

Section 232 of the Trade Expansion Act of 1962: Industrial Fasteners, Machine Tools and Beyond

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**SECTION 232 OF THE TRADE EXPANSION ACT OF 1962:
INDUSTRIAL FASTENERS, MACHINE TOOLS AND BEYOND**

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I. THE NEED FOR IMPORT CONTROLS AND NATIONAL SECURITY IN
UNITED STATES LAW

The United States includes in its domestic legislation provisions for the restriction of imports in order to protect the national security. The following discussion focuses upon section 232 of the *Trade Expansion Act of 1962*¹ which has recently been the center of attention in the petitions for import relief by the Department of Defense for the industrial fastener industry which produces bolts, nuts and large screws for weapons manufacture and by the National Machine Tool Builders Association (N.M.T.B.A.). Other provisions for embargoing foreign prod-

1. Trade Expansion Act of 1962 §232, 19 U.S.C. §1862 (1964).

ucts include section 5 of the *Trading with the Enemy Act*;² section 203 of the *International Emergency Economic Power Act*;³ and section 620(a) of the *Foreign Assistance Act of 1961*.⁴ Also, there are some 456 federal regulations governing the interrelationship between trade policy and national security. Quite a number of agencies are involved.⁵

While the bulk of the regulations overseen by these agencies only tangentially concern themselves with either trade policy or the national security, the breadth of administrative involvement sets quite a challenge for interagency cooperation. A full study is beyond the scope of the present work, but the interagency cooperation process is touched upon through an analysis of section 232 of the *Trade Expansion Act*.

II. THE NEED FOR IMPORT CONTROL PURSUANT TO SECTION 232 OF THE TRADE EXPANSION ACT

A. Legislative History

Section 232(b) and its legislative history have their genesis in the *Trade Agreements Extension Act of 1955*.⁶ Speaking of the bill, Senator Milliken explained the legislative intent as follows:

When [the President] is informed of the possibility that imports may be threatening that [national] security he . . . would have a careful study made; and if such threat is found to exist he must act to limit imports to a degree removing that threat.⁷

2. *Trading with the Enemy Act*, 50 U.S. App. §5 (1982).

3. *International Emergency Economic Power Act* §203, 50 U.S.C. §1702 (1982).

4. *Foreign Assistance Act of 1961* §620(a), 22 U.S.C. §2371 (1982).

5. Leaving out the agencies of the Department of Commerce and Defense which receive attention in succeeding sections of this paper, the agencies concerned include: Office of the Attorney-General; The Department of Energy: Procurement and Assistance; Management Directorate, Economic Regulatory; Administration, Office of the Secretary, General Energy Regulatory Commission and Conservation and Solar Energy Office; Federal Communications Commission; The Environmental Protection Agency; The Federal Reserve; The Federal Trade Commission; The Interstate Commerce Commission; The Justice Department; The Department of Labor, The Employment and Training Administration and The Employment Standards Administration; Office of Management and Budget; National Aeronautics and Space Administration; The Nuclear Regulatory Commission; The Office of Personnel Management; The Regulatory Information Service Center; The Securities and Exchange Commission; The Department of State; The Internal Revenue Service and Comptroller of the Currency of the Treasury Department; and The Water Resources Council.

LEXIS Search: ALLREG; National W/2 Security W/25 (Trade or Export) performed on October 11, 1985.

6. *Trade Agreements Extension Act of 1955*, Pub. L. No. 86, 69 Stat. 166 (1955).

7. 101 CONG. REC. 5299 (1955).

Senator Milliken believed that when the President could clearly show that imports were potentially harmful to the national security, a protective act of import preemption was mandated. The clause was designed to be preventative rather than curative in nature. Not every American industry, however, is sufficiently focal to the national security to invoke this protection.⁸ In addition, industries which are efficiently organized and managed generally do not need protection in competing with imports.

In order to obtain import protection under this clause, a causal nexus must be established between the national security and the imports to be investigated. The relationship between these essential elements must involve a potential harm flowing from the imports to the national security. The harm need not presently exist. For example, where defense needs are dependent upon the importation of goods by sea, and the sealanes are likely to be interdicted by hostile naval forces, it may be impractical to airlift supplies from overseas. In such a case a potential remediable harm can be identified if the U.S. Government has satisfactory grounds for expecting sealanes to be interdicted for a period longer than it would take to organize and effect an airlift of supplies. Once the alternatives to an airlift are determined to be impractical or likely to be ineffective, avoidance of the harmful effects of an interdiction of defense supplies is called for. Even if an airlift is practicable, import relief may be granted so that when an emergency does occur resources (personnel and material) can be distributed more efficiently.

When the national security clause was enacted in the *Trade Agreements Extension Act of 1955*, it did no more than constrain the President's authority to reduce tariffs, "if the President finds that such reduction would threaten domestic production needed for projected national defense requirements."⁹ A year later, the clause was expanded to allow the President to raise tariffs or impose quotas. At the hearings before the Senate Finance Committee on the 1955 Bill, Senator Humphrey succinctly expressed the intent behind that expansion:

I think we should try to maintain in this country the maximum reasonable practical mobilization base, and that we should protect that base against destruction from outside, to the extent that it is a reasonable mobilization base, . . . for the things we need . . . of vital necessity for us in the event of war.¹⁰

8. BUREAU OF INDUSTRIAL ECONOMICS, U.S. DEPT. OF COMMERCE, *STEEL SUPPLY AND DEMAND IN THE 1980s*, No. 43 (1982).

9. Codified at 19 U.S.C. §1862(a)(1964).

10. *Trade Agreements Extension: Hearings on H.R. 1 Before the Senate Finance*

When Congress enacted the national security clause as part of the 1955 trade liberalization laws, it did not consider the protection of domestic industries which are essential to the national security to be in any way inconsistent with its policy of trade liberalization. Instead, Congress saw the legislation as a means of actively pursuing both policies. The Secretary of Commerce observed that "as our [post-World War II] grant aid to the rest of the world is reduced and ultimately eliminated, we must increase our imports unless we are willing to see our exports decrease" and concluded that "we should continue the trade agreements legislation [for tariff reductions] for the same reason it was started in the first place, as an import/export-promotion measure."¹¹ The Secretary of Defense supported the bill on the ground that an expansion of exports would expand domestic production capacity and thereby "increase and improve the productive capacity available in this country . . . to meet the needs of an all-out emergency."¹²

In the *Trade Agreements Extensions Act of 1958*,¹³ Congress strengthened the national security clause in three ways. First, Congress broadened its language so that it applied not only to an imported "article," but also to "its derivatives," and to permit relief where either the "quantities" or the "circumstances" of imports threaten to impair the national security. Secondly, Congress directed the Executive Branch to consider certain factors when determining whether imports threaten to impair the national security. These factors broadened the scope of the clause by employing a definition of national security that expanded upon the narrower term, "national defense requirements," which was used in the 1955 provision. These factors are now embodied in subsection (c) of section 232. Thirdly, Congress granted private parties the right to petition for relief under the clause and required the Executive Branch to publish a report in response to each petition.¹⁴ Senator Byrd urged adoption of these amendments because they "further strengthened [the national security clause] so that sound results may be expected from it."¹⁵ Congress thus reaffirmed its intention that the national security clause should play a role in ensuring that *both* the nation's defense and trade liberalization goals are pursued simultaneously.

Comm., 84th Cong., 1st Sess. 85-86 (1955).

11. *Trade Agreements Extension: Hearings on H.R. 1 Before the House Comm. on Ways and Means*, 84th Cong., 1st Sess. 155 (1955) (statement of Sinclair Weeks)[hereinafter cited as *Trade Agreements Hearings*].

12. *Id.* at 188 (statement of Charles E. Wilson, Secretary of Defense).

13. *Trade Agreements Extensions Act of 1958*, 19 U.S.C. §§1351-1367 (1982).

14. 19 U.S.C. §1862(b),(d). *Cf.* 15 C.F.R. §§.359.3-10 (1982).

15. 104 CONG. REC. 13,919 (1958).

B. *Deterrence, Security and Free Trade in the 1980s*

Prospects for improved deterrence and international security are important to an investigation under the national security clause. To the U.S.S.R., as well as the United States, a strong industrial base which will support prompt mobilization and sustained military capacity has substantial value as a tool for diplomacy and as a deterrent to war.¹⁶ As conventional wisdom holds, so long as each super-power's defense planners perceive the other as having the capacity to match any attack, they will be loathe to recommend engaging the other in battle. Although the content of defense and trade policies has evolved since the 1950s, the same national security clause has continued to provide the legal crossroads for the two policies. It is not clear, however, that this crossroads connects necessarily divergent policies. Nor is the national security clause inconsistent with the view that since World War II, the world's prosperity, and thus world peace, are likely to be strengthened by promoting nations' different comparative advantages through free international trade. Far from being an anomaly, the national security clause recognizes the limitations that have always attached to that faith. War can destroy international trade and the prosperity such trade may bring. In maintaining the requisite national capacity to deter war, a nation's objective is security and defense, not prosperity. If the United States did not face the threat of war, and if the United States and its allies were not threatened by the massively armed Soviet Union, there would not be justification for the clause.

Alternatively, as the experience of the 1930s showed, peace and security of all nations are enhanced by an open trading system. To perceive peace and free trade as a trade-off obfuscates the contribution which free trade makes to world peace. To assume the worst and adopt beggar-thy-neighbor policies contributes to a self-fulfilling prophecy. Nevertheless, international relations between nations of diverse political, social and economic structures are full of frictions. Defense and trade cooperation treaties and accords seek to smooth out these frictions while recognizing that policies of self-interest do persist and have to be accommodated within the international system.

16. Certainly Soviet military experts recognize the strategic importance of the strength of the United States and its industrial capability. See SOVIET MILITARY STRATEGY 108-109, 114 (Sokolovskij ed. H.F. Scott trans. 3d ed. 1968); Ogarkov, *Na strazhe mirnogo truda* [On guard for peaceful labor], KOMMUNIST, No. 10, July 1981, at 82-83; Chicherin, 5 *Mobilizatsija* [Mobilization], 5 SOVETSKAJA VOENNAIA ENTSIKLOPEDIJA [Soviet military encyclopedia] 342-44 (1978); Belokonov, *Mobilizatsionnye vozmozhnosti gusudarstva* [Mobilization potential of states], 5 SOVETSKAJA VOENNAIA ENTSIKLOPEDIJA [Soviet military encyclopedia] 340-41 (1978).

Defense cooperation treaties may be adversely affected by barriers to trade in items of defense supply. To the extent that the United States makes valuable use of product innovations developed in allied nations, trade barriers could well be counterproductive by reducing the flow into the United States of such products. The imposition of trade barriers may violate the Memoranda of Understanding between the U. S. Secretary of Defense and various Western European defense ministers. These memoranda concern reciprocal openness of the United States and various Western European governments, when procuring military items, to suppliers from the other signatory nations. Still, they do not limit in any way the signatories' power to grant trade relief, especially on the grounds of national security. Specifically, their purpose is:

to make the most rational use of [the signatories'] respective industrial, economic and technological resources, to achieve the greatest attainable military capability at the lowest possible cost, and to achieve greater standardization and interoperability of their weapons systems.¹⁷

These memoranda are directed primarily at weapons systems and their components. Trade barriers in components are likely to hamper the production of the final product, and thus, defense supply can be inhibited.

Finally, protection policies lead to trade diversion as the products formerly exported to the United States are shipped instead to third markets. The result is that prices are lowered in those markets, and American exports to those third markets can be displaced. Consequently, the price of protection needs to be carefully measured both in economic and security terms.

III. G.A.T.T. IMPLICATIONS OF SECTION 232

Section 232 does admit argument to the effect that a nation's right to act in self-protection can take priority over its commitment to removing artificial trade barriers or maintaining comity and friendly relations with other nations. Self-protection is a legitimate excuse for action which would otherwise be illegal. Still, even if excusable under article XXI of the G.A.T.T., which excuses certain trade sanctions for national security reasons, section 232 relief may "nullify or impair" a

17. U.S.A.-U.K. Memorandum of Understanding, Sept. 24, 1975 at 1, 32 C.F.R. §6-1406.2.

nation's G.A.T.T. benefits.¹⁸ The United States could be required to pay compensation or suffer the opprobrium of G.A.T.T.-authorized retaliation for erecting trade barriers pursuant to section 232 because a restriction on imports for security reasons is likely to involve a breach of the obligation to accord most favored nation treatment.¹⁹ It is incorrect to suggest, therefore, that implementation of protection pursuant to section 232 "is not vulnerable to challenge" under the G.A.T.T.^{19.1} The domestic law of the United States has taken the G.A.T.T. factor into account without giving much weight to the consideration of international reaction to import protection under section 232.²⁰

IV. DEFINITIONAL ISSUES FOR A SECTION 232 INVESTIGATION

The criteria of section 232 are open-ended and broadly defined. The most elusive definition is the definition of "national security." Before a threat can be identified and evaluated, the object of the threat, being the national security, needs to be clearly defined. Only when the object can be described with some precision can the iterative process of evaluating the threat in different defense scenarios be kept to manageable levels. U.S. national security requirements have been broken into three categories by the Department of Commerce, namely, "direct defense," (*i.e.*, weapons production) "indirect defense" (*i.e.*, supply of inputs to the weapons production process) and "civilian."²¹ Two key inputs to the analysis are mobilization planning and the National Security Directive current at the time of the investigation. They set the parameters of the "national security" and guide the identification of mobilization requirements.²² Within the Directive is a scenario for National Defense Stockpile Planning. The stockpile is that part of the mobilization supply which needs to be produced *before* the emergency arises.

18. The General Agreement on Tariffs and Trade, opened for signature Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 194. The current version of GATT is contained in IV GENERAL AGREEMENT ON TARIFFS AND TRADE, BASIC INSTRUMENTS AND SELECTED DOCUMENTS; J. Jackson, *World Trade and the Law of G.A.T.T.* 748 (1969). *Contra*, U.S. Int'l Trade Commission, *Foreign Industrial Targeting and Its Effects on U.S. Industries, Phase I: Japan*, U.S.I.T.C. PUB. NO. 1437 at 2 (Oct. 1983).

19. See G.A.T.T., *supra* note 18, at art. I (most favored nation treatment).

19.1 See Knoll, *The Impact of Security Concerns Upon International Economic Law*, 11 SYR. J. INT'L L. COMM., 567, 581-610 (1984).

20. U. S. Dep't of Commerce, *The Effect of Imports of Nuts, Bolts and Large Screws on the National Security* 57 (Feb. 1983) [hereinafter cited as Department of Commerce]. But note that no domestic legal authority to pay compensation exists. This source is available from the author upon request.

21. *Id.* at ii.

22. *Id.*

Preparation for an emergency involves both a stockpile of supplies which can be utilized in the initial stages of meeting the emergency and a productive capacity capable of generating further supplies necessary to overcome the emergency.

The scenario in the Directive forms the basis for determining defense supply needs as regards particular industries. This is the standard that reliable emergency supplies must meet regardless of whether the supplies are domestic or imported. Based on that scenario, the Department of Defense (D.O.D.) provides the Federal Emergency Management Agency (F.E.M.A.) with anticipated defense mobilization expenditure levels. From those levels, the F.E.M.A. derives the expected direct and indirect defense production requirements of certain products and also estimates civilian demand as constrained by the particular emergency scenario. The Department of Commerce must fit these product requirements into an analytical model and calculate the ability of domestic and foreign producers to continue to provide supplies unabated during an emergency either with or without protection pursuant to section 232.

To summarize the process so far, pursuant to the emergency scenario provided by the National Security Directive, the Department of Defense decides what funds it expects to make available for a mobilization and the F.E.M.A. allocates these expected monies to the three categories of direct defense, indirect defense and civilian demand. The F.E.M.A. also defines standards for various product categories which must be met to achieve the desired mobilization preparedness. Thus, the demand side of the mobilization market is a function of estimates made by the D.O.D. and the F.E.M.A. The supply side is analyzed by the Department of Commerce which, in the course of a section 232 investigation, must determine whether protection from imports could help reach a level of supply sufficient to meet the demands set by the D.O.D. and the F.E.M.A.

The involvement of different federal agencies complicates coordination of this exercise. By virtue of the uncertainties inherent in any predictive analysis, disagreements will most likely arise with respect to the assumptions built into the scenarios selected. Crisis modeling is a task in which the potential for error is large and the consequences of error can be devastating.

For example, the domestic industry and overseas suppliers may face cyclical fluctuations in civilian consumer demand. When the economy is good or improving, demand will be high or rising and the industry economically healthy. When demand declines, producers either modify their operations, consolidate with other companies or go out of business. It is, obviously, not easy to calculate at which point in the business cycle an emergency will arise. It is very conceivable that do-

mestic producers and overseas suppliers could be facing different levels of local demand and be at different stages of the business cycle when an emergency does arise.

In addition, the domestic and overseas industries may specialize in different segments of the same market. For example, import penetration in the American industrial fastener market²³ has led to a situation where foreign firms are supplying smaller diameter standard fasteners while American companies are providing more specialized, custom tailored products at lower volume, but on a higher profit margin.²⁴ These market segments may be at different stages of the business cycle when a crisis arises.

Import penetration coupled with an economic downturn are relevant, but not sufficient elements, for an affirmative determination in a section 232 petition. International repercussions must be taken into account, as must the domestic effects of protection.²⁵

The advantage to the protected industry must be weighed against the costs to purchasers of the industry's products in having to buy the higher priced local product. In addition, the Department of Commerce must consider that the misallocation of resources to a relatively inefficient industry may cause that industry's profitability to depend upon the protection granted. Since domestic and foreign suppliers can be at different stages of the business cycle at the time of crisis, it may well be that the foreign suppliers are, at that time, better geared to provide the necessary emergency supplies.

So, not only may protection result in a misallocation of resources generally, thereby encouraging inefficiency, but once imports are excluded or restricted, the burden lies squarely on the shoulders of domestic producers to be prepared to meet emergency levels of demand no matter what stage of the business cycle the domestic industry is then facing.

Protection may itself slow the pace of innovation and reduce the U.S.'s technological advantage in defense preparedness,²⁶ while the very structure of an industry may be such that subsidization and promotion of innovation will generate a restoration of its economic health in the absence of protection from import competition.

Relief under the national security clause is not premised upon unfair trade practices as in the case of antidumping or countervailing legislation. Moreover, because imports hardly ever dominate the U.S.

23. For a more detailed discussion of the American industrial fastener market, see *infra* notes 38-66 and accompanying text.

24. *Id.* at iii *passim*.

25. See, e.g., Glass-Lined Chemical Processing Equipment, 47 Fed. Reg. 11,754.

26. *The Machine Tool War*, N.Y. Times, Apr. 9, 1984 at A18, col. 1.

market for a commodity, imports will seldom cause a depression in the business cycle, but they can aggravate a depression or impair a recovery. To this extent at least, it is possible to find that imports threaten to impair the national security. In such circumstances, an affirmative determination can legitimately be made under section 232.

Another factor to be introduced into and defined for a planning model is the ability of producers, both at home and abroad, to surge production. After all, an emergency is inherently unpredictable and must be met with maximum expedition. If skilled labor and adequate plant facilities are available, a surge is possible.

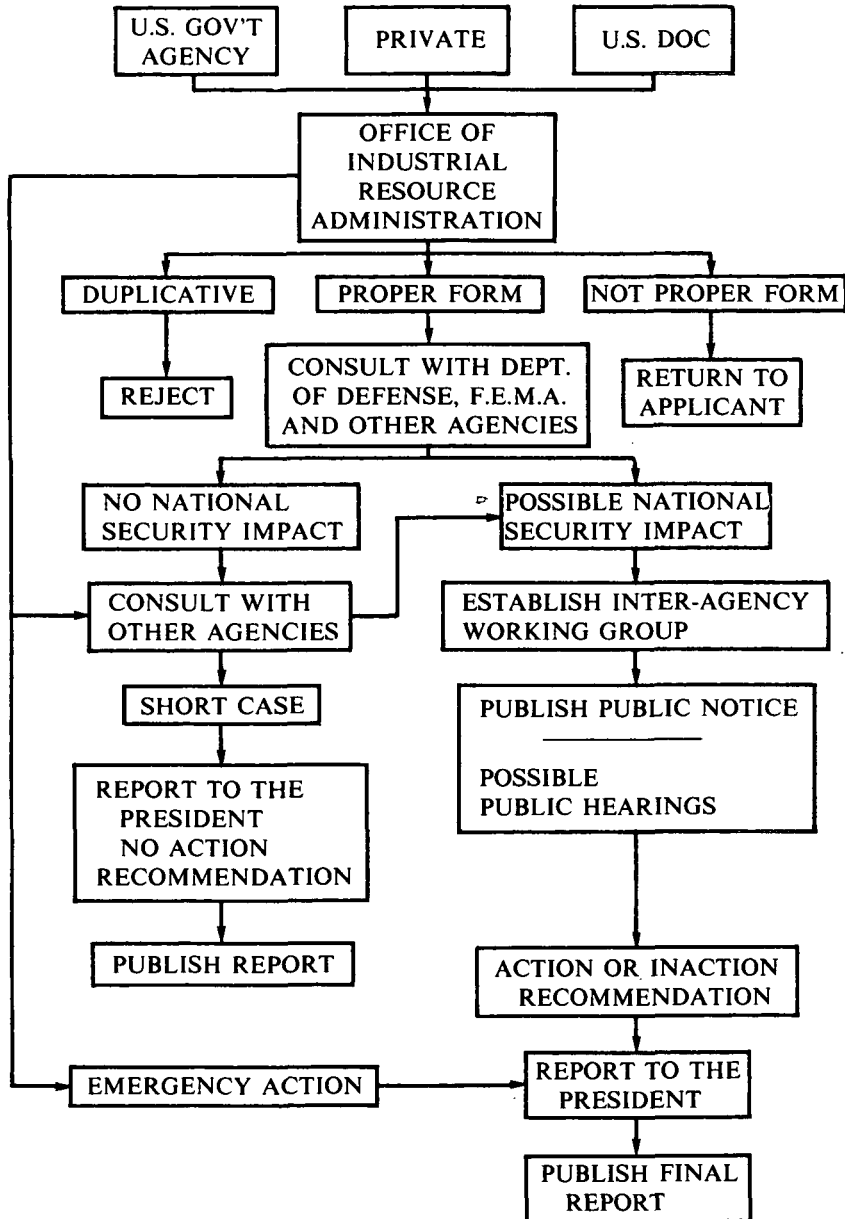
As the foregoing discussion is designed to suggest, by altering the definitions of "national security," "reliable imports" and "domestic capacity" with or without a surge component, the projected levels of supply and demand for any or all products in an emergency can be manipulated to support arguments both for and against import protection pursuant to section 232. The large number of indeterminate variables makes any section 232 investigation an exceedingly difficult exercise.

V. THE PROCESS OF A SECTION 232 INVESTIGATION

The progress of a section 232 investigation is depicted in the following flowchart:²⁷

27. Department of Commerce, *supra* note 20. As this flow chart indicates, the first step in an investigation is a format check. Then, various agencies are consulted. "Short cases" are those that are found to be not worthy of investigation, *i.e.*, where there is no significant impact on national security. With "emergency cases" and "short cases," the consultation procedure is by-passed. And in practice, emergency cases generally proceed under the International Economic Emergency Powers Act rather than under section 232.

U.S. DEPARTMENT OF COMMERCE
Industrial Resource Administration—Resource Assessment Division
SECTION 232—ACTION FLOW-CHART REQUEST FOR AN
INVESTIGATION BY:



The Department of Commerce has an open-ended discretion to decide whether to hold public hearings in the course of a section 232 investigation.²⁸ Any public hearings that are held do not involve formal pleadings and are not subject to the rules of evidence.²⁹ Materials submitted which are classified as sensitive by the government or regarded as confidential by the submitting party are not available for public inspection.³⁰ The Department is obliged, however, to consult with other departments, especially the Department of Defense.³¹

Taking as a case study the investigation of the industrial fastener industry, the Department of Commerce: Bureau of Industrial Economics consulted the Departments of Defense, State, Labor and the Treasury as well as the F.E.M.A., the United States Trade Representative (U.S.T.R.) and the Council of Economic Advisers. Submissions were received from the Industrial Fasteners Institute (I.F.I.), the Fasteners Institute of Japan and Japan Machinery Exporters Association, the American Association of Exporters and Importers: Industrial Fasteners Group, Allied International-American Eagle Trading Corporation, an exporter and importer of industrial fasteners, and Daniel Industries, Incorporated: Bolt and Nut Division, a domestic producer. Of these, the first and last submissions argued in favor of protection. The others argued against protection, primarily on the ground that the upturn in the business cycle, prevailing in 1982 at the time of the investigation, would bring the U.S. industry back on an even keel without protection.

In the machine tool industry investigation a year later, a similar breakdown occurred in the type of submissions received. Responses to the petition by the National Machine Tool Builders Association (N.M.T.B.A.) were received from the Machine Tools Importers' Association of America (M.T.I.A.A.), the German Machine Tool Builders' Association and a joint submission from the Japan Machine Tool Builders' Association, the Japan Metal Forming Machine Builders' Association and the Japan Machinery Exporters' Association. Even the Commission of the European Communities filed comments.

As these case studies suggest, the number and variety of inputs involved in a typical section 232 investigation require an enormous amount of time and expense by the parties, as well as the relevant agencies and departments. Consequently, the applicant U.S. producers, U.S. importers, foreign producers and the various interested government parties generally give a section 232 petition the attention it de-

28. 15 C.F.R. § 359.7(a) (1982).

29. 15 C.F.R. § 359.8(b)(4)(1982).

30. 15 C.F.R. § 359.7(a) (1982).

31. 15 C.F.R. § 359.7(d)(1982).

serves. Yet, these investigations are so slow and cumbersome that one may question whether it is all worthwhile in the end.

VI. SUBSTANTIVE CRITERIA TO BE ADDRESSED IN A SECTION 232 INVESTIGATION

The substantive criteria to be taken into account by both the Secretary of Commerce and the President are illustrated by, but not limited to:

- (1) the domestic production needed for projected national defense requirements;
- (2) the domestic capacity available to fulfill these production requirements;
- (3) existing and anticipated availabilities of human resources, products, raw materials and other supplies and services essential to fulfilling the projected production requirements;
- (4) the needs of defense suppliers to grow and expand the reserves of resources available for defense supply; and
- (5) the impact upon these industries and the U.S. national capacity on the quantity, availability and character of the imports [under investigation] and, in particular,
 - (i) the impact upon the economic welfare of individual domestic industries;
 - (ii) any substantial unemployment;
 - (iii) the decrease in government revenues;
 - (iv) decrease in the pool of human skills available to be tapped;
 - (v) the weakening in domestic industries' ability to raise financing; and
 - (vi) the displacement of domestic products' market share by excessive imports.³²

Finally, both the Secretary of Commerce and the President are obliged to "recognize the close relation of the economic welfare of the Nation to our national security."³³

In April of 1982, the Office of Industrial Resource Administration confirmed that "[t]he contingency of mobilization will be an important factor in the consideration of all the criteria listed in [the regulations

32. See generally 15 C.F.R. § 232.

33. Trade Expansion Act of 1962, *supra* note 1, at §1862(c); see also 15 C.F.R. § 359.4 (1982).

promulgated under the national security clause]."³⁴

The most recent application of these criteria was in the investigations concerning the industrial fastener industry and in the petition and comments concerning the machine tool industry. It is instructive to observe not only the values attached to these criteria in the course of the investigations, but also the detailed coverage in the N.M.T.B.A. petition of the perceived weaknesses in the unsuccessful section 232 action by the industrial fastener industry.

A. A Profile of the Industries Which Have Petitioned Under Section 232 (1955-1981)

Between 1955 and 1981, a large number of American industries applied for and were denied protection on national security grounds. The products for which protection has been sought are (in chronological order):

Fluorspar	Wooden Boats
Cordage	Fine Mesh Wire Cloth
Stencil Silk	Dental Burs
Jewelled Watches	Heavy Electric Power Equipment
Clinical Fever Thermometers	Cobalt
Analytical Balances	Tungsten
Photograph Shutters	Fluorspar (again)
Pin Lever Clocks	Steam Turbine Generators
Watches and Timers	Wool Knit Gloves
Wool Textiles	Surplus Military Rifles
Wool Felt	Transistors and Related Products
	All Textiles

Indeed, in 1955, representatives of the petroleum, fluorspar and lead and zinc industries sought barnacles³⁵ on the legislation to provide them with specific legislative protection.³⁶

Positive findings have been made by five Presidents that oil imports threaten to impair the national security.³⁷ Oil is the only industry

34. Office of Industrial Resource Administration, U. S. Dep't. of Commerce, EFFECT OF IMPORTED ARTICLES ON THE NATIONAL SECURITY, 47 Fed. Reg. 14,692-93 (1982) [hereinafter cited as Office of Industrial Resource Administration] (original text page numbers cited hereinafter).

35. Industry specific protections are commonly called barnacles.

36. H.R. Rep. No. 50, 84th Cong., 1st Sess. 44 (1955).

37. President Eisenhower, Proclamation No. 3279, 24 Fed. Reg. 1781 (1959); President Nixon, Proclamation No. 4210, 38 Fed. Reg. 9645 (1973); President Ford, Proclamation No. 4341, 40 Fed. Reg. 3964 (1975); President Carter, Proclamation No. 4744, 45 Fed. Reg. 22,864 (1980); President Reagan, Proclamation No. 4907, 47 Fed.

to have thus far received protection pursuant to section 232.

B. *The Case of the Industrial Fastener Industry*

The industrial fastener industry produces the bolts, nuts and large screws required by critical weapons systems, support items and industrial production facilities.³⁸ In 1977, the Federal Preparedness Agency (now the F.E.M.A.) concluded that the domestic supply of metal fasteners could not meet national security requirements in an emergency.³⁹ Its study was conducted at the request of the D.O.D. The report was transmitted to the Treasury Department because, prior to the 1979 amendments to the *Trade Expansion Act*, section 232 investigations were conducted by the Secretary of the Treasury. W. Michael Blumenthal, the then Treasury Secretary, doubted that the use of a World War II type scenario was an appropriate basis for determining the U.S.'s emergency needs and suggested that separate analyses of the markets for "standards" and "specials" (custom made fasteners) ought to have been included. He recommended no action and the investigation was terminated.⁴⁰

On February 11, 1982, Secretary of Defense Weinberger requested a new section 232 investigation.⁴¹ Secretary Weinberger opined that the situation had deteriorated and warned that "we must not be placed in a sole source foreign dependency situation for mobilization production needs."⁴² Investigations had also been conducted pursuant to the escape clause in section 201(b)(1) of the *Trade Act of 1974*,⁴³ and for countervailing duties pursuant to section 303 of the *Tariff Act of 1930*.⁴⁴

In June, 1975, the International Trade Commission (I.T.C.) reached a negative determination against producers who had brought an escape clause action, but in June, 1977, with the support of organized labor in the industry,⁴⁵ another action was commenced. In that

Reg. 10,607 (1982).

38. Letter from Secretary of Defense Caspar Weinberger to Secretary of Commerce Malcolm Baldrige, Jr. (Jan. 19, 1982) [hereinafter cited as Weinberger Letter]. This source is available from the author upon request.

39. Report of F.P.A., Addendum (April, 1978), Table A-4. This source is available from the author upon request.

40. SECRETARY OF THE TREASURY, REPORT TO THE PRESIDENT, (Oct. 18, 1978).

41. 47 Fed. Reg. 13,546 (1982).

42. Weinberger Letter, *supra* note 38.

43. Trade Act of 1974, 19 U.S.C. §§ 2101-2487 (1982).

44. Tariff Act of 1930 §303, 46 Stat. 590, *as amended* 19 U.S.C. § 1303 (1958).

45. The United Steelworkers of America and the International Association of Machinists and Aerospace Workers are the unions prevalent in the industry.

new action, the I.T.C. recommended relief in the form of higher tariffs, but the President determined that the recommended relief was not in the nation's economic interest. Therefore, he ordered an expedited section 232 investigation. After the request for relief received the support of the House Committee on Ways and Means, and the I.T.C. renewed its affirmative determination, the President increased the tariffs on certain industrial fasteners by a fifteen percent *ad valorem* for a three year period commencing in January, 1979.⁴⁶ The tariff hike was not renewed at the end of that period.⁴⁷

The section 201 and section 232 actions cannot be seen as simultaneous yet unrelated. They are grounded in the same facts and are designed to achieve the same protection from imports. Still, their legal bases are different. The section 232 investigation is concerned primarily with potential effects on the national security rather than, as under section 201, current, as well as potential, effects on the particular industry. Yet even in a section 232 investigation, the profitability, productivity and overall economic structure of the industry are relevant in determining whether government action is required to repair any deficiency in the capacity of the industry to meet emergency levels of demand. Unlike a section 201 investigation, it is not the effect of the presence of imports in the marketplace which is of concern, but rather their potential unavailability in an emergency.

In the section 232 investigation of imports of nuts, bolts and large screws, each of the factors enumerated in section 232(b) was investigated,⁴⁸ but three additional matters of specific concern to the industrial fastener industry were also taken into account. First, a distinction was made between "standards" and "specials." Secretary Blumenthal had raised this distinction as a ground for recommending no protection after the previous section 232 investigation concerning this industry. Second, it was noted that the industry presently imported its steel inputs, but that during a mobilization the U.S. steel industry could meet the total demand. Third, the ability of U.S. machine tool manufacturers to supply the tools needed by the industrial fastener industry was noted.⁴⁹ This last point is ironic because the very next industry to seek protection under section 232 was the machine tool industry with which the industrial fastener industry was so interdependent.

In the industrial fasteners investigation, the F.E.M.A. calculated the direct defense and defense supply requirements for fasteners based

46. Department of Commerce, *supra* note 20, at Appendix E.

47. *Id.*

48. *See supra* note 32 and accompanying text.

49. Department of Commerce, *supra* note 20, at 3-4.

on mobilization expenditure levels provided by the D.O.D. Projections for an emergency were based on a classified document entitled "Strategic and Critical Material Stockpile"⁵⁰ and the 1972 Use-and-Make Tables for the U.S. economy prepared by the Department of Commerce's Bureau of Economic Analysis. The F.E.M.A.'s estimations called for a seriously restricted level of civilian consumption. The Bureau of Industrial Economics updated the economic data to June 30, 1982. It also established an interagency working group for which the following inputs were developed:

- (1) The D.O.D. provided mobilization expenditure data and information on the machine tool reserve and machine tool trigger order programs.
- (2) The F.E.M.A. analyzed final demand expenditure level data and prepared the estimated mobilization requirements for nuts, bolts and large screws.
- (3) The Department of State analyzed the trade and foreign policy implications of potential import actions. It also reviewed the reliability of foreign industrial fastener suppliers during the mobilization.
- (4) The Department of Labor identified trends in the number of production workers in the fastener industry, their training needs, job and skill proficiencies, and wage patterns and supplied details of the availability of workers with special skills from the related industries. In addition, the Department identified the impact imports have had on employment.
- (5) The Treasury Department assessed the effects on the industry of the President's Economic Recovery Program and other tax incentives.
- (6) The United States Trade Representative (U.S.T.R.) identified various trade actions which have had and will have a bearing on this industry.
- (7) The Council of Economic Advisers reported on the costs and benefits of import restrictions on industrial fasteners and the impact on the economy of a significant shift from overseas to domestic supplies of fasteners.⁵¹

These inputs were then used to extrapolate forward both demand and supply in the industrial fastener market to the anticipated emergency. The conclusion was that, during mobilization years, domestic production capacity could meet defense requirements but not civilian needs

50. N.S.D. Memorandum 337 of Aug. 23, 1976, referred to in Department of Commerce, *supra* note 20, at 5.

51. Department of Commerce, *supra* note 20, at 6.

too.⁵²

Another factor considered in the investigation was the status of the skilled labor pool in the industry. Generally, the industrial fastener industry adjusts to the business cycle by hoarding skilled labor. The necessary skills take three to eight years to attain. The time between economic upturns being generally shorter, it makes sense to keep skilled personnel employed during a downturn rather than to train new people when the economy recuperates.⁵³ Although in its investigation the Department of Commerce found the skilled labor pool to be declining in numbers and the available idle machinery to be over fifteen years old,⁵⁴ the Department found that protection was not necessary to meet national security needs.⁵⁵ Imports from Asia were found to be reliable and sufficient in quantity to fill the shortfall in local production resulting from the declining fortunes of the U.S. industry.

Interestingly, only imports from Europe were considered to be of doubtful reliability during an emergency. The Bureau considered Japanese imports, which constitute the bulk of U.S. imports, to be "geographically reliable."⁵⁶ Indeed, no more than twenty percent of shipping was expected to be lost in the model utilized.⁵⁷ The later N.M.T.B.A. petition strongly argued that a scenario which considered imports from Asia to be reliable in an emergency was unrealistic.⁵⁸ The petition relied on the Secretary of Defense's Annual Report to Congress for 1984 which suggested that "[t]he Soviet Union's greatly improved fleet gives it a capacity to conduct an interdiction campaign against our shipping and naval forces in the Atlantic, Indian Ocean, and Northern Pacific."⁵⁹ In addition, the Bureau treated the declining capacity, falling employment levels and obsolete machinery as symptoms of a cyclical downturn only. A surge in domestic production was built into the emergency projections.

The danger of the Bureau's decision and projections is that if an enemy such as the U.S.S.R. were to realize the extent of American reliance on machine tool imports, production facilities in Asia and Western Europe could become subjects of attack. Japan itself is not substantially militarized⁶⁰ and has no plans to undertake major rearma-

52. *Id.* at 59.

53. *Id.*

54. *Id.* at iv.

55. *See* note 88 and accompanying text.

56. Department of Commerce, *supra* note 20, at 62.

57. *Id.*

58. *Id.* at 159.

59. Secretary of Defense, Annual Report to Congress (1984).

60. *See, e.g., Kamikaze Pacifists*, *ECONOMIST*, Dec. 18, 1982, at 12.

ment.⁶¹ In a war between the Soviet Union and the N.A.T.O. nations, therefore, the Soviets could intimidate Japan with the threat of hostile military action, while at the same time offering to forebear from attacking it on the condition that Japan not use its industrial might to aid the West. Because Japan has a relatively small defense force, it might be tempted to accept such an offer in order to protect itself from attack.

Indeed, in 1982, in the section 232 Investigation of Glass-Lined Chemical Processing Equipment, the Commerce Department concluded that: "under a full mobilization condition shipping losses are estimated to be extensive."⁶² Yet, this conclusion was not reached in the industrial fasteners case. In fact, the possibility was not even seriously considered. The complete failure to consider disruptions of imports as a result of factors other than interdiction on the high seas is a fundamental defect in the fastener report's approach to import reliability. These factors are the destruction of ports, airports, internal transportation facilities and factories by aerial attack or sabotage, the destruction and loss of access to energy supplies and the use of military force for intimidation.

Notwithstanding the strong friendship between Japan and the United States, Japan is seriously underdefended relative to the military significance of its industrial might. The possible results of such military weakness are that the Japanese industrial base could be seriously damaged at the outset of a major war, that the Persian Gulf and Indonesian sources of Japanese oil supplies could be destroyed, that ships of such supplies could be interdicted, or that Japan could be intimidated into a position in which it would be forced to deny its militarily significant products to the West and provide them instead to the East. In spite of these dangers, the I.T.C. anticipated that industrial fastener imports from Asia would still be reliable during an emergency. Thus, the imports were found to present no threat to the national security.⁶³

61. The Washington Post, Dec. 30, 1982, at 15 (quoting senior Japanese Defense analyst, Tomohisa Sakanaka and other senior government officials); The Washington Times, Mar. 2, 1982, at 4C (interview with Hon. Yoshio Okawara). See generally, Defense of Japan: White Paper of the Defense Agency of the Japanese Government (1980) (translated into English by the Japan Times Ltd.).

62. 47 Fed. Reg. 11,746, 11,953 (1982).

63. *Id.* In any case, protection may induce a few foreign producers to establish plants in the United States. This would only occur if such producers viewed the protection as a long-term phenomenon or if they expected that protection barriers, though temporary, would recur. Such plants would be easier to safeguard in an emergency by virtue of being on American soil. Not all the foreign producers shut out of the American market by protection would establish plants in the United States, however, even assuming that they would continue to be allowed to do so and even though the United

The analysis of the Council of Economic Advisers appended to the Department of Commerce report suggested that restriction of imports would actually be detrimental to the national security.⁶⁴ Drawing upon the fact that "in no period of its history, wartime or peacetime, has the United States ever experienced a prolonged fastener shortage,"⁶⁵ the Council doubted that there would indeed be a shortfall in production during an emergency and added:

To the extent that fastener imports are excluded, domestic producers are encouraged to switch production away from specials used by the defense industry and into the standards used by the non-defense sectors. This might weaken U.S. ability to increase arms production quickly in time of national emergency. There is no justification for import restriction or tariff relief.⁶⁶

To the extent that demand for a particular "special" surges during an emergency, equipment is reset to mass produce that special and the special effectively becomes a "standard." Yet, whether "special" or "standard," the overall production capacity of the U.S. industry remains limited. The Council of Economic Advisers appears to have given little weight to this limit. The limit was considered malleable. Yet, whether one accepts the Council's analysis or the analysis of the Department of Commerce, protection from imports pursuant to section 232 would not have been a positive contribution to emergency defense and defense supply. As is argued above, both analyses were defective on critical points.

C. *The Case of the Machine Tool Industry*

The focal nature of machine tools for defense preparedness, unlike that for many of the earlier national security clause petitions, is beyond

States is the largest single market in the world. Instead, many foreign suppliers would seek to have their governments negotiate a lowering of the protection barriers. Their rationale would be that the barriers would effectively separate the largest pool of demand from the most efficient producers leading to a misallocation of international resources.

64. Department of Commerce, *supra* note 20, at Appendix I.

65. *Id.* at 3. The Council concluded that the demand for fasteners is price inelastic. That is, because fasteners are a relatively minor input to the consumer durables for which they are primarily used and an essential component part, quite a large price increase for fasteners would have to occur before the demand for them would fall. The Council also concluded that the supply of fasteners is price elastic, because a small price increase would lead producers to increase output more than proportionately. See generally M.T.I.A.A. Petition. This source is available from the author upon request.

66. Department of Commerce, *supra* note 20, at 5.

question. In 1948, Congress declared a policy, which continues today, that: "the future safety and . . . the defense of the United States [requires] a national reserve of machine tools . . . for production of critical items of defense material."⁶⁷ In 1955, in supporting the *Trade Agreements Extension Act of 1955*, the Secretary of Commerce indicated that he expected the machine tool industry to be helped, not harmed, by tariff reductions, because he specifically identified machine tools as an American industry with a large export volume.⁶⁸ In recent times, however, the United States has become a major importer of machine tools. In 1982, the F.E.M.A. recognized the critical importance of the machine tool industry by singling it out for the reinstatement of a Trigger Order Program. Pursuant to that program, the government planned during 1983 and 1984 to enter into tentative contracts with approximately one hundred U.S. machine tool builders for the purchase of specified types and quantities of machine tools.⁶⁹

The Federal Acquisition Regulations⁷⁰ also operate to protect the American machine tool industry by listing certain categories of products which the D.O.D. may not purchase overseas.⁷¹ In addition, gov-

67. National Industrial Reserve Act of 1948 §2, 62 Stat. 1225, codified at 50 U.S.C. §451, as amended. This policy has been honored in the breach for the most part.

68. Trade Agreements Hearings, *supra* note 11.

69. F.E.M.A. Forum, Sept. 1982. This source is available from the author upon request.

70. 48 C.F.R. §§1-49 (1984). This general Federal Acquisition Regulation, effective as of April 1, 1984, replaced the Defense Acquisition Regulations (DAR) for defense contracts (32 C.F.R. Ch.1 §§1-39). The DAR provisions, however, continue to apply to contracts which preceded the effective date of the FAR.

71. The list is comprehensive and includes the following categories (CCH Government Contracts Reports 37,620.18 (1983)):

Federal Supply

<u>Class Number</u>	<u>Supply Class Title</u>
3408	Machining Centers and Way-Type Machines
3410	Electrical and Ultrasonic Erosion Machines
3411	Boring Machines
3412	Broaching Machines
3413	Drilling and Tapping Machines
3414	Gear Cutting and Finishing Machines
3415	Grinding Machines
3416	Lathes
3417	Milling Machines
3418	Planers and Shapers
3419	Miscellaneous Machine Tools
3426	Metal Finishing Equipment
3433	Gas Welding, Heat Cutting and Metalising Equipment
3441	Bending and Forming Machines

ernment policy recognizes that certain high technology machine tools are so essential for the production of state-of-the-art weapons that it has forbidden their export to adversaries of the United States.⁷²

The petition of the N.M.T.B.A. took into account the grounds upon which protective relief was denied to the industrial fastener industry. The N.M.T.B.A. accepted that it is a small industry producing but 0.12 percent of the U.S. Gross National Product in 1982.⁷³ It argued, however, that:

machine tools are different from specific end-products used for defense because they are the prerequisite for the production of virtually all such products and are the cornerstone of the industrial base supporting our national security.⁷⁴

In seeking to distinguish its petition from earlier unsuccessful ones, the N.M.T.B.A. compared the demand under specific military emergency scenarios with peacetime levels to show that in order to avoid production bottlenecks, the industry would need governmental support between wars. In wartime, total demands on the industry rose sharply to levels six to eight times higher than peacetime demand, largely as a result of military needs. The petition asserted that it would be impossible to maintain peacetime machine tool production at wartime levels without government intervention.

In addition to arguing that imports from nations other than Canada could not be considered "reliable," the petition claimed that the effectiveness of the U.S. policy of deterring Soviet aggression depends upon a Soviet perception that the United States could respond to an act of aggression both quickly and over a protracted period of time. Moreover, the United States also has to have a sufficient industrial infrastructure to survive after a war as well as an economy which could

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| 3442 | Hydraulic and Pneumatic Presses, Power Driven |
| 3443 | Mechanical Presses, Power Driven |
| 3446 | Forging Machinery and Hammers |
| 3448 | Riveting Machines |
| 3449 | Miscellaneous Secondary Metal Forming and Cutting Machines |
| 3460 | Machine Tool Accessories |
| 3461 | Accessories for Secondary Metalworking Machinery |

72. See 15 C.F.R. §399 (1982), based on the Export Administration Act of 1979, Pub. L. No. 96-72, 93 Stat. 503 (1979).

73. Petition for Adjustment of Imports of Machine Tools under the National Security Clause (Mar. 10, 1983), at 7 [hereinafter cited as N.M.T.B.A. Petition]. This source is available from the author upon request.

74. *Id.* at 8.

subsist during a war.⁷⁵ The N.M.T.B.A. submitted alternative emergency scenarios, in each of which an affirmative determination for protection resulted. The petition noted that the government presently relies on the Machine Tool Reserve, including Plant Equipment Packages, and the Machine Tool Trigger Order Program to provide machine tools in the event of a national emergency.⁷⁶ A problem with the government's policy is that the Machine Tool Reserve comprises seriously obsolete equipment, much of which is inoperable.⁷⁷ In addition, the Trigger Order Program assumes that there are healthy American machine tool builders available to respond to the trigger orders when they come. The program does not underwrite the American machine tool industry or maintain its strength or existing production capacity.

The government's position during the Korean War clearly showed that this policy was weak and ineffectual. At the outbreak of the Korean War in 1950, a potential problem of machine tool supply was not anticipated by civilian or military leaders.⁷⁸ The government readily concluded that it had ample machine tools on hand for the limited war effort and needed relatively little new production. It had in storage more than 80,000 idle machine tools, most of which were less than ten years old. There were also "several hundred Government-owned standby plants, many equipped with [machine] tools," and "thousands of tools standing idle in used and reconditioned dealers' hands;" and civilian industries had "not only become 'tooled-up' to the teeth for World War II but . . . had absorbed thousands upon thousands of surplus tools after the war."⁷⁹

By early 1952, "over 80 percent of the Air Force's reserves and over half of the Army reserve in storage at the time of Korea [had] been released for defense production."⁸⁰ But the government planners had erred fundamentally in failing to take account of the obsolescence of even the relatively new tools in the reserve. "[T]he new jet engines, guided missiles, and atomic weapons, to mention a few, require not only the very latest in scientifically designed tools, but in some cases the design of entirely new tools."⁸¹ As a result, "[b]y October 1951 the

75. See J.S. GANSLER, *THE DEFENSE INDUSTRY* 123 (1980); *The Washington Post*, Nov. 10, 1982, at A24, col. 1.

76. N.M.T.B.A. Petition, *supra* note 73, at 177.

77. J.S. GANSLER, *supra* note 75, at 113-14.

78. Defense Production Act, Progress Report No. 13, Machine Tools, U.S. Congress, Joint Comm. on Defense Production, S.Rep. No. 207, 82 Cong. 2d Sess. 1, 2 (1952).

79. *Id.* at 3.

80. *Id.* at 50.

81. *Id.* at 9.

unfilled backlogs [for machine tools] had increased to 24 months in spite of the substantial jump in monthly deliveries,"⁸² and "machine tools [were] classed as the no. 1 bottleneck" in the nation's mobilization effort.⁸³

On the problem of the industry's capacity to surge production in an emergency, the N.M.T.B.A. petition included projections prepared for the petition by Data Resources, Incorporated for both a limited Vietnam-style war scenario and a protracted conventional war scenario.⁸⁴ The projections assumed that the devastation resulting from a nuclear confrontation between superpowers would render any preparations for a nuclear war useless. Therefore, the arguments were not premised upon a nuclear war scenario.

In the limited war scenario of four years duration, U.S. producers would only be able to meet military demand with long delays in supply. The large-scale conventional war scenario was also projected to last four years and similarly showed a negative gap between defense needs and supply. Importantly, the model assumed that imports would continue to be available during peacetime, but would be interdicted early by the enemy in either war scenario. Therefore, no imports were considered to be reliable in an emergency. This definition of reliable imports, which was different from the Defense Department's definition, made the claim for protection from imports a more arguable position.

A serious national security emergency in the future would arguably require the production of far more armaments and at a faster rate than the Korean conflict required. The fact that a serious machine tool bottleneck developed during the Korean War notwithstanding the availability of a much more substantial machine tool stockpile than currently exists indicates how ineffective the small, obsolete and deteriorated stockpile presently on hand would be in a serious future national security emergency.

The petition also noted that with respect to machine tools, the likelihood that Japanese producers would establish plants in the United States if imports were sharply restricted is not high.

Currently, only one Japanese builder has a plant for full-time production [*i.e.*, Yamazaki Machinery Works, Ltd., which [began] production of primarily American-made machines in 1984], two others have assembly lines, and a couple more extend production licenses to U.S. firms Japanese plants in the U.S. are unlikely

82. *Id.* at 29.

83. *Id.* at 80.

84. N.M.T.B.A. Petition, *supra* note 73.

to sprout quickly, although the idea is rapidly growing popular as an alternative to the current import control debate.⁸⁵

In order to avoid future bottlenecks, the N.M.T.B.A. pressed strongly for protection barriers behind which the ailing U.S. industry could revitalize itself.

The framers of section 232 would hardly have expected the machine tool industry to be a major applicant for relief and the M.T.I.A.A. argued that the N.M.T.B.A. petition should be treated with surprise and even suspicion. If, however, today, from a Commerce Department perspective, importing machine tools was congruent with both U.S. trade policy and national security concerns, the N.M.T.B.A. petition would not have succeeded as it did in convincing Secretary Baldrige.

The comments of the M.T.I.A.A. to the N.M.T.B.A. petition challenged the assumptions upon which the petition was based. The M.T.I.A.A. argued that not all imports would be interdicted during an emergency, that civilian consumption could be cut to levels below those built into the scenarios posited by the N.M.T.B.A., and that American manufacturers could surge production more than the N.M.T.B.A. estimated.

In essence, the importers (the M.T.I.A.A.) relied upon the definitional assumptions and value judgments in the negative determination reached with respect to the industrial fastener industry. Both the industrial fastener and machine tool industries in the United States faced declining labor and capital resources. Both were losing their market share to imports in the context of a severe cyclical downswing in American demand. An upswing in demand for consumer durables would restore the health of both industries as the demand for industrial fasteners and machine tools depended on demand for those durables. In the face of such argument, it becomes clear that even given the adverse economic effects of imports in the United States, which are apparent in both cases, the claim for protection pursuant to section 232 turned upon the definitional assumption of import reliability and the ultimate emergency scenario utilized.

In February, 1984, Secretary of Commerce Baldrige recommended relief in the section 232 petition of the N.M.T.B.A. In light of that recommendation, the President's primary options were to award relief, perhaps different to that petitioned for, or reject relief on the ground that the premises of the N.M.T.B.A. petition, especially the emergency scenarios utilized, were incorrect. The least politically

85. AMERICAN METAL MARKET, July 11, 1983, at 3A.

favorable alternative would have been to conclude that the Secretary of Commerce ought not to have been convinced by the petition regardless of the correctness of its premises. Rather than immediately adopt one of those choices, the President called for revision of the conventional war scenario without also rejecting the petition.⁸⁶ As of June 1st, 1986 the matter remains unresolved. But, given the closeness in time of the two cases and the fact that this case was not summarily rejected, the N.M.T.B.A. clearly had succeeded in distinguishing and distancing themselves from the unsuccessful action on behalf of the industrial fastener industry. In addition, the long delay between Secretary Baldrige's affirmative recommendation and the yet to be released determination of President Reagan reflects the sensitive nature of the decision. Meanwhile, many American machine-tool manufacturers have taken to importing foreign machine tools to add to their supply capability.⁸⁷

VII. REMEDY OPTIONS UNDER SECTION 232

Although no protection was recommended in the industrial fastener investigation, a number of remedy options were canvassed by the industrial fastener industry in its submission on the case. These options were:

- (1) stockpiling of products or productive machinery;
- (2) investment allowances and subsidies;
- (3) tariffs;
- (4) quotas, Voluntary Restraint Agreements or Orderly Marketing Arrangements;
- (5) a Defense Department "Buy American" program;
- (6) legislation against "downstream dumping"; and
- (7) combinations of the above.⁸⁸

The I.F.I. submitted that the remedy adopted be simple, convincing to the electorate, easily administered, effective, appropriate and temporary.⁸⁹ It called for "breathing room" in which "permanent self-sufficiency at an acceptable level of capacity" could be attained.⁹⁰

The selection of available remedies, however, does not give sufficient weight to the caution issued by the U. S. Supreme Court in *FEA*

86. 9 ITIM 782 (Mar. 21, 1984); Mann, *Tool Import Relief Appeal Returned for More Study*, AVIATION WEEK and SPACE TECH. 93 (Apr. 9, 1984).

87. *Protectionism Threatens Profits*, ECONOMIST 67 (Jan. 26, 1985).

88. Department of Commerce, *supra* note 20, at 37.

89. *Id.* at 30-37.

90. *Id.* at 36.

v. Algonquin SNG, Inc.,⁹¹ in upholding the imposition of a license fee in lieu of quotas to adjust imports to protect the national security. The court warned that "our conclusion . . . in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports is also so authorized."⁹² Indeed, in *Independent Gasoline Marketers Council v. Duncan*,⁹³ an "import fee" on oil imports was struck down because it did not discriminate effectively against imported oils in favor of the domestic product.⁹⁴ The court viewed unfavorably demand-side incentives as section 232 remedies. In light of these two cases, the stockpiling, subsidy and "Buy American" remedies suggested above are of doubtful legal validity as remedies under section 232.

In addition to the question of the legal validity of the remedy selected, the fiscal and political costs and benefits of the remedy options must be taken into consideration. Following the unsuccessful section 232 action by ferroalloy producers immediately preceding the industrial fasteners investigation, for example, stockpiling of ferroalloys began.⁹⁵ The two cases are distinguishable, however, because it is practical to stockpile material inputs whereas obsolescence is likely to reduce the effectiveness of stockpiling a manufactured product. Therefore, stockpiling could be but a short term palliative in the industrial fastener and machine tool industries.

Investment assistance is hard to reconcile with the government's overall policy of fiscal restraint, but if properly administered, such restraint would be effective to restore the industry's economic health.

A separate source of Presidential authority to grant a remedy, which does not depend on any finding by the Department of Commerce, is Title III of the *Defense Production Act of 1950*.⁹⁶ This Act permits the President to make loans to businesses and non-profit research corporations for the expansion of capacity for research and development, provided that financial assistance is "not otherwise available

91. *FEA v. Algonquin, Inc.*, 426 U.S. 548, 564 (1976).

92. *Id.* at 571.

93. *Independent Gasoline Marketers Council v. Duncan*, 492 F. Supp. 614 (D.D.C. 1980); *accord*, *American Federation of Government Employees, AFL-CIO v. Freeman*, 510 F. Supp. 596 (D.D.C. 1981).

94. *Council v. Duncan*, 492 F. Supp. at 618; Bruff, *Judicial Review and the President's Statutory Powers*, 68 VA. L. REV. 2, 53-55 (1982). When the Government appealed, Congress legislated repeal of President Carter's program, overriding a Presidential veto en route. 126 CONG. REC. 6376-87 (daily ed. June 6, 1980) and 126 CONG. REC. H4600-02 (daily ed. June 5, 1980).

95. *See generally* 7 ITIM 334 (Dec. 8, 1982).

96. *Defense Production Act of 1950*, 50 U.S. App. §§2091-2098 (1982).

on reasonable terms.”⁹⁷ The loans can also be used to “purchase metals, minerals, and other materials, for Government use or resale” at prevailing market prices, in order to “assist in carrying out the objectives of [the] Act,”⁹⁸ and to “install government-owned equipment in plants, factories, and other industrial facilities owned by private persons” when “in [the President’s] judgment it will aid the national defense.”⁹⁹ As a practical matter, however, this authority is limited by the relatively meager appropriations made for its exercise. Thus, if the appropriations were more realistic, the program could conceivably go a long way in improving a petitioning industry’s well-being.

The I.F.I. also recommended that the government adopt a “Buy American” program, plus import quotas or a Voluntary Restraint Agreement or Orderly Marketing Arrangement, and vigilance against “downstream dumping.” The fiscal implications of “Buy American” programs are that the U.S. government will be spending more than it otherwise would to buy the relatively more expensive local product. The quota proposed was to vary with mobilization requirements operative from time to time. One problem with imposing a special tariff needed to protect a defense supply industry is that the level of tariff needed to deter unwelcome imports effectively may be very high. In the industrial fastener industry, the tariff would need to be over forty percent for some products since price disparities between domestic and imported items are due primarily to disparities in the cost of steel;¹⁰⁰ a disparity which in many cases would require unrealistic tariff amounts. There is no guarantee that tariffs will restore the desired productive capacity, because there is no direct linkage between increased tariffs and a reduction in import penetration. Overall, tariffs involve unwelcome G.A.T.T. implications and provide no guarantee that the industry would develop its productive capacity rather than rely on the tariff to continue securing a minimum market share for the local industry.

Perhaps more importantly, tariffs impact not just upon the defense supply, but the civilian welfare too. For example, the same bolt required for tank assemblies may also be required for snowmobiles. While only one end product is critical, if the bolts are identical, there is no way of limiting relief to cases in which the bolt is necessary to the

97. 50 U.S.C. App. §2092 (Supp. V. 1981).

98. 50 U.S.C. App. §2093(a) (Supp. V. 1981).

99. 50 U.S.C. App. §2093(e) (1976).

100. See the earlier case of Bethlehem Steel Corp. v. Bd. of Comm’rs of Dep’t of Water and Power of the City of Los Angeles, 80 Cal.Rep. 800, 276 Cal.App.2d 221 (1969), where the problem of disparate steel prices was sought to be remedied by a Californian “Buy American” Statute, *accord*, Zee Toys, Inc. v. County of Los Angeles, 149 Cal.Rptr. 750, 85 Cal.App.3d 763 (1978), *aff’d*, 449 U.S. 1119 (1981).

national defense. Clearly, for a remedy to be as effective as possible without serious negative side effects, it would need to impact upon the defense demand, but not the civilian demand for the product.

The I.F.I. argued that the obvious first step for relief is for the government to reform its own procurement practices so as to require that U.S. contractors and subcontractors utilize only nuts, bolts and large screws produced in the United States and Canada.

If the conventional wisdom in classical international law that states have an unfettered discretion to determine their national security needs and to act in accordance with that determination is accepted, then the use of the government's procurement power in this way is consistent with U.S. obligations under both bilateral and multilateral treaties since those agreements contain exceptions for, and can even be seen as subject to, the primacy of national security requirements.¹⁰¹ In view of the U.S.'s opposition to the Japanese government's procurement policy for its telecommunications monopoly (N.T.T.), however, Japan and other supply sources would certainly view any "Buy American" program unfavorably.

Another remedy proposed by the I.F.I. was a floating quota which could be adjusted periodically based on a minimum installed, mobilization-available production capability. Essentially, this remedy was a novel twist to the ill-fated trigger price mechanism (T.P.M.) for imposing anti-dumping duties on steel imports. The quota would be equal to the apparent domestic market for nuts, bolts and large screws, less "domestic adjusted production" where such production is the specified national security requirement and less an appropriate surge capacity. It would float in a way that would ensure a minimum installed domestic manufacturing capacity necessary to meet changing conditions both in the specified national security requirements and the apparent market shares. Under this formula, the size of the quota is set by the specified national security need, which in turn represents the target level of essential domestic capacity which the quota is intended to provide. Instead of establishing a floor price which guarantees the local industry a fair opportunity to compete, the suggested mechanism guarantees a minimum market share. It does not promote efficiency among local producers, because they do not have to meet foreign competition in order to make sales. In this respect, the floating quota is inferior to a T.P.M.

A national security import quota would also need to alleviate the industry's raw materials problems. At the present time, foreign steel sold overseas is considerably cheaper than domestic steel, primarily be-

101. N.M.T.B.A. Petition, *supra* note 73, at 43. See also Bethlehem Steel, 80 Cal.Rep. 800. See generally, Knoll, *supra* note 19.1, at 567.

cause there are no efficient domestic production facilities for fastener wire rod.¹⁰² A quota could demonstrate to domestic steel producers that fastener wire rod is a worthwhile market in contrast to the past, and this could arguably stimulate investment in modern "mini mills" for wire rod production. It is hoped that efficient facilities could compete with foreign steel producers in offering fastener manufacturers wire rod at the lower world prices.

Steel is cheaper overseas than in the United States, but imports of steel into the United States are restricted. Although labor costs in much of the American manufacturing industry are high by world standards, in the industrial fastener industry they are at least comparable to labor costs in Japan, the main source of fastener imports to the United States. Foreign steel exporters avoid American steel import restrictions by first using the steel to produce goods, such as fasteners, and then exporting those goods to the United States. These goods face lower protection walls than steel and the converted steel sells at higher quantities in the United States than would be the case if unconverted steel were being sold.

Where the steel is being sold to producers of exports at a lower price than to producers of non-exported products, the converted steel in the form of fasteners, for example, is being sold at "Less Than Fair Value." The problem of "downstream dumping" has been addressed only recently in pending legislation.¹⁰³

Unlike the I.F.I. petition, the petition of the N.M.T.B.A. did not offer remedy options, but simply pressed for a protective quota limiting imports to a seventeen and one-half percent market share. The U.S. National Academy of Sciences recommended subsidization of research and development in defense related technologies as a better way to ensure secure supplies of the best equipment.¹⁰⁴ The argument lay essentially between a quota which protected the market share of American producers with respect to both defense related and civilian demand and a promotion of only defense related technologies.¹⁰⁵

Nevertheless, subsidies and investment allowances designed to restore the industry's international competitiveness would alleviate cause rather than symptom. Ironically, because subsidies do not discriminate

102. Foreign steel sold in the United States is sold at roughly the price of domestic steel due to the residual effects of the T.P.M.

103. H.R. 4784, The Trade Remedies Reform Act, 1984. *Cf.*, S. 2497, Omnibus Trade Act of 1982.

104. *The Machine Tool War*, *supra* note 26.

105. Because of the accelerating rate at which machine tools become obsolete, stockpiling was not and is not a remedy for the problems of the machine tool industry. *See supra* note 77 and accompanying text.

against imports and are therefore unlikely to be a valid remedy under section 232, this alternative was not canvassed by the N.M.T.B.A.

The N.M.T.B.A. criticized the existing Trigger Order Program, but did not suggest its improvement as a satisfactory remedy for their ills.¹⁰⁶ That program's expenditure level is projected to only sixty percent of defense needs during the Korean War. In other words, it does not anticipate a major military conflict.

In support of the requested remedy of a quota, the N.M.T.B.A. argued that demand would not fall and that the higher priced American product would sell in sufficient volume to permit the industry to re-emerge at the technological and productive forefront of the international machine tool market. The industry offered to accompany the quota with a commitment to self-help in order to achieve this goal. The record of American machine tool producers in innovation, however, does not disclose a readiness to invest and respond to market pressures.¹⁰⁷ In the past, inefficiencies due to continuing reliance on outdated production processes led to order backlogs, causing customers to turn to quicker overseas suppliers.¹⁰⁸ Removal of the imports may bring customers back to the American producers, but would not of itself lead to an improvement in the quality of both the American product and the accompanying services. Nevertheless, a temporary protection wall would help to ease in the process of structural realignment, during which time the industry could reorganize itself into firms of economic scale utilizing up-to-date technologies. In the N.M.T.B.A. petition,¹⁰⁹ the industry impliedly offered to make such positive use of the respite offered by temporary protection.

VIII. SOME CONCLUSIONS ABOUT SECTION 232

Following the decision in *FEA v. Algonquin SNG, Inc.*,¹¹⁰ section 232 allows for only those remedies which impact directly upon imports. Particularly, where component rather than ultimate products are in-

106. N.M.T.B.A. Petition, *supra* note 73, at 184-87.

107. *Machine Tools: Will the Cornerstone Erode?*, *INDUSTRY WEEK*, Apr. 30, 1984, at 63-78 [hereinafter cited as *Industry Week*]; J.S. GUENTHER, *SELECTED EFFECTS OF THE ADMINISTRATION'S ECONOMIC RECOVERY PROGRAM ON THE MACHINE TOOL INDUSTRY* (Cong. Research Service, Library of Congress, 1981) CRS-10; NATIONAL ACADEMY OF ENGINEERING/NATIONAL RESEARCH COUNCIL, *THE COMPETITIVE STATUS OF THE U.S. MACHINE TOOL INDUSTRY* (1983).

108. *Industry Week*, *supra* note 107; J.S. GUENTHER, *supra* note 107, at CRS-II; NATIONAL ACADEMY, *supra* note 107, at 43.

109. And the supplementary petition filed in response to the submission by the Japanese and German producers and their importers.

110. *FEA v. Algonquin*, 426 U.S. 548.

volved, fashioning a legally valid remedy which minimizes the effect of import restrictions on civilian demand while protecting the national security is a hurdle yet to be overcome. Yet once a petition has received the nod of the Secretary of Commerce, as in the case of the N.M.T.B.A., it is difficult to deny relief from imports without, as it were, altering the rules of the game after the fact. At the same time, keeping those rules up-to-date, in particular the mobilization scenarios used to define what is "the national security," is an important prerequisite to identifying the needs of defense suppliers for government intervention, regardless of whether that intervention is in the form of protection from imports.

By the time the difficult definitional issues are clarified and the wide array of relevant criteria identified and adequately analyzed, the risk of the initial premise of the industry's indispensability to national security becoming obsolete in the face of accelerating technological changes is high. Whether or not the U.S. government considers imports to be as reliable in an emergency as domestic supply where the sensitive question of national security is involved, defense preparedness would seem to require that attention be concentrated on the quality of the product. Encouraging technological innovation throughout the Western world would seem to assure security better than entering into demarcation disputes as to the sources of current and future supplies. Even though the N.M.T.B.A. petition has continued to receive support from those like Senator John Heinz who views import relief as essential to saving a vital defense supply industry,¹¹¹ it is at least as important to recognize that section 232 encourages attention to symptom rather than cause. Its operation is expensive in both time and money terms,¹¹² its processes arduous, and its benefits, given the overwhelming number of negative determinations, are questionable. The foregoing analysis has sought to highlight some of the challenges facing any section 232 investigation by focusing on two recent strongly presented claims for relief.

A persuasive case can be made for a policy of trade liberalization with the confluent goal of international peace and security. The alternative of pursuing primarily national security supported by barriers to international trade has been tried before.¹¹³ Independent rather than

111. 2 Int'l Trade Rep. 1050 (Aug. 21, 1985); Wright, Foley, and Dingell (May 4, 1984) (discussing U.S. House Democrats' request for machine tool import curb) (cited by Kyodo News Service May 5, 1984); *PTO Letter from Senator Dole to New York Times*, (Apr. 25, 1984), N.Y. Times, May 6, 1984, at A31, col. 4.

112. This is so notwithstanding Trade Remedy Assistance Office aid to small businesses filing petitions for relief. 19 U.S.C. §1339, Pub. L. No. 98-573.

113. See, e.g., Smoot-Hawley, (Tariff) Act of 1930, Pub.L. No. 11-361, 46 Stat. 590

interdependent trade and security policies designed to deter aggression have given rise to a self-fulfilling prophecy. Seen in this light, the reluctance of the Administration to grant relief under section 232 has been a courageous contribution to an open and secure trading system. Unless this commitment is reversed, the continuing need for section 232 is surely doubtful.

IX. POSTSCRIPT

As of June 1, 1986, the section 232 N.M.T.B.A. petition remains in limbo. During the Lybian crisis, President Reagan reportedly found time to discuss the issue with representatives of the Department of Commerce, the National Security Council, and the Department of Defense.¹¹⁴ In the three years since the petition was filed, so much has changed in the machine tool industry that presidential action at this point would bear little relation to the facts pertaining three years ago. A number of American machine tool producers have closed their plants. Following the 30% rise in the value of the yen against the U.S. dollar, Japanese standard machine tool prices have risen 7% to 12% with further rises expected. In addition to this price realignment, some U.S. machine tool producers have taken the bit between the teeth and have become more competitive. For example, Kearney & Trecker Corporation of Milwaukee has cut prices on some machining centers by 26%.¹¹⁵

In Washington, pressure has mounted for White House attention to the plight of the machine tool builders. In a letter sent to the President on January 31, 1986, twenty-seven Republican Congresspersons, including Bob Michel from Illinois and Nancy Johnson from Connecticut, expressed strong support for the N.M.T.B.A. petition.¹¹⁶ The letter states that the machine tool industry was losing both skills and capacity and that such skills and capacity were essential to the technological edge of American weapons systems.¹¹⁷

Encouraged by these events, the industrial fastener industry, whose earlier section 232 petition was unsuccessful, has sought to reo-

(codified as amended in scattered sections of 18, 19 and 28 U.S.C.).

114. Rohan, *A Gyrating Industry: Prices, Systems, Shows*, INDUSTRY WEEK, Apr. 14, 1986, at 25.

115. *Id.*

116. *See, Congressmen Seek Measures Against Machine Tool Imports*, Jiji Press Ticker Service, Feb. 12, 1986.

117. *Id.*; *See also, Machine Tool Case Gaining Renewed White House Attention Amid Congressional Push for Action*, Daily Report for Executives (BNA), at L-1 (Feb. 5, 1986).

pen its case.¹¹⁸

It is unsurprising that the machine tool builders and the industrial fastener industry have now focused their attentions on the political rather than the legal avenues open to them for import relief. As was concluded when this article was first written, the long, arduous and misdirected procedures of a section 232 investigation offer little benefit to petitioning industries and to the U.S. Government seeking to pursue both national security and trade liberalization goals. Until such time as the United States develops a workable definition of its national security needs, no reasonable or predictable procedure for national security-based import protection can be developed. So long as the essential issues remain unresolved, the best the United States can hope for is that somehow it might just muddle through.

118. *Action Goal: Congressional Hearing Justified. Proposal: Reexamine Commerce Department Section 232 Fastener Investigation: An Open Letter to Casper Weinberger*, FASTENER TECH., Feb. 1986, at 6.