

1985

Causation under the Escape Clause: The Case for Retaining the "Substantial Clause" Standard

Kevin C. Kennedy

Follow this and additional works at: <http://elibrary.law.psu.edu/psilr>

 Part of the [International Law Commons](#), and the [International Trade Law Commons](#)

Recommended Citation

Kennedy, Kevin C. (1985) "Causation under the Escape Clause: The Case for Retaining the "Substantial Clause" Standard," *Penn State International Law Review*: Vol. 3: No. 2, Article 3.

Available at: <http://elibrary.law.psu.edu/psilr/vol3/iss2/3>

This Article is brought to you for free and open access by Penn State Law eLibrary. It has been accepted for inclusion in Penn State International Law Review by an authorized administrator of Penn State Law eLibrary. For more information, please contact ram6023@psu.edu.

Causation Under the Escape Clause: The Case for Retaining the “Substantial Cause” Standard

Kevin C. Kennedy*

I. Introduction

Section 201 of the Trade Act of 1974,¹ popularly known as the “escape clause,” provides for major—albeit temporary—relief to an American industry suffering or threatened with serious injury caused by increased imports of competitive merchandise.² Under the escape clause, the United States International Trade Commission (ITC) is required to make three findings before granting relief.³ The ITC must first find that imports of competitive merchandise have increased.⁴ It must then examine whether the domestic industry in question has been seriously injured or is threatened with serious injury.⁵ Finally, the Commission must determine whether the imports are a substantial cause of that injury or threat.⁶ This third factor is the focal point of this Article.

This Article will begin by briefly discussing the history of section 201. It will then examine the “substantial cause” standard and analyze a recent proposal by Congress to relax that standard.

* A.B. 1973, University of Michigan; J.D. 1977, Wayne State University Law School; LL.M. 1982, Harvard Law School. The author is a trial attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice. Previously the author was a law clerk at the United States Court of International Trade in New York City from 1982-1984.

The views expressed in this Article are solely those of the author and not those of the Department of Justice.

1. 19 U.S.C. § 2251 (1982). Section 406 of the Trade Act of 1974, 19 U.S.C. § 2436, deals with imports from Communist countries causing “market disruption . . . with respect to an article produced by a domestic industry.” 19 U.S.C. § 2436(a)(1) (1982). The types and duration of relief available under § 406 are identical to those under § 201, except that the United States International Trade Commission cannot recommend to the President adjustment assistance in a § 406 determination. 19 U.S.C. § 2436(a)(3) (1982).

2. 19 U.S.C. § 2251(b)(1) (1982). The relief available under § 201 includes increased tariffs on the article causing injury, quantitative restrictions on the article, tariff-rate quotas, orderly marketing arrangements with foreign countries limiting exportation to the United States of the articles, or any combination of these actions. 19 U.S.C. § 2253 (1982). The duration of relief can be for as long as five years. *Id.*

3. 19 U.S.C. § 2251 (1982).

4. 19 U.S.C. § 2251(b)(1) (1982).

5. *Id.*

6. *Id.*

II. Background

The unique feature of section 201, distinguishing it from most other trade legislation, is its focus on *fairly* traded imports which happen to be causing injury to a competing American industry. Thus, a petitioner seeking escape clause relief is not required to show that imports are being sold at less than fair value within the United States (*i.e.*, are being "dumped"), that they are being subsidized by a foreign government, or that they are otherwise being unfairly traded.⁷

The explanation for granting such extraordinary relief from fair trade can be found in the report of the Senate Committee on Finance:

The rationale for the escape clause has been, that as barriers to international trade are lowered, some industries and workers face serious injury, dislocation, and perhaps economic extinction. The escape clause is aimed at providing temporary relief for an industry suffering from serious injury, or the threat thereof, so that the industry will have sufficient time to adjust to the freer international competition.⁸

Section 201 traces its roots to article XIX of the General Agreement on Tariffs and Trade (GATT).⁹ That article recognizes the possibility that GATT-negotiated trade and tariff concessions might result in serious injury and market disruption to a domestic industry within the country which has made the concession. Article XIX therefore permitted an "escape" from GATT obligations under such circumstances.¹⁰ Although section 201's predecessor provision required that the increase in imports be attributable to trade conces-

7. See, e.g., § 701 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1671 (1982); § 731 of the Tariff Act of 1930, as amended by the Trade Agreements Act of 1979, 19 U.S.C. § 1673 (1982); § 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337 (1982).

8. S. REP. NO. 1298, 93d Cong., 2d Sess. 195 (1974).

9. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5, 6, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter cited as GATT]. Article XIX provides in part:

Emergency Action on Imports of Particular Products

1. (a) If, as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting parties shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or withdraw or modify the concession.

Id. See J. JACKSON, LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 629-39 (1977).

10. See J. JACKSON, WORLD TRADE AND THE LAW OF GATT 553-73 (1969) [hereinafter cited as JACKSON].

sions,¹¹ that requirement was abandoned with the enactment of section 201.

Escape clause proceedings are a two-phase process. They are commenced by the filing of a petition with the ITC "by an entity . . . which is representative of an industry,"¹² upon request of the President or Congress,¹³ or by the ITC on its own motion.¹⁴ The first phase, to be completed within six months of the filing of the petition or request,¹⁵ is conducted by the ITC which engages in fact finding and holds hearings. Upon conclusion of its investigation, the ITC determines first, whether serious injury exists and, second, whether the injury is attributable to an increase in imports of competing merchandise. If so, it recommends to the President the type and amount of relief it believes necessary to remedy the injury.¹⁶ The President in turn has sixty days from the date of the ITC's report to impose some form of relief.¹⁷ He may reject relief altogether, however, if he determines that such relief "is not in the national economic interest of the United States."¹⁸

III. The "Substantial Cause" Standard

The basic test for determining whether a petitioner or industry is entitled to relief under the escape clause is "whether an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article."¹⁹ The term "substantial cause" is defined as "a cause which is important and not less than any other cause."²⁰ This is a dual test: the increase in imports must be both an

11. Section 301(b)(1) of the Trade Expansion Act of 1962, 19 U.S.C. § 1901(b)(1) (1970) (repealed 1975).

12. 19 U.S.C. § 2251(a)(1) (1982). See Berg, *Petitioning and Responding Under the Escape Clause: One Practitioner's View on How To Do It*, 6 N.C.J. INT'L L. & COM. REG. 407 (1981) [hereinafter cited as Berg]; Adams & Dirlam, *Import Competition and the Trade Act of 1974: A Case Study of Section 201 and Its Interpretation by the International Trade Commission*, 52 IND. L.J. 535 (1977) [hereinafter cited as Adams & Dirlam].

13. 19 U.S.C. § 2251(b)(1) (1982).

14. *Id.*

15. 19 U.S.C. § 2251(d)(2) (1982). See Leonard & Foster, *The Metamorphosis of the U.S. International Trade Commission Under the Trade Act of 1974*, 16 VA. J. INT'L L. 719, 730-49 (1976) [hereinafter cited as Leonard & Foster].

16. 19 U.S.C. § 2251(d)(1) (1982). If the Commission issues a negative determination, the President has no power to act under § 201. See 19 U.S.C. § 2252(a) (1982).

17. 19 U.S.C. § 2252(b) (1982). Such relief may include imposition of or an increase in tariffs, quotas and orderly marketing arrangements, 19 U.S.C. § 2253(a) (1982), and may be initially ordered for a period of up to five years, 19 U.S.C. § 2253(h)(1) (1982).

18. 19 U.S.C. § 2252(a)(1)(A) (1982).

19. 19 U.S.C. § 2251(b)(1) (1982). The basic test involves a four-part analysis: (1) what is the affected domestic industry; (2) are imports increasing; (3) is there serious injury or a threat thereof; and (4) are the imports a substantial cause of that injury or threat of injury.

20. 19 U.S.C. § 2251(b)(4) (1982).

important cause of serious injury and must also be a cause equal to or greater than any other cause.²¹ In settling upon this definition, however, Congress made clear that it did not intend the ITC to make its causation determinations with mathematical precision.²²

Three recent escape clause determinations are illustrative of the ITC's interpretation of "substantial cause." In one determination the ITC concluded that increased imports were not a substantial cause of serious injury,²³ while in the other two it reached affirmative causation determinations.²⁴

In *Certain Canned Tuna Fish*,²⁵ the ITC found that imports of canned tuna fish were increasing, and that the domestic industry was suffering serious injury. Nevertheless, the ITC found two causes of injury to be more important than increased imports. First, the ITC found that the domestic industry—particularly the fishing fleet—had overexpanded.²⁶ Second, it found that the principal fishing grounds for tuna had shifted from the Eastern Pacific to the Western Pacific

21. See S. REP. NO. 1298, 93d Cong., 2d Sess. 120-21 (1974); H.R. REP. NO. 571, 93d Cong., 1st Sess. 44, 46-47 (1974); Note, *An Examination of ITC Determinations on Imports: The Basis for "Substantial Injury"*, 6 INT'L TRADE L.J. 242 (1980-81) [hereinafter cited as *An Examination of ITC Determinations*]. See also Note, *Escape Clause Causation After the Auto Case: 1.8 Million Japanese Imports As Less Than a Substantial Cause of Injury*, 16 GEO. WASH. J. INT'L L. & ECON. 299 (1982) [hereinafter cited as *Escape Clause Causation*].

Prior to enactment of the Trade Act of 1974, the test for causation was more rigorous. It involved a determination of whether the increased imports were a "major cause" of injury. "Major" was understood to mean greater than all other factors combined. Section 301(b)(1) of the Trade Expansion Act of 1962, 19 U.S.C. § 1901(b)(1) (1970) (repealed 1975). See *An Examination of ITC Determinations, supra*, at 243; Leonard & Foster, *supra* note 15, at 735.

22. The Senate Finance Committee commented:

Modification of the requirement that increased imports be the major cause of actual or threatened injury is necessary because "the major cause" has been interpreted as being a cause greater than all other causes combined (although there is some indication that in recent years the Commission has moved away from this standard). This has proved in many cases to be an unreasonably difficult standard to meet. Substantial cause is defined in the bill to mean a cause which is important and not less than any other cause. This requires that a dual test be met—increased imports must constitute an important cause and be no less important than any other single cause.

The Committee recognizes that "weighing" causes in a dynamic economy is not always possible. It is not intended that a mathematical test be applied by the Commission. The Commissioners will have to assure themselves that imports represent a substantial cause or threat of injury, and not just one of a multitude of equal causes of threats of injury. It is not intended that the escape clause criteria go from one extreme of excessive rigidity to complete laxity. An industry must be seriously injured or threatened by an absolute increase in imports, and the imports must be deemed to be a substantial cause of the injury before an affirmative determination should be made.

S. REP. NO. 1298, *supra* note 21, at 120-21.

23. *Certain Canned Tuna Fish*, No. TA-201-53, USITC Publication No. 1558 (Aug. 1984).

24. *Carbon and Certain Alloy Steel Products*, No. TA-201-51, USITC Publication No. 1553 (July 1984); *Unwrought Copper*, No. TA-201-52, USITC Publication No. 1549 (July 1984).

25. No. TA-201-53, USITC Publication No. 1558 (Aug. 1984).

26. *Id.* at 16 (views of Commissioners Eckes, Lodwick, and Rohr).

Ocean due to a warming of the Eastern Pacific.²⁷

In reaching this determination, the ITC majority noted the congressional directive which states that in assessing the relative importance of various causes of injury

the Commission . . . take into account all economic factors which it considers relevant, including (but not limited to)—

. . . .
(C) with respect to substantial cause, an increase in imports (either actual or relative to domestic production) and a decline in the proportion of the domestic market supplied by domestic producers.²⁸

The ITC also declined an invitation to aggregate the various economic factors and then compare them with the factor of increased imports.²⁹ They found support for this noncumulation approach within the legislative history of section 201.³⁰ Thus, even though imports had increased, and even though the ITC refused to cumulate economic factors, it was still able to reach a negative causation determination based on two other factors.

In *Carbon and Certain Alloy Steel Products*,³¹ a divided ITC found increased imports of certain steel products to be a substantial cause of injury to the domestic steel industry.³² For two types of steel products, however, decline in demand and intraindustry competition were considered more important causes of injury than increased imports.³³ In their analysis of the causal connection between imports and serious injury, the ITC majority considered a variety of factors, including the upward trend in the volume of imports, the downward trend in domestic consumption and domestic shipments, pricing practices in the relevant markets, and the interrelationship of

27. *Id.* This warming was attributed to the weather system known as "El Nino."

28. 19 U.S.C. § 2251(b)(2)(C) (1982).

29. No. TA-201-53, *supra* note 25, at 15. Cumulation of factors was obviously unnecessary here for those opposing the petition, since the ITC found two independent factors to be more important causes of injury than imports.

30. No. TA-201-53, *supra* note 25. In footnote 44 of their report, the Commission majority noted:

We believe that Congress envisioned that there be a multiple number of economic factors causing injury in most cases. Hence, Congress used the plural "factors." The Senate Committee on Finance also envisioned that there could be a multiple number of factors causing injury. In its report on the bill which became the Trade Act, the Committee stated that the Commission would have to assure itself that imports were a substantial cause of injury "and not one of a multitude of equal causes" and that there could be "a variety of other causes" (other than increased imports) affecting an industry, including "changes in technology or in consumer tastes, domestic competition from substitute products, plant obsolescence, or poor management.

Id. at n. 44.

31. No. TA-201-51, USITC Publication No. 1553 (July 1984).

32. *Id.* at 55 (views of Commissioners Eckes, Lodwick, and Rohr).

33. *Id.* at 50.

these factors.³⁴ For several steel products the majority found that imports consistently undersold the domestic product.³⁵

In response to the contention advanced by a group of Canadian steel producers that long-term decline in demand was a more important cause of injury to the domestic sheet and strip steel industry than imports, the ITC once again declined to aggregate the four factors responsible for this decline.³⁶ These four factors were: (1) the effect of increased importation of automobiles; (2) the decline in steel content of domestically produced automobiles; (3) the decline in domestic automobile sales; and (4) the substitution of aluminum cans for steel cans.³⁷ Finding each of these to be independent causes of injury, the ITC rejected the contention that "these factors should be considered collectively as a single cause of injury."³⁸ Having refused to cumulate factors, the ITC concluded that none of these four factors was a cause of injury more important than or equal to increased imports.

What was determinative for the ITC majority in finding increased steel imports to be a substantial cause of injury was the fact that imports were rising in the face of declining domestic sales. Furthermore, imports were underselling the competing domestic product and domestic prices were being suppressed.³⁹

In the third case, *Unwrought Copper*,⁴⁰ a unanimous ITC found that imports of copper were a substantial cause of serious injury to the domestic copper mining industry. Unlike the two investigations just discussed, a unique element of this case was that the world price for the import under review was established through buying and selling on two exchanges, the London Metal Exchange and the New York Commodity Exchange.⁴¹ Prices were thus determined by the relative levels of world supply and world demand.⁴² Despite a worldwide glut of copper, developing countries were continuing to mine large quantities of it in order to enhance their foreign exchange holdings.⁴³

The ITC found that the depressed state of the domestic copper industry was a direct reflection of the low level of world prices for copper—prices which were passed through to the United States in-

34. *Id.* at 55.

35. *Id.* at 57, 60, 62.

36. *Id.* at 60-61.

37. *Id.*

38. *Id.* at 61.

39. *Id.* at 62, 63.

40. No. TA-201-52, USITC Publication No. 1549 (July 1984).

41. *Id.* at 6.

42. *Id.*

43. *Id.* at 7.

dustry via imports.⁴⁴ In reaching its affirmative causation determination, the ITC discussed three economic factors which it concluded were not more important causes of serious injury than imports: (1) decline in demand; (2) cyclical changes related to the business cycle; and (3) world prices and factors of comparative advantage.⁴⁵

Regarding decline in demand, the ITC found that product substitution and declining intensity of copper use in products containing copper were probably responsible for accelerating the decline of the domestic producers' market share.⁴⁶ Nevertheless, when compared to increased imports, decline in demand was not considered to be a more important cause of injury.⁴⁷

As for cyclical changes, the ITC determined that copper consumption partially reflected general economic trends, so that when general economic conditions were poor, so too was the state of the domestic copper industry.⁴⁸ The ITC did not believe, however, "that Congress intended that a cyclical downturn per se be a cause of injury."⁴⁹ If it were otherwise, the ITC stated, it would invariably reach negative causation determinations whenever an escape clause petition was filed during an economic recession.⁵⁰ Instead, the business cycle had to be considered when examining the impact of imports.⁵¹

In connection with the third factor, world price and comparative advantage, the ITC considered the argument that the domestic industry's plight was mainly attributable to its inability to compete at the world price for copper because it lacked a comparative advantage in copper production.⁵² The ITC rejected out of hand the notion that it had to determine whether a domestic industry has a comparative advantage in a product before making an affirmative recommendation to the President.⁵³ The ITC reasoned that such a requirement would undermine the purpose of section 201, which is to give injured domestic industries breathing room in order to adjust and become competitive once again.⁵⁴

Given these considerations, the ITC concluded that increased imports of copper were a substantial cause of serious injury to the

44. *Id.* at 6.

45. *Id.* at 10-11.

46. *Id.* at 11.

47. *Id.* at 12. The Commission offered no explanation for this conclusion. This indicates the subjective nature of the weighing process.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.* at 13.

53. *Id.* at 15.

54. *Id.*

domestic copper industry.⁵⁵

How do these latest ITC determinations compare with its earlier "substantial cause" findings under section 201? Insofar as the *Certain Canned Tuna Fish* determination is concerned, the ITC has previously cited overproduction as a causation factor more important than imports.⁵⁶ Regarding the *Carbon and Certain Alloy Steel Products* decision, the ITC has on several occasions held that an increase in imports (either actual or relative to domestic production), when coupled with a decline in the proportion of the domestic market supplied by the domestic industry, establishes imports as a substantial cause of injury.⁵⁷ Price undercutting and price suppression have likewise been found determinative.⁵⁸ And in its *Unwrought Copper* determination, the ITC acted consistently with its latest decision in which it has held that a downturn in the business cycle cannot give rise to a negative causation finding.⁵⁹

In short, these three determinations are well within the mainstream of past ITC decisions. They certainly are not aberrational, nor do they indicate that the ITC has suddenly reversed course on the substantial cause standard. These three cases do not represent some novel interpretation of the law. Against this backdrop, the proposed amendment to the "substantial cause" standard will be considered.

55. *Id.* at 16.

56. *See, e.g.*, *Live Cattle and Certain Meat Products*, No. TA-201-25, USITC Publication No. 834 (Sept. 1977). The other factor relied upon in that decision—the change in weather—may be idiosyncratic to this industry, given its apparently high dependence on favorable weather for economic good health.

57. *See, e.g.*, *Clothespins*, No. TA-201-36, USITC Publication No. 933 (Dec. 1978); *Bicycle Tires and Tubes*, No. TA-201-33, USITC Publication No. 910 (Sept. 1978); *Television Receivers*, No. TA-201-19, USITC Publication No. 808 (Mar. 1977). These determinations give clear indication that the Commission takes seriously its statutory mandate in 19 U.S.C. § 2251(b)(2)(C) to consider these factors.

58. *See, e.g.*, *Clothespins*, No. TA-201-36, USITC Publication No. 933 (Dec. 1978); *Sugar*, No. TA-201-16, USITC Publication No. 807 (Mar. 1977); *Ferricyanide and Ferrocyanide Pigments*, No. TA-201-11, USITC Publication No. 767 (Apr. 1976).

59. *See, e.g.*, *Heavyweight Motorcycles*, No. TA-201-47, USITC Publication No. 1342 (Feb. 1983); *Stainless Steel*, No. TA-201-48, USITC Publication No. 1377 (May 1983); *Contra Certain Motor Vehicles and Certain Chassis and Bodies Therefor*, No. TA-201-44, USITC Publication No. 1110 (Dec. 1980). *See generally Escape Clause Causation*, *supra* note 21. As noted by Commissioner Eckes in *Heavyweight Motorcycles*, *supra*, at 14-15:

In reaching this conclusion, I have considered the significance of the present recession in my analysis. Without a doubt the unusual length and severity of the present recession has created unique problems for the domestic motorcycle industry. Without a doubt the rise in joblessness, particularly among blue-collar workers, who constitute the prime market for heavyweight motorcycles, has had a severe impact on the domestic industry. Nonetheless, if the Commission were to analyze the causation question in this way, it would be impossible in many cases for a cyclical industry experiencing serious injury to obtain relief under section 201 during a recession. In my opinion Congress could not have intended for the Commission to interpret the law this way.

For an expression of similar views, see the separate opinion of Commissioner Stern in *Stainless Steel*, *supra*.

IV. Proposed Amendment to the "Substantial Cause" Standard

A flurry of trade bills has been recently introduced in Congress. These bills are designed primarily to tighten and clarify rules of United States domestic international trade law.⁶⁰ One of these bills, introduced in the Senate in April 1984, would delete the word "substantial" from section 201(b)(2)(C).⁶¹ This would make the causation criterion simply one of finding increased imports to be a "cause" of serious injury.

This proposal is both unnecessary and ill-considered. There are several policy considerations which militate in favor of retaining the present causation standard.

First, the "substantial cause" standard has not been a major stumbling block for domestic industries which have petitioned the ITC for escape clause relief. The number of recent negative ITC determinations attributable to inadequate causation findings has been quite few. In fact, through September 1984 only one of five escape clause petitions for 1984 was denied because of a negative "substantial cause" finding.⁶²

Second, the substantial cause standard has been in existence now for ten years. Over this period, some fifty-three escape clause determinations have been issued by the ITC. There exists a developed body of decisional authority from which the Commission may draw in future cases. Moreover, interested parties may assess in advance the likelihood of their success should they decide to either file or oppose an escape clause petition.⁶³

Third, given the difficulty, if not impossibility, of quantifying the degree to which any one factor may be causing harm vis-à-vis

60. See, e.g., S. 2380, H.R. 5081, 98th Cong., 2d Sess. (1984) (steel import legislation); H.R. 3795, 98th Cong., 2d Sess. (1984) (wine equity legislation); H.R. 4784, 98th Cong., 2d Sess. (1984) (Trade Remedies Reform Act of 1984).

61. S. 2524, 98th Cong., 2d Sess. (1984) (Copper and Extractive Industries Fair Competition Act of 1984). The bill would amend § 201(b)(2)(C) of the Trade Act of 1974, 19 U.S.C. § 2251(b)(2)(C) (1982). It would also eliminate the President's discretion to withhold relief, and would make relief mandatory for a minimum of three years following an affirmative ITC determination.

62. In addition to the three § 201 determinations discussed above, the other two decisions in 1984 are Nonrubber Footwear, No. TA-210-50, USITC Publication No. 1545 (July 1984), and Stainless Steel Table Flatware, No. TA-201-49, USITC Publication No. 1536 (June 1984). These latter two determinations were negative based on an absence of serious injury.

In the ten-year period in which § 201 has been in existence, the Commission has issued 27 affirmative § 201 determinations out of a total of 53 cases. Of that total, three determinations were split. See Adams & Dirlam, *supra* note 12, at 578-99, (summary of findings on § 201 decisions in which the authors indicate that in its first nineteen § 201 cases the Commission reached negative determinations in only two cases because of inadequate causation); *An Examination of ITC Determinations*, *supra* note 21 (author surveys the first forty-two escape clause determinations, concluding that in fourteen instances imports were not a substantial cause of serious injury).

63. In one commentator's view, "[t]his is a reasonably clear and understandable standard." Berg, *supra* note 12, at 415.

imports, it is far from clear that a mere "cause" standard will appreciably ease the domestic industry's burden of proof. A change in the causation standard is not, therefore, a panacea for the domestic industry.

Fourth, the focus of the escape clause is relief from *fairly* traded import competition. Thus, while the causation standard in section 201 is one of the strictest in United States trade law, there is at the same time no requirement that a petitioner prove dumping, subsidization, or other unfair trade practices.

Fifth, there is a serious question of whether the proposed change to the causation standard is consistent with our international obligations under GATT. By entering into GATT, the United States committed itself to a world system of gradually freer trade than had existed prior to World War II.⁶⁴ An integral part of that commitment was elimination of quantitative restrictions⁶⁵ and gradual reduction and eventual elimination of tariffs.⁶⁶ Making escape clause relief easier to obtain would subvert the GATT objective of achieving an open world trading system.⁶⁷

A relaxation of section 201's causation standard could result in more frequent imposition of quantitative restrictions and increased tariffs as forms of escape clause relief. Not only would such a result contravene the spirit of GATT, it would also violate the letter of GATT because it would nullify and impair trade concessions inuring to the benefit of adversely affected trading partners.⁶⁸ In such an event, any trading partner so affected by escape clause relief would be legally entitled to retaliate in order to compensate itself for the nullification and impairment of GATT benefits which it had previously negotiated and concluded with the United States.⁶⁹

Such compensation in the form of "substantially equivalent concessions" will naturally mean that an American industry which happens to export products to that foreign country may very well find itself the target (and victim) of retaliation.⁷⁰ This targeting occurs even though that domestic industry was in no way responsible for the section 201 relief. The lesson is simple: when the United States restricts fairly traded imports in one sector of the economy under the

64. See JACKSON, *supra* note 10, at 553.

65. GATT, *supra* note 9, at arts. XI, XIII.

66. See JACKSON, *supra* note 10, at 205-40.

67. Among Congress' purposes in enacting the Trade Agreements Act of 1979, 19 U.S.C. § 1671 (1982), for example, were "to foster the growth and maintenance of an open world trading system" and "to expand opportunities for the commerce of the United States in international trade." Pub. L. No. 96-39, 93 Stat. 146, *codified at* 19 U.S.C. § 2502(2)&(3) (1982).

68. GATT, *supra* note 9, at arts. XIX, XXIII. See JACKSON, *supra* note 10, at 163-89, 564-66.

69. GATT, *supra* note 9, at art. XIX, ¶ 3(a). See JACKSON, *supra* note 10, at 564-66.

70. *Id.*

escape clause, export trade in another unrelated sector will most likely be affected in kind.⁷¹

A final reason for retaining the substantial cause standard related to the one just mentioned has to do with the scope of relief. Unlike a dumping investigation under the Trade Agreements Act of 1979, in which relief is foreign manufacturer specific,⁷² or a subsidy determination under that same Act, in which countervailing duties are imposed on the specific article from a specific country,⁷³ escape clause relief is indiscriminate in scope. Such relief generally affects all imports of the particular product under investigation, regardless of the country, manufacturer, or producer involved.⁷⁴ Because escape clause relief may be so broad in scope, affecting all fairly traded imports of a given article, the higher "substantial cause" standard is entirely justifiable. It strikes a balance between occasionally protecting domestic industries suffering serious injury from competing imports on the one hand and promoting an open world trading system on the other.

V. Conclusion

The potentially harsh consequences to our foreign trading partners if the escape clause causation standard is relaxed militates in favor of retaining the more stringent "substantial cause" standard. The specter of retaliation which will adversely affect sectors of the American economy exporting their products to those trading partners likewise warrants retention of the current standard of causation.

71. The recent dispute between the United States and the European Economic Community over compensatory trade concessions to the EEC in exchange for its agreement to limit the volume of steel exports to the United States under the October 1982 steel arrangement illustrates the possible results. For a background description of those negotiations, see Bureau of National Affairs, 9 U.S. IMPORT WEEKLY 52, 93 (Oct. 12 & 19, 1983).

72. See 19 U.S.C. § 1673 (1982).

73. See 19 U.S.C. § 1671 (1982).

74. 19 U.S.C. § 2253 (1982). Although this section allows for the negotiation of "orderly marketing arrangements" with foreign countries from which the articles are imported, the President has negotiated such arrangements in only two instances. See Footwear, No. TA-201-18, USITC Publication No. 799 (Feb. 1977); Television Receivers, No. TA-201-19, USITC Publication No. 808 (Mar. 1977).

In the recently decided steel escape clause determination, the President stated his intention to negotiate such an arrangement. See *The Shrinking of the Steel Industry*, N. Y. Times, Sept. 23, 1984, § 3, at 4; *Reagan's Sugar-Coated Protectionism*, Washington Post, Sept. 23, 1984, § G, at 1, 7.

