the claims that stringent restrictions over a longer period of time will solve the industry's problems, the imposition of such restrictons in the past has not led to a rejuvenation of the industry. The problems of the specialty steel industry demand a new approach.

This new approach should begin with the recognition that sections 301 and 201 cannot provide adequate relief to the specialty steel industry. The 1979 amendments to section 301 granted the President virtually unchecked retaliatory authority to "take all appropriate and feasible action within his power . . ." to enforce U.S. rights under any trade agreement or to respond to foreign unfair trade practices.[71] This amended version of section 301 does not require the President to determine that other remedies could not adequately deter subsidization of prod-

63. *Id.* at 4–8.

64. *Id.* at 8–11.

65. *Id.* at 11–12.

66. *Id.* at 14.

67. Id. at 14–15. The producers asserted that import penetration since 1962 has been injurious to the industry.

68. *Id.* at 18–26.

69. Proclamation No. 5074, *supra* note 1, at 70.

70. While tne specific limitations on imports differed, the relief granted by President Reagan was similar to that granted by Presidents Ford and Carter. *See* 41 Fed. Reg. 24,101 (1976); 44 Fed. Reg. 40, 873 (1979).

71. Trade Act of 1974, § 301, 19 U.S.C. § 2411. One article, commenting on the 1979 amendments, noted: "Thus it is reasonable to assume that the authority of the President is limited only by the constraints of Article II of the Constitution and international law." Fischer & Steinhardt, *supra* note 44, at 606.

ucts imported into the United States before taking action under section 301. These changes arguably contemplated the possibility that industries adversely affected by imports would be able to seek relief under section 301.

Section 301, however, should not become a mechanism through which industries by-pass the stricter injury standards required by other import relief provisions.[72] The flexibility of section 301 makes it inappropriate for the redress of wrongs covered by other trade laws.[73] Furthermore, excessive use of the retaliatory power threatens international economic relations.[74] The President must strike a balance between enforcing U.S. rights under existing trade agreements, and unilaterally imposing trade barriers whenever foreign competition threatens an American industry.

President Reagan professed his desire to begin a coordinated approach to the problem of injury to American industry caused by imports.[75] The President recognized that attempting to use section 301 in the specialty steel case focuses only on the narrow problem of subsidies rather than on a broad solution for the troubled industry.[76] Thus, the President decided to initiate a section 201 investigation as the beginning of a more comprehensive import relief program.[77] Unfortu-

72. For a comparison of the standards of various import relief provisions, *see* Fischer & Steinhardt, *supra* note 44, at 630–631 & nn.316–23.

73. *See* Coffield, *Using Section 301 of the Trade Act of 1974 as a Response to Foreign Government Trade Actions: When, Why, and How,* 6 N.C.J. INT'L L. & COM. REG. 381, 381 (1981). "Section 301 is not a substitute for, nor an alternative to, other U.S. statutes that address specific unfair trade practices, such as the antidumping laws, the 337 statute, or except under specifically provided procedures, the countervailing duty statute." *Id.*

74. *See id.* at 390, 394, 405. The author notes that a § 301 petition will not be effective when the Administration, for foreign policy reasons, is unwilling to take action against the allegedly offending nation. In some instances, even if the United States is willing to retaliate in an effort to eliminate the practice, the foreign government may, for political reasons, be unwilling or unable to curb the practice. These political considerations, Coffield states, mandate judicious use of the retaliatory power. *See also* Fischer & Steinhardt, *supra* note 44, at 689–90. "Broadly applied, section 301 could threaten the underlying security of the MFN [most-favored nation] principle and, conceivably, could escalate the rapidly developing trade war among the OECD nations as well as the communist bloc and the LDC's." *Id.*

75. *See* Presidential Documents, *supra* note 51, at 51,718. Others have expressed similar sentiments. *See, e.g., Import Relief, supra* note 6, at 67. In a statement opposing the adoption of legislated quotas, David J. Steinberg, President of the U.S. Council for an Open World Economy criticized the U.S. policy toward imports. He stressed the "[f]ailure of the steel industry [both management and labor] and of government . . . to seek a coherent, comprehensive redevelopment strategy that addresses the real problems and needs of the steel industry." *Id.*; *see also* Note, *Protecting Steel: Time for a New Approach,* 96 HARV. L. REV. 866 (1983) (cites legal problems with, and the ineffectiveness of United States policy toward the steel industry, and calls for a national industrial policy to shift resources away from steel toward growing industries and to condition any government aid to the steel industry on restructuring by the industry).

76. *See* Presidential Documents, *supra* note 51, where President Reagan states: "Thus, the specific subsidy complaints could lead to a remedy that fails to resolve the overall import problem. Moreover, dealing with the specific subsidy problem itself probably would not have a great impact on the world trading environment."

77. Section 201 provides the potential for more comprehensive import relief because it requires a general finding that an increase in imports caused injury to a domestic industry, while § 301 requires that such injury be caused by a specific unfair trade practice. Section 301, therefore, necessitates a separate claim to respond to each of the variety of unfair trade practices implemented by one country or several countries. *See supra* notes 53–55 and accompanying text.

nately, the options available under section 201 cannot provide effective, long-term relief for the specialty steel industry.

Section 201 specifies several options, including tariffs, tariff-rate quotas, quotas, and orderly marketing agreements, which the President can use individually or in combination to aid industries injured by imports.[78] Tariffs have proven ineffective, and even the producers of specialty steel have argued against using them.[79] Quotas, as commentators have often discussed, are merely short-run supports to industry which impose heavy costs on the consumer.[80] Not only do quotas hurt the consumer, but, in the long run, they also hurt the affected industry.[81] A tariff-rate quota is a provison under which a certain quantity of a product may enter at a given rate, and all imports in excess of the established quantity pay a higher rate.[82] These would not benefit the domestic specialty steel industry more than would either quotas or tariffs.[83]

Section 201 also allows the President to negotiate orderly marketing agreements (OMA's). The Trade Act of 1974 defines an OMA as "[An agreement] with foreign countries limiting the export from foreign countries and the import

78. Trade Act of 1974, § 201, 19 U.S.C. § 2253(a).

79. *See* Brief, *supra* note 62, at 43–44. The economic effect of tariffs is adequately treated in most economics textbooks. *See, e.g.*, J. RICHARDSON, UNDERSTANDING INTERNATIONAL ECONOMICS: THEORY AND PRACTICE 268–81 (1980). Tariffs theoretically stimulate expansion, investment, and employment through the combination of higher prices, better potential business and larger profits. This theoretical expansion in the protected industry, however, is offset by transferring the burden to consumers of the protected item. Prices for both foreign and domestic steel would be higher under tariffs, so demand and consumption would fall. Consumers also would bear the brunt of price increases passed to them by those who use specialty steel in common products like automobiles and knives.

80. *See, e.g.*, Hervey, *Economic Stagnation and the Resurgence of Trade Restrictions*, 6 ECON. PERSP. 23, 24–25 (1982). The economic effects of quotas are similar to the effects of tariffs. By artifically restricting the supply of a good, quotas force the consumer to pay higher prices while prohibiting him from increasing consumption regardless of his willingness to pay such higher prices. Under both a tariff and a quota, the foreign producer's revenue equals the quantity produced for export (now artificially restricted) multiplied by the price producers could have sold the goods for without the trade barrier. Under a tariff, the importing country receives an amount equal to the new (higher) price multiplied by the quantity imported, multiplied by the foreign producer's revenue. Under a quota, the government can allocate this latter revenue depending on the operation of the quota. The government will share the revenue with importers if the government sells those importers the right to buy abroad. If the government gives this right away, however, the importers receive all the benefit. On the other hand, if the government grants export licenses to foreign governments or exporters, the recipients of these licenses receive this revenue. In this case, the quota may result in a government subsidizing an industry's foreign competition, despite imposing quotas to protect that industry.

Although tariffs and quotas produce similar economic effects, they differ in other ways. Quotas have more certain economic consequences than tariffs. Quotas are also more rigid, restricting the amount of a good imported regardless of foreign growth, technological advance or changes in taste. Unlike tariffs, the restrictive effect of quotas cannot be overcome. Quotas, therefore, eliminate all foreign incentive to compete. *See* J. RICHARDSON, *supra* note 79, at 356–358.

81. The effects described *supra* note 79 reduce incentives for industry to innovate and invest in new products. One result of the artificial support of the steel industry is that workers have less incentive to seek retraining and relocation. *See* Reich, *supra* note 46, at 774.

82. *See* J. RICHARDSDON, *supra* note 79, at 353.

83. For a discussion of the effects of tariff-quotas see Rom, *The Tariff Quota*, 7 J. WORLD TRADE L. 421 (1973).

into the United States."[84] In the current specialty steel case, the United States concluded orderly marketing agreements with seven countries.[85] The European Economic Community refused to negotiate an OMA.[86] OMA's are preferable to the other options enumerated in section 201 since they involve bilateral negotiations rather than a unilateral imposition of trade barriers. OMA's, however, violate GATT; consequently, increased reliance on this remedy by the United States demonstrates a weakening U.S. commitment to the GATT system.

III

The United States has long been a leading proponent of the free trade ideal which has been codified in the GATT.[87] Some claim that the Trade Act of 1974 marked the beginning of a serious commitment by the United States to conduct its foreign trade guided by the principles set forth in GATT.[88] The legislative history, however, indicates that Congress has never whole-heartedly supported GATT.[89] Similarly, the Executive Branch, through its negotiation of voluntary

84. Trade Act of 1974, § 201, 19 U.S.C. at § 2253(a)(4). Occasionally, the terms OMA and VER (voluntary export restraint) (discussed *supra* text accompanying notes 13–24) are used interchangeably. VER's generally refer to arrangements concluded between industries in importing and exporting countries with only the support of their governments. OMA's, however, result from explicit governmental intervention aimed at procuring specific agreements between importing and exporting countries. *See* Sauermilch, *Market Safeguards Against Import Competition: Article XIX of the General Agreement on Tariffs and Trade*, 14 C.W. RES. J. INT'L L. 83, 113 (1982).

85. The U.S. has concluded orderly marketing agreements with Argentina, Austria, Canada, Japan, Poland, Spain, and Sweden. *See* Notice, 48 Fed. Reg. 48,888 (1983).

86. *See* 8 U.S. IMPORT WEEKLY (BNA) 939 (Sept. 21, 1983).

87. *See* Finlayson & Zacher, *The GATT and the Regulation of Trade Barriers: Regime Dynamics and Functions*, 35 INT'L ORG. 561, 570 (1981). "The norm of liberalization or free trade is often regarded as central to the GATT regime . . . . Liberalization was regarded as important by many American officials, but it was not a primary goal of most other industrial and developing countries." *Id.; see also* Williamsburg Summit Declaration, *supra* note 4; Quayle, *U.S. International Competitiveness and Trade Policies for the 1980's*, 5 *NW J. INT'L L. & BUS.* 1, 3 (1983):

> United States international trade policies must seek to promote the efficient operation of a free and fair system of international trade. We must reduce and eliminate quotas and subsidies that protect the inefficient and raise costs for everyone. We must minimize our own use of such policies and also persuade our trading partners that it would be to their advantage to do the same.

On the other hand, Secretary of State George Schultz observed that "[a]lthough everyone says they are for free trade, there are strong pressures in the U.S. and other countries to move in a protectionist direction." N.Y. Times, May 27, 1983, § 4, at 14, col. 5. Reich claims that the endorsement of the free trade ideal points out a fundamental contradiction in American trade policy: "Our government must not intervene, since intervention by assumption distorts production and saps our competitive strength. At the same time, one must not permit other governments to intervene, since intervention gives our industrialized rivals unfair competitive advantage." Reich, *supra* note 46, at 776.

88. *See* Grzybowski, *supra* note 54, at 296.

89. Campbell, *The Foreign Trade Aspects of the Trade Act of 1974*, 33 WASH. & LEE L. REV. 325, 331 (1976). Congress stated with regard to section 301, "However, the Committee felt that it was necessary to make it clear that the President could act to protect U.S. economic interests whether or not such action was consistent with the articles of an outmoded international agreement initiated by the Executive 25 years ago and never approved by Congress." S. REP. NO. 1298, *supra* note 29, at 7304.

restraint agreements in the early 1970s, and its recent utilization of OMA's has repeatedly shown a willingness to ignore GATT commitments.[90]

The most fundamental GATT obligation is the most-favored nation principle, set forth in Article I, which mandates that a country grant other GATT members the most favorable trade concessions it has granted to any other country.[91] By adopting this requirement, signatories to the GATT hoped to eliminate discriminatory treatment among trading partners, and prevent the distortion of trade patterns which accompanies discrimination. OMA's directly violate the language of Article I because they are agreements through which governments selectively restrict the export of certain products to specified countries. For example, when the United States negotiates an OMA on specialty steel with Japan, Japan agrees to limit exports of specialty steel only to the United States. Absent any other constraints in the agreement, Japan may continue the unrestricted export of specialty steel to other countries. This selective restraint of trade by the exporting country clearly violates the most-favored-nation obligation.[92]

In addition to this general most-favored-nation provision, Article XIII specifically prohibits the discriminatory application of export restraints.[93] To comply with Article XIII, the exporting countries with which the U.S. has negotiated OMA's would have to volunteer to restrict exports of specialty steel to every

90. One author, commenting on the VER's negotiated by the Johnson administration, noted:

> [T]he U.S. approach seeks to avoid the risk of a GATT violation . . . by having the importing nation volunteer to enter into a consent agreement to waive its rights under GATT on the imposition of export controls, thereby bypassing GATT completely. The obvious effect of this technique, if practiced on a wide scale would be to undermine the principles and effectiveness of GATT.

Smith, *Voluntary Export Quotas and U.S. Trade Policy, A New Non-Tariff Barrier*, 5 LAW & POL'Y INT'L BUS. 10, 30 (1973).

91. GATT, *supra* note 3, at Art. I(1) states, "any advantage, favor, privilege or immunity granted by any party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

92. *See* Finlayson & Zacher, *supra* note 87, at 569–70. *But see* Sneaker Circus, Inc. v. Carter, 457 F. Supp. 771, 795 (E.D.N.Y. 1978). In this action seeking to nullify two OMA's, Judge Costantino held that GATT was inapplicable to the case because "Congress has never ratified GATT." *Id.* Citing GATT Article XIX, Judge Costantino continued, "even if GATT were applicable, it specifically provides for the suspension of the obligations of the Agreement in the event that imports of a given product into any country cause or threaten serious injury to domestic producers of the same or competitive products." *Id.*

Judge Costantino's analysis is incorrect in two respects. First, Article XIX allows the country whose industries have been injured by imports to suspend trade obligations. Under an OMA, an exporting country voluntarily agrees to restrain its exports. This situation is not covered by Article XIX. Second, even if Article XIX allowed for export restraints, the GATT preparatory work indicates that the MFN obligation must be maintained even when a party suspends obligations pursuant to Article XIX. *See* J. JACKSON, *supra* note 3, at 564–65.

93. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation to all third countries is similarly prohibited or restricted.

GATT, *supra* note 3, at Article XIII(1).

market. Absent this unlikely cooperation among all specialty steel-producing nations, OMA's contravene the express language of this Article.

OMA's also violate the provision in Article XI(1) which prohibits quantitative restrictions on both imports and exports.[94] Although this general provison has several exceptions,[95] the only one possibly applicable to the OMA's negotiated on specialty steel is Article XII which allows restrictions to safeguard the balance of payments.[96] Article XII, however, requires that such restrictions be limited to the minimum necessary "to forestall the imminent threat of, or to stop, a serious decline in (a nation's) monetary reserves. . . ."[97] In addition, Article XII requires the parties to relax the restrictions as conditions improve, and to eliminate them when conditions no longer justify their existence.[98] As discussed above,[99] the specialty steel producers claim that they need lengthy, restrictive quotas to increase the competitiveness of the domestic industry. While this increased competitiveness would help the balance of payments, Article XII requires a stronger threat to the reserves of the importing country than the U.S. would be able to show.

While OMA's are illegal under GATT, they are also "formally unassailable."[100] Although the exporting countries violate GATT by imposing selective restraints on exports, no importing country will contest these violations because the importing country specifically requested the restrictions in the first place.[101] The use of OMA's by the United States to restrict imports of specialty steel continues the trend of negotiating compromises outside the GATT system. By implementing procedures which either violate or ignore GATT, the major trading powers undermine the validity of GATT as a regulator of international trade.[102]

94. See GATT, *supra* note 3, at Art. XI(1) which states

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

95. *Id.* Article XI(2) allows export restrictions to prevent or relieve food shortages, restrictions necessary to the application of standards for grading or classification and import restrictions on agricultural or fisheries products under certain circumstances. Article XX(h) provides a general exception stating that nothing in the GATT shall be construed to disallow measures taken by contracting parties in an effort to comply with any international commodity agreements. Article XXI(b)(iii) provides that nothing in the agreement shall prevent a contracting party from taking action which it considers necessary to protect its national security interest in specified situations. None of these exceptions applies to the specialty steel case.

96. *Id.* at art. XII(1).

97. *Id.* at art. XII(2)(a)(i).

98. *Id.* at art. XII(2)(b).

99. *See supra* notes 62–68 and accompanying text.

100. *See* Tumlir, *A Revised Safeguard Clause for GATT?*, 7 J. WORLD TRADE L. 404, 407 (1973).

101. *See* Sauermilch, *supra* note 84, at 116–17 *see also* Kirgis, 72 AM. SOC'Y INT'L L. PROC. 1, 7 (1978) (suggesting the possibility of an action either by the Contracting Parties as a body or by a third country asserting, under Article XIII of GATT, that OMA's "nullify and impair" a benefit accruing to that country under GATT. Neither seems likely given the widespread and continued use of OMA's.

102. *See* Mueller & Van Der Van, *Perils in the Brussels-Washington Steel Pact of 1982*, 5 WORLD ECON. 259, 277 (1982).

IV

Although GATT cannot adequately cope with all of the world's increasingly complex trade problems, the GATT framework does measurably constrain the actions of countries and provides a degree of stability to the system of international trade.[103] Since the GATT has been successful in resolving many trade disputes, countries should attempt to halt the erosion of the GATT caused by repeated, unchallenged violations of GATT obligations. Given the increased reliance on OMA's by the United States, two options present themselves: reform GATT so that countries can negotiate OMA's within GATT constraints, or remove specialty steel from the GATT system. The latter offers the only viable solution to the problems of the American specialty steel industry.[104]

The formation of a global organization governing specialty steel trade looms on the horizon.[105] Although many suggestions have been offered, as yet no such organization has been developed.[106] Setting up a separate regime to govern specialty steel admittedly conflicts with professed American ideals about free trade. These ideals, however, have recently been honored more in the breach than in the execution. As shown, the United States, while asserting a desire to comply with GATT, continues to resolve complex trade problems outside the GATT regime. Furthermore, free trade is not always in the best interests of the United States.[107]

Removing industries like specialty steel from GATT would bolster the GATT regime. Since GATT would not attempt to cover trade problems with which the

103. *See* Finlayson & Zacher, *supra* note 87, at 598–602. GATT has also influenced U.S. trade policy making and legislation. The process of preparing for and conducting multilateral negotiations creates incentives to conform domestic laws and practices to those of other countries. In addition, all the major postwar trade legislation was designed to initiate GATT negotiations, or implement the results of such negotiations. Lipson, *The Sources and Effects of Regime Change*, 36 INT'L ORG. 417, 446–51. (1982).

104. For a concise discussion of the problems of reforming GATT to cope with trade problems, see Jackson, Louis, & Matsushita, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267, 383 (1982).

> One of the questions that has been appropriately raised in connection with the system is whether it can adequately cope with the truly large cases, such as trade problems of the steel or automobile sector, which are often the result of important and painful trends of structural adjustment. If the rules are not adequately tuned to massive problems of this type, they could when inflexibly administered, create problems rather than solve them. One answer to this criticism would be to improve and change the rules. But when the world's procedures for such change are as difficult, lengthy, and inflexible as they are, rule changes do not occur easily.

Id. Commentators have suggested reforming Article XIX of the GATT to allow for export restraints and OMA's for the past decade without success. *See, e.g.*, Tumlir, *supra* note 100; Bergsten, *On the Non-Equivalence of Quotas and "Voluntary" Export Restraints*, TOWARD A NEW WORLD TRADE POLICY: THE MAIDENHEAD PAPERS 239, 258 (C. Bergsten ed. 1975).

105. *See* Walter, *Protection of Industries in Trouble, The Case of Iron and Steel*, 2 WORLD ECON. 155, 182–86 (1979).

106. *Id.* at 183–84.

107. *See* Treines, *The Myth of Free Trade*, 77 GRAD. WOM. 29, 30 (May/June 1983) ("Persisting in our blind faith in the theoretical blessings of free trade will only benefit the sweat shops of the world and hasten the destruction of the U.S. industrial base." *Id.*); *see also* Givens, *The U.S. Can No Longer Afford Free Trade*, BUS. WK., Nov. 22, 1982, at 15. ("We must recognize that free trade, while a laudable concept is hopelessly inadequate as a trade policy." *Id.*).

system has been unable to cope, a more workable, albeit more limited, system of free trade would result. A separate trade regime for steel would also control the pace of adjustment to imports and allow domestic producers to begin restructuring the industry uninhibited by fears of changing market conditions.

Establishing a separate governing body for the specialty steel industry would not create a rush to set up similar sectoral organizations each time a complex trade problem arose. Most of the recent actions to restrict imports have involved only three industries: steel, textiles, and clothing.[108] These industries share a number of characteristics including standardized, labor-intensive production processes, and mature, price competitive markets.[109] These traits make the industries particularly susceptible to foreign competition because newly industrializing countries can rapidly become competitive by utilizing their abundant supply of low-cost labor. In addition, since the demand for goods produced by these industries fluctuates very little, small differences in price will cause consumers to shift their source of supply. Sectoral regimes, then, should only be established in these areas where basic industries have proven unable to adjust to import competition and the present system of international trade has failed to facilitate such adjustment.

One proposal for organizing the steel industry would create an arrangement akin to the Multi-Fibre Arrangement (MFA) governing the textile industry.[110] Similarities between the problems of the steel industry, and those which the textile industy confronted in the 1950s and 1960s indicate that this idea is worthy of further consideration. Textiles, like specialty steel, is a labor intensive industry. In the 1950s, Japan took advantage of an abundant supply of low-cost labor to develop a competitive edge in the textile industry. Newly industrializing countries, like Brazil and the Republic of Korea (South Korea) today, have built up a similar advantage in the production of specialty steel. Like the steel industry, the textile industry in the early 1960s lobbied strenuously for legislated quotas, but settled for export restraints. As in the steel industry, these voluntary restraints did not aid the recovery of the industry. Thus, the United States sought to legalize the voluntary restraints, illegal under GATT, within the multilateral framework of an international textile arrangement.[111]

The Multi-Fibre Arrangement entered into force in 1974.[112] This arrangement

108. *See* Lipson, *supra* note 103, at 428.

109. *Id.* at 428–29.

110. *See* Perlow, *The Multilateral Supervision of International Trade: Has the Textiles Experiment Worked?*, 75 AM. J. INT'L L. 93, 93 n.3 (1981).

111. *See id.* at 94–96. At the insistence of the United States, this arrangement allowed "selective restriction of trade with countries whose exports were causing or threatening market disruption, while at the same time allowing for an 'orderly development' of trade." *Id.* at 97. The U.S. preference for this sort of multinational framework as opposed to bilateral agreements followed from both domestic and international concerns. The government faced a powerful domestic textile lobby pressuring for quotas. In addition, the United States feared that any attempt to negotiate bilateral accords would degenerate into a confrontation between North and South. *See* Aggarwal, *The Unraveling of the Multi-Fibre Arrangement, 1981: An Examination of International Regime Change*, 37 INT'L ORG. 617, 628 (1983).

112. *See* Arrangement Regarding International Trade in Textiles, *done* Dec. 20, 1973, 25 U.S.T. 1001, T.I.A.S. No. 7840, extended by protocol of Feb. 1, 1978, *discussed in* Perlow, *supra* note 110.

partially removed the textile industry from the control of GATT, and established an alternative regulatory framework for the imposition of both import and export restraints on textiles.[113] The central supervisory organ under the MFA is the Textile Surveillance Body (TSB). Unlike GATT panels, created on an ad hoc basis for dispute resolution, the TSB is a permanent body possessing supervisory powers.[114] The TSB has suffered from an inability to gather sufficient information quickly enough to conduct an efficient review of restraints adopted under the MFA.[115] In addition, the TSB has failed to effectively discourage actions which violate the MFA and to interpret the rules of the MFA and apply those rules to new developments in textile trade.[116] Despite these problems, the TSB has encouraged parties to resolve their differences and prevented a total collapse of the regulatory structure.[117]

Notwithstanding the failures of the TSB, a modified version of this body should serve as a model for a supervisory organ to govern international steel trade. The goals of the specialty steel industry in the United States parallel those of the textile industry before the adoption of the MFA. These goals include the desire to expand trade and reduce trade barriers while avoiding disruption of trade in individual countries.[118] The MFA attempted to strike a balance between these conflicting objectives and initially established a broad consensus on these objectives by appealing to a variety of interests.[119] This consensus broke down, however, due to a number of factors including a drop in the demand for textiles during the recession of 1974. In addition, despite the original consensus, countries soon

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Discussions about devising a separate agreement to control international textile trade began in 1959, and concluded in 1962 with the Short Term Agreement, which ran from October 1961 through September 1962. This was followed by the Long Term Arrangement (LTA) which gave way to the Multi-Fibre Arrangement in 1974. Perlow, *supra* note 110, at 97–98.

113. Perlow notes that the LTA, which preceded the MFA, retained substantive and institutional connections with GATT. Perlow, *supra* note 110, at 98 n.21. For example, the GATT Director-General is appointed chairman of the Textiles Committee, a plenary body which grew out of a GATT working party established in 1959 to study the problems of market disruption in the cotton textile industry. *Id.* at 103. Also, countries with continuing problems regarding implementation of recommendations from the TSB may refer these problems to the GATT Council.

114. *Id.*

115. *Id.* at 120–23.

116. *Id.* at 123–30.

117. *Id.* at 131.

118. *See* Article 1(2) of the MFA, *reprinted in* Perlow, *supra* note 110, at 100–01. The goals of the MFA are:

> [T]o achieve the expansion of trade, the reduction of barriers to such trade and the progressive liberalization of world trade in textile products, while at the same time ensuring the orderly and equitable development of this trade and avoidance of disruptive effects in individual markets and on individual lines of production in both importing and exporting countries.

Id.

119. *See* Perlow, *supra* note 110, at 103. The author mentions Article 6 which allows for special treatment of certain countries, and Article 8 which recognizes importing countries' interests in "avoiding transshipment and circumvention," and exporting countries, interests in "promoting industrial adjustment in importing countries." *Id.*

began to express differing view on the best means to accomplish the goals of the MFA.[120]

To prevent the problems caused by a breakdown in the initial consensus, the supervisory body governing the steel industry should be structured so as to avoid the mistakes of the TSB.[121] This new body must be willing to establish and vigorously enforce a strict set of rules. Such rules should include detailed procedures for obtaining data from both importers and exporters in order to monitor adequately compliance with the terms of the agreement. In addition, the supervisory organ must take an active role in dispute settlement. Parties should not be left to resolve their differences through purely bilateral negotiations. Without extensive multilateral participation, this new arrangement would ultimately suffer the same fate as the GATT, where parties ignore the established mechanisms and resolve their differences bilaterally on a case-by-case basis.[122]

The new trade regime would sanction the imposition of unilateral restraints and the discriminatory use of OMA's. The participants in the system would have to develop guidelines for the imposition of restraints similar to those in Articles 3 and 4 of the MFA.[123] The multilateral supervision of restraints would guarantee all exporters a share in the world market for specialty steel. At the same time, producers in the United States could assure themselves of a market for their products which would provide revenue to finance a restructuring of the specialty steel industry.

CONCLUSION

American specialty steel producers blame the continuing decline of the domestic industry on unfair foreign trade practices. Efforts to reverse this decline demand a new approach. Neither existing trade legislation nor regulation of

120. *See id.* at 119.

121. *Id.* at 119–30. Any international regulatory framework must be prepared to deal with a diminishing of the original enthusiasm for the guidelines imposed by the structure. Countries willing to cooperate in the development of an international framework for the conduct of steel trade will be less inclined to abide by the established rules when self-interest no longer dictates that they do so. The regulatory mechanisms must be powerful enough to prevent a breakdown of the system despite the inevitable erosion of the consensus upon which the participants established the system.

122. The proposed regime for specialty steel could conceivably remain affiliated with GATT as has the MFA. *See supra* note 113. Completely removing the new system from the control of GATT, however, should enhance the effectiveness of both organizations. Emphasizing that GATT has no authority over certain sectors of international trade will encourage use of GATT procedures in those areas over which GATT control is acknowledged. In addition, completely removing the new steel regime from GATT institutional control should ease the supervisory burden on those institutions, and heighten the efficiency of both the new structure and GATT institutions.

123. Perlow, *supra* note 110, at 101–02. Article 3 of the MFA imposes guidelines for the imposition of unilateral restraints. Article 4 establishes standards for the negotiation of bilateral agreements. The guidelines for OMA's adopted under the new regime must include strict, substantive guidelines for determining when restraints negotiated under an OMA conform to the general standards imposed on unilateral restraints. The MFA suffered from amorphous standards governing bilateral restraint agreements. The lack of well-defined criteria for these agreements made multilateral supervision difficult. *Id.* at 117.

international trade under the GATT has solved the problems of the industry. Some existing remedies under U.S. laws, like quotas and tariffs, have proven ineffective over the past two decades. Other potentially effective remedies, like OMA's, violate GATT. For GATT to continue as a viable entity governing the majority of international trade, complex trade problems, like those in the specialty steel industry, must be resolved in regimes completely or partially removed from GATT.

In establishing these regimes, the U.S. must recognize that free trade is no longer an achievable goal in every facet of international trade. An ordered, multilateral system is preferable to the current chaos where countries impose unilateral restraints, and then conduct bilateral negotiations outside the GATT structure. Only through a new international regulatory system can the United States start to reverse the decline in the specialty steel industry.