

Fordham International Law Journal

Volume 9, Issue 3

1985

Article 7

An Analysis of the Conflicts Between Congressional Import Quotas and the General Agreement on Tariffs and Trade

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An Analysis of the Conflicts Between Congressional Import Quotas and the General Agreement on Tariffs and Trade

John J. Reinke

Abstract

This Note will discuss recent US import quotas in light of the United States' obligations under GATT. Part I of this Note will examine the legal frameworks of the US Constitution, GATT, and section 301. Part II will focus on the domestic and international conflicts that have stemmed from recent protectionist legislation proposed by Congress. Part III will criticize the conflict between the President and Congress, the application of section 301, and the dispute resolution provisions of GATT. Finally, Part IV will propose improvements for the performance of the United States under GATT and section 301. This Note will conclude that the United States must improve its trade policy by coordinating its trade actions with section 301 and GATT.

AN ANALYSIS OF THE CONFLICTS BETWEEN CONGRESSIONAL IMPORT QUOTAS AND THE GENERAL AGREEMENT ON TARIFFS AND TRADE

INTRODUCTION

Conflicting approaches taken by the United States Congress and the President to improve the United States international trading position¹ have led to actual violations of the

1. Since 1977, the United States balance on current accounts in the United States international transactions has generally fallen below zero, reaching a deficit level of U.S.\$101.5 billion in 1984. UNITED STATES BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES, 796 (106th ed. 1986). In the second quarter of 1985, the trade deficit was U.S.\$31.8 billion. *Id.* The United States annual imports have exceeded annual exports each year since 1978, sometimes by as much as U.S.\$325 billion of imports to U.S.\$225 billion of exports. See Farnsworth, *Veto Seen For Curbs on Textiles*, N.Y. Times, Sept. 9, 1985, at D6, col. 4 (graph reprinted from an International Monetary Fund Source).

The growing popularity of protectionism in the United States Congress has threatened to disrupt the international trading system. Silk, *Protectionist Mood: Mounting Pressure*, N.Y. Times, Sept. 17, 1985, at D1, col. 3. After having pursued a free trade policy for the past fifty years, in the fall of 1985 Congress has considered protectionist measures. *Id.* These restrictive measures have been likened to some of the major causes of the Great Depression. *Id.* Senator Robert Dole reportedly told the Council on Foreign Relations that he had "never seen stronger Congressional sentiment for acting on the trade front." 2 INT'L TRADE REP. (BNA) No. 36, at 1104 (Sept. 11, 1985). Congressional action in response to trade imbalances is not a novelty. See generally SENATE COMM. ON FINANCE, SOCIAL SECURITY AMENDMENTS OF 1970, S. REP. NO. 1431, 91st Cong., 2d Sess. (1970) (United States trade imbalances and surging United States imports in the late 1960's led to intense lobbying for import restrictions).

In the first nine months of 1985, members of Congress had proposed 300 bills suggesting mandatory restrictions on imports of various types of goods. For example, the Thurmond-Jenkins bill would have limited shoe imports from the existing 77 percent of the United States market to 55 percent, and would have strengthened current textile import quotas from one percent annual increases to six percent annual increases. See, e.g., H.R. 1562, 99th Cong., 1st Sess., 131 CONG. REC. H1275 (daily ed. Mar. 19, 1985) (a bill to promote economic recovery of the United States textile and apparel industry and its workers); H.R. 1973, 99th Cong., 1st Sess., 131 CONG. REC. H1901 (daily ed. Apr. 3, 1985) (a bill providing for orderly trade in the nonrubber footwear industry).

Ultimately, these pressures resulted in the passage of a bill restricting imports of textiles. On October 10, 1985, by a 262 to 159 vote, the House of Representatives passed H.R. 1562, which restricts imports, 24 votes short of the two-thirds majority needed to override the expected presidential veto. H.R. 1562, 99th Cong., 1st Sess., 131 CONG. REC. H8622 (daily ed. Oct. 10, 1985); see 2 INT'L TRADE REP. (BNA) No. 41, at 1288 (Oct. 16, 1985). On November 13, 1985, the Senate voted 60 to 39 to pass H.R. 1562, seven votes short of the two-thirds majority needed to override an expected presidential veto. H.R. 1562, 99th Cong., 1st Sess., 131 CONG. REC.

S15342-43 (daily ed. Nov. 13, 1985); see 2 INT'L TRADE REP. (BNA) No. 46, at 1167 (Nov. 20, 1985).

President Reagan has consistently opposed restrictive economic proposals. See, e.g., 2 INT'L TRADE REP. (BNA) No. 36, at 1107 (Sept. 11, 1985) ("[p]rotectionism is a crippling cure far more dangerous than any economic illness"); Boyd, *President Urges U.S. Lawmakers To Block Protectionist 'Stampede'*, N.Y. Times, Sept. 18, 1985, at A1, col. 4 ("a mindless stampede toward protectionism will be a one-way trip to economic disaster"); Weinraub, *Reagan Rejects Shoe Import Curb*, N.Y. Times, Aug. 29, 1985, at D1, col. 2 ("[p]lacing quotas on shoe imports would be detrimental to the national economic interest"); 2 INT'L TRADE REP. (BNA) No. 36, at 1107 (Sept. 11, 1985) (quote relief cost over U.S.\$3 billion over the last five years to protect domestic jobs in the shoe industry).

In response to the congressional pressure for quotas, the Reagan Administration has proposed a series of punitive actions against certain trade practices. For instance, the President has planned action against the European Economic Community, Japan, South Korea, and Brazil to remove barriers to United States exports of canned fruit, cigarettes, leather, insurance, and computers. Farnsworth, *Veto Seen For Curbs on Textiles*, N.Y. Times, Sept. 9, 1985, at D1, col. 6.

In addition, as part of his trade policy initiative, President Reagan unveiled a proposed U.S.\$3 million fund to stimulate United States exports and to encourage a new round of multilateral trade negotiations. See 2 INT'L TRADE REP. (BNA) No. 38, at 1182 (Sept. 25, 1985); Weinraub, *Reagan to Push Free Trade in Talk Monday*, N.Y. Times, Sept. 22, 1985, at 8, col. 1. The bill incorporating this proposal received a mixed reaction from the Senate Banking Subcommittee. S. 1763, 99th Cong., 1st Sess., 131 CONG. REC. S13122 (daily ed. Oct. 10, 1985); see also 2 INT'L TRADE REP. (BNA) No. 44, at 1394 (Nov. 6, 1985) (a report of mixed reactions in the Senate). However, the House Banking Trade Subcommittee voted unanimously for the subsidy on November 7, 1985. See 2 INT'L TRADE REP. (BNA) No. 45, at 1439 (Nov. 13, 1985). This bill authorized U.S.\$300 million to be mixed with regular loans for meeting foreign financing competition. Congress has delayed this bill until the fiscal year 1986. See 2 INT'L TRADE REP. (BNA) No. 50, at 1566 (Dec. 18, 1985).

On December 17, 1985, President Reagan vetoed textile bill H.R. 1562 less than an hour before it was to become law. President's Message to the House of Representatives Returning H.R. 1562 Without Approval, 21 WEEKLY COMP. PRES. DOC. 1510-11 (Dec. 23, 1985). In the veto message, President Reagan restated his position "not to stand by and watch American workers lose their jobs because other nations do not play by the rules." *Id.* at 1510. To determine whether the United States' trading partners were abiding by the terms of their trading agreements with the United States, the President directed the Secretary of the Treasury to investigate textile import levels to determine whether international agreements have been breached. *Id.* The President also asked United States Trade Representative [hereinafter referred to as USTR] Clayton Yeutter to consult with the textile industry and incorporate the industry's views into any renegotiation of multilateral agreements, and directed the Secretary of Labor to work with Congress to provide U.S.\$100 million in additional funds to relocate displaced workers. *Id.* Summarizing the Administration's trade policy, the President stated that "[w]e want to open markets abroad, not close them at home. In a fair and open market we know that America can out-produce and out-compete anybody." *Id.* at 1511.

In response to the President's veto, the House has scheduled a delayed vote for August 3, 1986 to override the veto. 3 INT'L TRADE REP. (BNA) No. 1, at 5 (Jan. 1, 1986). Meanwhile, proponents of the legislation plan to muster the necessary two-

General Agreement on Tariffs and Trade (GATT)² and have weakened the United States role in that international agreement.³ Protective trade action⁴ taken by Congress in disregard of United States obligations under GATT⁵ has given rise to

thirds majority to override a veto and to prevent extensive retaliation by United States trading partners. *Id.*

2. The General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, A7, T.I.A.S. No. 1700, 55 U.N.T.S. 187 [hereinafter cited as GATT]. See generally J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 329-32 (1969) (review of the creation of GATT). GATT required the initial members to sign the Protocol of Provision Application of the General Agreement on Tariffs and Trade, on Oct. 30, 1947, 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308 (effective January 1, 1948). GATT is still applied through this Protocol and is binding on the United States. See *infra* notes 38-62.

The type of unilaterally determined import relief proposed by Congress conflicts with the multilateral free trade agreement embodied in GATT. These import quotas conflict with two of the most basic substantive obligations of GATT: 1) the Most Favored Nation Treatment and 2) a series of commitments regarding nontariff trade barriers. See GATT, *supra*, art. 1 (General Most Favored Nation), art. 11 (General Elimination of Restrictions), art. 13 (Nondiscriminatory Administration of Quantitative Restrictions); *infra* note 5 and accompanying text; see also J. JACKSON, *supra*, 194, 249-70, 305-21 (discussion of GATT obligations).

3. 2 INT'L TRADE REP. (BNA) No. 30, 955 (July 24, 1985). USTR Yeutter told the House Ways and Means Subcommittee on Trade that the proposed bill imposing a surcharge on imports could violate GATT and expose the United States to compensation claims and retaliation. *Id.* The bill would require the executive branch to initiate certain trade actions against major trading partners before seeking GATT settlement and relief. See H.R. 3035, 99th Cong., 1st Sess., 131 CONG. REC. H5972 (daily ed. July 18, 1985); 2 INT'L TRADE REP. (BNA) No. 30, at 955 (July 24, 1985). Although seeking to benefit certain sectors of the United States economy, the bill would require the Administration to circumvent, and in effect, withdraw from GATT dispute settlement procedures. See *supra* notes 33-37, 136 and accompanying text.

4. For the purposes of this Note, protective trade action or protectionism refers to direct restrictions on the amount of certain goods such as textiles that are imposed by Congress in the form of import quotas. D. SALVATORE, *INTERNATIONAL ECONOMICS* 208 (1984). Cumulatively, import quotas hurt consumers who must pay higher prices and choose their goods from a limited market. Schoenbaum, *Trade Friction with Japan and the American Policy Response*, 82 MICH. L. REV. 1647, 1657 (1984); see, e.g., 131 CONG. REC. S12457 (daily ed. Oct. 2, 1985) (statement of Sen. Danforth). S. 680, the textile-apparel quota bill, would cost consumers in the United States approximately U.S.\$14 billion per year. See *id.* Import quota cost has also been estimated at U.S.\$2 billion a year in additional consumer costs. Farnsworth, *Veto Seen For Curbs On Textiles*, N.Y. Times, Sept. 9, 1985, at D1, col. 6. Some estimates place the cost of import quotas to the United States consumer at U.S.\$300,000 per United States textile job saved. 2 INT'L TRADE REP. (BNA) No. 36, at 1115 (Sept. 11, 1985).

By reducing competition in certain domestic markets, import quotas slow United States industrial productivity. Hay & Sulzenko, *U.S. Trade Policy and "Reciprocity"*, 16 J. WORLD TRADE L. 471, 479 (1982). Protectionism supports declining industries, thereby shielding their inefficiencies from innovation and investment that could improve their competitiveness. Schoenbaum, *supra*, at 1651.

5. GATT, *supra* note 2, art. 1 (General Most Favored Nation). The Most Fa-

national and international distrust⁶ in the ability of GATT to function as an instrument of free trade and to preserve the stability of international trade.⁷ Flagrant disagreement between

vored Nation obligation of GATT requires that the goods of any contracting party be given "no less favorable" treatment than that given other contracting parties. *Id.*; cf. S. 1404, 99th Cong., 1st Sess., 131 CONG. REC. S9185 (daily ed. July 9, 1985) (a bill to respond to unfair trade practices of Japan); 2 INT'L TRADE REP. (BNA) No. 30, at 951 (July 24, 1985) (anti-Japanese emotions prompted restrictive trade legislation). Anti-Japanese emotions in the United States prompted protectionist legislation against Japan. *Id.*

6. 2 INT'L TRADE REP. (BNA) No. 38, at 1207 (Sept. 25, 1985). For example, on Sept. 18, 1985, Nobou Matsunaga, Japan's ambassador to the United States, warned the United States of possible retaliation by Japan. *Id.*; 2 INT'L TRADE REP. (BNA) No. 36, at 1105 (Sept. 9, 1985). Likewise, Japanese Vice President Susumi Nikaido warned on September 10, 1985 of a crisis situation between Japan and the United States which could lead to Japanese trade retaliation. *Id.*

South Korea also warned of retaliation, threatening both not to support the United States request for a new round of multilateral negotiations in GATT, and to seek compensation under GATT. See 2 INT'L TRADE REP. (BNA) No. 31, at 973 (July 31, 1985) (the executive branch anticipated threats of retaliation, particularly from the Far East); 2 INT'L TRADE REP. (BNA) No. 30, at 963 (July 24, 1985).

On July 18, 1985, European Community delegate Tran Van Tink warned the GATT Council that the Community would retaliate in kind if the United States imposed shoe quotas. 2 INT'L TRADE REP. (BNA) No. 30, at 958 (July 24, 1985). Twenty-eight developing nations, voicing their opposition to the quotas and warning that H.R. 1562 would violate the GATT, wrote letters to the Senate Finance Committee and the House Ways and Means Committee. 2 INT'L TRADE REP. (BNA) No. 28, at 896 (July 10, 1985). USTR Yeutter predicted that stringent import quotas would result in "substantial retaliation" against United States exports and would unravel more than 30 bilateral international trade agreements. *A Race For Import Curbs*, N.Y. Times, Sept. 22, 1985, at E4, col. 1; see Archibald, *Section 301 of the Trade Act of 1974*, in *MANUAL FOR THE PRACTICE OF INTERNATIONAL TRADE LAW* 16 (W. Ince & L. Glick eds. 1984); Schoenbaum, *supra* note 4, at 1651, 1657; 2 INT'L TRADE REP. (BNA) No. 38, at 1188 (Sept. 25, 1985); 2 INT'L TRADE REP. (BNA) No. 30, at 958 (July 24, 1985).

Although remedial, retaliation as a means to eliminate an unfair trade practice is not an end in itself. At best, retaliation serves as a good threat. Archibald, *supra*, at 16. Factors affecting the viability of retaliation as a part of a trade policy include: 1) the consistency of the proposed retaliation with international obligations, 2) the likelihood of counter-retaliation, 3) the likely success of retaliation to eliminate the unfair practice, 4) the possible adverse effects on other national interests, and 5) the effect on the general bilateral relationship. *Id.* at 17; see D. SALVATORE, *supra* note 4, at 213-15; see also 131 CONG. REC. S12457 (daily ed. Oct. 2, 1985) (statement of Sen. Danforth). The Senator valued the risk of retaliation at U.S.\$33 billion of United States exports. See *id.*

7. Dymock & Vogt, *Protectionist Pressures in the U.S. Congress*, 17 J. WORLD TRADE L. 496, 498, 511 (1983); see STAFF OF SENATE COMM. ON FINANCE, 96TH CONG., 1ST SESS., *MTN AND THE LEGAL INSTITUTIONS OF INTERNATIONAL TRADE* 15 (Comm. Print 1979) [hereinafter cited as SENATE STAFF REPORT]. "Many governments have hesitated or refused to invoke the procedures of Article XXIII [of GATT]." SENATE STAFF REPORT at 15; see also Jackson, *The Crumbling Institutions of the Liberal Trade System*, 12 J.

the legislative and executive branches of the United States Government⁸ has diminished trust in the ability of the United

WORLD TRADE L. 93, at 93-106 (1979). At least five causes of the crisis of confidence in the international trade system can be delineated: 1) the sluggishness of the world economy, 2) growing skepticism about liberal trade and comparative advantage as an economic model, 3) growing recognition of the dangers and disadvantages of economic interdependence, 4) greater divergence between the economic structures of GATT members, and 5) the breakdown of GATT. Jackson, *supra*, at 93-96.

During 1982, the United States Congress expressed doubt about the usefulness of GATT and attempted to legislate protectionist measures. Dymock & Vogt, *supra*, at 498, 511. See generally *Protectionism That Protects Nothing*, N.Y. Times, Nov. 18, 1985, at A20, col. 1 (congressional protectionism would damage international political and economic interests such as GATT); Roberts, *Curb On Imports Of Textile Gains*, N.Y. Times, Sept. 20, 1985, at A1, col. 2 (Representative Thomas J. Downey, House Trade Subcommittee member, warned that textile bills could undermine the international trading system).

Protectionist legislation could disrupt the highly integrated international economy by disturbing the interdependence of the contribution of budget deficits, high interest rates, an overvalued dollar, trade deficits and rising international debt that has served as the base for recent United States and foreign economic growth. Schoenbaum, *supra* note 4, at 1651-57; Silk, *Capital Inflows and Trade Gap*, N.Y. Times, Sept. 18, 1985, at D2, col. 3. President Reagan stated:

[o]ur economy is truly interwoven with those of our trading partners. If we cut the threads that hold us together, we injure ourselves as well. If our trading partners can not sell shoes in the United States, many will then not be able to buy U.S. exports. That would mean more U.S. jobs lost.

Weinraub, *Reagan Rejects Shoe Import Curb*, N.Y. Times, Aug. 29, 1985, at D5, col. 1; see *Protectionism That Protects Nothing*, N.Y. Times, Nov. 18, 1985, at A20, col. 2; Weinraub, *Reagan to Push Free Trade in Talk Monday*, N.Y. Times, Sept. 22, 1985, at 8, col. 6; Silk, *Protectionist Mood: Mounting Pressure*, N.Y. Times, Sept. 17, 1985, at D1, col. 3.

8. Compare Boyd, *President Urges U.S. Lawmakers To Block Protectionist 'Stampede'*, N.Y. Times, Sept. 18, 1985, at A1, col. 4 (President Reagan referred to Congress's restrictive proposals as "a mindless stampede toward protectionism" and "a one-way trip to economic disaster [sic]") with Roberts, *Curb on Imports of Textiles Gains*, N.Y. Times, Sept. 20, 1985, at A1, col. 2 (House Speaker Thomas P. O'Neill, criticizing the President's trade policy, accused President Reagan of "being willing to preside over the de-industrialization of America").

The economic approach of Congress to alleviating trade imbalances is based on a construction of the concept of reciprocity. Hay & Sulzenko, *supra* note 4, at 475-76. That approach poses three threats to the international commercial environment. *Id.* at 475. First, reciprocity is bilateral retaliation in which dispute settlement reverts from multilateral negotiations, such as GATT, to bilateral or unilateral approaches. *Id.* at 475-76. Second, reciprocity undermines GATT principles of Most Favored Nation treatment. *Id.* at 476. Third, reciprocity goes beyond the GATT principle of national treatment. *Id.*

This congressional approach contrasts with the approach taken by the executive branch. *E.g.*, H.R. DOC. No. 100, 99th Cong., 1st Sess., 131 CONG. REC. H7204-05 (daily ed. Sept. 4, 1985). The International Trade Commission [hereinafter cited as ITC] recommended to the President import relief for the footwear industry under section 201 of the Trade Act of 1974, 19 U.S.C. § 2251 (1982). 2 INT'L TRADE REP.

States to function as a member of GATT⁹ and to maintain a stable domestic market.¹⁰

This Note will discuss recent United States import quotas in light of the United States' obligations under GATT. Because the United States Constitution and section 301 of the

(BNA) No. 25, at 814 (June 19, 1985). President Reagan "determined that granting import relief would not be in the national economic interest." H.R. Doc. No. 100, 99th Cong., 1st Sess., 131 CONG. REC. H7204-05 (daily ed. Sept. 4, 1985). Coincident with President Reagan's decision against imposing shoe import quotas, the executive branch committed its efforts to a "campaign" to enforce United States trade rights. Farnsworth, *Section 301 Is Polished As A U.S. Trade Weapon*, N.Y. Times, Aug. 27, 1985, at D1, col. 1; see 2 INT'L TRADE REP. (BNA) No. 36, at 1100 (Sept. 11, 1985); *President's News Conference On Foreign And Domestic Issues*, N.Y. Times, Sept. 18, 1985, at B6, col. 1.

9. Jackson, *Implementing the Tokyo Round: Legal Aspects of Changing International Economic Rules*, 81 MICH. L. REV. 267 (1982). Protectionism poses a serious national and international legal conflict with free and fair trade obligations under GATT. One of the greatest constraints on the United States management of its international economic interests is the interaction of the executive and legislative branches, which influences United States foreign relations and international trade. *Id.* at 380.

10. Showing its hostility toward the President's position on trade and the United States' obligations under GATT, Congress has drafted bills protecting the industries adversely affected by high levels of imports. See, e.g., 131 CONG. REC. E4081-82 (daily ed. Sept. 18, 1985) (statement of Rep. Edgar) (speech supporting H.R. 1562 and describing the economic woes of garment factory workers).

Farnsworth, *Veto Seen For Curbs On Textiles*, N.Y. Times, Sept. 9, 1985, at D1, col. 6. The textile industry in particular has pressured Congress for such legislation. Textile and apparel workers represent almost ten percent of the United States' manufacturing jobs. *Id.* Pointing to 200,000 jobs lost and 250 plant closings in the last four years caused by increasing textile imports, labor and management organizations lobbied Congress for import restrictions. *Id.* In a 6-month period, Manchester, Georgia lost 645 of 1,934 private sector textile jobs due to imports. 131 CONG. REC. E4156 (daily ed. Sept. 20, 1985) (statement of Rep. Ray). Representative Ray urged support of H.R. 1562 to save such domestic jobs. *Id.*; see, e.g., 131 CONG. REC. H7606-07 (daily ed. Sept. 19, 1985) (statement of Rep. Nichols). "Where can a 50-year-old black man who has been a loom fixer in a textile mill most of his entire adult life find a new job?" *Id.*

GATT provisions have never been formally submitted to Congress for acceptance. Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 265 (1967). Although recognized by Congress as a cornerstone of United States trade policy, evidence of congressional ratification of GATT is equivocal. *Id.* at 265-69; see also Hay & Sulzenko, *supra* note 4, at 472 (the United States still professes a strong commitment to GATT).

Nevertheless, as a former Commerce Department official has observed, retaliation to United States import quotas from areas like the Far East "is going to . . . hurt American industry in places where U.S. competitors want to grow." 2 INT'L TRADE REP. (BNA) No. 30, at 963 (July 24, 1985); see also Hay & Sulzenko, *supra* note 4, at 479 (possibility of a trade war in the 1980's).

Trade Act of 1974¹¹ vest the President and Congress with separate powers,¹² the United States compliance with international agreements like GATT may be insufficient in fulfilling the United States' obligations.¹³ An examination of section 301, GATT, and certain recent protectionist bills, will demonstrate the need for an improved approach to international trade imbalances.

Part I of this Note will examine the legal frameworks of the United States Constitution, GATT, and section 301.¹⁴ Part II will focus on the domestic and international conflicts that have stemmed from recent protectionist legislation proposed by Congress.¹⁵ Part III will criticize the conflict between the President and Congress, the application of section 301, and the dispute resolution provisions of GATT.¹⁶ Finally, Part IV will propose improvements for the performance of the United States under GATT and section 301.¹⁷ The Note will conclude

11. Section 301, Trade Act of 1974, 19 U.S.C. § 2411 (1982) [hereinafter cited as section 301]. Section 301 provides in part:

(a) Determinations and action by President. If the President determines that action by the United States is appropriate—

(1) to enforce the rights of the United States under any trade agreement; or

(2) to respond to any act, policy, or practice of a foreign country or instrumentality that—

(A) is inconsistent with the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(B) is unjustifiable, unreasonable, or discriminatory and burdens or restricts United States commerce;

the President shall take all appropriate and feasible action within his power to enforce such rights or to obtain the elimination of such act, policy, or practice. Action under this section may be taken on a nondiscriminatory basis or solely against the products or services of the foreign country or instrumentality involved.

Id.; see *infra* notes 63-82 and accompanying text.

The USTR filed three self-initiated section 301 actions: Brazil Informatics, 301-49, filed Sept. 16, 1985; Japan Tobacco, 301-50, filed Sept. 16, 1985; and Korean Insurance, 301-51, filed Sept. 16, 1985. See 2 *INT'L TRADE REP.* (BNA) No. 44, at 1422 (Nov. 6, 1985).

12. Compare U.S. CONST. art. I (grant of power to the legislative branch) with U.S. CONST. art. II (grant of power to the executive branch).

13. See *supra* note 2; Jackson, *supra* note 9, at 380.

14. See *infra* notes 18-82 and accompanying text.

15. See *infra* notes 83-134 and accompanying text.

16. See *infra* notes 135-49 and accompanying text.

17. See *infra* notes 150-52 and accompanying text.

that the United States must improve its trade policy by coordinating its trade actions with section 301 and GATT.

I. THE LEGAL FRAMEWORKS

A. *The United States Constitution and the Commerce Power*

The United States resolves political and legal issues through the interaction of the legislative and executive branches.¹⁸ The United States Constitution empowers Congress to regulate commerce with foreign nations¹⁹ and to ratify treaties.²⁰ Under article II, section 2 of the Constitution, the President of the United States has the authority to negotiate international agreements and to carry on international diplomacy.²¹ The Constitution does not authorize the executive branch to regulate foreign commerce,²² yet Congress may authorize the President to negotiate trade agreements and to take other action affecting the area of foreign commerce.²³ Specifici-

18. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 138-81, 194 (1983).

The continual controversy existing between Congress and the executive as to the extent of each branch's foreign affairs power centers on whether Congress and the president act as constitutional equals in this sphere or whether the executive initiates foreign policy while the Congress acts merely to implement the president's policy.

Id. at 194.

19. U.S. CONST. art. I, § 8, cl. 3 (foreign commerce power).

20. U.S. CONST. art. II, § 2, cl. 2 (foreign affairs power). Congressional power in this area is well established. *Id.*; see also American Ass'n of Exporters & Importers v. United States, 583 F. Supp. 591 (Ct. Int'l Trade 1984), *aff'd*, 751 F.2d 1239 (Fed. Cir. 1985) (discussion of congressional foreign trade legislation). In dictum, the court pointed out the difficulty of determining whether textile trade negotiations constitute foreign or domestic affairs. 583 F. Supp. at 598.

21. U.S. CONST. art. II, § 2. J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 18, at 190-94, 201-11. Executive agreements can be made by the President on his own authority without congressional approval. *Id.* at 206; see e.g., Proclamation No. 2761A, 12 Fed. Reg. 8863 (1947) (United States participation in GATT).

22. See U.S. CONST. art. I, § 8; American Ass'n of Exporters & Importers v. United States, 751 F.2d 1239, 1247 n.13 (Fed. Cir. 1985). In authorizing implementation of international textile trade agreements, Congress statutorily empowered the President to carry out such agreements. See also United States v. Yoshida Int'l, Inc., 526 F.2d 560, 572 (C.C.P.A. 1975). "It is nonetheless clear that no undelegated power to regulate commerce . . . inheres in the Presidency." *Id.* (emphasis in original); see also Jackson, *Perspectives on the Jurisprudence of International Trade: Costs and Benefits of Legal Procedures in the United States*, 82 MICH. L. REV. 1570, 1572 (1984) (discussion of implementing international agreements).

23. Section 101, Trade Act of 1974, 19 U.S.C. §§ 2111, 2112 (1982); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936). The President

cally, section 301 of the Trade Act of 1974 authorizes the President to enforce United States trade agreements.²⁴ Interaction between the legislative and executive branches also occurs through the United States Trade Representative²⁵ (USTR), who coordinates the United States' international trade policy.

makes treaties with the advice and consent of the Senate; but he alone negotiates. . . .

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.

Id. at 319-20.

Section 101 of the Trade Act of 1974 grants to the President authority to negotiate trade agreements. 19 U.S.C. § 2111 (1982). Section 102 urges the President "to take all appropriate and feasible steps with his power . . . to harmonize, reduce, or eliminate such barriers to . . . international trade." 19 U.S.C. § 2112(a) (1982); *see* S. REP. No. 1298, 93d Cong., 2d Sess., 87 (1974) (Congressional bill authorizing the President to impose import surcharges); *see also* American Ass'n of Exporters & Importers v. United States, 751 F.2d 1239, 1247 (Fed. Cir. 1985) (analyzing congressional authorization to the President to carry out textile agreements by regulation, the court said that broad delegations in the international field are normal); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (by delegating its commerce powers, Congress may establish policies and standards and prescribe the rules that implement those Congressional policies).

24. *See supra* note 11 and accompanying text.

25. 19 U.S.C. § 2171(b)(1) (1982). The Reorganization Plan No. 3 of 1979, 44 Fed. Reg. 69, 273 (1979), *reprinted in* 19 U.S.C. § 2171(b)(1) (1982), provides in part that:

[t]he Trade Representatives shall have primary responsibility, . . . for developing, and for coordinating the implementation of, United States international trade policy The Trade Representative shall serve as the principal advisor to the President on international trade policy and shall advise the President on the impact of other policies of the United States Government on international trade.

Id. 19 U.S.C. § 2131(a) provides, in part, that the executive branch will coordinate the United States' international trade policy with respect to GATT. 19 U.S.C. § 2131(a) (1982); *see* S. REP. No. 1298, 93d Cong., 2d Sess., 105 (1974). The Senate Committee on Finance, which has responsibility over trade policy and trade agreements, has jurisdiction over the nomination of the USTR. The Senate must consent to all USTR appointments by the President. The USTR thus serves the two branches of the United States' Government advising both the President and Congress about international trade matters. *Id.* at 105.

Under section 2211, the House Speaker selects a negotiation delegation of five Congressmen on the recommendation of the Committee on Ways and Means. 19 U.S.C. § 2211 (1982). The President is required to submit annual reports to Congress on trade agreements and on import relief, 19 U.S.C. § 2213(a) (1982), and to

Conflicts between the legislative and executive branches of the United States Government often arise when each branch attempts to resolve the international problem of trade imbalances by opposing means.²⁶ The power to regulate commerce²⁷ is a jealously guarded congressional power²⁸ that results in constant tension between the executive and legislative branches in the area of foreign commerce.²⁹ The President's veto power counterbalances the power of Congress to regulate foreign commerce.³⁰ Although this balance between the executive and legislative branches usually results in effective legislation in the area of trade, this separation of powers between the branches of the federal government has impaired the ability of the United States to reach an organized and effective trade policy.³¹

As a result of this interbranch tension, Congress has frequently overpowered the Administration in trade matters, hindering the implementation of GATT and negotiation under its terms.³² Responding to special interests in industries dis-

seek information and advice from the private sector with respect to negotiating objectives before entering a trade agreement. 19 U.S.C. § 2155(a) (1982).

26. See generally L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 89-123 (1972) (discussion of the conflicts created by the separation of powers). Henkin states that:

[i]n the competition for power in foreign affairs, the principal issues have resulted from Presidential initiatives invoking one or more of his "plenary" powers, resisted by Congress citing its "plenary" powers; but Presidents have also accused Congress of "poaching." Sometimes each has claimed exclusive power, sometimes the power to act as well as the other; occasionally the branches acted differently if not inconsistently and each sought to prevail.

Id. at 92; see also J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 18, at 136. The concept of separation of powers is not a technical rule of law but a concept that recognizes the necessary area of interaction between the branches of the federal government. J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 18, at 136.

27. U.S. CONST. art. I, § 8.

28. See Jackson, *supra* note 9, at 342; J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 18, at 135-37.

29. Jackson, *supra* note 9, at 341.

30. Dymock & Vogt, *supra* note 7, at 499. The Executive veto power functions as an impediment to Congress in addition to executive proposals to expand trade and to negotiate trading rules. *Id.* at 499; see also 2 INT'L TRADE REP. (BNA) No. 36, at 1104 (Sept. 11, 1985) (executive veto of trade legislation foreseen).

31. Jackson, *supra* note 9, at 341, 380; see *supra* note 1 (discussion of differing executive and legislative approaches to the United States trade imbalance).

32. Jackson, *supra* note 9, at 341; see, e.g., Brinbaum, *Rostenkowski Says Trade Bill Will Come First*, Wall St. J., Sept. 13, 1985, at 3, col. 1.

tressed by imports, such as domestic textile manufacturers,³³ Congress has developed solutions that may benefit those particular sectors,³⁴ but which may be detrimental to the United States economy as a whole.³⁵ While protecting a few industries and distributing the cost of that protection throughout the economy may seem worthwhile,³⁶ once protectionist legislation is in place, even strong policy arguments may fail to provoke Congress to repeal the law if it proves ineffective.³⁷ This specialized approach to trade legislation has an international impact as well. By alleviating the distress of special interests in an *ad hoc* fashion, Congress disrupts the overall stability of in-

[President Reagan's] strategy of slowing the push for tougher trade policy isn't working, and unless he comes up with a plan that brings retribution against countries who keep out or unfairly drive up the price of U.S. products, he's guaranteed a crippling fight with Congress.

Id. at 3, col. 2.

33. See, e.g., H.R. 1562, 99th Cong., 1st Sess., 131 CONG. REC. H1275 (daily ed. March 19, 1985) (a bill to promote economic recovery of United States textile and apparel industry and workers); see *supra* note 10 (discussion of textile industry pressuring Congress for protectionist legislation).

34. Jackson, *supra* note 22, at 1580. Special economic sectors in the United States manipulate the legislative system to obtain certain statutory wordings that will make the results of their potential cases foreseeable. *Id.* However, the number of Congressmen who support free trade may be larger than it seems. Congressmen may introduce and publicly support protectionist measures to curry favor with constituents. One former United States trade official characterized this as "Lydon Johnson's iron law of trade: 'Be a free trader, but don't tell a soul because there are no votes in it.'" CONGRESSIONAL QUARTERLY INC., TRADE: U.S. POLICY SINCE 1945. 24 (M. Thompson ed. 1984); see Roberts, *Congress Trade Revolt: Reagan Lag and Job Cuts*, N.Y. Times, Sept. 19, 1985, at D1, col. 2; 2 INT'L TRADE REP. (BNA) No. 42, at 1345 (Oct. 23, 1985) (United States lawmakers bow to special interest groups lobbying for import curbs).

35. See *infra* notes 36-38, 136 and accompanying text.

36. See Jackson, *supra* note 22, at 1580; Kristof, 'New Wave' View of Protectionism, N.Y. Times, Sept. 9, 1985, at D1, col. 1. "A country might be willing to accept a small drop in its standard of living to preserve certain industries that it deems necessary for national security." Kristof, 'New Wave' View of Protectionism, N.Y. Times, Sept. 9, 1985, at D1, col. 1.

37. Jackson, *supra* note 22, at 1580. Congress established detailed statutory criteria because Congress distrusts executive discretion. See *id.*; cf. 19 U.S.C. §§ 2251-2252 (1982) (discussed *infra* at note 86). These formulas may later become inappropriate with respect to economic policy or may violate international law. See Jackson, *supra* note 22, at 1580. In the Domestic International Sales Corporations (DISC) case, a GATT panel found that a United States law contravened United States international obligations. Regarding DISC, GATT doc.L/4422 of Nov. 2, 1976, reprinted in 23d Supp. BISD 98, 99 (1977) [hereinafter cited as DISC]; see generally Jackson, *The Jurisprudence of International Trade: The DISC case in GATT*, 72 AM. J. INT'L L. 747 (1978) (discussion of DISC).

terdependent domestic and international markets.³⁸

B. *The General Agreement on Tariffs and Trade*

Opened for signature in 1947, GATT is the principal international multilateral agreement that regulates world trade.³⁹ The agreement symbolizes an economic trend away from national protectionism and toward international cooperation and interdependence⁴⁰ and is intended to apply on both international and national levels.⁴¹ The GATT may be implemented bilaterally, multilaterally, regionally, and institutionally by member nations for the expansion of trade.⁴² On a national level, GATT is implemented on both public and private levels.⁴³ For example, in the United States, the Trade Act of 1974 was drafted to coordinate with the United States GATT obligations.⁴⁴

Despite the intended integration of GATT into national legislation, implementation of GATT in the United States is impeded by the frictions between the legislative and executive branches.⁴⁵ Congress is hostile to GATT because GATT became a legal obligation in the United States without congressional ratification.⁴⁶ Even if a GATT panel finds that United

38. See Note, *Protecting Steel: Time for a New Approach*, 96 HARV. L. REV. 866, 885 (1983). Without an industrial policy, the United States government responds to the current economic pressures in short-sighted fashion. *Id.* at 885. On Nov. 5, 1985, Don Bonker, Chairman of the House Democratic Trade Task Force, proposed the formation of a trade committee to coordinate trade bills. See 2 INT'L TRADE REP. (BNA) No. 45, at 1449 (Nov. 13, 1985). Although the Task Force's proposed trade committee would attempt to resolve current trade problems by coordinating trade bills, its *ad hoc* nature would undermine the coordination it would be designed to achieve. *Id.*

39. See GATT, *supra* note 2; Jackson, *supra* note 10, at 250.

40. See GATT, *supra* note 2, preamble; Note, *The Law of the GATT: Study & Research*, 18 J. WORLD TRADE L., 357 (1984). However, the United States does not always comply with its GATT obligations. See Hudec, *GATT or GABB? The Future Design of the General Agreement on Tariffs and Trade*, 80 YALE L.J. 1299, 1300 (1971). The accumulation of acts of noncompliance has gradually forced GATT to abandon its system of detailed rules. This erosion of GATT's integrity may ultimately lead its members to abandon GATT in favor of a more permissive international trading scheme. *Id.* at 1300.

41. See Note, *supra* note 40, at 360-65.

42. See *id.* at 362.

43. See *id.* at 360-62.

44. See 19 U.S.C. § 2102(3) (1982).

45. See Jackson, *supra* note 9, at 380.

46. *Id.* at 347. When trade legislation was before the Senate in 1973, certain

States law contravenes the United States international legal obligations under GATT, Congress, acting on a national level, may choose not to change its law.⁴⁷ Nonetheless, on an international level, the GATT agreement requires the United States either to negotiate new trade commitments or to negotiate a dispute settlement between its member countries.⁴⁸

According to a Senate committee report on dispute settlement under GATT, GATT provides two types of dispute settlement processes.⁴⁹ The report identifies the first of these processes as settlement by negotiation and agreement. In this process, the relative economic, political, and military power of each party would determine the outcome.⁵⁰ The second of these processes is settlement by negotiation and agreement, but with reference to the terms of GATT.⁵¹ Some commenta-

events, such as the controversy over the Vietnam conflict and President Nixon's involvement in the burglary of the Democratic National Committee Headquarters, made Congress reluctant to delegate authority to a President whom Congress did not trust. *Id.* at 347. Congress did not enact the Trade Act of 1974 until President Nixon resigned. *Id.*; see Jackson, *supra* note 10, at 268.

47. See Jackson, *supra* note 22, at 1580; Jackson, *supra* note 37, at 747.

48. See Note, *supra* note 40, at 357. However, "[t]here is no single, sharply defined dispute-settlement procedure in GATT." See J. JACKSON, *supra* note 2, at 164. See also Note, *Liberalization of International Trade in the Service Sector: Threshold Problems and a Proposed Framework under the GATT*, 5 *FORDHAM INT'L. L.J.* 371, 405-08 (1982) (difficulties in enforcement of GATT procedures give rise to uncertainty).

49. SENATE STAFF REPORT, *supra* note 7, at 13. While GATT does not expressly provide for two distinct procedures, two can be inferred. *Id.* at 13.

50. *Id.*

51. GATT, *supra* note 2, art. 22 (Consultation), art. 23 (Nullification or Impairment). Article 22 provides:

Each contracting party shall accord sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, such representations as may be made by any other contracting party with respect to the operation of customs regulations and formalities, anti-dumping and countervailing duties. . . .

Id. art. 22.

Article 23 in part provides:

If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as a result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situations, the contracting party may, with a view to the satisfactory adjustment of the matter, make written representations or proposals to the other contracting party or parties which it considers to be concerned.

tors observe that GATT lacks the ability to enforce its terms, and now provides merely a forum for the airing of disputes, in which GATT acts more as a basis for mediation and less as a binding agreement.⁵² This viewpoint illustrates a lack of faith in the ability of GATT to settle disputes.

This lack of faith is justifiable on several grounds.⁵³ First, article 23, which provides a mechanism for dispute settlement,⁵⁴ relies on the voting process of GATT.⁵⁵ The GATT's voting procedure is a one-vote-per-member system that gives majority power to those developing countries that export intensively to the United States,⁵⁶ which puts the United States and other developed countries at a disadvantage. Second, this dispute procedure encourages lengthy delays.⁵⁷ Third, the outcome of the article 23 process is uncertain because the phrase "nullification or impairment" is vague and ambiguous, which allows a country to negotiate a GATT violation with the country that allegedly violated its GATT obligations.⁵⁸ As arti-

Id. art. 23; *see also* SENATE STAFF REPORT, *supra* note 7, at 9, 13, 15.

52. CONGRESSIONAL QUARTERLY INC., *supra* note 34, at 37.

GATT lacks power to enforce its rules because Congress refused to allow the U.S. government to participate in its proposed administrative bodies, which consequently never came into being. The 300 member GATT Secretariat, based in Geneva, provides a forum for the airing of disputes among contracting nations, allowing GATT to perform a mediating role in world trade.

Id.

53. Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J. WORLD TRADE L. 1, 4-7 (1979).

54. *See supra* note 51.

55. GATT, *supra* note 2.

56. Jackson, *supra* note 53, at 5-7. A majority vote on an article 23 dispute may in practice necessitate the agreement of the disputants themselves. *Id.* at 7-8. Other weaknesses include: 1) a poor complaint process, 2) meager staff resources, 3) poor fact finding procedures, 4) inadequate review procedures, 5) ambiguous panel findings, and 6) a rigid approach to trade policy. *Id.* at 7-8; *see also* SENATE STAFF REPORT, *supra* note 7, at 15.

57. Jackson, *supra* note 53, at 5. The delays may be inordinate. *Id.* at 5; *see also* SENATE STAFF REPORT, *supra* note 7, at 15. Disputes in GATT may linger for years without resolution. SENATE STAFF REPORT, *supra* note 7, at 15.

58. GATT, *supra* note 2, art. 23 (Nullification or Impairment) (*see supra* note 51); SENATE STAFF REPORT, *supra* note 7, at 16 n.4. Clarifying this ambiguity, the concept of "prima facie nullification" developed in GATT settlement procedure. The concept applies to cases involving: 1) a breach of legal obligations of GATT, 2) the enactment of import quotas, or 3) a member nation's subsidization of domestic goods. SENATE STAFF REPORT, *supra* note 7, at 16 n.4. Once the complaining nation shows the prima facie case, the infringing country has the burden of showing that its

cle 23 is drafted, this dispute procedure provides little more than an opportunity to negotiate.⁵⁹ Another drawback to effective settlement is that the GATT panel conciliation approach in article 22 vests too much decision-making power in a group of panelists,⁶⁰ who either may be biased in rendering decisions or may be ill-equipped⁶¹ to interpret vague phrases in GATT.⁶²

C. *Section 301 of the Trade Act of 1974*

Section 301 of the Trade Act of 1974 integrates the rights and obligations of GATT into United States domestic law.⁶³ Section 301 broadly empowers the President to enforce the rights of the United States under any trade agreement or to respond to acts or policies of foreign countries that are contrary to any trade agreement or that are otherwise unfair or restrictive of United States commerce.⁶⁴ The President's authority to enforce United States trade rights includes all appro-

actions do not constitute the nullification or impairment prohibited under Article 23. *Id.*; see also Jackson, *supra* note 53, at 6-7. The ambiguities of the nullification or impairment concept burden the decision-making panel with the task of interpreting the agreement, a task which it may not be competent to perform. Jackson, *supra* note 53, at 6. Jackson, *supra* note 37, at 771.

59. See GATT, *supra* note 2, art. 23 (Nullification or Impairment) (a contracting party may make a written proposal to another contracting party in respect to a possible GATT violation); see *supra* note 51.

60. Jackson, *supra* note 53, at 6. In representing his country a GATT panelist may be biased by his nation's trade objectives and policies. *Id.* at 6.

61. Jackson, *supra* note 53, at 7. Due to lack of expertise, panels may be unable to make the necessary legal and equitable applications of the vague Article 23, and the panels may make political recommendations beyond the authority granted under the article. *Id.* at 7. *But see* Jackson, *supra* note 37, at 764. "Over the course of GATT history, there have been a large number of Panel reports on article [23] complaints" and there have been a number of instances of fine legal and jurisprudential reasoning. *Id.* at 764.

62. 2 INT'L TRADE REP. (BNA) No. 30, at 959 (July 24, 1985). Despite these faults, the GATT dispute mechanism is still a viable settlement procedure for the United States. For example, the GATT Council established a dispute panel to inquire into Japanese quota restrictions on shoe imports in response to a complaint filed by the United States. *Id.* at 959. *But cf.* 2 INT'L TRADE REP. (BNA) No. 42, at 1326 (Oct. 23, 1985). Retaliating for a United States complaint about European Economic Community wheat imports, European Community lodged a complaint in GATT against United States subsidy programs. *Id.* at 1326.

63. Section 301, *supra* note 11, 19 U.S.C. § 2411; Jackson, *supra* note 10, at 261. The rights and obligations of GATT are implemented through national legislation of the member country. Jackson, *supra* note 10, at 261.

64. 19 U.S.C. § 2411 (1982).

priate and feasible actions within his power.⁶⁵ Section 301 functions as a discretionary tool for implementing trade policy with respect to unfair trade practices of foreign governments.⁶⁶ This section authorizes the President to act on his own with a minimum of procedural requirements.⁶⁷ In addition, under section 302 of the Trade Act of 1974, any interested private citizen may petition the USTR, requesting Presidential action under section 301.⁶⁸ Under this provision, the USTR may in his discretion determine to initiate an investigation.⁶⁹

Although within the power authorized by Congress,⁷⁰ the President's discretionary power under the Trade Act of 1974 is circumscribed.⁷¹ Congress is unlikely to give any new author-

65. *Id.*

66. 19 U.S.C. § 2411(c)(1) provides that:

[i]f the President decides to take action under this section and no petition requesting action on the matter involved has been filed under section 2412 of this title, the President shall publish notice of his determination, including the reasons for the determination in the Federal Register. Unless he determines that expeditious action is required, the President shall provide an opportunity for the presentation of views concerning the taking of such action.

Id.

67. *Id.*; Archibald, *supra* note 6, at 4; *see* Dymock & Vogt, *supra* note 7, at 508-09.

68. Section 302, Trade Act of 1974, 19 U.S.C. § 2412 (1982). Section 302 provides as follows:

(a) Any interested person may file a petition with the [USTR] . . . requesting the President to take action under section 2411 of this title and setting forth the allegations in support of the request. The Trade Representative shall review the allegations in the petition and, not later than 45 days after the date on which he received the petition, shall determine whether to initiate an investigation.

(b)(1) If the Trade Representative determines not to initiate an investigation with respect to a petition, he shall inform the petitioner of his reasons therefor and shall publish notice of the determination, together with a summary of such reasons, in the Federal Register.

(2) If the Trade Representative determines to initiate an investigation with respect to a petition, he shall initiate an investigation regarding the issues raised. The Trade Representative shall publish the text of the petition in the Federal Register and shall, as soon as possible, provide opportunity for the presentation of views concerning the issues, including a public hearing

. . . .

Id.

69. *Id.*

70. *See supra* note 23 and accompanying text.

71. *See, e.g.*, 19 U.S.C. § 2432(d) (1982); S. REP. NO. 1298, 93d Cong., 2d Sess., at 185. While drafting the Trade Act of 1974, increasing ill will between Congress and the President prompted Congress to design measures that circumscribe administrative discretion. S. REP. NO. 1298, 93d Cong., 2d Sess., at 185.

ity to the Administration in this area.⁷² Actions taken pursuant to section 301 are limited in number because of the administrative cost and length involved.⁷³ Since July 1976, only fifty-one section 301 complaints have been filed,⁷⁴ and only three cases have been initiated in 1986 by the USTR in fulfillment of President Reagan's proposal to enforce trade sanctions.⁷⁵

As a complement to section 301, section 302 can be used as a private channel for complaints in respect to international trade,⁷⁶ thereby enabling a private citizen to participate directly in the resolution of the trade problem.⁷⁷ This kind of private enforcement demonstrates the availability of section 301 as a mechanism for dispute resolution.⁷⁸ As a practical matter, the citizen who files a section 301 petition is urged to solicit advice from the USTR.⁷⁹ Not only may private parties file section 301 claims, but they may participate in the ensuing investigation as well.⁸⁰ The USTR publishes a notice in the Federal Register requesting public comment or a public hear-

72. See 2 INT'L TRADE REP. (BNA) No. 39, at 1227 (Oct. 2, 1985). Some members of Congress have suggested that more authority under section 301 be advanced to the USTR. *Id.* at 1227.

73. See 2 INT'L TRADE REP. (BNA) No. 36, at 1100 (Sept. 11, 1985). The wide ranging authority of the President to react against unfair trade practices of other countries does not make section 301 an instant cure for United States trade problems. One source estimated that the recently initiated section 301 actions, *see supra* note 1, will take at least one year to resolve. *Id.* at 1100.

74. See 2 INT'L TRADE REP. (BNA) No. 44, 1414-22 (Nov. 6, 1985) (reprinting a current table of section 301 cases from the USTR office).

75. See *supra* notes 1, 74.

76. 19 U.S.C. § 2412 (1982); *see* Archibald, *supra* note 6, at 4; Dymock & Vogt, *supra* note 7, at 509.

77. See SENATE STAFF REPORT, *supra* note 7, at 21. In comparison to the political organization of less democratic states, the political structure of the United States permits the participation of interested private citizens in the enforcement of domestic trade rights such as those provided in the Trade Act of 1974. Unfortunately, the right of a private citizen to influence trade negotiations renders the United States Government less flexible in trade negotiations when negotiating trade policy with foreign governments. *Id.*

78. *Id.*

79. Archibald, *supra* note 6, at 5. Such consultations save time and effort by coordinating United States trade policies with the narrow objectives of the private citizen complainant. *Id.* at 5.

80. See Trade Act of 1974, §§ 301, 306, 19 U.S.C. §§ 2411, 2416 (1982). Section 306 provides in part that "[t]he Trade Representative shall . . . keep the petitioner regularly informed of all determinations and developments regarding his case under this section, including the reasons for any undue delays. . . ." *Id.*; *see* Procedures for Complaints Filed Under Section 301 of the Trade Act of 1974, 15 C.F.R. § 2006 (1982); Archibald, *supra* note 6, at 6-7.

ing on the issues raised by the petition.⁸¹ This procedure settles trade disputes by reference to pre-existing GATT obligations.⁸²

II. THE CONFLICT BETWEEN CONGRESSIONAL IMPORT QUOTAS AND THE GATT

A. The Domestic Conflict

During the fall of 1985, Congress proposed more than 300 protectionist bills in response to distress in United States industries harmed by imports.⁸³ While Congress focused on protectionism, the President and the USTR proposed stricter enforcement of section 301, asking Congress to grant the executive branch more power to act in defense of free trade.⁸⁴ The recent surge of protectionist bills reflects Congress's reassertion of its right to regulate foreign commerce under article I, section 8 of the United States Constitution⁸⁵ and its rejection of its former authorization of power to the President, embodied in section 301 of the Trade Act of 1974.⁸⁶ This domestic

81. Trade Act of 1974, § 302, 19 U.S.C. § 2412 (1982), which in part provides that "the Trade Representative shall publish the text of the petition in the Federal Register and shall, as soon as possible, provide opportunity for the presentation of views concerning the issues, including a public hearing. . . ." *Id.*

82. See 19 U.S.C. § 2131 (1982); Jackson, *supra* note 22, at 1571. Section 301, in providing specified rules, insures conformity with the private citizen's expectations of GATT as an international body. Jackson, *supra* note 22, at 1571.

83. H.R. 1562, 99th Cong., 1st Sess., 131 CONG. REC. H1275 (daily ed. March 19, 1985); see *supra* notes 1, 10 and accompanying text.

84. See 2 INT'L TRADE REP. (BNA) No. 38, at 1183-84 (Sept. 25, 1985) (Congress reacted to Reagan's section 301 policy initiative as a good signal to trading partners but too late to stop Congress from proposing a trade quota bill). See *supra* notes 1, 18-28, and accompanying text.

85. U.S. CONST. art. I, § 8.

86. Pursuant to its authority under 19 U.S.C. § 2251(b) and (d), the ITC issued a report to the President on its recommendations. See 19 U.S.C. § 2251(b), (d) (1982); *supra* note 8. The ITC determination and report to the President recommended that the executive impose a 5 year quota on shoe imports. *Supra* note 8. President Reagan was within his authority granted by Congress to withhold quota reliefs by rejecting the ITC recommendation, provided that the recommended shoe import relief was not in the United States' economic interest. See 19 U.S.C. § 2252(a)(1)(A) (1982). In determining whether to provide relief, the President has a range of factors that he may consider if they are relevant. *Id.* Some of these are: 1) probable effectiveness of import relief, 2) effect of import relief on consumers, 3) effect of import relief on United States international obligations, 4) United States international liability respecting compensation as a result of the import relief, and 5) economic and social costs were import relief provided or not. 19 U.S.C. § 2252(c)

conflict between the legislative and executive branches, created by the United States constitutional and statutory system, constrains the development of an effective international trade policy.⁸⁷ By retreating to protectionism and reasserting its constitutional powers in commerce matters, Congress not only threatened the disruption of domestic and international markets but also the breach of international obligations agreed to in GATT.⁸⁸

In December 1985, the President vetoed a major piece of proposed protectionist legislation.⁸⁹ By exercising his veto, the President thwarted passage of the bill, thereby preserving not only United States international trade obligations, but also the foreign affairs power of the executive branch.⁹⁰ Moreover, the President maximized the life of the bill as long as possible to ease the protectionist pressures in Congress and to cause concern among United States trading partners.⁹¹ In this way, the President incorporated the views of Congress into his actions to reduce the possibility of a legislative veto.⁹² Although the President may have reduced interbranch tension by incorporating Congress's opinion regarding trade legislation into his international policy, this type of political maneuvering blurs the separation of powers.⁹³ As a result, the executive branch may take a less desirable position in trade negotiations

(1982). Although the President's rejection of the recommendation was within his authorized discretionary power, Congress supported the ITC findings, 2 *INT'L TRADE REP.* (BNA) No. 31, at 973 (July 31, 1985), and sought to enact them. *See supra* note 1, 8 and accompanying text.

87. Jackson, *supra* note 9, at 341.

88. *See supra* notes 5, 7.

89. 3 *INT'L TRADE REP.* (BNA) No. 1, at 5 (Jan. 1, 1986) (President Reagan vetoes the trade bill); *see supra* note 1 (discussing veto of H.R. 1562).

90. 3 *INT'L TRADE REP.* (BNA) No. 1, at 5 (Jan. 1, 1985). By preventing the bill's passage, President Reagan avoided goading United States trading partners into filing compensation claims and taking extensive retaliatory actions against the United States. *Id.* at 6; *see also supra* notes 2, 6 and accompanying text.

91. *See* 2 *INT'L TRADE REP.* (BNA) No. 48 at 1518 (Dec. 4, 1985); 2 *INT'L TRADE REP.* (BNA) No. 39, at 1234-35 (Oct. 2, 1985). Three hundred protectionist bills certainly sent a strong signal to exporter nations with closed markets. 2 *INT'L TRADE REP.* (BNA) No. 39, at 1234-35 (Oct. 2, 1985). One narrow political objective for drafting such a volume of restrictive trade legislation may have been simply to make the United States public aware of the trade deficit. *Id.*

92. *See* Abourezk, *The Congressional Veto: A Contemporary Response to Executive Encroachment on Legislative Prerogatives*, 52 *IND. L.J.* 323 (1977); Jackson, *supra* note 9, at 348.

93. *See* Jackson, *supra* note 9, at 381.

in order to gain congressional approval.⁹⁴

During the fall of 1985, as Congress was debating the bill he later vetoed, the President took a firm position by proposing to resolve the trade imbalance through enforcement of section 301.⁹⁵ Under this proposal, the USTR was to open certain export markets to resolve the trade imbalance,⁹⁶ thereby providing for the enforcement of United States rights and obligations under trade agreements in response to certain foreign trade practices.⁹⁷ According to the President, use of these trade sanctions would help United States exporters⁹⁸ and enable the United States to realize the joint economic objective of the Trade Act of 1974 and GATT to expand trade and to improve international trading rules.⁹⁹ However, the use of section 301 does not alleviate distress in United States markets affected by high amounts of imports,¹⁰⁰ and therefore does not

94. *See id.* The executive may oversell negotiations with other trading partners to gain congressional approval. *Id.*

95. *See supra* note 1 and accompanying text.

96. *See* 2 INT'L TRADE REP. (BNA) No. 36, at 1100 (Sept. 11, 1985). Opening overseas markets is the primary objective of proposing the initiation of a section 301 trade action. *See id.* at 1100. The USTR targeted the European Community, Japan, South Korea, and Brazil as closed markets. *Id.* A closed market is an economy that is not engaging in international trade. *See* D. SALVATORE, *supra* note 4, at 420.

97. *See* 19 U.S.C. § 2411(a)(1) (1982). Section 301(a)(1), providing for the enforcement of United States trade rights, requires the enforcement of "the rights of the United States under any trade agreement." *Id.*

98. *See* Farnsworth, *Section 301 Is Polished As U.S. Trade Weapon*, N.Y. Times, Aug. 27, 1985, at D13, col. 1 (an action taken under section 301 is directed towards foreign, not domestic, markets).

99. *See* Dymock & Vogt, *supra* note 7, at 499. In 1981, the USTR stated that the United States trade policy is "aimed at the achievement of open trade and the reduction of trade distortions. . . ." *Id.* at 499. Stating a free trade objective, GATT provides:

that [the contracting parties'] relation in the field of trade and economic endeavor should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods. . . .

GATT, *supra* note 2, preamble; *see also* 19 U.S.C. § 2131(a) (1982) (on bringing existing trade agreements into conformity with principles promoting an open, nondiscriminatory, and fair international economy).

100. *Cf.* Trade Act of 1974, § 301(b)(2), 19 U.S.C. § 2411(b)(2) (1982). Section 301(b)(2) provides that the President may "impose duties or other import restrictions on the products of, and fees or restrictions on the services of, such foreign country or instrumentality for such time as he determines appropriate." *Id.*; *see also* Farnsworth, *Section 301 Is Polished As U.S. Trade Weapon*, N.Y. Times, Aug. 27, 1985, at D13, col. 1. Curbing foreign protectionism under section 301 helps employees of

lessen the pressures in Congress for import quotas.

B. *The International Conflict*

The conflict between the executive and legislative approaches to the United States trade imbalance has several international effects. First, congressional import quotas interfere with new trade agreements negotiated under GATT, and by doing so impair efforts to improve GATT's dispute settlement procedures.¹⁰¹ Second, Congress's unilateral approach reduces the United States' effectiveness as a member of GATT.¹⁰² Third, this interbranch conflict highlights that the supremacy clause of the United States Constitution provides for the constitutional preemption of international agreements such as GATT.¹⁰³ Finally, Congress's unilateral approach distorts both the current GATT dispute settlement process and international economic relations.¹⁰⁴

As Congress has solidified its position on unilateral trade action, legislative distrust in the effectiveness of GATT leaves Congress wary of multilateral negotiations.¹⁰⁵ However, protectionist legislation interferes with the free trade goals of GATT. Attempts by Congress to enact protectionist legislation have directly conflicted with efforts by the USTR to seek a new round of multilateral trade negotiations under GATT.¹⁰⁶ This conflict has intensified as Congress has sought to restrict a greater percentage of imports from developing countries than those from industrial nations.¹⁰⁷ Because GATT was

United States export industries and not those hurt by imports such as United States shoe manufacturers. Farnsworth, *Section 301 Is Polished As U.S. Trade Weapon*, N.Y. Times, Aug. 27, 1985, at D13, col. 1.

101. See *infra* note 105-11 and accompanying text.

102. See *infra* notes 112-17 and accompanying text.

103. See *infra* notes 118-23 and accompanying text.

104. See *infra* notes 124-29 and accompanying text.

105. See J. JACKSON, *supra* note 2, at 163-81; see Note, *supra* note 48, at 405-06.

106. 2 INT'L TRADE REP. (BNA) No. 30, at 958 (July 24, 1985). To the international trading community, the United States trade policy seemed confused. *Id.* While the USTR sought to open GATT negotiations, Congress sought to impose protectionist measures on the prospective negotiating partners. *Id.*; see also H.R. 1562, 99th Cong., 1st Sess., 131 CONG. REC. H1275 (daily ed. March 19, 1985) (a bill to impose import quotas).

107. 2 INT'L TRADE REP. (BNA) No. 29, at 918 (July 17, 1985). Congress targeted the proposed quotas toward countries whose exports exceeded their imports. *Id.* Countries that are relatively less developed than the United States such as

comprised of a majority of developing countries,¹⁰⁸ and required a majority vote to convene the Special Session sought by the United States,¹⁰⁹ the highly visible protectionist actions by Congress may jeopardize the role of the United States in improving GATT decision-making procedures.¹¹⁰ The publicity that has attended the trade policy dispute within the United States Government may damage the USTR's ability to negotiate within the GATT framework.¹¹¹

The import quotas recently proposed by Congress typify the kind of unilateral trade restrictions that are prohibited by the multilateral GATT agreement.¹¹² Such unilateral actions have offended United States trading partners and deterred them from participating in trade negotiations.¹¹³ For example, when Congress threatened to enact textile import quota legislation in the fall of 1985, South Korea threatened to withdraw support from any United States multilateral trade negotiations.¹¹⁴ The contradictory approaches taken by the President and Congress also may have reduced trust in the United States as a negotiating partner.¹¹⁵ By legislating import quotas and

Brazil, Taiwan and South Korea fell into this category. *Id.* However, Japan did not fall into this category. *Id.*

108. SENATE STAFF REPORT, *supra* note 7, at 9.

109. *See* 2 INT'L TRADE REP. (BNA) No. 30, at 948 (July 24, 1985). In July of 1985, the United States called for a Special Session of GATT's 90 members in order to convene a meeting of senior GATT officials. *Id.* To convene the Special Session, the assent of 46 contracting parties was required. *Id.*

110. Trade Act of 1974, § 121(a)(1), 19 U.S.C. § 2131(a)(1) (1985) sets forth the United States role in GATT. The Trade Act provides that the President shall revise the decision-making procedures in GATT to reflect a balance of economic interests between trading nations. *Id.* This role is compromised by Congress' protectionist stance. Because the voting majority of GATT is composed of developing countries, whose exports to the United States compete with United States products, Congress' protectionist legislation has jeopardized the fulfillment of the Trade Act of 1974's objective to bring the terms of GATT into conformity with principles of free and fair trade. *See* Jackson, *supra* note 53, at 2.

111. *See* Jackson, *supra* note 9, at 381. In theory, member nations of GATT may monitor the acts of the United States President and Congress. By raising their concerns in an appropriate manner and at an appropriate time, member nations may influence the interbranch process to maximize the advancement of their interests. *Id.* at 381.

112. *See supra* note 5; *see also* GATT, *supra* note 2, art. 11 (General Elimination of Quantitative Restrictions).

113. *See* 2 INT'L TRADE REP. (BNA) No. 31, at 973-74 (July 31, 1985).

114. *Id.* at 973.

115. Dymock & Vogt, *supra* note 7, at 499.

ignoring the dispute settlement procedure under GATT,¹¹⁶ Congress materially changed the United States negotiating position to one that takes advantage of the United States' bargaining power.¹¹⁷

The tension between the legislative and executive branches highlights that under the United States' implementation of a hierarchy of norms¹¹⁸ the United States Constitution preempts international agreements such as GATT.¹¹⁹ The hierarchy of norms doctrine determines which among contradictory legal doctrines will control.¹²⁰ In the United States, the supremacy clause elevates the powers of the United States Constitution over the rights and duties of GATT as an international agreement.¹²¹ The commerce powers granted to Congress under article II of the Constitution impede the ability of GATT to promote free trade between trading partners.¹²² While the hierarchy of norms doctrine permits the Constitu-

116. Jackson, *supra* note 22, at 1571; *see supra* note 49 and accompanying text; Schoenbaum, *supra* note 4, at 1651. Protectionist bills that are oriented toward a particular section of the economy not only disturb economic markets but also erode the effectiveness of GATT. Schoenbaum, *supra* note 4, at 1651; *see* Hudec, *supra* note 40, at 1300.

117. Jackson, *supra* note 22, at 1571; *see supra* note 49 and accompanying text.

118. Jackson, *supra* note 9, at 268-69. The hierarchy of norms doctrine determines which law will prevail among contradictory legal documents. *Id.*

119. U.S. CONST. art. VI. The supremacy clause of article VI indicates that the United States Constitution is the supreme law of the land. J. NOWAK, R. ROTUNDA, & J. YOUNG, *supra* note 18, at 6, 18-20. Thus, under the hierarchy of norms doctrine, when a conflict arises between the United States Constitution and an international agreement such as GATT, the supremacy clause requires that the United States Constitution prevail. Jackson, *supra* note 9, at 269.

120. *See supra* note 118.

121. *See* I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 610-11 (3d ed. 1979). Constitutional limitations determine the validity of international negotiations. *Id.*; *see also* California Bankers Ass'n v. Schultz, 416 U.S. 21, 59 (1974) (the area of foreign relations may be subject to less constitutional restraint than domestic affairs); Jackson, *supra* note 9, at 380, 388. Although the President has the power to negotiate for the United States, Congress retains the power to ratify. Jackson, *supra* note 9, at 388. Coordinating the two processes involves balancing the distribution of these powers, but this process takes time and effort. *Id.* Meanwhile, the free trade objectives of GATT remain difficult negotiating objectives for the United States to obtain. *Id.* The United States can be bound by an international obligation under international law, yet may not comply with that obligation in its domestic law. *Id.* at 359. *See, e.g.,* DISC, *supra* note 37. An international agreement like GATT does not dispose of constitutional power; instead the United States retains the power to violate its treaty obligations. L. HENKIN, *supra* note 26, at 151; *see supra* notes 118-19 and accompanying text.

122. Jackson, *supra* note 9, at 380, 388.

tion to be the supreme law of the land, this doctrine in effect encourages a breach of international legal obligations.¹²³

Congress' unilateral approach distorts both the current GATT dispute settlement process and international relations. Lacking faith in the effectiveness of GATT dispute settlement process,¹²⁴ Congress did not attempt to resolve the United States trade imbalance under the dispute procedures of articles 22-23.¹²⁵ Although Congress could have resolved the trade dispute through section 301 of the Trade Act of 1974,¹²⁶ Congress sought to handle the international trade problem unilaterally, without the participation of the executive branch.¹²⁷ Trade actions of this type, outside the framework of GATT, may lead to sectional rather than international treatment of an international problem.¹²⁸ Narrow, sectional protectionism exemplifies the congressional view that the overall rights and obligations of the international economy are not balanced.¹²⁹

The United States is caught between the contradictory goals of implementing GATT in United States law and attempting to legislate restrictive trade quotas.¹³⁰ While the United States complies with GATT in permitting maximum

123. See *supra* note 118 and accompanying text.

124. See SENATE STAFF REPORT, *supra* note 7, at 14-15. Because the United States has a weaker bargaining position than developed countries on one-vote-per-member basis, Congress views the dispute settlement process as biased and unfair. *Id.* at 15. See generally Jackson, *supra* note 37, at 754 (GATT uses majority voting).

125. See *supra* note 1 (instead Congress ignored GATT procedures and drafted its own trade legislation).

126. See *supra* note 11, 63-82 and accompanying text.

127. See Roberts, *Congress Chiefs Warn of Action To Curb Trade*, N.Y. Times, Sept. 5, 1985, at A1, col. 5. In a bipartisan effort, Congress adopted protectionist trade bills, ignoring President Reagan's section 301 proposal, and defying his threat to veto the bills. *Id.*

128. Hay & Sulzenko, *supra* note 4, at 476. If permitted to proliferate, sectoral unilateral acts would lead to the disintegration of GATT and other multilateral attempts to coordinate international trade, thereby leading to a war of all against all. *Id.*

129. *Id.* at 473. This viewpoint accounts for the broad based political appeal of protectionism as a solution for Congress in redressing the trade imbalance. *Id.* at 473.

130. Compare GATT, *supra* note 2, preamble with H.R. 1562, 99th Cong., 1st Sess., 131 CONG. REC. H1275 (daily ed. March 19, 1985). For example, although the preamble of GATT provides for "expanding the production and exchange of goods," GATT, *supra* note 2, preamble, H.R. 1562 sought to increase textile import quotas by 5 percent annually. H.R. 1562, 99th Cong., 1st Sess., 131 CONG. REC. H1275 (daily ed. March 19, 1985); see also *supra* note 1 (discussion of H.R. 1562).

imports,¹³¹ it also violates GATT by shielding certain parts of its domestic economy, thereby failing to comply with GATT.¹³² Protecting domestic labor by imposing trade restrictions like import quotas impairs the international economy.¹³³ With the executive branch attempting to comply with GATT while the legislative branch attempts to violate that agreement, implementation of GATT in the United States may itself be a barrier to trade.¹³⁴

III. *CRITICISMS*

Although both branches seek to improve the United States economy, the tensions between the President and Congress are unnecessarily antagonistic.¹³⁵ Protectionist reactions by Congress provide economic aid to particular sectors at the risk of disrupting the international trading system and compromising United States legal obligations under GATT.¹³⁶ Congress' threatened override of the President's veto forces the President to oversell trade negotiations with other partners to gain congressional approval at the expense of a greater degree of free trade.¹³⁷ The Administration's proposal to impose section 301 trade sanctions attempts to improve international trade for the United States in a manner consistent with GATT, but does little to alleviate protectionist pressures in Congress.¹³⁸ However, the President remains constrained by the limited congressional authorization of power, a constraint which seems

131. GATT, *supra* note 2, art. 13 (Nondiscriminatory Administration of Quantitative Restrictions).

132. See H.R. 1562, 99th Cong., 1st Sess., 131 CONG. REC. H1275 (daily ed. March 19, 1985); H.R. 1973, 99th Cong., 1st Sess., 131 CONG. REC. H1901 (daily ed. April 3, 1985); Jackson, *supra* note 22, at 1574-75. In addition to its substantive trade policies, the United States attempts: 1) to maximize the opportunity to receive all relevant facts, 2) to prevent corruption, 3) to enhance the opportunity to be heard, 4) to base dispute settlement on fairness and not power, 5) to be efficient, and 6) to govern with consistency and stability. Jackson, *supra* note 22, at 1574-75.

133. See D. SALVATORE, *supra* note 4, at 208, 213.

134. Jackson, *supra* note 22, at 1570.

135. *Id.*

136. See *supra* notes 5, 34-38 and accompanying text. Although it appeases congressional constituencies, protectionism only treats a mere symptom, rather than a cause, of the decline in United States competitiveness. The focus of protectionism is on the high level of imports, a result of an overvalued dollar. Dymock & Vogt, *supra* note 7, at 498.

137. See *supra* note 1 (discussion of congressional override).

138. See *supra* note 100 and accompanying text.

likely to remain unchanged.¹³⁹ Furthermore, section 301 may be targeted toward sectors that are too specific for significant improvement of the United States' trading position.¹⁴⁰ While section 301 benefits bilateral resolutions,¹⁴¹ section 301 complaints, initiated by the USTR in attacking those unfair trade practices not found to be illegal under GATT,¹⁴² may circumvent the GATT multilateral agreement.¹⁴³ Complaints initiated by private citizens may harass foreign trading partners when the private sector manipulates section 301 to ensure its domestic interests.¹⁴⁴

Many commentators criticize the effectiveness of GATT for its inability to resolve trade disputes.¹⁴⁵ Noncompliance with rules that are out of date, unfair or vague makes GATT unattractive as a means of dispute settlement.¹⁴⁶ Others have argued that GATT is adequate to resolve disputes.¹⁴⁷ For example, a proposed new round of multilateral trade negotia-

139. See *supra* notes 22-26, 31, 84 and accompanying text.

140. See, e.g., 2 INT'L TRADE REP. (BNA) No. 41, at 1289 (Oct. 16, 1985). For example, the three section 301 actions, begun in the fall of 1985, were directed against Korean, Japanese, and Brazilian markets, only a small part of the export market of the United States. *Id.*

141. See 2 INT'L TRADE REP. (BNA) No. 42, at 1329 (Oct. 23, 1985). The USTR found section 301 an appropriate tool for bilateral resolution and a complement to GATT procedure for the European Community wheat export case. *Id.* at 1329.

142. 2 INT'L TRADE REP. (BNA) No. 44, 1390 (Nov. 6, 1985). Section 301 complaints of unfair trade practices may not be illegal trade practices under GATT. *Id.* at 1390.

143. Archibald, *supra* note 6, at 8. The section 301 process is not bound by international agreements such as GATT, so the President can retaliate with or without international authority. *Id.*

144. Jackson, *supra* note 22, at 1579. Similar abuse occurred when the domestic television industry manipulated section 301 to harass the foreign television industry. *Id.*

145. See, e.g., Schoenbaum, *supra* note 4, at 1651. "Nations use the GATT only to claim their 'rights', never to fulfill their obligations." *Id.*

146. Jackson, *supra* note 53, at 1-2. Noncompliance results from a lack of an adequate system: 1) to revise and amend GATT, and 2) to apply GATT rules and resolve disputes. *Id.*; see 2 INT'L TRADE REP. (BNA) No. 33, at 1025-26 (Aug. 14, 1985). On Aug. 13, 1985, USTR Yeutter said that GATT trade rules have fallen into disuse or abuse. 2 INT'L TRADE REP. (BNA) No. 33, at 1025-26 (Aug. 14, 1985). Protectionism in the United States will increase if GATT becomes ineffective and irrelevant to the current international economy. *Id.* at 1026; see also SENATE STAFF REPORT, *supra* note 7, at 5, 16 (noncompliance with GATT obligations may become informally "legalized").

147. See 3 INT'L TRADE REP. (BNA) No. 3, at 101 (Jan. 15, 1986). An ITC report found that the existing settlement mechanisms under GATT are usually adequate. *Id.*

tions would complement the dispute settlement mechanism,¹⁴⁸ and would offer an opportunity both to improve international trading rules and to restore Congress' faith in GATT.¹⁴⁹

IV. *RECOMMENDATIONS*

The international trading system should not be threatened by import quotas from Congress. Congress should abandon its protectionist stance and develop, with the President and the USTR, a policy that is consistent with section 301 of the Trade Act of 1974. This trade policy should minimize sectional, protectionist measures and focus on improving the United States' short and long-term economic gain.

The office of the USTR could act as the bridge between Congress and the President in forming this policy. Accordingly, the USTR should make more section 301 complaints in order to achieve short-term bilateral resolutions of the trade imbalance. The United States could improve the long-term prospects for its trade imbalance by using section 301 to encourage its trading partners to negotiate new trade agreements. By threatening to file a section 301 complaint and to engage a trading partner in protracted litigation, the United States could provide an incentive to resolve trade disputes through negotiation.¹⁵⁰ To facilitate productive negotiations, the USTR should be free from interfering congressional delegations.¹⁵¹ Also, Congress should allow the President more

148. 2 INT'L TRADE REP. (BNA) No. 39, at 1224 (Oct. 2, 1985). During the fall of 1985, an agenda for a new round of multilateral trade negotiations was formulated by the USTR. *Id.* at 1224. Setting a precedent in GATT, the United States called for an extraordinary session of member states. 2 INT'L TRADE REP. (BNA) No. 36, at 1106 (Sept. 11, 1985). A majority of GATT members agreed to the session and began formulating an agenda. *Id.* at 1106.

149. 2 INT'L TRADE REP. (BNA) No. 50, at 1579 (Dec. 18, 1985). The proposed GATT negotiations may be GATT's last chance to improve its credibility with the United States Congress. *Id.* at 1579. If these negotiations fail, GATT may be further undercut by more protectionist legislation from the United States. *Id.* Recognizing the need to reform GATT enforcement rules, Congress urged negotiators to begin a new round of trade negotiations to discuss reform. 2 INT'L TRADE REP. (BNA) No. 44, at 1390 (Nov. 6, 1985). However, interbranch conflict impairs initiation of new trade negotiations. 2 INT'L TRADE REP. (BNA) No. 49, at 1555 (Dec. 11, 1985). For example, Senator Baucus threatened that if President Reagan vetoed the import quota bill, Congress would not support GATT multilateral trade negotiations pending in 1986. *Id.*

150. See Hay & Sulzenko, *supra* note 4, at 471.

151. 19 U.S.C. § 2211 (1982); see *supra* note 23.

negotiating authority in the area of foreign commerce. Finally, Congress should reduce its hostility towards GATT, and congressional acts should conform with GATT.¹⁵² If such a policy is formulated and implemented, the United States could function better as a trading partner, as a member of GATT, and as a participant in the international economy.

CONCLUSION

The United States must develop a coordinated approach in resolving United States trade imbalances. If the percentage of United States imports or exports should be reduced or increased, respectively, the United States has both international and national obligations to effectuate such economic goals through the existing legal frameworks of the General Agreement on Tariffs and Trade and section 301 of the Trade Act of 1974. If these legal structures are inadequate, the United States has the responsibility to negotiate improvements through multilateral agreements. Protectionist legislation is not only a policy of dubious economic benefit,¹⁵³ but it is also contrary to the international trade policy that the United States has ratified in both international and national law.

John J. Reinke

152. J. JACKSON, *supra* note 2, at 163-81; see Note, *supra* note 48, at 405.

153. Compare Kristof, 'New Wave' View of Protectionism, N.Y. Times, Sept. 9, 1985, at D1, col. 1, with Passel, *Protectionism Just Won't Work*, N.Y. Times, Sept. 7, 1985, at A30, col. 1. See also 2 INT'L TRADE REP. (BNA) No. 39, at 1243 (Oct. 2, 1985). Although both the Congressional and the Presidential approaches target the import and export markets, respectively, each approach makes the world trading system a scapegoat for certain lagging sectors of the United States. *Id.* Just as imports and exports influence the domestic economy, so also may fiscal and monetary policy influence the economy. The world growth rate has declined over 1.5 percent over the past decade, thereby exacerbating the overvaluation of the United States dollar and the growth of the United States deficit. *Id.* See generally 2 INT'L TRADE REP. (BNA) No. 45, at 1450 (Nov. 13, 1985); 2 INT'L TRADE REP. (BNA) No. 44, at 1405 (Nov. 6, 1985).

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INTERNATIONAL
LAW JOURNAL**

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FORDHAM INTERNATIONAL LAW JOURNAL

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