Panel I: Administrative Agencies, Private Parties, and the Courts

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Panel I: Administrative Agencies, Private Parties, and the Courts

PROFESSOR KOH: Our first speaker on the panel on Administrative Agencies, Private Parties, and the Courts is Mr. Peter D. Ehrenhaft. Mr. Ehrenhaft was a senior law clerk to Chief Justice Warren of the Supreme Court, has been a partner at a number of firms, was the Deputy Secretary and Special Counsel for Tariff Affairs at the Treasury Department—a job which several other panelists have held in various forms—and is currently a partner at the Washington firm of Bryan, Cave, McPheeters & McRoberts. He has taught trade policy at George Washington University Law School and the University of Pennsylvania Law School, and he is the author of numerous articles in this area.

MR. PETER D. EHRENHAFT: Let me begin by suggesting that the main problem in considering what trade law is and ought to be, is that we lack a consensus within our society as to what the real issues are that ought to be addressed. We have been focusing on peripheral issues that are more easily understandable and more susceptible to fixes (or perceived fixes) by our agencies and by our Congress, perhaps because we are not fully able to come to grips with what needs to be done to address the real issues.

I find essentially three of these “real issues”: The first is: How does an economy in a democratic society adjust to change? The fact of change is overwhelming and inexorable. At the same time, change is a very uncomfortable phenomenon; many people don’t like it. And yet those same people are voters—particularly in our society, where we vote pretty often—and adjustment to change takes longer than the periods between elections. This phenomenon puts terrible pressures on elected officials. It is one of the very serious problems in addressing the two other “real problems” of trade law.

The second real problem is: What do we do with overproduction? It is a surprise, I suppose, at a time when one sees daily pictures of people starving in Ethiopia, of barrios in South America, and of homeless people even in the United States, to suggest that we are awash in overproduction. But, despite pictures from around the world, the problems most in need of solution by our trade policy boil down to: What we should do with too many cars and semiconductors, too much steel and wheat? Overproduction is everywhere.
Private Remedies

It is a natural outgrowth of the need and desire for jobs, which in the modern world is a key commitment of governments.

The third, and last, real problem of trade law is: How can we be responsive to our citizens, fair to our friends, faithful to our international commitments, and at the same time dedicated to the rule of law? These four requirements are mutually exclusive in many situations which the trade law addresses. They can't very well be simultaneously accommodated, and yet some kind of accommodation is required.

I am convinced that most of the decisions taken under our existing trade law do not completely respond to any of those four criteria. They pretend to meet them but in fact do not. Instead, our trade law devotes too many of our resources and diverts our attentions to what I have described elsewhere as "pimples on the landscape of our trade picture." Most of the countervailing and antidumping duty cases over which oceans of ink are spilled in the periodicals affect a very small amount of trade.

Another favorite theme of mine is that we really don't know what the effect of our trade laws is, and we have been afraid to find out. No systematic effort is made to analyze the after-effects of antidumping, countervailing or Section 301 cases. One small beginning was made by the General Accounting Office (GAO) in a study of five cases brought under the then Section 201 "escape clause" in which it attempted to analyze what happened after the ITC acted. Did the industries that obtained relief actually secure their market positions and the restoration to economic health that they hoped to achieve when they invoked these trade laws? The results were very inconclusive. The main reason relates to the very first point that I made: There is very little in the world that is static. Factors such as product changes, different producers, and different demands by consumers all have significant effects, probably far in excess of any quota that was or can be imposed with regard to most commodities that are internationally traded.

With regard to the internationally traded commodities that make up our enormous trade deficit, as distinguished from the small noisemakers that occupy the time of trade law administrators, the trade laws seem to be particularly ineffective, almost irrelevant.

1. See Glossary at 129.
2. See Glossary at 129.
3. See Glossary at 130.
4. See Glossary at 130.
Why is that so? Let me briefly go back to the three issues that I outlined at the beginning and comment a bit about them.

First: adjustment to change. As I think you will agree, change is a fundamental fact of life. Therefore, as a priority of all policy, it seems to me that we must act on our belief that change is inevitable, and that we must devise ways to respond to change. That response should not depend on whether the change comes from within our country or from abroad. Is there a rational, principled way to distinguish between domestically caused change and foreign-caused change? I think not. A wonderfully illustrative incident occurred to me while I was still in the government, which brought this truism home to me. It concerned a gentleman who made slide rules. He claimed that the production of slide rules was a wonderful business, particularly as he made very expensive, hand-crafted models. But his entire business was wiped out within 18 months by the introduction of the hand-held calculator. The hand-held calculator was faster, cheaper, more widely available; everything that the slide rule could do, other than serve as an *objec d'art* for display as an antique, could be done better by the hand-held calculator. That technological change compelled the gentleman to give up his family's century-old plant and fire his 250 employees. There was nothing that he could do to preserve the slide rule business. There was nothing the government would do to maintain their production. But think of what would have happened if slide rules had been dumped by the Koreans. The whole panoply of our government trade apparatus would have become available to charge onto the scene asking, "What can we do to save the slide rule makers?" But because the slide rule was rendered obsolete by the hand-held calculator, there was nothing in our volumes of economic laws to deal with the "problem," if, in fact, it was a societal "problem."

It seems to me that if we have a sensible outlook toward change, we must ask ourselves, if there is a material difference between change induced by the "external" forces of foreign production and change required by "internal" forces, such as new technology, new fads, the weather, the elections, or whatever. I suggest that we ought not to have in our law a presumption that because a force for change comes from the outside, we should have to have a wholly different series of responses, a different legal mechanism, a wholly different administration, and a wholly different way of assessing the costs of adjustment than when we face a domestically caused change.
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It is for this reason that I have been one of the few people practic-
ing trade law who have suggested that we abandon our administra-
tive method of assessing antidumping duties and substitute for it a
private damage action. Antidumping cases are really disputes be-
tween private parties about access to the market. That's all that they
are. There is no reason for the government to confront foreign gov-
ernments about dumping; there is no reason to send our govern-
ment investigators scurrying around foreign plants to investigate
foreign businesses' costs of production. If participants in the mar-
ket are "wronged" by competitors, private litigation remedies be-
tween the parties concerning their rights of access to the market
should be available. This litigation should be subject to a rule of law
that is identical to the one that we would apply domestically if a
party were engaged in price behavior that we thought was anticom-
petitive. If in New York we can't find a business tort reason for re-
sisting cheap goods made in New Jersey, then it seems to me it
should make no difference that those goods were made in Taiwan. I
think that a private remedy action would address that anomaly. I
would abolish the whole bunch of silly rules that undoubtedly dedi-
cated, but I suggest, misguided, bureaucrats have to administer. I
was one of them; I know.

My second point concerns responding to overproduction. This is
a very serious problem, whether it involves agricultural commodities
or industrial goods. Throughout the western world and even in less
developed countries, we are all making more steel, more plastics,
more textiles, and even more food than we can consume. (Perhaps
we could consume more; we just can't pay for the production of the
excess.) What is the world to do with these vast quantities of goods
that are not being and probably cannot be bought? Can we improve
their distribution? Can we provide money or other resources with
which those lacking could buy goods from those who turn them out?
We did that for a while—creating a debt crisis we also can't handle.

I was just in Japan yesterday. One of the ideas now floating
around in Tokyo was the proposal that Japan increase its demand
for our goods by stopping its people from working so hard! They
are too industrious. They still go to work on Saturdays. They still
work more than 40 hours each week. The idea was very seriously
proposed that they cut down their work week to accomplish two
goals: first, to reduce output, and, more importantly, to increase
nonwork time, creating a demand for leisure—time products that the
Japanese don’t have the time to enjoy now because they are working so hard. Maybe that is something that we should think about.

There are probably other ways of stimulating demand and facilitating the distribution of supply. These measures are really what we need, much more than 3.283% ad valorem dumping duties. But even by suggesting such a change in priorities, I am tremendously oversimplifying the underlying challenge of modifying a society’s values, which is what this Japanese proposal really contemplates. Let me cite, for example, one very short story from my experience in the government that illustrates the enormous complexity and interrelation between the problem of overproduction and the core values of a society.

The U.S. was going to impose a countervailing duty on Swiss cheese made from milk obtained from cows grazing in the Swiss Alps. Nasty of us to do that, because it was darn good cheese! But it happened that the cheese was being produced from milk provided by cows grazing at the 2,000- to 3,000-meter level in the Alps. It cost so much to keep those cows housed and healthy up there in the Alps that each liter of milk really cost as much to produce as a liter of cognac. Yet the Swiss cheese that was being sold at the Safeway in Washington was, of course, offered at about the same price as cheese made by our good dairymen up in Wisconsin. The cut rate for the real Swiss cheese was regarded as “unfair” by our folks. Rightly so! We went to the Swiss and said, “You know, you just can’t export that cheese at that low price, because it is unfair to our dairy farmers.” And they said, “Well, yes, but we have to keep those cows up there.” We replied, “It costs so much, why do you keep them up there?” They said, “Your tourists come over here and they like to see those cows up in the Alps. The cows also cut the grass, without which the Alps would be impassable for tourists.” And we said, “Then you have to put your cows into your tourist budget, not your agriculture budget. Maybe they are really only expensive lawnmowers.”

The real point, of course, was that the Swiss wanted those cows up in the Alps because they wanted the people who cared for them to stay in the Alps. They don’t want those farmers to come down and live in the cities. That would create further problems. Thus, it is the social reason, the political reason that impels governments to subsidize people to live in the Alps, or to make steel in Youngstown. It is a phenomenon as true here as in Switzerland. We can’t simply say every job is fungible, because it is not. People cannot easily move
from here to there. So the overproduction problem must be addressed with more fundamental solutions than tacking duties or quotas on imports. We must recognize it as a social problem, that can only be solved by social means like cutting the Japanese work week and not by trade law nit-picking.

The third problem I wanted to discuss is the difficulty of devising and applying a body of law that is fair to all and to the ideals of our international understandings. What trade law should we have? I have already suggested my view that trade law, as such, is probably an oxymoron. The “trade law” is not a principled body of ideals and mechanisms for accomplishing these goals. Even though we have fashioned a trade law on a “judicial model,” we should regret that fact. It is too expensive. There is little evidence that it works. It involves governments in confrontations that they don’t need. And despite all of the “due process,” the judicial review, the enrichment of the lawyers, and the good feeling it gives to us lawyers that we are doing something constructive and rational and in accordance with our traditions, the end result is as phony as a three-dollar bill. The dumping margins that are exquisitely calculated to three decimal places are built on a castle of sand. Those numbers are rarely based on hard facts and they fail to address completely the problems of change or overproduction that really are meaningful in our international trade. To suggest that further elaborations of those laws would do something constructive about easing our trade deficit or overcoming our real economic problems is just wishful thinking.

At the same time, I, too, am a victim of wishful thinking. Here, on campus, we can indulge ourselves. But what do we do when we return to Washington? I have a few suggestions. First, we need, I think, something like the Robinson-Patman Act\(^5\) to deal with dumping, or something perhaps more traditional from our antitrust law. We don’t need a longer, more detailed antidumping law.

Second, I think that we do need a flexible, enforceable law like Section 301 given more public attention and resources. No doubt we need to expand the market abroad for our goods. Section 301 seems to be a plausible and effective way of doing so. Having just come from Korea, I can assure you that they have heard that message.

And, finally, if all that I have said is pie-in-the-sky, let me just make a couple of more minor short-term recommendations for im-

proving the law we have which could be accomplished without the radical overhaul that I am anxious to see adopted.

First, I think we need sunset provisions in our law in dumping and countervailing duty cases. It is absurd that they remain on the books potentially forever. The European Community (EC) has adopted sunsets. I think that there ought to be an end to these cases after, let us say, two or three years. If the affected domestic industry is still being hurt by imports at "unfair" prices, it should make a new showing in a new investigation.

Second, I think we ought to adopt the EC's approach to calculating the duty to be assessed. They set the duty at the level needed to overcome the injury, and not based on very elaborate case-by-case, import-by-import, down-to-the-penny calculations we love to compute. If we find dumping with regard to a particular product, and we find that during the historic period the average margin was 14%, let us apply a 14% "fine" for the next two years on those imports or, better, a 10% duty to eliminate underselling or overcome "injury" to the domestic industry. Let us then be done with the matter and go on to something else more productive rather than involving scores of people in determinations whether the 14% should be 13.67% with regard to this import and 14.67% for the next. The allocation of our scarce resources to this exercise is just ridiculous.

Third, I would suggest that an expanded ITC would be the appropriate agency to handle all of our trade matters. I also suggest that, as in the EC and Canada, the Commission devote as many resources and as much effort to verify the submissions made by the American industry demanding relief as is now devoted by the Commerce Department to the verification of the materials that the foreign exporters submit when they are subjected to these kinds of proceedings. If we really believe in fairness and due process, that is a minimal reform.

I have provided you with a fairly long laundry list of ideas. I hope that it at least provides our following panelists many targets at which to shoot.
Panel I: Respondents

PROFESSOR KOH: Our next speaker is the Honorable Thomas J. Aquilino of the U.S. Court of International Trade. Judge Aquilino was formerly Vice President of three transportation companies. He graduated from Rutgers Law School then clerked at the Southern District of New York. He then went on to the firm of Davis, Polk & Wardwell and subsequently has joined the Court of International Trade. Judge Aquilino, Mr. Ehrenhaft has just suggested that you should be out of a job. I am curious as to your reaction.

JUDGE AQUILINO: Mr. Ehrenhaft may be right. As we know, the role of the courts in this country is essentially passive and, therefore, silence away from the courthouse is advisable, if not a necessity. Nevertheless, in view of Peter Ehrenhaft's challenging remarks, I want to make several observations.

First and foremost, this country has been committed since its earliest days to the resolution of problems through the use of lawyers and judicial review. That a traditional legal approach has been developed to address present problems of international trade was thus certainly predictable. The antidumping and countervailing duty law that has developed, though complex, is narrow in its application. This law, Mr. Ehrenhaft, is hardly draconian, which may well be the reason why it does not dispose of all the trade problems that ail us. It is not my perception that Executive discretion has diminished as a result of this law, nor is it my perception that proceedings within the Department of Commerce and the International Trade Commission are conscious preliminaries to court resolutions, as claimed in one of Mr. Ehrenhaft's very thoughtful and challenging articles. On the contrary, administrative discretion is broad; while judicial discretion is essentially nonexistent.

Mr. Ehrenhaft, in past presentations, has suggested dealing with some cases, which he would characterize as "small," in court, while leaving so-called "big" cases to political or economic resolution. However, unlike Mr. Ehrenhaft and Mr. Justice Scalia, and perhaps others, I am not able to distinguish between big and small cases in advance of their presentment and resolution, which, as I understand the thesis, would be the point at which a small case would go to immediate court resolution, with the big cases going to a "different kind of international consultative regime." Query: Was it clear in

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1954 that *Brown v. Board of Education*\(^7\) would affect more than local school districts in the four states before the Supreme Court? Picking up on something Professor Koh said at the outset, query: Have international regimes in place in the aftermath of World War II actually ameliorated the international trade problems we now face?

The courts, and here I am talking specifically about the Court of International Trade, the federal circuit, and even the Supreme Court, clearly are not responsible for what has been characterized as the “judicialization” of international trade law. The courts, just as clearly, are not in any real position to measure the overall effects of their rulings in this area. Finally, the last comment that I would make from the court’s limited vantage point is that though the antidumping and countervailing duty law does provide a framework to assess specific reasons for trade imbalances, the law has not transferred the process of policymaking out of the hands of the Congress and the Executive, wherein it must, and still does, rest.

**PROFESSOR KOH:** Our next speaker is Mr. Michael Stein. He is a graduate of Swarthmore and Columbia University, a former lecturer in law in South Africa, trial attorney at the Civil Division of the Justice Department, and Deputy General Counsel and then General Counsel of the International Trade Commission. He is now a partner at Dewey, Ballantine, Bushby, Palmer & Wood in Washington and I am curious as to what his views from both sides of the coin are about an aggressive ITC.

**MR. MICHAEL H. STEIN:** I will answer that question first. The notion of an aggressive ITC is an oxymoron. It is just inconceivable. Placing trade policy in an agency that was created precisely to take it out of politics is just crazy. The fact is that in Washington, short-term planning is the next session of Congress and long-term planning is the next election. You are not going to have a system for making trade policy that is independent of the political process. To the contrary, the reason we have the sort of trade policy apparatus we do is because of the fact that government is a creature of politics. It is impossible in our government to establish an agency with credibility sufficient to override political considerations. Why don’t we have an industrial policy? If we were able to pick winners and losers among emerging industries, we would find that the winners were always in the districts of whichever senator or congressman controlled the relevant appropriations committee. The result of these sorts of pressures is the trade policy we have today, which is not nearly as irrational as has been made out by the first two speakers.

\(^7\) 349 U.S. 294 (1954).
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You have to recognize what the goal of trade policy is. If you believe that world prosperity is enhanced by open markets and minimum government intervention, then the purpose of trade policy should be to deflect the political pressures that arise from industries that find themselves disadvantaged by this sort of open world competition. Our trade policy has been established precisely to create the illusion of relief for these industries. Its purpose is to set up a system that is so complex and so intricate that, on their way to relief, these industries don't quite understand what went wrong. By the time they get through the system, get what is supposed to be relief, and find out that it doesn't work, they are simply too exhausted to go back and begin again. I would argue that the system works pretty well.

As Peter Ehrenhaft mentioned, there are a number of run-of-the-mill trade disputes, handled generally as dumping or countervailing duty cases, brought by industries where the result will not have a macro effect on prosperity in the United States or the world at large. Sometimes if the case is small enough it can be handled through the escape clause, Section 201 of the Trade Act of 1974. This statute provides that if the International Trade Commission decides that rising imports are seriously injuring a domestic industry, it can recommend tariffs or quotas to the President, who then decides on whether to implement them in light of the national economic interest.

In terms of helping a domestic industry cope with competition, Section 201 makes no sense. It does not deal with any of the things you would want to consider, such as the likelihood that relief will help restore competitiveness. But, if the industry is small enough and is in a state that doesn't have much else going for it, a domestic industry can sometimes get relief. The clothespin industry had 200 employees, but the two Senators from Maine staked their political careers on getting that industry relief. It got relief. The cedar shakes and shingles industry that was mentioned earlier was the same sort of thing. It is a very small industry from states in the Far West. The industry got relief, essentially for two reasons. One, it did not affect the overall economy, so it was politically acceptable. Two, the lumber industry as a whole was complaining about Canadian subsidies, and the Administration wanted to send a message.

Many trade decisions can be explained by such political externalities.

The system works reasonably well for small industries. For large industries, the formal legal processes do not work well at all. However, I think that private parties and the government really are starting to do a little better now. I will take as my text two cases—automobiles and semiconductors—in which the contrast between the two was really important. In each there were trade disputes that our government had to deal with, and ones I think illustrate the play between the judicial and the political branches.

In the automobile case, for years American automobile companies produced a product whose main purpose was defining the social status of the people who bought it. It incidentally got you from one place to the other. The Japanese came up with the revolutionary notion of having a product whose major purpose was getting you from one place to another efficiently and cheaply. People then decided that it wasn’t really that important to have their social status defined; they would rather spend less to get from one place to another. As a result, the American automobile companies faced a serious problem. Chrysler Corporation was bankrupt for all intents and purposes. Ford Motor Company was losing money in amounts that were unacceptable, and had the problem gone on I think that Ford would have produced its automobiles in Europe and exported them to the United States. (General Motors is so large it probably could have survived.) Nevertheless, it would have been unthinkable for the nation’s major consumer-durable product, accounting for between one out of five or one out of seven jobs in the country, depending on how you count, to be produced in major part in another country. It was not possible politically to allow free trade to operate. Some government policy had to be formulated.

The trade laws told the automobile companies, “Go to the ITC, show you are seriously injured, show imports are the cause, and then the President will do something about it.” But the ITC said, in effect, “Sorry, you forgot to say ‘Simon says.’” The Commission decided that because there was a recession in progress, the recession was more important than imports. It was a fundamentally mistaken decision. Nonetheless, that was the decision of the judicialized administrative agency. The result was that the President had almost no options. The major remaining option was legislation, and rather than that the United States Trade Representative
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(USTR)\(^9\) went to Japan and said, "I'm not negotiating with you, you understand that, because I have no authority to negotiate. And in fact the Assistant Attorney General of the Antitrust Division told me that he would bring action against me if I did negotiate with you because I would be conspiring in restraint of trade. However, I do want to forecast that Congress will pass and the President will sign a law establishing quotas unless you voluntarily restrain exports." And the Japanese did. There was no thought to an overall strategy for the industry, and the result was that necessary action was taken in a way that was substantially less beneficial to the United States and more beneficial to our major trading partner than it had to be.

In the semiconductor case, the industry was a victim of foreign industrial targeting. It was faced with a closed market in Japan, while being forced to compete with dumped imports in its home market. It therefore found it difficult to obtain the cash flow needed to remain competitive in this research-intensive industry, where R&D expenditures can be as much as 20\% of sales, and where the product may change completely every three years.

Through what I think was a much more sophisticated use by private parties of the trade laws, sufficient pressure was put on the Administration to force it to think about what made sense for the future of this industry. The Administration devised and implemented a coordinated strategy to come to agreements with our major trading partners that would prevent the dumping of the overcapacity that was in the industry, and that would open markets. The solution may actually turn out to be beneficial for the world trading system as a whole. And the interesting thing about it was that there were people in the government who were looking at the question of what makes sense in terms of the United States for trade policy, not simply looking at the requirements of the trade relief statutes to see how little action they could get away with. This is new and, I think, really one of the first hopeful signs that I have seen in my 10 years in this field.

PROFESSOR KOH: Our fourth and final panelist is Mr. Harvey Applebaum, from the Washington law firm of Covington & Burling. He is a graduate of Yale College and Harvard Law School. (I guess he will tell us in a moment where his true loyalties lie.) He was an editor of the Harvard Law Review and a Sheldon Traveling Fellow. Since 1963 he has been at Covington & Burling, where his specialties have been international trade and antitrust. He is former Chairman of the Antitrust Section of the American Bar

\(^9\) See Glossary at 130.
Association. He has lectured at the University of Virginia and at Georgetown Law School. Finally, he is on the Board of Governors of the Association of Yale Alumni, which means that he is responsible for much of the well-being of this University.

MR. HARVEY M. APPLEBAUM: There are several reasons why it is a special pleasure for me to be on this program. The first is that the Moderator, Harold Koh, was formerly at Covington & Burling. Second, as Professor Koh mentioned, while I am a Yale College graduate, and a member of the Board of Governors of the Association of Yale Alumni, this is my first opportunity to participate in a Yale Law School function. My only previous connection with Yale Law School is that Dean Calabresi taught me freshman economics in 1955. Finally and most intimidatingly, to my knowledge this is the first time my daughter Julie, who is a senior at Yale and is in the audience, has ever heard me speak publicly, as distinguished from in the household.

I have been practicing trade law for 25 years and indeed began practicing when it was not as fashionable and popular as it is now. There are two perspectives that should be disclosed as background to my comments. First, I represent both foreign and domestic industries in trade law cases and, indeed, it is becoming increasingly difficult to tell the difference between the two. And second, as you know, I practice both antitrust and international trade. When one talks about judicialization and legalism you can contrast the two at many stages. My own view is that trade law cases have become judicialized and legalistic in spades.

Trade law cases are extraordinarily complex and involve extraordinarily detailed and burdensome procedures both before the Commerce Department, the International Trade Commission, and the courts. One can spend great time on the intricacies of what is the cost of production of a product in Canada or Japan, or what is an "upstream subsidy" in a particular country. These cases represent intense litigation on two fronts. The parties are back and forth between the Department of Commerce and the ITC in antidumping and countervailing duty cases. To my knowledge, there is no other federal body of laws where there are simultaneously two separate federal agencies "adjudicating." In addition, they may be in court at the same time that they are involved in an administrative review of an antidumping or countervailing duty order.

There are also extraordinarily unrealistic time limits. These strict time limits simply do not permit reasoned analysis, either as to
whether there are sales at less than fair value or subsidies, or whether there has been injury. This is not the fault of the administering agencies; it is what Congress has provided. Every time Congress touches the trade laws it tries to make them faster and more expeditious. The notion is that when a United States industry has trade difficulty, it somehow should obtain fast relief. The ITC must analyze the cause of injury, for example, with respect to the U.S. semiconductor industry, the U.S. softwood lumber industry, the U.S. steel industry, or the U.S. automobile industry within a matter of months, usually with a one-day hearing. This can be contrasted with similar issues in an antitrust case tried over many weeks or months by an administrative law judge at the Federal Trade Commission or by a federal district court judge with no time limits. There is no parallel between the speed with which trade law cases have to be decided and what is done in other areas of law such as antitrust. I agree with Judge Aquilino that it is typical and common for the United States to address issues through the law and the courts, but it is not typical to do it in this fashion with the extraordinary time pressures and complexities that are involved.

One of the effects of this situation is that the major cases are settled with intervention by the Executive Branch. Mike Stein described the settlement that occurred as a result of an ITC decision not to find injury in the Section 201 automobile case. The pressure of major trade cases has led to government-to-government settlements with respect to carbon and specialty steel; some 20 countries entered into voluntary restraint arrangements in return for the withdrawal of antidumping and countervailing duty cases. In the last year, the U.S. has concluded two major agreements, one on softwood lumber from Canada, which was the aftermath of a countervailing duty case, and more recently the semiconductor agreement.

From the perspective of competition policy or perhaps the Antitrust Division or the Federal Trade Commission (FTC), these agreements are international cartels, endorsed by the United States Government. I am not criticizing them for that reason, but that is, in effect, what they represent. Former Assistant Attorney General William Baxter, who shaped the Reagan Administration’s approach to the antitrust laws, said that he found the trade laws to be totally unacceptable and anticompetitive, but they were here to stay, there was little he could do about them and, therefore, the Department of Justice would generally have to ignore them. It is interesting that the near breakdown of the U.S.-Canada Free Trade Agreement ne-
egotiations concerned the antidumping and countervailing duty laws (i.e., Canada's desire to eliminate its exposure to these laws and the United States' concern about Canadian subsidies).

I doubt that a private damage remedy, as Peter Ehrenhaft suggests, would resolve the problem. Such a remedy might make the cases more realistic and meaningful if they were under normal time-tables. However, discovery against foreign governments in subsidies cases or even discovery against foreign companies could be problematic. While private companies submit antidumping questionnaire responses, many of our trading allies have long resisted discovery in private antitrust cases.

Overall, we have a very expensive and complex trade law system, and I agree with Mike Stein that it rarely provides meaningful relief. This is perhaps one meaning of Harold Koh's reference to illusion versus reality. While I don't agree that the system is intended to frustrate, the system often does frustrate. U.S. industries prosecute their cases at great expense. The foreign companies usually also expend enormous amounts of resources and money. The result often has very little effect on the marketplace. Many domestic industries are disappointed after trade cases, whether they win or lose. In my experience, it is either disappointed or losing domestic industries that go to Congress and say, "It wasn't us, it wasn't our case. You have to change the law." And the law is changed periodically; the Congress is about to change it now. Congress tries its best each time to make it easier, if not automatic, for domestic industries to win trade law cases. I suppose providing relief is the role of the law, of the agencies and of the courts, but Congress always fails. The agencies and the courts can always find reasons why a particular domestic industry has not satisfied the statutory criteria, however easy or flexible they are supposed to be.

That is the process. I do not believe that the trade laws are the answer, but I am not sure that I have an answer. Unless one is concerned about the competition policy aspect (i.e., the competitive condition of the industry), and Congress does not seem to be, it seems that the major cases must be settled by government-to-government negotiations. I tend to agree with Mike Stein that for the smaller cases, the cases themselves are an outlet, if not a scapegoat. This is not a very sensible way to develop trade policy, but it does seem to be well established that it is the U.S. way. At least for the Washington trade bar it provides a very interesting and stimulating practice.
Panel I: Questions & Answers

PROFESSOR KOH: We have about 20 to 25 minutes for questions. I would just like to exercise my prerogative by asking one question to all the panelists. We have used the terms "judicialization" and "legalization" interchangeably, but if I understand Peter Ehrenhaft’s point correctly problem is not judicial resolution of some of these disputes but the problem is legalization, namely the statutory detail which is involved. I am wondering if the various panelists will address whether they view both judicialization and legalization as a problem, or whether they think that they are different from one another.

MR. STEIN: We might as well say the weather is a problem. This is 20th century America. And the way you decide disputes involving the government is to establish fairly rigorous rules, some form of due process, and let people go at it.

Trade regulation has been brought kicking and screaming into the 20th century. I don’t think there is very much you can do about it. Ten years ago, without all these rules, the system was perceived by domestic industries not to work because they didn’t think they were getting an honest count from the agencies. I think Harvey Applebaum is exactly correct: Congress’ trade policy has been to grant as little relief as grudgingly as humanly possible because of our commitment to free trade and, I think, our commitment to competition policy. The purpose of the trade laws is to provide an outlet for domestic industries that are injured. When the agencies find ways to deny relief, Congress tries to fix it. I don’t think you can avoid this judicialization except in the large cases, where there is something called the “rule of a billion.” If there is more than a billion dollars worth of trade, you cannot leave results to the vicissitudes of litigation, and you wind up with government-to-government negotiation. I guess that is not terribly surprising. I think there is really no point in railing against the inevitable demand for and linkage of judicialization and legalization.

MR. EHRENHAFT: I think Professor Koh has made an important distinction between judicialization and legalization. I have suggested the judicial relief aspect for dumping cases, and not for countervailing duty cases, because I believe that private parties that are injured by what we can reasonably regard as a business tort—whether the source of that problem is domestic or foreign—ought to be able to recover in the normal procedures of a court. I think
that would enable the injured party to recover damages for itself, rather than to obtain customs duties that are put into the Treasury if it wins, and it would enable the normal timetables of judicial cases to be applied to those particular cases. In addition, I don't find the problem of foreign discovery a very serious one. I think that our experience with Section 337 cases indicates that foreign parties faced with a best-evidence rule and with the possibility that their goods will be excluded if they fail to cooperate with a judicial proceeding would have adequate incentive to continue.

PROFESSOR KOH: Does everybody know what Section 337 cases are?

MR. EHRENHAFT: Section 337 cases are cases brought under Section 337 of the Tariff Act of 1930, enabling the ITC to exclude goods, including those that have infringed a U.S. patent or trademark, which are imported through certain unfair trade practices from entering the country. Section 337 does not apply, however, to antidumping and countervailing duty unfair trade cases, but there is no reason why that couldn't be changed.

I think that a judicial model, perhaps in the ITC, along the lines of a Section 337 action, if damages were recoverable, would satisfy our normal longings for due process. What I object to is the legalization of the rules, such as those requiring adjustments, that go into exact detail without adequate intellectual or policy orientation to make them sensible.

So I think there is a distinction, as Professor Koh points out, one that would particularly make sense for the small cases. Although, as Judge Aquilino has noted, we can't distinguish between large and small cases, I think that we all can apply a "rule of a billion" or something similar. If overall levels of trade are significantly affected, we must look for some out-of-court way to deal with the problem, because it's larger than two industries objecting or fighting with each other. If we have a small dispute between two companies, the judicial mold is probably adequate.

JUDGE AQUILINO: So long as trade disputes are legalized with rules, the system is going to beget the kind of judicialization that we have. It's almost impossible to legalize a matter of international trade which has such great importance and simultaneously to avoid the kind of lawyers' process which we have.

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MR. APPLEBAUM: One comment ought to be made about judicialization. The Trade Agreements Act of 1979,\(^1\) which became effective on January 1, 1980, marked the first time that access to the courts in antidumping and countervailing duty law cases became available. One result has been that in virtually every case—big or small—it is almost automatic that either the Commerce Department or ITC injury determinations or both go into Judge Aquilino's Court of International Trade and often thereafter to the Court of Appeals of the federal circuit.

My own view is that if we have to have a legalized system for trade disputes, it is not only from the United States' perspective, but also from the foreign perspective. While I have said these cases are extremely complex, time unrealistic, etc., I think by and large most foreign participants in these cases come away with the feeling, using Michael Stein's terms, that they had a day in court. We have highly visible administrative procedures with full hearings, with confidential data given to lawyers under protective order, and with the right to challenge in court. When I said most cases go to court, that means on behalf of both sides. There are as many Japanese, European, Canadian, and Brazilian companies in court as United States industries. (I can remember only 20 or 25 years ago suggesting to a Japanese company that they bring a lawsuit in the United States, and at that time they thought it absurd to consider challenging the United States Government in its own courts.) In sum, judicialization provides the Department of Commerce and the International Trade Commission with a discipline, an overseer, and a guidance that they didn't have before, which will hopefully make them more attentive to and concerned about the justification and reasonable basis for their decisions.

AUDIENCE MEMBER: I have a comment and a question. I don't know if I disagree with Harvey Applebaum or not, but based upon my experience as a trade litigator, I would not call the ITC process judicial. There is little consideration, if any, given to the rules of evidence, and there is no effective cross-examination. The hearings consist primarily of people standing up and giving what in court would be at best a closing argument. The parties litigating, if you want to call it litigating, proceed before the ITC without access to much—if not most—of the evidence that the commissioners look at when they decide their cases. I think that, with respect to the

ITC, one must keep in mind that while there is a formal process it is not very court-like, if that is what is meant by "judicial."

MR. APPLEBAUM: By judicialization, I was referring to increasing access to the courts and the courts’ overviewing or overseeing of the ITC and the Commerce Department. I don’t disagree with your description of what happens at the ITC; it is a quasi-adjudicative proceeding at best, and the hearings are more like a legislative hearing than judicial proceeding. What I did mean to say, though, is that if you contrast U.S. trade law proceedings with those that exist in some other countries, the U.S. procedure is far more transparent. I would certainly agree with you, though, that you cannot compare an ITC, or for that matter, a Commerce Department proceeding, with a true Administrative Procedure Act (APA) due process proceeding or a federal district court proceeding, where you have full rights of cross-examination and full rights to access to everything in the record.

AUDIENCE MEMBER: I am not sure that I agree, at least with respect to, for example, the Canadian procedure. As I’ve observed it, it is even more judicial. They have hearings with real evidence, real cross-examination, and real witnesses. The hearings last for days rather than one day.

MR. APPLEBAUM: The Canadians purport to, of course, pattern their proceedings and substantive standards after the U.S. laws. When it had less of a caseload, the International Trade Commission, then called the U.S. Tariff Commission, used to spend six, seven, or eight days on a hearing. The 1968 Canadian Potash hearing went on for eight days. But the Commission can’t do that any longer, given time limits and its very heavy docket. Let me ask you given the time limits that the Congress has imposed, if you see any way in which the ITC could allow for the kind of process in the Administrative Procedure Act with cross-examination, access to records and the like. Keep in mind that there are no time limits for proceedings at the Federal Trade Commission in antitrust cases or any proceedings in the federal district courts. You can take six, eight, twelve months or more for discovery alone.

MR. EHRENHAFT: Could I just suggest that we do have a model in the Section 337 situation, one that really ought to be applied by the Commission? The ITC ought to have hearings judges to hear these re-determinations with opportunities for the Commission to

review as they do in Section 337 cases, which also operate under fairly tight timetables. That would be a much more sensible allocation of resources and a more judicial-type atmosphere for conducting those kind of hearings.

PROFESSOR ANDREAS LOWENFELD: Before everybody gets so fascinated with the judicial and legal models, remember what a company facing import trouble does. It has a series of options. You have on the one hand the so-called unfair trade action (the tilted playing field) where you start with the Commerce Department, then go to the International Trade Commission, and then one or the other side goes to court. Or you go with an escape clause case, where you don’t get the administrative agencies first or the courts at the end.

What’s the difference? Take the unemployed auto worker in Detroit and his brother-in-law who works in Gary, Indiana for a steel company. They both get laid off. These cases were roughly contemporaneous. The steel industry talked about dumping and subsidies ad infinitum, and still does, while the auto companies simply invoked the escape clause. Why are these routes so different? Neither one of them really addresses the problem. It’s interesting that Mr. Stein says that the ITC decided the auto case wrong. I submit it doesn’t make any difference. If the ITC had decided the automobile escape clause case in the fall of 1980 in favor of the industry, what would have happened? There would have been a recommendation to the President which probably would have gone over to the new term, and there would have been a negotiation of very much the same thing as what finally happened. So let’s not let the delusion of either legal rules or the role of the courts overtake where we started: namely, control by the political branches. Basically, Peter Ehrenhaft got it about right.

MR. STEIN: I think there really would have been a difference had the ITC decided the auto case affirmatively. If you had a government that cared about overall industrial strategy, it could have fashioned relief that would have been substantially better for the world trading system than what ended up to be the case with the voluntary restraint “non-agreement agreement.” You could have, for example, gone to a tariff rather than de facto quota, which would have at least kept the economic rents in the United States instead of Japan. You could have put some sort of performance requirements on the domestic industry. Finally, you would not have had what I thought

13. See Participants’ Biographies at xi.
was a humiliating extra-legal non-negotiation. All this could have been done in accordance with international rules, so I think it would have been useful.

The steel industry's problems and the automobile industry's problems, I think, were substantially different. Overcapacity and government subsidization is a tremendous problem in world steel trade because investments in steel plants throughout the world are not based on market considerations, but on considerations of industrial economic policies, or perceptions of economic prestige. The result is a serious problem of dumping. If I ran a steel company and I were thinking about modernization, and I looked around the world and realized that into the indefinite future I would be faced with competitors who were prepared to sell in my market at marginal cost, I think I'd put my money into an oil company instead. (To show how smart the steel industry is, USX did buy an oil company, but at the top of the market.)

To continually criticize an industry for failing to invest and modernize, when such investments are plainly uneconomical, seems to me to be at least to some degree unfair. There is a public policy justification for a steel program. The industry uses the trade laws essentially the way you use the two-by-four on the mule: to get the government's attention. And having gotten the government's attention, the industry and government ought to try to work out some sort of strategy that makes sense. I don't think that in the handling of the automobile and steel cases there was a lot of thought within the government about how to tailor relief to come up with something sensible. I think the thought in the government was how to get these guys off our back.

MR. APPLEBAUM: I agree with Mike Stein that there is a vast difference between presidential relief under trade laws, such as Section 201, which incidentally is the safeguard provision of the GATT, and what we get out of voluntary restraint arrangements. However, unlike Mike, I think the ITC decided the auto case correctly. The perspective of our foreign allies was that even when the domestic industry brings a case and loses under what we're calling quasi-judicial or adjudicative procedures, then all it has to do is go to Congress and say, "We lost but the law is bad, give us relief." But Mike Stein's point is very important: Under Section 201, we would have controlled the relief, including the procedures and the time frame. As it turned out, it was left to the Japanese government both to im-
pose and to administer the relief, and of course, every year we have had to have this non-negotiation that Mike's been talking about.

**PROFESSOR KOH:** Let me just point out that the term Section 201 refers to the President's escape clause authority, the discretionary form of import relief as opposed to the non-discretionary form in a Section 301 unfair trade practice case.

**PROFESSOR LOWENFELD:** I just want to respond for a moment to the notion that, if the escape clause action in automobiles had gone the other way, the U.S. government would have been in charge and they probably would have put on a tariff. If so, then what? We would have had higher prices and the American automobile companies still would not have shaped up. Following the course we chose, looking at Ford 10 years later, it's a success story. It's a success story partly because the American auto companies realized that they couldn't press their own government and that they could not count on the Japanese forever, and so they shaped up.

**MR. STEIN:** I think they would have shaped up anyway. What they needed was time, and they got that time. I think, however, they could have gotten the time more efficiently.

**AUDIENCE MEMBER:** I find something kind of unreal about the economics behind these dumping decisions. Peter Ehrenhaft indicated that he thought the U.S. Swiss cheese group should have gotten relief because it was a lot more expensive to make Swiss cheese in Switzerland than the price at which it could be sold here. The story told, however, seemed to imply that in fact the Swiss were internalizing in their price the benefits to the tourist trade and the benefits of stopping people from moving from the countryside to the cities. That seems to me to make sense. How, administratively, does a court take into account the internalization of those kinds of costs in making a decision about their value?

**MR. EHRENHAFT:** That's a very good question, and you've put your finger on a couple of very important points. If we are concerned about consumer welfare, then obviously we should welcome dumped and subsidized goods. We should want to have foreign companies dump their goods here, and we should welcome the transfer of resources from the Swiss to us when they sell $4.00 cheese for $1.00 in this country. Why do we not want cheap goods? The principal reason is the one that I have mentioned, our concern about employment. We are more concerned about maintaining employment of our workers than we are about getting cheap merchandise for them. And we are concerned that, if foreign companies can
dump their merchandise in this country willy-nilly, they are going to capture the market permanently after our workers are laid off and our investors have pulled out. It's a transfer of the unemployment and adjustment problem from their country to ours. We think it's unfair for them, if they have employment problems, to keep the status quo of those people making cheese and make our workers look for new jobs in semiconductors. That's the philosophical, and probably the only correct, basis upon which we can justify dumping and countervailing duty laws: Namely, that we should prevent the shift of the burden of adjustment from abroad to here. That is the only basis that I believe really makes sense.

**PROFESSOR GARY HUFBAUER:** I wanted to ask about Peter Ehrenhaft's two main themes. Question one: If you get the government out of the small cases and turn them over to private litigators in the court system, do you think the private court system will be open with the underlying allegations of improper, unfair government intervention, toleration of cartels, toleration of restrictive practices against unions, etc., or do you think instead that in the small cases we won't need to have the courts involved because those issues will be taken up by the U.S. government in the large cases? Question two has to do with another theme you raised: simplification. If I understand simplification, it means getting rid of—or substantially narrowing—the powers of the Department of Commerce, the ITC and possibly the USTR. In any event, it means substantially reducing the government bureaucracy and probably getting rid of pages of administrative regulations, the *Federal Register*, and legislation that has built up over the years. As you well know, Peter, better than anyone else, the current omnibus act is going in exactly the wrong direction. Maybe you think the revolution in terms of simplification is going to be coming much sooner if things are getting so bad that the breakdown is imminent. So, I'd like a forecast on the proximity of simplification.

**MR. EHRENHAFT:** I guess one of the greatest insights one gains from having been in the government, as you know, is how helpless you are. As a government official, there is a tide of events in time that moves on regardless of who is in power, and I think that has been true in our trade law. There hasn't been a significant difference whether Republicans or Democrats nominated the incumbents, at least in this particular field.

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14. See Participants' Biographies at x.
Private Remedies

Your first question was: How are the courts going to deal with issues such as restrictive union practices, environmental rules, and other kinds of aspects that can influence prices? I don’t think that those kinds of considerations play a role today in dumping cases. I’m talking about making a private damage action available for a price discrimination tort that would be identical whether the discriminator was domestic or foreign, and I don’t know that union rules, environmental rules, or any of those things have any role to play in it. I don’t think that they do in our administrative dumping cases and I don’t think that they would in the judicial model that I have proposed.

PROFESSOR LOWENFELD: Treble damages?

MR. EHRENHAFT: I wouldn’t necessarily have treble damages, no. I would have simple damages as an adequate compensation.

PROFESSOR LOWENFELD: Would you have to show injury?

MR. EHRENHAFT: Yes, the way that you would in an ordinary antitrust case.

PROFESSOR LOWENFELD: That would mean changing the dumping laws.

MR. EHRENHAFT: Yes, absolutely. You’d have to accept that the purpose in the dumping law is to address injury from dumping as opposed to dumped imports.

I think that the ITC is woefully mistaken in its approach on that. I think that the problems you are talking about, such issues as the environmental laws, the labor rules, and so on, are very serious problems but not ones that can appropriately be addressed, or should be addressed, within the confines of a particular case. I remember the environmental issue was raised by the Indonesians when we told them that it was unfair that they had no scrubbers on their steel mills and that this enabled them to ship their steel at much lower cost to the United States than that of our producers because of their investments in environmental controls. They said that the United States had polluted the world in the 1890s, and now it was their turn. In addition, they responded that it was appropriate for an underdeveloped country to put its priorities where it had to with its limited resources, and the first priority was to make the steel and to worry about the air later. These are not questions that can be answered glibly or quickly, especially within the very short time limits of dumping and subsidy cases, and I don’t think they should be.

As for your second question, as to whether we’re going to see a simplification revolution in our lifetimes, I think there is only faint
hope that we will, if indeed we can galvanize this audience and others to see the appropriate light and the wisdom of our views. Perhaps the students present today will remedy the procedure when they become practitioners. One problem is that too many lawyers, as we presently turn them out of most law schools, profit too much from the present system as it is. Therefore, we are unlikely to see much pressure for reform from within the trade bar. As far as industry, and even more so the Congress, is concerned, these issues are greatly complicated and they have been so laden down with slogans that people accept as fact, such as the need to address "unfair trade practices" by others when we do exactly the same kind of things and when, in fact, a price discrimination policy is a very sensible policy that most businessmen adopt for most of their sales. We have to get rid of all of that baggage, and perhaps only when it collapses of its own weight is there reasonable expectation for change. A true movement for reform is unlikely.

MR. APPLEBAUM: I think we've seen the revolution, but it's been in the opposite direction of what you're suggesting. I think what has happened to the trade laws in the last 20 years has been a revolution. There has been a vast and dramatic change, but it's been as you've heard on the panel today, toward more complexity, more lawyering, more procedures, more judicial intervention. What I have observed, which doesn't seem to make any difference, is that increasingly the Senate Finance Committee and the House Ways and Means Committee staffs and members of Congress recognize that "tinkering" with the trade laws won't eliminate the deficit. The General Accounting Office has estimated that if all of the unfair imports were absolutely embargoed, excluded from the country, it would only affect 5% to 10% of the trade deficit. But knowing that, even recognizing that trade laws are not the answer, Congress seems increasingly to want to make them more legalistic, and to make them more accessible, and to make more domestic industry victories possible. I don't see that stopping any time soon. In disagreement with Peter, I think the trade bar in Washington and elsewhere has been one of the more responsible, restraining voices on what Congress has been doing.

MS. JUDITH BELLO: ¹⁵ My question to the panel and to Judge Aquilino in particular is whether in this increasingly legalized, judicialized review process, we really need two layers of judicial re-

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¹⁵. See Participants’ Biographies at viii.
view? Should we retain at first resort the Court of International Trade, and then resort to the federal circuit?

**JUDGE AQUILINO:** That is obviously a question for the political branches in Washington to resolve. I don't think there's an inherent reason why a two-level review exists.

**MR. STEIN:** I think there is a reason. I'm not sure it's working out the way it ought to, but there should be more than one judge to decide questions of policy, which is why there are three judges on the circuit courts of appeals. It's just very, very dangerous to have a single level in the Court of International Trade, because then you could have a single person who easily could be mistaken, with only Supreme Court review, making decisions on what the law means. If you do it the other way around, you have a court of appeals. The major contribution that the Court of International Trade can make in the dumping and countervailing area is to "marry in haste and repent at leisure." There's a tremendous premium on getting decisions fast. They're not always correct. If you have single-judge review in the Court of International Trade, you can actually get into the record and fix blunders. And I think it is that sort of searching, factual review that has had some effect at the Commerce Department, but so far no effect whatsoever at the ITC. No ITC decision has been reversed through judicial review so far. If you had review only in the Court of Appeals, I think what you would get is the Court of Appeals now and again focusing on some questions of statutory interpretation, but otherwise judicial review would not serve the function it ordinarily does because it is inconceivable that the court could get into the detailed examination of the record that is necessary for judicial review to perform its function. So, I think we are stuck with two levels of review.

**MR. EHRENHAFT:** My response would be the opposite. I would say, abandon all judicial review, or most of it. I think that it has had an important disciplining attribute because of the point that Mike makes, that the agencies have to act so quickly, but then everyone runs into court anyway so that everyone slowly and methodically can review what has been done. Why not have a more realistic timetable to begin with and allow a correct procedure that wouldn't necessitate that meticulous, after-the-fact review? I think that the problems that Congress observed at the time that the Trade Agreements Act of 1979 was adopted—namely, the failure of the agencies to articulate why they were doing things—was something that the Treasury was beginning to address. I think that the Treasury started publish-
ing opinions that ran for more than one column in the Federal Register, and attempted to lay out the reasons why it decided as it did. If that had been continued, and if one were to adopt an administrative law judge type of proceeding, and then had judicial review only of that through normal APA-type proceedings, I think we would have an adequate procedure of judicialized decisionmaking and the level of review appropriate and traditional in our entire legal system without this whole panoply of courts. Sorry, Judge Aquilino, I don’t want to unemploy you, but I am not convinced that the Court of International Trade is a necessary addition to our court system.

MR. APPLEBAUM: I think we ought to rescue Judge Aquilino. Even if antidumping and countervailing duties were eliminated, the Court of International Trade has other functions, including the customs and tariff laws, and others. More broadly, I would like to comment that the issue of whether you have two courts or one, whether you want, in a sense, a new review of the factual record in detail by the Court of International Trade, as distinguished from what we have in normal APA proceedings, like with the Federal Trade Commission, where you have a fully developed record below with full cross examination, discovery, evidentiary rules, and then you go straight to the United States Court of Appeals. I find that there are good arguments on both sides of that question. If you had more realistic timetables, then it would augur more for the need for only one reviewing court, but you’d still have the question about the record developed below that a court of appeals would normally review. In the absence of more realistic timetables at the Court of International Trade, you have more access to the administrative record than you do below. So it seems to me that there are well-drawn lines of argument, and it may be that it’s the procedural time element of the statutes, not so much their substantive policy, that prompts some to believe you need both levels of review.

AUDIENCE MEMBER: I’m a trade lawyer with Schnader, Harrison in Washington. I hear a strong thread of “inevitability” running through a lot of the comments here today. The automobile case probably would have gone very much the same way whatever decision the ITC came up with. Peter Ehrenhaft felt he had very little control, even though he was in a very responsible position in the government. And, I have had this feeling as I have watched the trade law process in any number of examples. I wonder, first of all, if people could comment on this in general.
I’d also like to offer an hypothesis in particular, which is that there is a “consumer interest,” and I don’t just mean the usual retail consumer, but particularly the industrial consumer. If, for example, the price of steel is put up too high to protect the steel industry, you may make it impossible for the auto industry to compete. A perfect example now is with Toshiba. People were ready to tear Toshiba to shreds, and American industry came rushing in and said, “My God, don’t do that! We need what they have, and they’re supplying us.” Thus, you keep finding this tension between industrial consumers and producers. If the basic premise is correct that an open trading system is in our national interest, along with everybody else’s national interest, the fact is that there is always some interest hurt any time we try protectionist devices and judicial and legislative interventions.

MR. EHRENHAFT: I think that as a matter of fact those consumer interests are sometimes taken into account, for example, if you recall the escape clause case on copper. The main reason why the President decided not to grant relief to the copper industry was his finding that it would drive up the price of copper to the extent that the copper users would be substantially injured, and that there were many more companies in the copper using business than there were in the copper mining business. The way that the escape clause under Section 201 is structured allows the President to take such interests into account in deciding whether or not to grant relief.

I think that one of the problems we have in the countervailing duty and dumping cases under Section 301 is that these kinds of discretionary considerations are not allowed to be raised. The only consideration is the injury to the competing producer. This is exactly why American industries try to push everything into the countervailing/antidumping model, because it is just in those kinds of proceedings where those consumer interests are not permitted to be considered by the Administration.

MR. APPLBAUM: Let me add that another reason to go the antidumping/countervailing duty route under Section 301 is that you don’t have any competition policy considerations. The Department of Justice earlier, and the Federal Trade Commission more recently, have tried unsuccessfully from time to time to persuade the ITC to take into account the effect on the competitive condition of the industry bringing the case. (I’m not saying this was proper, because the Congress didn’t direct these actors to consider the competition policy, but that it has been without success.) On the other
hand, if you have a Section 201 escape clause proceeding, the President can take into account competition concerns as well as consumer concerns.

This platter of options becomes a critical cutting edge for a domestic industry seeking to bring an import relief case. The antidumping and countervailing duty laws, while they are complex and involve judicial review and the like, contain no element of presidential discretion or arguably no element of politics except in the very biggest cases that do get into government-to-government negotiations. If you file a Section 201 case, however, seeking quotas or tariffs such as for the copper, automobiles, and steel cases you've heard about, even if you win at the ITC, you still suffer the risk, for unrelated reasons, that the President might not grant the relief. So, when you're talking about the consumer interests and, I would add, competition policy interests, there are very great differences between these various trade law options.

MR. STEIN: I think the most important change in government trade policy in the second Reagan Administration is the beginning of the recognition that the national interest might actually matter. These notions that whatever the market dictates is what was ordained by God to happen, that the high dollar is wonderful because it shows we're rich, and that it is fine if other governments' industrial or adversarial trading policies permit them to sell massive amounts of goods to us—while we can't sell anything to them—are finally beginning to break down.

This panel is entitled, “Administrative Agencies, Private Parties, and the Courts.” I think that our trade policy formulation system is unusual in that it is driven, not by government's perception of what is necessary in the national interest, but by private parties' actions in focusing the government on particular trade disputes. It seems to me there are now three really major trade disputes that have to be solved: semiconductors, supercomputers, and large transport aircraft. I think that the United States government is finally starting to focus on the question of what policies make sense, not only for the producing industries, but for the consuming interest, and for the world trading system as a whole. It may be, however, that the only way that you can create a sensible trading system is to deny access to our market now and again as a tool for getting other governments to recognize that certain policies of theirs may not be in the overall world economic interest.
Private Remedies

An interesting example of this is the lumber agreement with Canada. I think the uniform reaction to this agreement by observers was: "It's terrible! It establishes a cartel! It raises prices! It's awful!" The United States lumber industry argued, with ultimate success, that Canadian timber cutting policies were fundamentally irrational, that they were destroying their forests in order to promote short-term employment in their lumber production industry, and that the overall result was a substantial misallocation of economic resources. A countervailing duty case was brought. But, it was politically much too sensitive a case to be brought to resolution in that process. There were government-to-government negotiations, resulting in a 15% export tax by Canada. Basically, the United States gave up about $500 million a year in trade relief, giving it to Canada instead as the price for getting this relief. The government of British Columbia two weeks ago decided to raise the price that it charges for timber, because it turns out that this has not had the devastating effect on Canada that its industry predicted. In fact, the Canadian government was providing what amounted to an unnecessary subsidy to its industry. I think that industry on both sides of the border will be healthier as a result of this agreement. It is possible that with respect to semiconductors, if the United States government ultimately can persuade Japan to act as though it were a market economy, we will again have a more efficient allocation of resources in that industry, and the industries in both countries, and the world trading system as a whole, will benefit.