

THE TRADE ACT OF 1974: COPING WITH UNEQUAL ENVIRONMENTAL CONTROL COSTS

SCOTT C. WHITNEY*

I. INTRODUCTION

Congress has recently established an institutional framework to be employed in formulating and implementing international trade policy. On January 3, 1975, President Ford signed into law the Trade Act of 1974,¹ which was enacted by Congress under its plenary constitutional authority to "lay and collect taxes, duties, imposts" and "to regulate commerce with foreign nations."² Despite its constitutional power in these areas, since 1934 Congress has periodically delegated to the President specific and limited trade agreement power to negotiate reciprocal tariff and trade concessions with foreign nations.³ Until the passage of the Trade Act of 1974, the most recent congressional delegation of authority to the President to negotiate trade agreements was the Trade Expansion Act of 1962.⁴ The President's authority under this Act terminated June 30, 1967 and since that date the President has been without negotiating authority.⁵ The proposed Trade Act of 1970,⁶ which Congress failed to enact, was the last legislative attempt to address the trade policy of the United States prior to the Trade Act of 1974.

In the interval since the last foreign trade legislation enacted by Congress in 1962, the economies of the world and of the United States have experienced radical changes. The extent and magnitude of these changes made it clear that United States trade policy was overdue for a reevaluation. In particular, the increasing importance of certain "nontariff barriers" or "distortions" called for special consideration. Foremost among these distortions were those which have arisen as a result of the increased costs of production caused by the pollution abatement and other environmental costs incurred by United States industry. These costs have also been incurred, to a lesser degree, by the industries of our foreign trade partners, especially the highly developed industrial nations.

The purpose of this article is to focus on the domestic

* Professor of Law, College of William and Mary, Marshall-Wythe School of Law; A.B., Univ. of Nevada, 1949; J.D., Harvard, 1952.

¹ Pub. L. No. 93-618, 88 Stat. 1978 (Jan. 3, 1975).

² U.S. Const. art. 1, § 8.

³ 19 U.S.C. § 1351 (1970), as amended.

⁴ 19 U.S.C. §§ 1801-1991 (1970).

⁵ Although the President's authority to *negotiate* and enter into new trade agreements expired in 1967, 19 U.S.C. § 1821(a) (1970), his authority to take retaliatory action against discriminatory trade practices of a foreign government remained unimpaired. See S. Rep. No. 1431, 91st Cong., 2d Sess. 237 (1970).

⁶ H.R. No. 18970, 91st Cong., 2d Sess. (1970).

decision-making structures needed to cope with complex and emerging world economic conditions and distortions in international trade competition arising from unevenly incurred environmental control costs. Initially, the current economic trends necessitating revision of the United States' international trade decision-making structure will be reviewed. The impact of environmental control costs upon the United States' trade position will then be analyzed. Finally, the provisions of the Trade Act of 1974 will be discussed in order to provide the basis for an evaluation of the adequacy of the United States' international trade policy-making and decision-making structure to cope with economic distortions resulting from programs such as pollution abatement.

Congress recognized the problem of unevenly incurred environmental abatement costs in 1972 and mandated an extensive and continuing study by the Department of Commerce to determine, among other things: (1) the short and long term effects of pollution abatement programs upon production costs and market prices of domestic manufacturers on an industry-by-industry basis; (2) a corresponding analysis with respect to foreign industrial nations; (3) the advantage gained by a foreign nation where it fails to require its manufacturers to implement comparable programs or in some way reimburses or subsidizes such programs; (4) ways to equalize any advantage that a foreign competitor may derive from the failure of its government to require pollution controls comparable to those of the United States.⁷

The first two reports of the Secretary of Commerce prepared under this mandate have now been published.⁸ Although these reports contain some important advances in the difficult matter of ascertaining the extent of the impact of environmental costs upon foreign trade, they fall far short of reaching even tentative conclusions. However, the reports do acknowledge that the cost of environmental requirements "will have significant economic consequences" and substantially affect the United States trade position.⁹

II. THE SETTING: RECENT ECONOMIC TRENDS AFFECTING U.S. FOREIGN TRADE

In 1974, as Congress undertook to consider what provisions to enact to produce an adequate trade reform bill, it faced a complex

⁷ Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, § 6, 86 Stat. 897 (Oct. 18, 1972), codified in a note following 33 U.S.C. § 1251 (Supp. II, 1972). For the full text of § 6, see note 24 *infra*.

⁸ U.S. Dep't of Commerce, *The Effects of Pollution Abatement on International Trade*, vol. I (1973) & vol. II (1974) [hereinafter cited as *Pollution Abatement and International Trade*].

⁹ I *Pollution Abatement and International Trade*, *supra* note 8, at 16.

array of new economic forces unlike those that confronted the Congress which debated and enacted the Trade Expansion Act of 1962. These new forces necessitated a major reconsideration of the conventional techniques of formulating and applying a viable trade policy.

A primary factor is that United States imports of merchandise have increased in the past decade—from \$18.7 billion in 1964 to \$69.1 billion in 1973—nearly a four-fold increase.¹⁰ This trend will undoubtedly become accentuated because of an increased dependence on foreign oil and because of the recent exorbitant price increases imposed by the Organization of Petroleum Exporting Countries (OPEC). The Department of Interior forecast of supply and demand for oil in the United States for the remainder of the century supports this prediction:

TABLE I¹¹
TRILLIONS OF BTU

	1971	1975	1980	1985	2000
Domestic Supply	22,569	22,130	23,770	23,600	21,220
Percent of Total	74.0	63.1	56.3	46.6	29.7
Supplemental Supplies	7,923	12,960	18,420	27,100	50,160
Percent of Total	26.0	36.9	43.7	53.4	70.3
Total	30,492	35,090	42,190	50,700	71,380

Regardless of the precise accuracy of such forecasts, it is clear that even assuming developments such as the success of major conservation efforts, resort to alternative energy sources, increased exploration and production of petroleum (for example development of the outer continental shelf reserves), and increased refinery capacity, a significant shortage in the supply of petroleum and petroleum products will remain. This continuing problem was reflected in presidential announcements of a national commitment to "Project Independence,"¹² a program intended to achieve national energy self-sufficiency at the earliest possible date.¹³ However, one Project Independence study recognized that at best, "1985 is the earliest date by which self-sufficiency can reasonably be expected with this

¹⁰ Staff of Senate Comm. on Finance, 93d Cong., 2d Sess., Staff Data and Materials on U.S. Trade and Balance of Payments 1 (Feb. 26, 1974) [hereinafter cited as Senate Comm. Staff Data].

¹¹ U.S. Dep't of Interior, United States Energy Through the Year 2000, at 10 (1972).

¹² Former President Nixon outlined in detail his proposed Project Independence in a special message to Congress on the Energy Crisis. The text of this message appears in 120 Cong. Rec. H 151 (daily ed. Jan. 23, 1974).

¹³ See, e.g., Atomic Energy Comm'n, The Nation's Energy Future vii (1973) (report submitted to President Richard M. Nixon by D.L. Ray, Chairman, U.S. Atomic Energy Comm'n).

program," and that at best, United States dependence on oil imports could only be reduced by half (to 6 million barrels per day) by 1980.¹⁴ This study also recognized that these objectives could be attained only if the complete recommended "Project Independence" program was adopted in time for Fiscal Year 1975 budgeting and was sustained over the next decade and beyond, a remote likelihood.¹⁵ Thus, the problem of dependence upon foreign sources of oil is likely to continue to have great impact upon the United States' balance of payments. Since 1966 the United States has incurred annual deficits in both trade and balance of payments, with the exception of 1973, when a modest surplus in the balance of payments was achieved because of unusually large sales of agricultural products.¹⁶

This decade also saw a severe, unprecedented overheating of the U.S. economy which greatly intensified upward pressures on domestic wages and prices. Increasing wages and prices of domestically-produced commodities injured their ability to compete with commodities produced abroad. The chart on the following page demonstrates the significantly higher increase in unit labor cost in manufacturing incurred by the United States as compared to that of its nine leading industrial trading partners.¹⁷

In terms of impairing the ability of domestically-produced commodities to compete with foreign commodities, perhaps the most ominous of all the recent economic trends is the decline in the growth rate of productivity in the United States during the past decade. Table II demonstrates this decline.¹⁸

The repercussions of these developments have been significant. Although domestic wages have, in recent decades at least, been higher than those of other countries, until quite recently the impact of this factor upon the competitive position of domestic industry in international trade has been offset by the higher productivity of the American worker. This was demonstrated as recently as 1960-64, during which period the United States still exported more than it imported.¹⁹

¹⁴ *Id.*

¹⁵ *Id.* At this time there is little evidence that the Project Independence study will become an "action" paper.

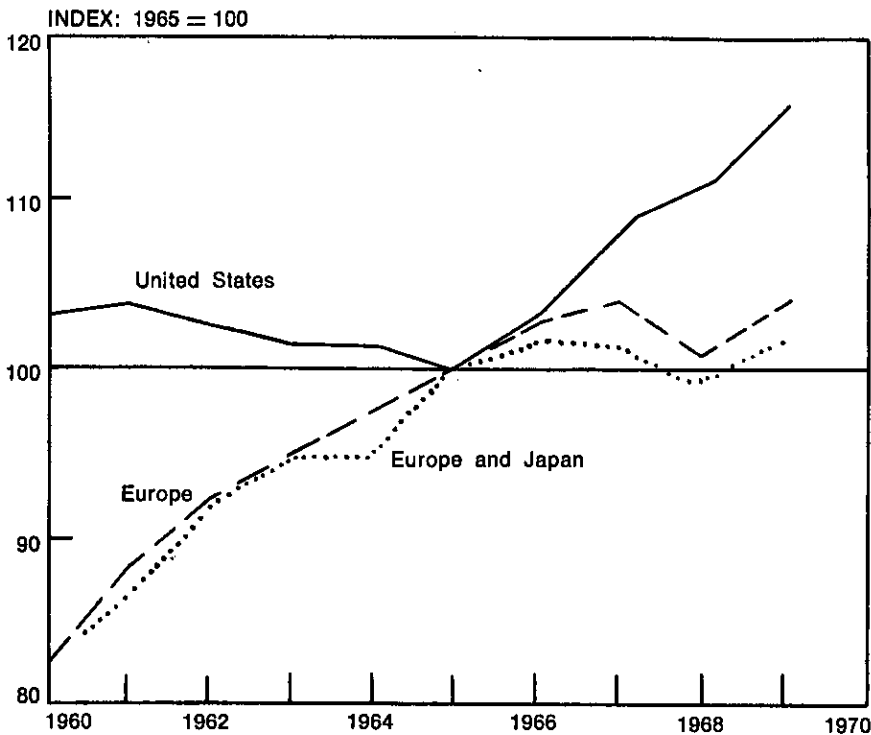
¹⁶ See Senate Comm. Staff Data, *supra* note 10, at 1, 8.

¹⁷ This chart is reprinted from volume 1 of compendium of Papers submitted to the Comm'n on Int'l Trade and Investment Policy, United States International Policy in an Interdependent World 539 (1971) [hereinafter cited as CITIP Study].

¹⁸ This table, which is based on data from the Bureau of Labor Statistics, U.S. Dep't of Labor, appears in 1 CITIP Study, *supra* note 17, at 545.

¹⁹ Senate Comm. on Finance, 93d Cong., 2d Sess., Tables and Statistical Material on U.S. Balance of Trade and Balance of Payments 1 (Dec. 1974).

THE TRADE ACT OF 1974



NOTE: Data for trading partners are weighted according to U.S. imports from each country in 1965. Data for Europe pertain to Belgium, France, Germany, Italy, Netherlands, Sweden, Switzerland (wage earners only), and the United Kingdom.

TABLE II
AVERAGE PERCENT CHANGE IN OUTPUT PER MAN-HOUR FOR MANUFACTURING EMPLOYEES

Country	1960-65	1965-69	1969-70
United States	4.3	2.1	1
Belgium	5.4	8.6	11.7*
Canada	3.7	4.1	3
France	4.8	7.0	9
Germany	6.0	5.7	4
Italy	7.1	3.7	1.2*
Japan	8.2	15.1	13
Netherlands	6.4	8.4	12
Sweden	5.9	8.2	6
United Kingdom	3.4	4.0	3
Switzerland	3.1	7.2	5

* Not available for 1969-70; 1968-69 data used instead.

To date American financial policymakers have been unable to arrest the problems created by the interaction of increased domestic prices, increased wage levels, and declining worker productivity.

The result has been an acceleration of the trend toward greater imports, a trend which is evident from the data in Table III.²⁰

TABLE III
U.S. TRADE AND BALANCE-OF-PAYMENTS DEFICITS
[In billions of dollars]

	U.S. Trade Position				Trade Balance		Balance of Payments		
	Exports (X)		Imports (M)		C.I.F. (M)				
	Minus Foreign				Excluding Foreign				
	Total	Aid	F.O.B.	C.I.F. ¹	F.O.B.	Aid (X)	Liquidity ²	Official Settlements ²	Basic Balance
1960	19.6	17.9	15.1	16.3	4.5	1.6	- 3.7	- 3.4	-0.8 ³
1961	20.2	18.3	14.7	16.0	5.5	2.3	- 2.3	- 1.3	
1962	21.0	18.7	16.5	17.8	4.5	0.9	- 2.9	- 2.7	
1963	22.5	19.9	17.2	18.6	5.3	1.3	- 2.7	- 1.9	
1964	25.8	23.1	18.7	20.3	7.1	2.8	- 2.7	- 1.5	
1965	26.7	24.3	21.5	23.2	5.2	1.1	- 2.5	- 1.3	-1.7
1966	29.5	27.0	25.6	27.7	3.9	- 0.7	- 2.2	.2	
1967	31.0	28.5	26.9	28.8	4.1	- .3	- 4.7	- 3.4	
1968	34.1	31.8	33.2	35.3	.9	- 3.5	- 1.6	- 1.6	
1969	37.3	35.3	36.0	38.2	1.3	- 2.9	- 6.1	2.7	
1970	42.7	40.7	40.0	42.4	2.7	- 1.7	- 4.7	-10.7	-3.0
1971	43.5	41.7	45.6	48.3	-2.1	- 6.6	-22.7	-30.5	-9.6
1972	49.2	47.5	55.6	58.9	-6.4	-11.4	-14.7	-11.1	-9.8
1973 ⁴	70.8	69.4	69.1	73.2	+1.7	- 3.8	- 7.9	- 5.3	+1.7

¹ C.I.F. imports for the years 1960-66 are assumed to be roughly equivalent to 108.3% of f.o.b. imports in accordance with a Bureau of Customs—Tariff Commission—Bureau of Census study based on 1966 arrivals. For the years 1967-73 estimates are based on Bureau of Customs-Bureau of Census studies showing estimated freight and insurance charges to be 6.9 percent (1967), 6.3 percent (1968), 6.1 percent (1969), 6.2 percent (1970), 6.1 percent (1971), and 5.9 percent for 1972 and 1973.

² The liquidity and official settlements deficits for 1966-73 excludes SDR allocations.

³ Annual average.

⁴ Estimated on basis of partial data.

Source: U.S. Department of Commerce.

The effect of prolonged trade and balance of payments deficits upon the value of United States currency has been adverse. Recent inflationary developments contributed to staggering balance of trade and payments deficits between 1970 and 1972 and produced massive runs against the dollar. As a result, the United States became unable to maintain a fixed parity between the dollar and gold, and the fixed exchange rate structure collapsed on August 15, 1971.²¹ Subsequently, there occurred several dollar devaluations, which further intensified the inflationary pressures on the U.S. economy. Devaluation makes imports more expensive for domestic consumers and domestically-produced exports relatively less expensive for foreign

²⁰ Reprinted from Senate Comm. Staff Data, *supra* note 10, at 1.

²¹ Senate Comm. on Finance, 93d Cong., 2d Sess., Summary and Analysis of H.R. 10710 at 3 (Feb. 26, 1974).

consumers. Thus domestic prices for imports into the United States experience price increases. This in turn may trigger demands for higher wages so that a vicious wage-price cycle may be set in motion. Correspondingly, the increase in exports which resulted from the dollar devaluations have tended to create domestic resource or commodity shortages. These shortages in turn have created further pressure for domestic price increases and, in some instances, necessitate the imposition of export controls which contravene one of the primary purposes of devaluation, *i.e.*, the reversal of unfavorable trade and payments balances. The adverse impact of this situation upon the value of U.S. currency is clear. The charts on the following page demonstrate the international position of United States currency.²²

This factual presentation demonstrates that developments in international and domestic economic conditions have substantially contributed to the worsening competitive position of domestic business. This result requires a focus on one of its specific causes—environmental control cost distortions, which are nontariff barriers to foreign marketing of domestic commodities.

III. DISTORTIONS ARISING FROM ENVIRONMENTAL CONTROL COSTS

The need to cope with the problems of inflation, declining worker productivity, continuing national budget deficits, prolonged disequilibria in balance of trade and payments, and the unfavorable rate of exchange between United States currency and that of its major trading partners is apparent. All of these necessary policy objectives are inextricably related to inflation, the abatement of which has recently been designated as the top national priority by President Ford in his Economic Address to a joint session of the Congress.²³ Clearly, trade reform legislation is an important element in the total program to control inflation and stabilize the national economy.

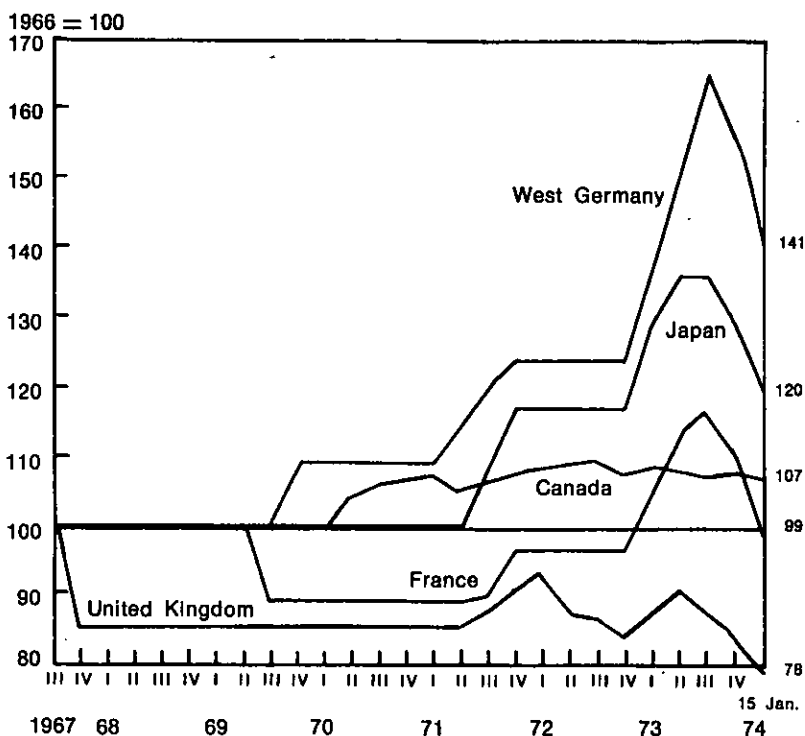
Until comparatively recently, however, the extent to which these adverse economic forces are aggravated by both short and long term environmental costs was not widely recognized. These costs may be defined as the additional costs incurred by producers of any commodity or service, as a result of environmental regulation. Expressed in terms of classical economics, federal, state and local environmental reform and planning legislation and implementing regulations, especially those imposed since 1969, have set in motion

²² The charts are reprinted from Senate Comm. Staff Data, *supra* note 10, at 46.

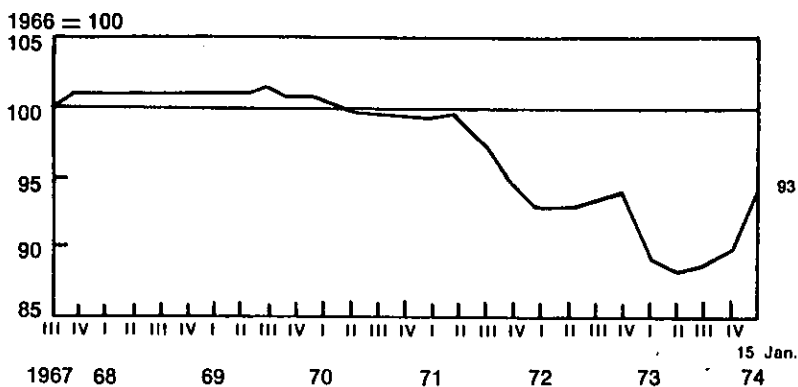
²³ 120 Cong. Rec. H. 10, 120 (daily ed. Oct. 8, 1974).

Comparative Exchange Rates

Major US Trading Partners: Exchange Rates Relative to the US Dollar



US: Effective Rate of Exchange of the US Dollar



* The indexes are based on the central rates except in periods of currency float where the values shown are market rates.

** Derived from weights based on overall U.S. trade during 1972.

SOURCE: Council on International Economic Policy Annual Report, February 1974.

an economic process whereby environmental externalities are being converted into costs of production, and therefore, introduced into the nation's price structure. Thus, there results not only domestic price increases, but also, as Congress has recognized, a substantial impact upon the foreign trade posture of the United States.

A. *Measuring Environmental Control Costs*

As a result of its recognition of the influence of domestic environmental costs upon U.S. foreign trade, Congress directed the Secretary of Commerce, in section 6 of the Federal Water Pollution Control Act Amendments of 1972,²⁴ to study the matter. The central task imposed by section 6 is the identification and quantification of costs incurred by domestic and foreign manufacturers in the course of compliance with environmental laws and regulations. To

²⁴ The Federal Water Pollution Control Act Amendments of 1972, § 6, codified in a note following 33 U.S.C. § 1251 (Supp. II, 1972), provides:

(a) The Secretary of Commerce, in cooperation with other interested Federal Agencies and with representatives of industry and the public, shall undertake immediately an investigation and study to determine—

(1) the extent to which pollution abatement and control programs will be imposed on, or voluntarily undertaken by, United States manufacturers in the near future and the probable short- and long-range effects of the costs of such programs (computed to the greatest extent practicable on an industry-by-industry basis) on (A) the production costs of such domestic manufacturers, and (B) the market prices of the goods produced by them;

(2) the probable extent to which pollution abatement and control programs will be implemented in foreign industrial nations in the near future and the extent to which the production costs (computed to the greatest extent practicable on an industry-by-industry basis) of foreign manufacturers will be affected by the costs of such programs;

(3) the probable competitive advantage which any article manufactured in a foreign nation will likely have in relation to a comparable article made in the United States if that foreign nation—

(A) does not require its manufacturers to implement pollution abatement and control programs,

(B) requires a lesser degree of pollution abatement and control in its programs, or

(C) in any way reimburses or otherwise subsidizes its manufacturers for the costs of such programs;

(4) alternative means by which any competitive advantage accruing to the products of any foreign nation as a result of any factor described in paragraph (3) may be (A) accurately and quickly determined, and (B) equalized, for example, by the imposition of a surcharge or duty, on a foreign product in an amount necessary to compensate for such advantage; and

(5) the impact, if any, which the imposition of a compensating tariff or other equalizing measure may have in encouraging foreign nations to implement pollution abatement and control programs.

(b) The Secretary shall make an initial report to the President and Congress within six months after the date of enactment of this section of the results of the study and investigation carried out pursuant to this section and shall make additional reports thereafter at such times as he deems appropriate taking into account the development of relevant data, but not less than once every twelve months.

date the studies conducted pursuant to section 6 have fallen short of this goal. The most recent study acknowledges that "there are virtually no reliable, comprehensive cost analyses in being which can be directly used to answer the questions posed by Section 6."²⁵ Moreover, the study concedes, "no studies or approaches have yet been identified that are directly useful in reaching confident conclusions about pollution costs impacts on international trade."²⁶ The lack of useful studies is due largely to two factors.

1. The accurate and consistent identification of fixed and operating pollution control costs is the core of the methodological difficulty, both from the viewpoint of structuring the cost components themselves, and with respect to the problems associated with collection of actual plant data. For virtually all manufacturing industries, wide variations exist in cost impacts related to pollution controls as a result of plant-to-plant variations of such factors as age of equipment; geographical location; and the production processes, fuels, and materials employed. In addition, determination of the full impact of pollution control costs for any product line involves an aggregation of costs incurred by all suppliers of the end-product manufacturers. Similar plant-to-plant variations occur within these supplier industries, thereby compounding the difficulty of direct analysis and conclusions.

2. The pollution cost studies carried out by other organizations are invariably designed to serve purposes that are substantially different from those set out in Section 6. This is particularly true of cost studies carried out by regulatory agencies which often seek to identify general levels of aggregate costs which are not detailed enough to allow conclusions about impacts on price and trade for particular product lines.²⁷

The difficulties of data compilation with respect to foreign competitors are even greater because, in addition to the foregoing problems, American researchers must deal with varying degrees of uncooperativeness and secretive attitudes as to what is conceived to be proprietary and confidential business information.

One of the earliest efforts to quantify domestic environmental costs on anything approaching a national basis consisted of a sum-

²⁵ II Pollution Abatement and International Trade, *supra* note 8, at 3.

²⁶ *Id.*

²⁷ *Id.*

mary of eleven microeconomic studies prepared by private economic consultant firms for the Council on Environmental Quality, the Department of Commerce and the Environmental Protection Agency, which was published as a joint-agency study in March of 1972.²⁸ The eleven studies, each of which focused upon a specific industry, undertook to assess the cost of the air and water pollution abatement requirements then in effect. In addition, this work contained a macroeconomic study of the impact of air and water pollution control upon the economy in general, and upon international trade and balance of payments in particular. One obvious weakness of this study is its scope: it undertook to quantify only costs arising from air and water pollution control and did not attempt to assess costs arising from other types of environmental regulation. Moreover, events subsequent to publication of the study have made it clear that the 1972 forecasts of air and water pollution costs were substantially understated: the enactment of the Federal Water Pollution Control Act Amendments of 1972²⁹ and the extensive promulgation of air and water quality regulations subsequent to March 1972 have produced and will continue to produce environmental control costs many times greater than those originally forecast.

Since the publication of the joint-agency report various other studies have been undertaken, and considerable effort is now being made to structure methodologies that will produce the data required to organize a study that adequately addresses the questions raised by Congress. One such study is that of the Social and Environmental Statistics Administration (SESA) of the Department of Commerce. The objective of the SESA program is to devise a conceptual framework for a full-scale pollution abatement expenditures survey. The initial phase will undertake to quantify capital expenditures and operating costs for abatement of air and water pollution and solid waste disposal.³⁰ The basic technique will be a skillfully structured pilot survey which will be sent to approximately 1100 establishments falling within 12 or 14 standard industrial classifications. The data garnered from the pilot program will be factored into a more comprehensive survey covering a minimum of 15,000 establishments representing 20 standard industrial classifications. This broad survey effort will be supplemented by two more specialized and detailed surveys: one covering 17,000 mineral producing and manufacturing establishments that consume more than 20 million

²⁸ Council on Environmental Quality, Dep't of Commerce, and Environmental Protection Agency, *The Economic Impact of Pollution Control: A Summary of Recent Studies* (1972).

²⁹ 33 U.S.C. §§ 1251-1376 (Supp. III, 1973).

³⁰ II *Pollution Abatement and International Trade*, *supra* note 8, at 7-8.

gallons of oil annually; the other an attempt to derive data on a company rather than industry basis.³¹

Pursuant to section 6(a)(1) of the Federal Water Pollution Control Act Amendments of 1972,³² the Environmental Protection Agency (EPA) has contracted for a series of studies to develop cost data to determine the availability and achievability of pollution control systems for 27 industrial categories by July 1, 1977 and July 1983, respectively. The EPA project involves both technical and economic analysis. The technical analysis will determine what control systems will be necessary to comply with effluent guidelines and the economic analysis will quantify the capital investment and operating costs of such technology. While this study addresses itself to only part of the environmental cost problem, the methodological and data developments that result from the study may be useful in other more comprehensive surveys.³³

The foregoing studies and reports represent important first steps in developing an adequate data base and methodology with which to fashion a meaningful response to the investigation called for by Congress. However, it must be recognized that even if these domestic data gathering methods and analyses are complete and accurate, the more difficult portions of the study remain: (1) the collection of comparable data from all relevant trade partners;³⁴ (2) determination of the actual effects upon U.S. imports and exports to be expected from various cost impact differentials on a product-by-product as well as on an overall basis. This determination constitutes the penultimate purpose of the study mandated by Congress. However, it will not be possible to fulfill that purpose until the data from trade partners becomes available.

It was recognized in 1971 that environmental costs would have a substantial impact upon our international trade and investment relations. The studies submitted to the Commission on International Trade and Investment Policy (CITIP) contain an analysis entitled "International Economic Implications of Environmental Control and Pollution Abatement Programs."³⁵ This study was completed in July of 1971, and concluded that if the United States imposed strict anti-pollution measures upon domestic industry, either by direct

³¹ *Id.*

³² Codified in a note following 33 U.S.C. § 1251 (Supp. II, 1972). For text of § 6(a)(1), see note 24 *supra*.

³³ II Pollution Abatement and International Trade, *supra* note 8, at 8-10.

³⁴ The Commerce Department has begun to analyze data with respect to the pollution control programs of nine other industrialized nations: Belgium, Canada, France, Germany, Italy, Japan, Netherlands, Sweden and the United Kingdom. See I Pollution Abatement and International Trade, *supra* note 8, at 20 and Appendices A-1 to A-84.

³⁵ 1 CITIP Study, *supra* note 17, at 777-90.

regulation or by a taxing scheme; United States export and import-competing industries would be placed at a competitive disadvantage in both world and domestic markets.³⁶ Furthermore, it pointed out that the United States trade balance and level of national income would thereby be adversely affected: unless countervailing or compensatory measures were adopted, a policy of strict environmental regulation would encourage the outflow of investment funds to foreign production sites. This outflow would be likely to worsen the balance of payments deficits and to affect domestic growth rates and employment adversely.³⁷ Another obvious result would be a significant decline in the United States' share of many world markets.³⁸ The United States would thus aggravate an already pronounced trend of pricing domestic industry out of important world markets and of making domestic markets more vulnerable to competition by imports.

The 1971 CITIP study recommended that the Committee on Environment, an organ of the United Nations Organization for Economic Cooperation and Development, be delegated the task of devising an international agreement under which the industrial nations would adopt "pollution control measures which incorporate costs in price,"³⁹ by which it is apparently meant that nations would agree to quantify environmental costs and seek to incorporate that increment representing environmental cost into final commodity pricing. To date this international agreement has not been reached. Even if such an agreement is reached and implemented, the CITIP study acknowledged that specific United States export- and import-competing industries might still be seriously affected, in which event it concludes that adjustment assistance similar to that provided by the 1962 Trade Expansion Act would be the best available remedy.⁴⁰

Thus, until an effective and reliable international reporting system can be established and, equally important, until an international regulatory structure can be created to formulate equalization measures appropriate to correct an improper competitive advantage arising from inequalities of environmental protection costs, it will probably not be possible to achieve fully the objective of Congress to be able to "accurately and quickly determine"⁴¹ if an improper

³⁶ *Id.* at 787.

³⁷ *Id.* at 784.

³⁸ *Id.*

³⁹ *Id.* at 787.

⁴⁰ *Id.* at 788. For a discussion of the adjustment assistance remedy for trade distortions, see text at notes 59-82 *infra*.

⁴¹ Federal Water Pollution Control Act Amendments of 1972, § 6(a)(4)(A), codified in note following 33 U.S.C. § 1251 (Supp. II, 1972).

competitive advantage, as defined in section 6(a)(3) of the Federal Water Pollution Control Act Amendments of 1972,⁴² is occurring, and if so, to equalize the situation by appropriate countermeasures.

Since potent economic forces make immediate responses to the problem essential, this delay in securing the data necessary to formulate equalization measures is intolerable. It should be evident from the analysis of the recent economic trends that it is not feasible to postpone the United States' response to distortions arising from unequal incurrence of environmental protection costs for the decade or more that would probably be required to perfect such international arrangements.

B. *Costs of Environmental Regulation*

Despite the lack of comprehensive data sufficient to quantify the full extent of the impact of pollution abatement and other environmental protection costs on the United States balance of trade and payments, significant evidence suggests that the impact of these distortions is substantial and possibly critical to the national economic welfare. These environmental control cost distortions take a variety of forms. It has already been noted that United States energy demands upon foreign sources have had and will continue to have major impact on the United States balance of trade and payments and that environmental constraints on domestic oil and gas production and refinement substantially increase United States dependence on foreign sources at a time when costs are increasing exponentially.⁴³ The precise extent to which United States environmental regulations contribute to the outflow of capital may be unknown, but it is widely recognized that the outflow of capital exerts an adverse influence both upon the balance of trade and payments and upon the level of employment in the United States.

A further adverse economic impact results from the fact that existing environmental laws and regulations force domestic producers to allocate scarce capital to pollution abatement technology rather than to productive capacity. A recent study shows that because of the cost of compliance with environmental laws, the pulp and paper, iron and steel, and non-ferrous metals industries will suffer significant additional import penetration, with the concomitant adverse effects upon the United States trade position.⁴⁴ For example, the investment required of the iron and steel industry to finance necessary environmental controls would be sufficient to in-

⁴² See note following 33 U.S.C. § 1251 (Supp. II, 1972). For text of § 6, see note 24 *supra*.

⁴³ See text at notes 10-16 *supra*.

⁴⁴ II Pollution Abatement and International Trade, *supra* note 8, at 14.

crease its productive capacity to a level of 10-11 million product tons by 1978.⁴⁵ Since this investment, under current environmental laws and regulations, must be allocated to abatement technology, there will be no such increase in capacity. Thus, increased domestic demand for steel will have to be met by imports, causing an import penetration that might not result without the cost of compliance with environmental regulations.⁴⁶ The foregoing problems stemming from domestic environmental regulation are not themselves susceptible to easy solutions by changes in United States trade policy.⁴⁷ Yet the existence of these stresses on the national economy increases the need for effective strategies to counteract competitive irregularities arising from environmental cost advantages enjoyed by various United States trade partners.

A recent industry "disaggregation study" provides a reasonably complete indication of the net impact upon United States export- and import-competing industries of meeting environmental abatement costs, relative to the effective protection now offered United States import-competing industries under present tariff levels.⁴⁸ This scholarly study estimated environmental costs for each of a number of specific commodities, including capital and depreciation costs for abatement technology, operating costs, and research and development expenditures. These pollution control cost estimates were then articulated into the total process of manufacturing the final product expressed as a ratio of cost to dollar volume of sales.⁴⁹ In order to form a basis for determining competitive impact, it is necessary to equate these costs to the "effective tariff protection" now afforded these commodities.⁵⁰ Using the weighted average of total environmental costs protection as a percent of value added for the selected industries, the study shows that the environmental costs comprise four percent of total value, which in turn represents twenty-seven percent of the total effective rate of protection afforded these commodities under existing tariffs and quantifiable non-tariff barriers.⁵¹ The study demonstrates that more than one-

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ U.S. domestic policy may be changed more easily. The current national attention given to controlling inflation and improving the posture of the United States in international trade may result in legislative and executive review of existing environmental laws to determine whether the economic and inflationary impacts outweigh their benefits or whether more cost-effective strategies can be substituted.

⁴⁸ Walter, *The Pollution Content of American Trade*, 11 *West. Econ. J.* 61 (1973).

⁴⁹ *Id.*

⁵⁰ "Effective tariff protection" includes not merely stated or nominal tariff levels but also quantifiable non-tariff barriers such as quotas.

⁵¹ Walter, *supra* note 46, at 61. See also *II Pollution Abatement and International Trade*, *supra* note 8, at 58.

fourth of the effective protection Congress intended to accord the selected industries has in fact been eroded by environmental costs.⁵²

Thus it is evident that meaningful congressional consideration of trade reform legislation must take into account a series of unprecedented economic forces affecting this nation's world trade position: (1) spiralling inflationary costs on a scale never before experienced in this country during this century; (2) significantly declining worker productivity; (3) continued deterioration in balance of trade and payments; (4) substantial and continuing budget deficits; (5) major impacts on the relative exchange value of our currency; (6) a massive and increasing import requirement of increasingly expensive foreign oil; (7) as yet uncalculated, but conceded substantial environmental costs which promise to price products manufactured domestically further out of the market. Both houses of Congress considered different strategies and institutional solutions to cope with these conditions.⁵³ Congressional consideration resulted in the enactment of the Trade Act of 1974.

IV. TRADE ACT OF 1974: THE CURRENT DECISION-MAKING STRUCTURE FOR COUNTERACTING DISTORTIONS

The adverse impacts upon United States trade arising from distortions resulting from the unequal incurrence of environmental control costs between one or more United States trade partners and United States producers result from two specific causes. The first and most obvious cause is the significant increase of imports into the United States due to the advantages gained by a foreign competitor who incurs lower environmental control costs. In such instances import relief for domestic producers is the appropriate remedy. Title II of the Trade Act of 1974⁵⁴ establishes the decision-making mechanism for provision of this relief. The other specific cause of adverse effects upon United States trade from environmental cost distortions is the use of various "unfair" trade practices by a foreign trade partner. Two examples of these trade practices are foreign governmental subsidies to offset environmental control costs and governmental exemptions from environmental control requirements. In such instances the remedy afforded domestic producers is relief from these trade practices. Title III of the Trade Act of 1974⁵⁵ provides these remedies.

For purposes of analysis of the provisions of the Trade Act of 1974, it is assumed that no international regulatory apparatus

⁵² Walter, *supra* note 46, at 61.

⁵³ See generally S. Rep. No. 1298, 93d Cong., 2d Sess. (1974).

⁵⁴ Pub. L. No. 93-618, 88 Stat. 2011-41.

⁵⁵ *Id.*, 88 Stat. 2041-56.

adequate to cope with inequalities in environmental control costs will be forthcoming in the foreseeable future and that the United States will therefore be obliged to develop unilateral strategies to cope with this problem. Moreover, this analysis will not discuss the question of which unilateral measures constitute the most appropriate remedies for such distortions.⁵⁶ Instead, this analysis will focus on the issue of what trade decision-making structure would best enable the United States to respond effectively to such distortions in order to protect vulnerable sectors of domestic industry and to improve the overall balance of trade and payments position of the United States.

A. *Import Relief Provisions*

Where a domestic producer is either threatened with serious injury or is actually injured by increased imports arising from the price advantages gained by foreign producers as a result of lower environmental control costs, one possible remedy is the granting of import relief. Import relief may take the form of offsetting duty increases, tariff-rate quotas, quantitative restrictions, or use of orderly marketing agreements. This analysis will not consider which specific type of import relief may be the most appropriate remedy in a particular situation. Instead, in discussing the Trade Act of 1974, it will focus on what institutional decision-making structure is best suited to determine when import relief is warranted.

The Trade Act of 1974 makes major changes in the import relief apparatus established by the Trade Expansion Act of 1962 (1962 Act). Under the 1962 Act, as construed by the United States Tariff Commission,⁵⁷ there were four prerequisites to an affirmative finding with respect to an industry, on the basis of which finding the President could proclaim "such increase in, or imposition of, any duty or other import restriction on the article causing or threatening to cause serious injury to such industry as he determines to be necessary to prevent or remedy serious injury to such industry."⁵⁸ These prerequisites were: (1) imports of an article similar to or competitive with one produced by the domestic industry must be increasing; (2) the increased imports must be in major part the result of trade agreement concessions; (3) the domestic industry producing

⁵⁶ For an analysis of the various options available to counteract environmental cost distortions, see Kirgis, *Effective Pollution Control in Industrialized Countries; International Economic Disincentives, Policy Responses, and the GATT*, 70 Mich. L. Rev. 860 (1972). See also Dep't of Treasury, *GATT Studies in International Trade*, No. 1, *Industrial Pollution Control and International Trade* (1971).

⁵⁷ U.S. Tariff Comm'n, *Nonrubber Footwear* 6 (No. 359, Jan. 1971), noted in *Recent Decisions*, 7 Texas Int'l L.J. 163 (1971).

⁵⁸ 19 U.S.C. § 1981(a)(1) (1970).

the like or competitive article must be suffering serious injury; and (4) the increased imports must be the major factor in causing or threatening to cause serious injury.⁵⁹

In addition to import relief for an industry, the 1962 Act authorized both firms and groups of workers to petition for adjustment assistance.⁶⁰ To qualify for such individual relief, petitioners had to meet the same four prerequisites.⁶¹ At the outset, little relief was obtained under these provisions. During the first seven years under the 1962 Act, no relief was granted either to a firm or to a group of workers. In 1969, the Tariff Commission granted relief to two workers' groups in the form of adjustment assistance.⁶² Thereafter, as of April 1972, relief was granted in response to 39 petitions from groups of workers and 11 petitions from firms.⁶³ Relief to an industry has been rare.⁶⁴

The 1974 Act will most likely facilitate the provision of import relief to firms and groups of workers. Unlike the 1962 Act, under the Trade Act of 1974 no causal link to trade concessions is required for relief.⁶⁵ Secondly, the criteria as to the extent to which imports must have contributed to the injury to an industry, firms or workers have been relaxed by the 1974 Act. Under the 1974 Act there are two different criteria: (1) for industry, a Trade Commission⁶⁶ finding is required that increased imports are or threaten to become a substantial cause of serious injury,⁶⁷ a term defined by the Act to mean a cause that is "not less than any other cause,"⁶⁸ and (2) for workers, the Secretary of Labor must find that a significant number or proportion of workers have become totally or partially separated, that sales or production have decreased absolutely and that increased imports contributed importantly to the decline in sales or production and to the separation of workers.⁶⁹ For individual firms, the Secretary of Commerce must make the same findings as those

⁵⁹ U.S. Tariff Comm'n, *Nonrubber Footwear 6* (No. 359, Jan. 1971). See note 57 *supra*.

⁶⁰ 19 U.S.C. §§ 1901(c)(1), (2), (3) (1970).

⁶¹ See *id.*

⁶² U.S. Tariff Comm'n, *Buttweld Pipe* (No. 297, Nov. 1969); U.S. Tariff Comm'n, *Transmission Towers & Parts* (No. 298, Nov. 1969).

⁶³ See Fulda, *Adjustment to Hardship Caused by Imports: The New Decisions of the Tariff Commission and the Need for Legislative Clarification*, 70 Mich. L. Rev. 791, 800 (1972).

⁶⁴ For a detailed analysis of the Tariff Commission's interpretation of the Trade Expansion Act of 1962, see *id.*

⁶⁵ Trade Act of 1974, § 201, 88 Stat. 2011.

⁶⁶ Trade Act of 1974, § 171, 88 Stat. 2009, amending 19 U.S.C. § 1330 (1970). This section changed the name of the United States Tariff Commission to the United States International Trade Commission.

⁶⁷ Trade Act of 1974, § 201(b)(1), 88 Stat. 2012.

⁶⁸ Trade Act of 1974, § 201(b)(4), 88 Stat. 2012.

⁶⁹ Trade Act of 1974, § 222, 88 Stat. 2019.

required for relief of worker injury.⁷⁰ The term "contributed importantly" is defined as "a cause which is important but not necessarily more important than any other cause."⁷¹

Under the 1962 Act, the predecessor of the Trade Commission would institute an investigation upon the filing of an import relief petition by industry or labor groups, by the Senate Committee on Finance, by the House Ways and Means Committee, by the President or upon the initiative of the Commission itself.⁷² This complaint procedure is continued under the new law, and in addition the Special Representative for Trade Negotiations⁷³ is also authorized to petition for import relief.⁷⁴

Determination of whether increased imports are in fact a substantial cause of serious injury is based upon the satisfaction of three specific economic conditions: (1) significant idling of productive facilities; (2) inability of a significant number of firms to operate at a reasonable level of profit; and (3) significant unemployment or underemployment within the industry.⁷⁵ With respect to the threat of serious injury the Commission is required to consider whether there has been: (1) a decline in sales; (2) a higher and growing inventory; and (3) a downward trend in production, profits, wages, or employment in the domestic industry concerned.⁷⁶ With respect to substantial cause, the Trade Commission must take into account whether there has been: (1) an increase in imports (either absolute or relative to domestic production); and (2) a decline in the proportion of the domestic market supplied by domestic producers.⁷⁷ New provisions in the "escape clause" section of the 1974 Act require the Trade Commission to investigate and report on efforts by firms and workers in the industry to compete more effectively with imports⁷⁸ and to determine whether or not increased imports may be attributable to problems solved by resort to the remedial provisions of the Antidumping Act of 1921,⁷⁹ the countervailing duty law, or under

⁷⁰ Trade Act of 1974, § 251(c), 88 Stat. 2030.

⁷¹ Trade Act of 1974, §§ 222, 251(c), 88 Stat. 2019, 2030.

⁷² 19 U.S.C. § 1901(b)(1) (1970).

⁷³ The Office of the Special Representative for Trade Negotiations is established by § 141(a) of the Trade Act of 1974, 88 Stat. 1999. The Special Representative is appointed by the President with the advice and consent of the Senate. *Id.* The Special Representative is the successor to the identically-named office created pursuant to Executive Order No. 11075, 28 Fed. Reg. 473 (Jan. 15, 1963).

⁷⁴ Trade Act of 1974, § 201(b)(1), 88 Stat. 2012.

⁷⁵ Trade Act of 1974, § 201(b)(2)(A), 88 Stat. 2012.

⁷⁶ Trade Act of 1974, § 201(b)(2)(B), 88 Stat. 2012.

⁷⁷ Trade Act of 1974, § 201(b)(2)(C), 88 Stat. 2012.

⁷⁸ Trade Act of 1974, § 201(b)(5), 88 Stat. 2012.

⁷⁹ 19 U.S.C. §§ 160-71 (1970). The Antidumping Act of 1921 empowers the Secretary of the Treasury to take certain ameliorative steps whenever there is a finding that a domestic industry is being, or is likely to be injured, by the sale of foreign merchandise at less than its fair value either in the United States or elsewhere. *Id.* §§ 160-61.

those other remedial provisions of the 1974 Act dealing with unfair trade practices.⁸⁰ In the last case the agencies which administer the relevant provisions of law are to be notified. If the Trade Commission does find that a serious injury or threat of serious injury exists, it must include in its report the amount of duty increase or imposition of other import restrictions necessary to prevent or remedy such injury.⁸¹ Alternatively, if it finds that adjustment assistance for a workers' group, a firm or a community can remedy the injury, it must recommend the provision of such assistance.⁸²

The critical question arising in appeals for relief under the Trade Act of 1974 is what presidential action is taken after the Trade Commission has concluded its investigation and made an affirmative finding. Under the 1974 Act, upon receiving an affirmative finding of injury from the Trade Commission, the President: (1) must consider the extent to which adjustment assistance has been or could be made available;⁸³ and (2) may decide to provide import relief.⁸⁴ The President is then required to make his decision within 60 days after receiving the Trade Commission report.⁸⁵ In deciding whether or not to provide import relief, the President is required to take into consideration several factors: (1) the probable effectiveness of import relief as a means to promote adjustment; (2) the effect of import relief upon consumers; (3) the impact upon domestic industries and firms of any possible modification of import restrictions which may result from international obligations to provide compensation;⁸⁶ and (4) the economic and social costs which would be incurred by taxpayers, communities, and workers, if import relief were or were not provided.⁸⁷

The 1974 Act authorizes the President to impose one or more of the following import relief measures: duty increases; tariff-rate quotas; quantitative restrictions; orderly marketing agreements; or any combination of such actions.⁸⁸ Whenever the President selects a particular measure or measures to provide import relief, he is re-

⁸⁰ Trade Act of 1974, § 201(b)(6), 88 Stat. 2013.

⁸¹ Trade Act of 1974, § 201(d)(1)(A), 88 Stat. 2013.

⁸² Trade Act of 1974, § 201(d)(1)(B), 88 Stat. 2013.

⁸³ Trade Act of 1974, § 202(a)(1)(B), 88 Stat. 2014.

⁸⁴ Trade Act of 1974, § 202(a)(1)(A), 88 Stat. 2014.

⁸⁵ Trade Act of 1974, § 202(b), 88 Stat. 2014.

⁸⁶ The industries and firms referred to here should not be confused with industries and firms that might petition for import relief under Title II of the Act, 88 Stat. 2011; rather, they are industries and firms that might be affected by presidential action under § 123 of the Act, 88 Stat. 1989, which provides that whenever any action is taken under § 203, 88 Stat. 2015, the President may enter into trade agreements with foreign governments for the purpose of granting new concessions as compensation for such actions in order to maintain the general level of reciprocal and mutually advantageous concessions.

⁸⁷ Trade Act of 1974, § 202(c), 88 Stat. 2014.

⁸⁸ Trade Act of 1974, § 203(a), 88 Stat. 2015.

quired to report his action to Congress.⁸⁹ If the action taken by the President differs from the recommendation of the Trade Commission, he must state the reason for the difference.⁹⁰ If he determines that the provision of import relief is not in the national economic interest, he must state the reasons why, as well as indicate what steps he is taking, other than adjustment assistance programs, to repair the serious injury found by the Commission.⁹¹

If the President determines that import relief is appropriate, he must proclaim the award of such relief and require that it take effect within 15 days of his determination.⁹² However, if on the date of his determination he announces his intention to negotiate an orderly marketing agreement under sections 203(a)(4) or (5) of the 1974 Act,⁹³ then such relief must be proclaimed and take effect within 90 days of the determination date.⁹⁴ In addition, if the initial form of relief proclaimed does not include an orderly marketing agreement, such an agreement may thereafter be negotiated with a foreign government; and after such an agreement takes effect, the President may suspend or terminate, in whole or in part, the initial form of relief granted.⁹⁵

If the President reports to Congress that he has determined not to provide import relief despite an affirmative determination by the Trade Commission under section 201(b),⁹⁶ or that he is granting relief that is different from that recommended by the Commission, Congress may override the President's determination and give effect to the Commission's recommendation by a simple majority vote taken within ninety days of the President's report to Congress.⁹⁷

⁸⁹ Trade Act of 1974, § 203(b), 88 Stat. 2015.

⁹⁰ Trade Act of 1974, § 203(b)(1), 88 Stat. 2015.

⁹¹ Trade Act of 1974, § 203(b)(2), 88 Stat. 2015.

⁹² Trade Act of 1974, § 203(e)(1), 88 Stat. 2016.

⁹³ 88 Stat. 2015.

⁹⁴ Trade Act of 1974, § 203(e)(1), 88 Stat. 2016. For purposes of the proclamation of relief, the "import relief determination date" is the date of the President's determination under § 202(b), 88 Stat. 2014.

⁹⁵ Trade Act of 1974, § 203(e)(2), 88 Stat. 2016. If, at any time an orderly marketing agreement does not continue to be effective, the President may grant other forms of import relief so long as the time limitations of § 203(h), 88 Stat. 2017, are not exceeded. *Id.* § 203(e)(3), 88 Stat. 2016.

⁹⁶ 88 Stat. 2012.

⁹⁷ Trade Act of 1974, § 203(c), 88 Stat. 2016. This is the procedure which was proposed by the Senate Finance Committee, with a slight modification. Under the original Senate version of the Act the President had no discretion to withhold relief in the face of an affirmative determination by the Commission under § 201(b): he would have been required to take some form of positive action. If he opted for a form of relief that differed from that recommended by the Commission, Congress could compel adoption of the Commission's recommendation by simple majority vote. See S. Rep. No. 1298, 93d Cong., 2d Sess. 84 (1974). The original House version would not have required the President to take positive action whenever there was a finding of serious injury by the Commission, and Congress

The provision for congressional override of a presidential determination regarding import relief is a significant departure from the prior congressional practice of delegating to the President nearly absolute discretion over such matters. Along with other provisions of the Trade Act of 1974,⁹⁸ it reflects a gain of power by the Trade Commission at the expense of the President, by virtue of the congressional retention of supervisory powers which, when affirmatively exercised, give legal effect to the Commission's recommendations.

Furthermore, while Congress has expanded its own supervisory role, it also has ensured that its actions would be well-informed. The Act increases from two to five the number of congressional advisors to be appointed from each house to oversee international trade negotiations. The Senate Finance Committee and the House Ways and Means Committee are to nominate the advisors from among their own respective members, and the nominees are to be appointed by the President pro tempore of the Senate and the Speaker of the House.⁹⁹ In addition, the Act requires that the Private Advisory Committee for Trade Negotiations, a committee chaired by the Special Trade Representative and composed of 45 representatives of government, labor, industry, agriculture, consumer interests and the general public,¹⁰⁰ be given full access to all data concerning negotiating objectives and the progress of negotia-

would not have had the authority to override that decision not to act. See Senate Comm. on Finance, 93d Cong., 2d Sess., Summary and Analysis of H.R. 10710—The Trade Reform Act of 1973, at 33 (1974). However, the House version provided that, if the President ordered import relief in the form of either orderly marketing agreements or quantitative restrictions, such relief would cease to be effective if, within 90 days from the submission of the proclamation of such measures to the Congress, either the House or the Senate adopted a resolution of disapproval. *Id.* at 37. The Senate also proposed that the total possible period of effectiveness of any given import relief measure be extended from seven to eight years. The proposal was adopted. See Trade Act of 1974, § 203(h), 88 Stat. 2017.

⁹⁸ Section 172(a) of the Act, 88 Stat. 2009, extends the term of office of the Commissioners from six to nine years and provides for appointment of the chairman and vice-chairman on the basis of seniority rather than by presidential designation. Section 175(a), 88 Stat. 2011, increases slightly the compensation of each member of the Commission and, more importantly, provides that the budget of the Commission is to be approved directly by Congress rather than by the office of Management and Budget, an arm of the executive branch. Section 174, 88 Stat. 2011 gives the Commission the authority to hire its own attorneys and to represent itself in all judicial proceedings. Under prior law, the Commission was required to request the Justice Department for such assistance.

All of these changes came at the insistence of the Senate Finance Committee which, if its version had fully prevailed over that of the House, would have strengthened the independence of the Committee even more. Specifically, the Finance Committee would have extended the term of each Commissioner to fourteen years; enlarged the membership to seven; and provided for the appointment of the chairman and vice-chairman by a majority vote of the Commission. See S. Rep. No. 1298, 93d Cong., 2d Sess. 18 (1974).

⁹⁹ Trade Act of 1974, § 161(a), 88 Stat. 2008.

¹⁰⁰ Trade Act of 1974, § 135(b), 88 Stat. 1996.

tions.¹⁰¹ The Act further requires that the committee issue formal advisory opinions to Congress indicating whether pending trade agreements would achieve equity and reciprocity.¹⁰²

The contrast between the original House version of the Trade Act of 1974 and the version ultimately passed by Congress highlights the question of what is the best way to organize trade policy decision-making. The original House version¹⁰³ would have left unchanged the nature of Trade Commission proceedings under the Trade Expansion Act of 1962 and Part 206 of the Commission's regulations.¹⁰⁴ Essentially, these proceedings were investigatory and fact-finding only; since the President retained absolute discretion to accept or reject recommendations based on facts found by the Commission, the Commission lacked effective power. The Senate Finance Committee, by virtue of an amendment that would have *required* the President to grant some form of import relief whenever the Commission made an affirmative finding of injury under section 201(b)(1),¹⁰⁵ would have completely reversed this situation.¹⁰⁶ Even though the Trade Act does not go that far, it nevertheless represents a significant and desirable reallocation of decision-making power in an area that is politically sensitive.

It has long been recognized that important advantages derive from congressional delegation of regulatory power to specialized agencies which can provide a continuity of surveillance and expertise over complex economic matters and that these advantages are normally unavailable in the three constitutional branches of government.¹⁰⁷ Traditionally, administrative agencies have been given rule-making, quasi-judicial and executive powers, with judicial review operating as a check on the lawfulness and reasonableness of agency decisions. To delegate authority to a specialized, expert commission to evaluate complex trade issues and to reach detailed conclusions and to omit to provide the means to implement these findings and conclusions, and instead to allow either inaction or totally different relief, would be anomalous and unsound.

Prior to the enactment of the Trade Act of 1974 there were only

¹⁰¹ Trade Act of 1974, § 135(i), 88 Stat. 1998.

¹⁰² Trade Act of 1974, § 135(e), 88 Stat. 1997.

¹⁰³ See Senate Comm. on Finance, 93d Cong., 2d Sess., Summary and Analysis of H.R. 10710—The Trade Reform Act of 1973, at 31 (1974).

¹⁰⁴ 19 C.F.R. § 206 (1974).

¹⁰⁵ Trade Act of 1974, § 201(b)(1), 88 Stat. 2012.

¹⁰⁶ Under the Senate version the President could have granted a form of relief different from that recommended by the Commission, although even this limited grant of discretion would have been subject to a congressional override. See S. Rep. No. 1298, 93d Cong., 2d Sess. 83-87 (1974).

¹⁰⁷ See, e.g., J. Landis, *The Administrative Process* 6-46 (1938).

two situations in which the President could circumvent the findings and decision of an independent administrative agency. One of these has now been partially corrected by the new Trade Act through congressional reservation of certain supervisory powers.¹⁰⁸ The other is the power of the President under section 801 of the Federal Aviation Act of 1958¹⁰⁹ to substitute his decision for that of the Civil Aeronautics Board, arrived at after the holding of adjudicatory hearings, to award territorial, overseas and international air carrier permits. In both instances judicial review is precluded. The Senate has severely criticized the power of the President to overrule independent agency decisions on air transportation:

The practical result of this total shifting of authority has been to subject the President directly to all the burdens and pressures of air commerce regulation. Thus, he is called upon in every section 801 case to pass final judgment on the fitness, willingness, and ability of air carriers to perform the service in question—these being the fundamental statutory criteria for the issuance of any certificate. In the great majority of instances, including those covered by section 801, the decision called for must be based entirely on economic or technical considerations having no practical bearing whatsoever on national defense policy or the conduct of foreign relations. . . . Matters of an economic or regulatory nature which the Board, acting under the aegis of the Congress, is alone competent to decide and for which it alone is adequately staffed and ordered have somehow unwittingly become delegated to the Executive.¹¹⁰

It is equally anomalous to empower the President to ignore and, in effect, to veto a considered agency decision that import relief is required; such a process violates basic principles of sound decision-making. Moreover, such an apparatus endangers the credibility of government. Presidential use of section 801 powers in

¹⁰⁸ See text at notes 85-92 *supra*.

¹⁰⁹ 49 U.S.C. § 1461 (1970).

¹¹⁰ Senate Commerce Comm., Improvement of Procedures for the Development of Foreign Air Commerce, S. Rep. No. 119, 85th Cong., 1st Sess. 2 (1957).

Senate Bill 1423 in the 85th Congress would have amended section 801, 49 U.S.C. § 1461 (1970), *inter alia*, "by restricting the President's power to overrule CAB certification actions to foreign air transportation cases involving national defense or foreign policy" and by requiring the President "to submit to Congress a report of any instance in which he overrules a Board order as contrary to the interests of defense or foreign policy." S. 1423 passed the Senate, 104 Cong. Rec. 5137 (1957), but was not acted upon by the House.

aviation cases has occasioned accusations of improprieties.¹¹¹ Similarly, presidential discretion to award import relief was recently criticized on the ground that "the White House treated the matter 'as a political football.'"¹¹² This criticism of the potential for abuse does not apply to any particular President. These problems of the credibility and integrity of the decision-making process arise from an unsound executive-legislative-administrative relationship and have occurred in prior presidential administrations and would likely have continued in future administrations had Congress not enacted these provisions of the 1974 Act.

B. "Unfair" Trade Practices Provisions

Whereas Title II of the Trade Act of 1974¹¹³ deals with means of providing relief from injury caused by "fair" but injurious import competition, Title III¹¹⁴ deals with "unfair" and "illegal" trade practices affecting United States exports or foreign imports into the United States. Distortions arising from inequalities in environmental control costs can manifest themselves in the form of foreign subsidies, exemptions from environmental regulations as to selected industries competing in international trade markets, or other trade practices.

The 1974 Trade Act broadens existing authority to retaliate against "unreasonable" or "unjustifiable" foreign import restrictions adversely affecting United States exports.¹¹⁵ However, this authority continues to be a wholly discretionary one in the hands of the President. The Trade Act provides no complaint procedure to force a decision on any unfair foreign trade practice of foreign governments described in section 301.¹¹⁶ Section 301(a) authorizes the

¹¹¹ See Markham, Two Proposals for Amendment of the Federal Aviation Act of 1958, 35 J. Air. L. & Com. 591, 597 (1969); Whitney, Integrity of Agency Judicial Process Under the Federal Aviation Act: The Special Problem Posed by International Airline Route Awards, 14 Wm. & Mary L. Rev. 787 (1973); Note, Section 801 of the Federal Aviation Act—The President and the Award of International Air Routes to Domestic Carriers: A Proposal for Change, 45 N.Y.U.L. Rev. 517 (1970).

¹¹² 81 American Metal Market, Apr. 1, 1974, at 27.

¹¹³ 88 Stat. 2011.

¹¹⁴ 88 Stat. 2041.

¹¹⁵ Trade Act of 1974, §§ 301-41, 88 Stat. 2041-56.

¹¹⁶ Trade Act of 1974, § 301(d)(2), 88 Stat. 2042, does provide that, upon the filing of a complaint by an interested party alleging restrictive practices by a foreign government, the Special Representative for Trade Negotiations is required to conduct public hearings and to submit to Congress semiannual summaries of such complaints and hearings. This subsection, however, does not require the President to take notice of such complaints. Section 301(e), 88 Stat. 2042, requires the President to provide an opportunity for the presentation of views before taking any action under § 301(a), 88 Stat. 2041. However, the same subsection also allows the President to postpone such presentations until after he has acted, if he determines that the "national interest" calls for expeditious action.

President to suspend concessionary treatment for, and to impose duties or other import restrictions on, the imports of any foreign country which, *inter alia*, discriminates or permits "acts or policies which are unjustifiable or unreasonable and which burden or restrict United States commerce."¹¹⁷ The President also is given authority to act against countries which provide subsidies on exports to the United States or to other foreign markets having the effect of substantially reducing sales of competitive United States products in the United States or elsewhere.¹¹⁸ However, in the latter situation the President can act only if: (1) the Secretary of the Treasury finds that the foreign country does provide subsidies; (2) the Trade Commission finds that the subsidized imports in fact reduce sales of competitive United States products; and (3) the President finds that the Antidumping Act of 1921,¹¹⁹ and the countervailing duty law¹²⁰ are inadequate to deter such practices.¹²¹

In acting under the authority of section 301, the President is required to consider the relationship of such action to the international obligations of the United States.¹²² Actions may be undertaken on a nondiscriminatory treatment basis, *i.e.*, most favored nation basis; or the President may act selectively with respect to specific countries which maintain unreasonable or unjustifiable restrictions.¹²³

Section 302 of the 1974 Act¹²⁴ subjects any presidential action taken under section 301 on a nondiscriminatory treatment basis to a quasi-veto by Congress. If, before the close of the 90-day period following receipt of the presidential decision setting forth such action, both the Senate and the House, by an affirmative vote of a majority of those present and voting, adopt a resolution of disapproval with respect to such action, then the presidential action has no effect except with respect to the country whose restrictive acts or policies caused the taking of the presidential action in the first place.¹²⁵ In contrast to its proposals with respect to a grant of

¹¹⁷ Trade Act of 1974, § 301(a)(2), 88 Stat. 2041.

¹¹⁸ Trade Act of 1974, § 301(a)(3), 88 Stat. 2041. The President may also act whenever he determines that a foreign country: (1) maintains unjustifiable or unreasonable import restrictions which impair the value of the trade commitments made to the United States or which discriminate against United States commerce; (2) imposes unjustifiable or unreasonable restrictions on access to supplies of foods, raw materials or manufactured products which burden or restrict United States commerce. *Id.* §§ 301(a)(1), (4), 88 Stat. 2041.

¹¹⁹ 19 U.S.C. §§ 160-71 (1970).

¹²⁰ 19 U.S.C. § 1303 (1970).

¹²¹ Trade Act of 1974, § 301(c), 88 Stat. 2042.

¹²² Trade Act of 1974, § 301(b), 88 Stat. 2042.

¹²³ *Id.*

¹²⁴ 88 Stat. 2043.

¹²⁵ *Id.*

import relief, the Senate Finance Committee did not undertake to narrow or eliminate the virtually unchecked discretion of the President, as reflected in the original House bill, to retaliate against unreasonable or unjustifiable trade practices of foreign trade partners. The Committee did agree that the power of the President to retaliate against such acts should be explicitly extended to cover acts which affect "services" as well as goods,¹²⁶ thereby bringing under a protective umbrella shipping, aviation, insurance, and banking activities.¹²⁷

The countervailing duty is one of the most direct responses available to retaliate against a grant, bounty or subsidy accorded a foreign industry by its government in the form of an exemption from environmental control costs. Section 303 of the Tariff Act of 1930¹²⁸ requires the Secretary of the Treasury to impose countervailing duties upon imported merchandise whose manufacture, production, or export has been aided directly or indirectly by a bounty or grant (*i.e.*, subsidy). Section 331 of the Trade Act of 1974¹²⁹ makes major procedural as well as substantive changes in the Tariff Act countervailing duty law. Under new subsection (a) of section 303 of the Tariff Act of 1930¹³⁰ the Secretary of the Treasury is now required to initiate a formal investigation to determine whether there exists a bounty or grant; the determination must be made within 12 months after the date on which the contention was first presented to the Secretary.¹³¹ Under prior law there was no prescribed time within which a determination had to be made.¹³² After an affirmative final determination by the Secretary under new subsection (a), any countervailing duties imposed must apply to any merchandise entered, or withdrawn from a warehouse, for consumption on or after the date of the publication of such determination in the Federal Register.¹³³

Moreover, under new subsection (b) of section 303 of the Tariff Act of 1930, the reach of the countervailing duties law is extended to cover non-dutiable items.¹³⁴ However, to the extent that the international obligations of the United States so require, countervailing duties may not be imposed on non-dutiable items unless there is an affirmative determination by the Trade Commission that the impor-

¹²⁶ See S. Rep. No. 1298, 93d Cong., 2d Sess. 22 (1974).

¹²⁷ Trade Act of 1974, § 301(a), 88 Stat. 2041, defines the term "commerce" to include "services associated with the international trade." *Id.*

¹²⁸ 19 U.S.C. § 1303 (1970).

¹²⁹ 88 Stat. 2049.

¹³⁰ Trade Act of 1974, § 331(a), 88 Stat. 2049, adding 19 U.S.C. § 1303(a).

¹³¹ Trade Act of 1974, § 331(a), 88 Stat. 2050, adding 19 U.S.C. § 1303(a)(4).

¹³² Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1970).

¹³³ Trade Act of 1974, § 331(a), 88 Stat. 2051, adding 19 U.S.C. § 1303(c).

¹³⁴ Trade Act of 1974, § 331(a), 88 Stat. 2050, adding 19 U.S.C. § 1303(b).

tation of the subsidized, non-dutiable merchandise is injuring, or likely will injure or impede the establishment or maintenance of a domestic industry.¹³⁵ No such affirmative finding, of course, is ever required with respect to dutiable items. If the Secretary makes a determination that a bounty or grant exists with respect to a non-dutiable import, and after the Trade Commission makes an affirmative finding under section 303(b)(1)(A),¹³⁶ the Secretary is authorized to order the suspension of liquidation with respect to such merchandise entered or withdrawn from warehouses on or after the day of the publication of such determination in the Federal Register.¹³⁷ Thereafter, the Secretary may order the assessment of countervailing duties as provided in section 303(a).¹³⁸

New subsection (d) of section 303 of the Tariff Act of 1930¹³⁹ adds a whole new concept to the unfair foreign trade statutes. During the four-year period following the enactment of the Trade Act of 1974, the Secretary of the Treasury is granted discretionary authority to refrain from imposing a countervailing duty after an affirmative determination is made under section 303(a), if he determines that: (1) adequate steps have been taken to reduce or eliminate the adverse effect of a bounty or grant;¹⁴⁰ (2) there is reason to believe that, under section 102 of the Trade Act of 1974,¹⁴¹ successful trade agreements will be negotiated with foreign countries which provide for the reduction or elimination of barriers to or other distortions of international trade;¹⁴² and (3) the imposition of a countervailing duty would be likely to jeopardize the satisfactory completion of such negotiations.¹⁴³

This grant of discretionary power is designed to implement a congressional declaration favoring the establishment of international agreements with respect to the use of export subsidies and the application of countervailing duties.¹⁴⁴ Nevertheless, the Secretary's exercise of discretion under this subsection is subject to congressional review and veto. Whenever the Secretary refrains from imposing countervailing duties pursuant to section 303(d), he must report his decision, along with his reasons for it, to both houses of Congress.¹⁴⁵ At any time after such report, his decision may be

¹³⁵ Trade Act of 1974, § 331(a), 88 Stat. 2050, adding 19 U.S.C. § 1303(b)(1)(B).

¹³⁶ Trade Act of 1974, § 331(a), 88 Stat. 2050, adding 19 U.S.C. § 1303(b)(1)(A).

¹³⁷ Trade Act of 1974, § 331(a), 88 Stat. 2050, adding 19 U.S.C. § 1303(b)(1)(B).

¹³⁸ Trade Act of 1974, § 331(a), 88 Stat. 2051, adding 19 U.S.C. § 1303(d)(2).

¹³⁹ Trade Act of 1974, § 331(a), 88 Stat. 2051, adding 19 U.S.C. § 1303(d).

¹⁴⁰ Trade Act of 1974, § 331(a), 88 Stat. 2051, adding 19 U.S.C. § 1303(d)(2)(A).

¹⁴¹ 88 Stat. 1982.

¹⁴² Trade Act of 1974, § 331(a), 88 Stat. 2051, adding 19 U.S.C. § 1303(d)(2)(B).

¹⁴³ Trade Act of 1974, § 331(a), 88 Stat. 2051, adding 19 U.S.C. § 1303(d)(2)(C).

¹⁴⁴ Trade Act of 1974, § 331(a), 88 Stat. 2051, adding 19 U.S.C. § 1303(d)(1).

¹⁴⁵ Trade Act of 1974, § 331(a), 88 Stat. 2051, adding 19 U.S.C. § 1303(e)(1).

overridden by a simple majority resolution of disapproval by both Houses, and the countervailing duty becomes effective immediately.¹⁴⁶

Section 331(b) of the 1974 Trade Act amends section 516 of the 1930 Tariff Act¹⁴⁷ in such a way as to provide domestic manufacturers, producers, or wholesalers, the right to seek judicial review of a negative countervailing duty determination by the Secretary of the Treasury.¹⁴⁸ Under prior law, judicial review was available only after the Secretary had made an affirmative finding of bounty or grant and had levied countervailing duties;¹⁴⁹ such a review system was only of benefit to importers and others adversely affected by the imposition of countervailing duties. The Trade Act of 1974 amends section 516 of the 1930 Tariff Act so that domestic manufacturers, producers and wholesalers can petition the Secretary of the Treasury to reconsider his determination that countervailing duties should not be levied in a particular case. There is no prescribed time within which the Secretary must reach a decision on the merits of such a petition; however, if the Secretary decides that his initial decision denying imposition of a countervailing duty is correct, the petitioner must notify the Secretary within 30 days of his intention to contest the denial in Customs Court.¹⁵⁰

V. CONCLUSION

Congress has recognized that far-reaching changes in the United States and world economies require fundamental reevaluation of the international trade policy that has prevailed over the last several decades. For the first time the U.S. economy is beset by an unprecedented combination of economic forces which should not be allowed to continue. Various factors—continuing inflation, decline in worker productivity, deteriorating balances of trade and payments, substantial and worsening budget deficits, persistent currency exchange crises, increasing dependence on foreign energy sources and raw materials, chronic shortages of capital and unduly high interest rates, new non-tariff international trade distortions arising from unequal incidents of environmental control costs—all create urgent pressures to devise adequate international trade regulatory mechanisms capable of coping with these problems.

¹⁴⁶ Trade Act of 1974, § 331(a), 88 Stat. 2051, adding 19 U.S.C. § 1303(e)(2).

¹⁴⁷ 19 U.S.C. § 1516 (1970).

¹⁴⁸ Trade Act of 1974, § 331(b), 88 Stat. 2052, amending 19 U.S.C. § 1516 (1970).

¹⁴⁹ 19 U.S.C. § 1514 (1970).

¹⁵⁰ Trade Act of 1974, § 331(b), 88 Stat. 2052, amending 19 U.S.C. § 1516(c) (1970). A party is permitted to contest a decision of the Secretary of the Treasury under § 516 of the Tariff Act of 1930, 19 U.S.C. § 1516 (1970), by filing a civil action in Customs Court. 28 U.S.C. § 2632 (1970).

With respect to import relief, the Trade Act of 1974 provides several important improvements. Initially, the Act substantially reduces the burden of proof that industries, firms and groups of workers must sustain in hearings before the Trade Commission. Thus, the probability of import relief is substantially increased. Moreover, once the Trade Commission makes an "affirmative finding," the assurance that the President will take effective action has been enhanced. Not only is the President's accountability to Congress significantly expanded, but the time in which the President must act is specified and expedited. Of perhaps equal significance, the Act provides for congressional override of a presidential determination either to refuse import relief or to grant relief other than that deemed appropriate by the Trade Commission. Finally, the Act establishes procedures calculated to improve the quality of available data upon which trade decision-making will be based.

As to unfair trade practices, the Trade Act of 1974, while providing certain improvements, falls short of providing as effective remedies as those provided for import relief. The most critical shortcoming of the Act is its failure to provide a complete procedure capable of forcing a decision on any unfair trade practice described in section 301: the Act leaves to presidential discretion the decision whether to retaliate against "unreasonable" or "unjustifiable" foreign import restrictions affecting United States exports. It is difficult to perceive a rationale for having one approach to import relief and another for dealing with unfair trade practices.

On the positive side, the Act significantly enhances the effectiveness of countervailing duties by requiring the Secretary of Treasury to impose such duties in cases of foreign subsidies and by requiring the Secretary's deliberative process to be completed within twelve months of complaint. Similarly, review and veto by Congress in cases where the Secretary, despite an "affirmative finding," nevertheless exercises his discretionary power to abstain from assessing countervailing duties, is an important check upon executive department discretion. Finally, the provision for judicial review in a case where the Secretary makes a negative determination provides further control over such discretion.

Since the legislative deliberations involved in the enactment of the Trade Act of 1974 were substantial, it is likely that Congress will not be inclined to undertake an early reassessment of this legislation. However, the economic conditions that provided impetus for many of the innovations in the Trade Act continue to worsen, and thereby intensify the pressures to create an optimal international trade decision-making process. It is imperative that the

THE TRADE ACT OF 1974

Congress maintain a vigilant oversight of the effectiveness of the processes devised by the Act. If the apparent limitations of the Act become clear in light of future events, Congress should act swiftly to enact the necessary amendments.

BOSTON COLLEGE INDUSTRIAL AND COMMERCIAL LAW REVIEW

VOLUME XVI

April 1975

NUMBER 4

BOARD OF EDITORS

THOMAS J. FLAHERTY

Editor in Chief

LARRY E. BERGMANN
Articles Editor

ALLAN H. CARLIN
Articles Editor

RANDOLPH H. ELKINS
Executive Editor

ELLEN SEGAL HUVELLE
Articles Editor

STEPHEN J. KIELY
Articles Editor

JAMES R. MCGUIRK
*Business and
Managing Editor*

JOHN P. MESSINA
Articles Editor

PETER E. MOLL
Articles Editor

PHILIP E. MURRAY, JR.
*U.C.C. Reporter Digest
and Articles Editor*

JEAN S. PERWIN
Articles Editor

KENNETH S. PRINCE
Articles Editor

WILLIAM B. ROBERTS
Articles Editor

WILLIAM P. ROBINSON, III
*Topics and
Solicitations Editor*

KATHLEEN E. SHANNON
Articles Editor

DONNA MCLELLAN SHERRY
Articles Editor

MICHAEL J. VARTAIN
Executive Editor

JAMES M. WHALEN
Articles Editor

HARRY H. WISE, III
Articles Editor

CONTRIBUTING EDITORS

MICHAEL JOSEPH BETCHER

MARC R. K. BUNGEROTH

ROBERT B. CARPENTER

JAMES ANTHONY FRIEDEN

SUSAN KAGAN LANGE

RONALD E. LASKY

MARSHALL F. NEWMAN

KEVIN P. PHILLIPS

DONNA VITTER PLOTT

HELEN S. RAKOVE

DAVID STRAUSS

JOSEPH H. WALSH

SECOND YEAR STAFF

CALUM ANDERSON

LUCY WEST BEHYMER

KENNETH BOUCHARD

BARBARA BRUCE

ROGER J. BRUNELLE

THOMAS J. CANAVAN

SUSAN CHAMPION

MICHAEL A. DEANGELIS

TUCKER DRUMMOND

DANIEL ENGELSTEIN

FRANCIS E. GIBERSON

MARC D. GREENBAUM

W. THOMAS HAYNES

JILL LANDSBERG

BARRY LARMAN

STEVEN LENKOWSKY

MARION KATZ LITTMAN

DEBORAH M. LODGE

ROBERT LOMBARDI

RICHARD F. MCQUAID

PAUL D. MOORE

JANET S. PAINTER

JOSEPH D. PIZZURRO

ALAN POLACKWICH

ROBERT RASKOPF

REGINA STRAZZULLA ROCKEFELLER

ROBERT L. ROSSI

VINCENT SACCHETTI

RONNA GREFF SCHNEIDER

JUDITH SCOLNICK

RICHARD J. SHEA

JEFFREY B. STORER

BETTY WAXMAN

FACULTY COMMITTEE ON PUBLICATIONS

PAUL R. MCDANIEL

*Chairman of the Faculty Committee on Publications
and Faculty Advisor to the Law Review*

MARSHA HEARN

Administrative Secretary

MARY LANNIGAN

Administrative Secretary