Panel II: Controlling Imports and Opening Foreign Markets

PROFESSOR HAROLD KOH: Our second panel begins with Gary Horlick, a graduate of Dartmouth, Cambridge University, and this law school. He worked at the Ford Foundation in Latin America, and then in private practice before becoming international trade counsel to the Senate Finance Committee. He then served as the Deputy Assistant Secretary of State for Import Administration, and is currently a partner at the law firm of O'Melveny and Myers in Washington, D.C. Mr. Horlick lectures on International Trade at Georgetown Law Center. He taught the international trade course at Yale Law School for several years and played an integral part in developing interest in international trade here. He is also the world's greatest fanatic about Pepe's pizza.

MR. GARY HORLICK: One point worth emphasizing at the outset is the interplay between the procedural aspects you heard about earlier this morning and the substance in any given case. A good example is the discussion of judicial review you had at the end of the first session. Judicial review was absolutely crucial at the Department of Commerce in forcing us to do the job right. Whether every case got reviewed did not matter; what mattered was the knowledge that it could be reviewed. This became, first, a pressure to do the case right, and second, an explanation to give to members of Congress, cabinet secretaries, or foreign ambassadors, about why a case couldn't be fixed. They'd say, "Do it this way, it's politically convenient." And you'd say, "We'd be sued. It wouldn't work." That's a very good example of how procedural devices—in this case, judicial review—force adherence to substantive norms.

What I want to do today is not give you a rather dry recital of the U.S. trade statutes. What I want to do is take a look at the way these laws are currently being viewed by Congress. As you may have noticed, trade is a hot item legislatively this year, and the proposed changes deal with almost every section of the U.S. trade laws. By way of background, as you may have gathered from this morning’s panel, U.S. trade policy is mainly reactive. It is a function of private pressures on the government; the government rarely takes the initiative. That has changed slightly in what I label as the "post-Bello era," starting in 1985, when the U.S. government for the first time since at least 1981 started trying to think coherently about what the
Controlling Imports

U.S. wanted as a trade policy. But even so, most trade proceedings, most trade pressures, and most lobbying are still a result of private company pressures.

You can identify two forms of pressures. One form deals with imports. Import relief pressures, to put it very simply, are applied by private entities, such as companies and workers, trying to use the trade laws to exclude competition. They are explicitly anti-competitive, as Harvey Applebaum stated this morning. Harvey’s background is ideal for this practice. It takes an antitrust lawyer to recognize just how anticompetitive these laws are. In that sense, I agree with Peter Ehrenhaft’s thought that in theory they really ought to be privatized. Private companies are trying to use a body of law to reduce competition. The same companies would do the same to their domestic competitors if they could. There is no reason why eliminating competition should be accomplished through administrative agencies in the government.

There’s an important corollary which Peter added that many others don’t: We have to have the right standard. It’s not enough simply to say you need a private right of action. We have to figure out what the standards should be. Where import relief is concerned, whether it’s through the antidumping or countervailing duty laws in particular, or through any other law, a series of questions exists. The first question—and it is fundamental—is: What justification is there for treating foreign goods differently from U.S. goods? A perfect example is as follows: A company in the U.S. can sell at a certain price related to its costs and be considered to be acting not only fairly but nobly. Our whole economic system is based upon price competition. We encourage our companies to lower their prices. But if the same company were just outside the U.S. and shipping the good in with the same cost structure and prices, it would be dumping. We have to ask why, and indeed if, there is any justification for considering one good to be unfair and the other fair. That, indeed, is the real flaw in the stirring oration my good friend Mike Stein gave to you about semiconductors and lumber. You can only say that this is in the world economic interest in terms of allocation and resources if the standards being used are economically efficient. Certainly the antidumping law is a joke in terms of economic efficiency. I say that, having enforced it rigorously for two years because it’s on the books. But it doesn’t make sense, at least to most economists, in terms of the kinds of pricing
schemes they want and very noticeably it is not followed within the U.S. in U.S. antitrust law.

The second question—and it is related to the first—is: What is fair behavior? Some criteria other than economic efficiency may exist, though again, as a policy matter, why is it fair if the U.S. does it and unfair if a foreigner does it, or vice versa? No one in Congress is looking at these questions. The assumption is that dumping is evil and pernicious.

The second congressional focus is on market opening measures. This concern is embodied Section 301, which provides for a sweeping delegation of power to the President. The breadth of this delegation is really quite remarkable compared to that found in domestic regulation. Section 301 in essence allows the President to do anything he wants to any imported good or service, with no judicial review and no good standards to speak of. Even if there were standards, in view of the importance of judicial review in maintaining standards, without such review the President could do anything he wanted to do. I can think of no economic regulatory area in a domestic context where Congress has given such sweeping power to the President, outside of time of war. Under it, the President can use access to the U.S. market as leverage to force foreign markets open. And this of course is desirable; it is pro-competitive. What we're trying to do, in a bizarre way, is to force the Japanese to open their markets. In theory, that would make them even more competitive economically because, presumably, if they're protecting their home markets, their import prices are higher than they should be and they're paying for that. So, these market opening measures are a good thing from a world economic policy point of view.

The caveat is whether, first of all, this is accomplished in a way that actually does open foreign markets or whether it's really being done to set up a pretext for closing the U.S. market, i.e., the U.S. finds that the market in Ruritania is closed to U.S. widgets; therefore, the U.S. closes down access to its market for Ruritanian widgets. Maybe the goal of the widget industry all along was simply to close out Ruritanian widgets but it couldn't figure out a way.

The third question, which is more tortured, is: What can be gained in international negotiations? As I say, we want to use our market as leverage, and that's a rational approach. But what can we "get" using that leverage? In most bargaining situations, one party doesn't have complete power; the other side has some—pardon the term—countervailing power. It becomes very tricky to guess how
Controlling Imports

far the U.S. can go, how much it can get foreign countries to open their markets before instead they start closing their markets and trigger counter-retaliation. The reason I stress this second aspect is that this is the congressional conundrum that you're seeing this year reflected in the Gephardt Amendment, the Super 301, the 301, and so on. The question is: How can Congress force the Administration to make what is in essence an extremely subtle judgment? The principal congressional sponsors of these measures have been quite aware of this problem. I remember talking to a staffer in 1982 when this discussion was launched. As she put it, “Congress cannot legislate subtlety.” Anything Congress does is going to be a blunt instrument. In 1985, the Administration finally started taking the retaliatory/negotiation approach to the situation. The problem was, however, that it was too late for Congress. What you see now in legislation is Congress trying to control the Administration by setting standards that define exactly how the Administration should tell when it has pushed just the right amount in negotiations. If any of you have ever been in any kind of negotiations, starting with buying a car, you will realize that it’s very hard to negotiate by remote control through a body of 537 members.

Briefly, let me go over the provisions of the legislation and then you'll hear some comments, I'm sure, from other panelists. The stated purposes of the trade legislation in 1987 are threefold, all of them quite noble. The first concerns the Uruguay Round. It is to provide the U.S. government with the authority to negotiate trade agreements that would open foreign markets to us and open our market further to foreigners, in the name of increased economic efficiency. Such matters often boil down to fights between Congress and the Executive about the proper allocation of power. While this is a life and death matter for my fellow panelist today, Judy Bello, and her colleagues in the executive branch, involving the formulation of trade policy, it really goes more to the allocation of power under the U.S. Constitution than to trade policy as such.

The second stated purpose of the 1987 trade legislation involves Section 201, or the “escape clause,” and concerns the issue of adjustment. There's a legitimate concern within Congress that the U.S. really does not have a good system for channeling energies toward adjustment rather than toward protection. Both the Ways and Means and Finance Committees have worked very hard and very responsibly. (That isn't to say I agree with all they've done.) Essentially, what they're trying to do is to force the International Trade
Commission to decide if an industry seeking import relief under Section 201 can become competitive, or whether it should simply slowly fold its tents and adjust out of the industry. This promises to put a real burden on the ITC. I can’t think of a U.S. government agency that indulges in that kind of judgment, and the only consolation I have for the judges on the Court of International Trade is that their decisions will not be subject to judicial review.

This is the kind of thing investment bankers do all the time. What’s fascinating is that the government is going to try to substitute its judgment for that of the marketplace, and that this is being done in the name of a free market and a level playing field. I don’t know how it will work out, but this is a fairly sincere attempt by the two committees.

There is an interesting problem with Section 201, which hasn’t been mentioned. If you’re serious about using Section 201 in a way that is beneficial for the world trading system, it’s not one-sided. If one vote had switched on the ITC, the U.S. in 1980 could have raised very high tariffs on Japanese autos. And it wouldn’t just have been Japanese autos, but everyone’s automobiles. The U.S. imports about $20 billion in autos a year. In theory, under the GATT, if a 10% tariff were set on $20 billion in automobiles, tariffs would be lowered 10% on $20 billion in other imports, and if that’s the case, it becomes a way of fighting protectionism. If you’re going to protect your auto industry, you’re forced to lower levels of protection in your other industries to keep a balance.

One of the main reasons we do not use Section 201 more, and instead use bilateral voluntary restraint agreements, is to avoid paying that kind of tariff “compensation,” to increase our overall level of protection. Again, most economists would say that is corrosive, rather than beneficial, to the world trading system. If we don’t lower our tariffs 10% on $20 billion worth of goods, all the foreign countries get to retaliate against $20 billion of our exports by raising their tariffs 10%. Thus the shakes and shingles case, which was mentioned earlier, was a victory for the shakes and shingles industry here. It didn’t matter much except to certain book publishers, com-

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1. I recall that this same type of “judgment call” came up in the context of countervailing duty cases in 1982 on European steel. The question under the subsidy law was whether or not a government investment in a foreign industry was viable. We had the statutory deadlines you heard about; actually less, 150 days. We called up some major consulting firms and asked if they could help us, how much it would cost, and how long it would take. They came back with “two years” and “$5,000,000,” neither of which we had.
Controlling Imports

puter parts makers and Christmas tree growers in the U.S. who found Canada slapping tariffs on their exports to Canada in retaliation. Import relief was granted in 1983 on specialty steel and the Canadians retaliated on U.S. specialty steel exports. We don't sell a lot of specialty steel in Europe, so instead of retaliating on specialty steel, the Europeans did a laundry list. They retaliated on chemicals, skis, and either firearms or fire alarms (I've never gotten it straight). It turned out that one company, a name that used to be quite familiar in New Haven, Olin, sold all three in Europe. They had no idea this retaliation was coming at them. They woke up and found three of their lines of business suddenly subjected to protectionist European tariffs because of the U.S. desire to protect its specialty steel industry, an industry with which Olin had no connection, except that it turned out that Olin bought European specialty steel for the edges for its skis. A company totally uninvolved in the case found itself disadvantaged in four different ways.

This leads into the big question, the big fight on Section 201 in the current legislation, which is presidential discretion in Section 201. The argument for presidential discretion is specifically to look out for the Olins of the world, or the farmers, or the consumers. Section 201 is not a free ride. Yes, we could protect ourselves against Japanese cars and European cars, but we would pay for it in other ways. Someone's going to pay for it, and the real lesson of most trade policies is that there's no free lunch. That's why people fight so hard in Washington. Protectionism is a form of rent-seeking behavior and frequently, for many industries, the highest return on their investment is Washington lawyers. If a lawyer could get import relief 'worth $100 million, the legal fees would have to be astronomical for that to be a lower return on investment than an ordinary factory's 10% or 15% annual return.

The last of the three main goals of the 1987 legislation addresses the use of access to the U.S. market as leverage to get access overseas. As I said, this is something the U.S. is very interested in and is positive on the trade side. The legislative issue is presidential discretion. This issue is probably the toughest single fight. Assuming that the U.S. has a good definition of what constitutes unfair trading practices by foreigners, should the President be required to retaliate against those unfair practices in other markets? This leads into the problem of how Congress can set up in advance a standard for negotiation. This is very tricky. Most of the serious fighting in Con-
gress about trade this year is over how much presidential discretion there should be in Section 301.

Those are the three stated goals of the legislation. But the deadly parts of the bill for trade lawyers are the dumping and countervailing duty provisions. Why do we care about dumping or countervailing duty provisions? It goes back to the discussion about the privatization of trade law in the U.S. Dumping and countervailing duty rules are non-discretionary—if your case is good, you win. Therefore, lawyers almost always prefer to use them because there's no risk of losing out to political influence at the White House. Certainly in my two years I can honestly say that none of our cases was decided politically. Since those laws are non-discretionary, there's an obvious pressure put on the legislature by any domestic company with any kind of trade problem to define that trade problem as either dumping or subsidies. You'd much rather have your problem defined as dumping than as something that's actionable under Section 201, because Section 201 has the political review and concern for consumers that you've heard about. If you can get Congress to define your problem as dumping, then Commerce calculates the duty, the ITC finds injury, and you've won your case. Consumers don't enter into it, nor does competitive policy.

I will give a couple of examples to show how the legislative process works. First, a case involving Canadian pork. Congress passed a law in 1984 setting out the means of defining an “input” subsidy. The Commerce Department decided to ignore that law in 1985. A foreigner went to court; the court ruled in the foreigner's favor. The U.S. pork industry didn't like it; it went to Congress, and so far has already gotten the Senate to reverse the court. That's not an issue of policy; it's simply a matter of having the industry's problem defined as a subsidy or dumping. On the dumping side, similarly, there's an amendment introduced by one Senator for the stated purpose of raising duties on Japan by 20%. The other argument in favor of it is that the European Community does it to us; therefore, we should do it to Japan. Actually, the EC doesn't do it to us; that's a misstatement. The funny part of all this is that the Japanese, who have enough problems with the U.S., never use their dumping law against us.

What does this all mean in the big picture? The big picture is simple. What I have described is the nightmare you heard about at the end of the last session. Is the revolution coming? It's already here. It's happening piecemeal. You see the same sort of adminis-
Controlling Imports

tative protection being put in every trade act, and it's layered. You start in 1974 with some layers, 1979 with some more layers, 1984 more, 1987 yet more. This is fine; it means more U.S. industries will get relief and more workers will be employed in the U.S. But, if everyone does it, it becomes self-defeating. A short history of U.S. trade policy is as follows: Until 1934, Congress did all trade policy by line item tariffs. That worked until other countries raised their tariffs to retaliate against ours. The net result was that world trade dropped by approximately one-half; that drop is usually considered one of the causes of the worldwide depression. Whether that's true or not, everyone believes it. So, starting in 1934, the U.S. led the world toward market opening, getting rid of protection. Now the protection is happening piecemeal, and the U.S. and every foreign country, each in its own way, is heading in the wrong direction. We're doing it, not through tariffs, but through a proliferation of trade bills. This is an extremely gloomy outlook. I had thought about this and had decided to leave you in a depressed state about it. The only ray of light I have is that the person following me is the fairy godmother of U.S. trade law, my former classmate here, co-counsel, colleague and a few other things, and the ray of hope in U.S. trade law, Judy Bello.
Panel II: Respondents

PROFESSOR KOH: If I can just embellish the description of Judy Bello: She’s a graduate of this law school who went on to work at the Legal Adviser’s office at the State Department, then, after a stint in private practice, was the Deputy for Public Policy, for the Deputy Assistant Secretary of Commerce for Import Administration, who at least part of that time was Gary Horlick. She is now the Deputy General Counsel at the United States Trade Representative’s office, where she is the chair of the Section 301 committee. So, very frequently when we’re talking about what the President can do under Section 301, we’re talking about what Judy and her committee are recommending that he do. She’s also been a lecturer in trade law here at Yale, and has been integral in the continuing interest in the subject here.

MS. JUDITH HIPPLER BELLO: I reckoned that Gary was going to leave you in a gloomy state, and I knew that he would shift to me the role of being Pollyanna. So I’m going to try to fulfill that expectation.

This responsibility, though, reminds me—as it may some of you—of what White House staffers tell me is the President’s favorite joke, bar none. And that is of the little boy who on Christmas morning runs down the stairs with his parents close behind him to see what Santa has brought him from Toys ‘R’ Us. He’s expecting trains, mechanical toys, laser guns, and so forth. Instead, to everyone’s horror, they find a room full of manure. The parents are stunned; the little boy is aghast, and stops dead in his tracks. He then recovers, disappears for a moment, comes back with a shovel, and frantically begins shoveling this manure. His father, who still hasn’t recovered from the shock of what happened to everything he bought at Toys ‘R’ Us, says, “Son, what are you doing?” The boy replies, “Dad, with all this manure, there must be a pony in here somewhere!”

Gary Horlick hasn’t given you all the details, but there are many of us in the executive branch who see each of the bills passed in the House and Senate as approximately 1200 pages each of a lot of manure. A reasonable question, then, is why are we cooperating with the Congress in trying to shape a reasonable trade bill? Is it only that we believe in miracles on 34th Street, or is there some

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2. Ms. Bello was named Acting General Counsel at the USTR in November 1987.
Controlling Imports

rational basis—other than our enormous faith in Thelma Askey\(^3\) and Josh Bolten\(^4\). With them at the helm, if only they were in the majority position, everything would be O.K. Otherwise, what is the basis of our continuing to try to work with the Congress to get a bill that we at least can live with and, we hope, even like?

There is a pony in the trade bills, and it’s worth trying to extricate him from the barnyard in which he’s been entombed. The pony, as most of you probably know, is what’s referred to as negotiating authority. That is not, of course, what it really is. As you all know from Constitutional Law I, the President, under the Constitution, already has plenary authority to negotiate under his foreign affairs powers. But as you also know from Constitutional Law I, it’s the Congress that has constitutional authority over foreign commerce. While we can negotiate with our trading partners until we’re blue in the face, they realize we can’t “deliver” unless we have the Congress on board in those negotiations.

What’s been worked out by some of my august predecessors is what’s called the “fast track.” That is, the Congress agrees in advance that when we bring back to the Congress an agreement that we’ve negotiated and an implementing bill, the Congress will consider them under the so-called “fast track.” It does not guarantee that Congress will approve the agreement and change U.S. law in the way that appropriate implementation of the agreement will require. But it does guarantee up front that the Congress will consider a trade agreement on an expedited timetable, and that at the end of the day (usually 60 days), it will vote “yes” or “no” on the entire package, which will not be subject to hopelessly unraveling amendments.

Most of us view the fast track as a real “pony” in the trade area. The reason is that, as I think Professor Koh mentioned this morning, just last year we launched the Uruguay Round of multilateral trade negotiations. This is the eighth round of trade negotiations, the most ambitious ever in scope. Now, is this just another round of trade negotiations or is this truly critical? I’d like to argue that it’s truly critical. The reason is that we are faced with these 1200-page trade bills, principally because of Congress’ frustration with our mounting trade deficit. But everyone in Washington, even in the hallowed halls of Congress, agrees that the causes of the trade deficit are not problems with trade policy or trade laws that can be

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3. See Participants’ Biographies at vii.
4. See Participants’ Biographies at viii.
tinkered with. Instead, a chief cause of our trade deficit is our inadequate savings rate, fueled in turn principally by our federal budget deficit. Another cause is closed access to markets abroad—in lesser developed countries, because of their debt problems and lack of money to buy things from us, and in developed countries like Germany and Japan, because they have deliberately chosen to have slow growth policies. So the markets are closed abroad, we don't save enough here, our economic engines are being fueled by foreign investment in the United States, and the result necessarily is what seems to be a chronic trade imbalance. That is what's driving the trade bills, but the trade bills will do nothing to fix any of those problems.

What will help fix some of those problems is the Uruguay Round of multilateral trade negotiations, where we're trying to improve the current GATT rules. For example, we are trying to improve the rules on dispute settlement because, after all, substantive rules are less valuable if you can't count on getting your disputes under them resolved expeditiously. We are also targeting the rules for agriculture, which had long been the source of too often acrimonious disputes with our trading partners—in particular, the European Community.

We are also trying to expand the trading rules greatly; they currently cover only merchandise trade. Merchandise trade increasingly accounts for less and less of world trade. So we want to cover trade in services, intellectual property issues, and also trade-related investment measures. We want to make the world trading system more comprehensive and reliable so that it can continue to be as open and as fair as possible. So, the great hope here for the problems that have given rise to the trade deficit and thus to the frustration that the Congress is trying to cope with, is that they can be resolved by these negotiations.

But we will not make progress in these negotiations unless we can tell our trading partners that they are not wasting their time talking to the President and his staff only. Instead, we want to be able to say, "Not to worry; we have authority from our Congress. Chances are good that the Congress will 'deliver' when we bring back an agreement. Therefore, it makes sense for you to talk with us."

We met with a group of commercial counselors from several embassies recently and asked them, "What are you going to recommend to your governments if we don't get a trade bill in 1987, either because the Congress doesn't deliver, or the President vetoes?"
Controlling Imports

And their answer was, “We’re going to tell our governments to stop negotiating. Otherwise you guys get two bites at the apple. First, they negotiate with the President. Then the Congress takes a hard, critical look and they negotiate with the Congress. That’s unfair.”

So that’s what I argue in the first instance is a valuable “pony,” so valuable that we continue to work with the Congress even though what we’d really like to do is throw out most of the pending omnibus trade bill provisions.

At the same time, though, to be honest, I note that this pony is a little bit hobbled to start with. The fast track is a peculiar entity in U.S. trade law. It is a statute, enshrined in the United States Code. However, when you read it closely, it clearly was enacted as part of the constitutional rulemaking procedures in each of the houses of Congress. What that means is that even if the Congress enacts and the President signs a trade bill in 1987, the House and the Senate each has plenary authority in accordance with its rules to change the fast-track. We might think we’re getting fast-track authority, but it could be modified at any time.

This was underscored to me and others quite recently—in fact, Wednesday—in the context of the Canadian negotiations (which we were hotly pursuing until Canada walked out on us earlier this week). As you may know, we have a very powerful maritime lobby in the United States. The industry is very happy with the protection it enjoys in the form of the Jones Act5 and other current laws. Consequently, it does not want maritime issues to be on the negotiations table. So the industry approached the Senate Rules Committee to change the rules in the Senate to take fast track off the table for any trade agreement with Canada that encompasses maritime negotiations.

I don’t think this Senate resolution is likely to be passed; that’s not my concern. My concern is that this development symbolizes and refreshes peoples’ memories that the fast track is not “in concrete” for all time, that it’s only available so long as the Senate for its part and the House for its part are happy with the way things are going.

The fast track is a very important “pony.” We do want trade agreements authority—but even when we get it, we still have a long way to go through the course of the negotiations, always with the

fear that someone will resort to the House Rules Committee or the Senate Rules Committee and try to hobble the fast track.

So that's the pony in the trade bills. How likely is it that we're going to get it? Well, there's at least a rumor a day on this possibility. The problem is, even if you are a Pollyanna (which I am), you're looking at a basically tri-cameral "legislature," consisting of the House of Representatives, the Senate, and the Trade Conference, which comprises about 200 members organized into about 17 sub-committees. This creates a massive procedural morass that makes it difficult to achieve the substance that we want out of the process. Besides, the Congress has other priorities; the Finance and Ways and Means Committees properly view the budget and the debt ceiling as priorities ahead of trade legislation. So, although I'd like to play my Pollyanna role and say I think it will all work out, I think there's substantial risk that it might not. But because there's a pony in it for us—trade agreements authority and the accompanying fast track—we are indeed doing our very best to work with not just Thelma Askey and Joshua Bolten, but the majority as well, to try to get a bill that the President will sign.

PROFESSOR KOH: We've heard a lot about Thelma Askey and Joshua Bolten. Thelma Askey, who is our next speaker, is the Minority Counsel for the House Ways and Means Committee. I should say, putting my teaching cap on, that through historical accident, or maybe not accident, the principal committees in the House and Senate to have jurisdiction over trade bills have been the House Ways and Means Committee and Senate Finance Committee because tariff bills were originally for raising revenue and therefore had to originate in those committees. That means that the legal counsel, minority and majority, for those two committees have important roles to play. It also means that in the conference that is now happening, there is a struggle, as we will hear, about jurisdiction. Josh, the famous Joshua Bolten, is the Minority International Trade Counsel of the Senate Finance Committee, who will speak this afternoon. Right now we are lucky to have with us Thelma Askey, who is the Minority Trade Counsel for the Ways and Means Committee, which means that she is the principal legal adviser to the Republican members of the House Ways and Means Committee. She is a graduate of Texas Tech and has also done work at American University and George Washington, and after a stint on the staff of a Congressman from Tennessee, has been working for the Ways and Means Committee.

MS. THELMA ASKEY: I'm rather an interloper here today because I'm one of the few non-lawyers on the panel of the seminar this afternoon. However, I've been with the Ways and Means Com-
Controlling Imports

mittee for 10 years, so I hope that I can give you a little insight on how we create manure, and we do plenty of that. Also, I have to make a correction; I'm a Tennessean, not a Texan.

I also was a little chagrined to find out that I was on the substantive panel rather than the process panel, because at this point in time, at least in the legislative end of it, we're bogged down in the process, and the process right now is the substance, and at this time is at the heart of H.R. 3. Although we are in some danger of addressing substance before we conclude this process of doing a trade bill, and if we get a public law out of it, we probably are in as great a danger as we ever have been of making substantive changes in U.S. trade policy, as well as in the congressional procedures that Judy Bello already alluded to: fast-track procedures and negotiating authority.

One of the reasons why we are so focused on the process at this point, I think, is the inability of the Congress, at least up until recent days, to address some of the substantive problems that have already been discussed today that affect our trade policy and affect the trade deficit, such as getting some control over the federal fiscal budget. We have had some success in recent days. The House passed the budget bill; I think that the Senate passed it before they left. But we still have a long way to go on reconciliation and on the argument between the President and the Congress over tax increases and defense spending. But at least we seem to have finally made some of the hard decisions on the budget process, and we won't have to work, perhaps, on the kind of processes of the trade law in order to appear to constituents and anyone in the world at large who may be watching our system to be doing something. We can actually get down to what we need to do in the substance area.

Another reason why we have been so bogged down in the process, as has already been alluded to today, is that there is a tremendous battle going on between the Administration and the Congress over the balance of power. It's reflected in fast-track procedures, it's reflected in the discretion that's being argued about in the context of Section 301, Section 201, and a number of our trade laws.

There are going to be, I think, some changes for the future in the two roles that will be played by the Congress and the Executive and, indeed, by the third branch of government. I think that if Peter
Ehrenhaft has his way, we'll have more of a role in determining trade policy development in our country.

Another reason that we're bogged down in the process is that we are very much involved in a traditional argument by some of the self-interested politically strong groups over developing procedures in such a way that they are weighted in the groups' favor at the end of the day. There is a tremendous amount of time spent in the nuances of the procedures, and the expectation, I believe, is that there is success to be had in this exercise because the procedures will work in your group's favor at the end of the day. And so I do think that we're still going through a traditional process every time we do a trade bill, arguing with the various interest groups on how balanced our trade procedures should be and on how balanced they are.

I think that the fourth reason we're bogged down in the process right now is the hidden, perhaps not so hidden, political agendas that naturally exist when we are so close to a presidential election. It is probably more obvious in the argument over the Gephardt provision and Gephardt's own stated basis for his campaign, but I think it is occurring throughout the discussion of the trade bill. Whether we will have a trade bill hinges in part upon the outcome of this argument: Whether we want a bill the President will sign, or a bill the President will veto and which will lead to a fight to override, which can be exploited for any particular partisan aspects of it, will depend upon the interest groups whose support may be wanted in the presidential election and what might be given to them in this trade bill.

And so we do have a lot of arguments on process that remain to be addressed before we get to the substantive arguments. There are obviously substantive arguments there, and I hope that they result in less of a treatment of the symptoms and more of a treatment of the causes of our trade deficit. We have tended to get bogged down, and the Congress has tended to get bogged down, in the rhetoric of the deficit itself and the relationship of the value of the dollar to the trade deficit, and what to do about Toshiba, and what to do about Japan, etc. I do think that with this trade bill we have been bogged down more than in the past. I think that the evolution of trade bills since the 1979 Act indicates that we have been working at the edges of trade laws without accomplishing much of a policy shift. A thread that runs through trade acts since the 1979 Act is

that they're all described as lawyer relief acts. There is an effort to turn everything over to a quasi-judicial or a judicial process in order to take the politics out of the process. And one of the goals of the politicians is to take themselves out of the process and let it be settled in a more legalistic way. In the 1979 Act we went so overboard in that direction that it became very expensive and difficult to run through cases. The 1984 Act\(^8\) was an effort to reverse some of that process and give the Administration more discretion and lessen the ability of petitioners at every step of the procedure to challenge administrative decisions in court—to define everything in legalistic terms as either a dumping or countervailing duty case and therefore get back to the kind of automatic relief that some of our industries have desired so strongly.

But we do have before us some substantive policy changes that will be made, and I think the Gephardt Amendment and Super 301 discussion is one of those: Are we going to move to a symptom-oriented kind of trade policy that may be politically desirable at this point in time, or are we going to try to maintain the government's role as a mediator of a fair policy that all of our U.S. companies can have a crack at and under which importers as well as domestic producers will be treated similarly?

The second substantive argument I have already alluded to and that is the fight between Congress and the Administration over discretion. Another substantive issue is reflected in the kind of plant-closing legislation that we are facing. It is a recognition, I think, of the adjustment that we need to have in our society because of the change in the trade basis. But, that plant-closing policy also raises the serious policy question of whether the government is going to be responsible for mediating between labor and management and whether plants are closed or move overseas. We are getting pretty close to what we have criticized the Japanese for doing, and that is picking winners and losers. I am not so sure the government is the best instrument to do that.

I would like to make two points before I conclude, and I hope that they can be discussed again in the question period. I think a lot of the members of the Ways and Means Committee, especially the Republican members, would caution the Administration not to make a pony out of negotiating authority when it really is a donkey or worse. Congress has carved up the negotiating authority to such a

degree that I am afraid that it is not going to be worth what the Administration hopes it will be worth in the final analysis. The Administration should be very careful about desiring this fast-track procedure so strongly and desiring this negotiating-authority procedure that has worked so well in the past. They may find out that what they get is not something that worked as well as it did in the past, but something that would just be a real problem for them and the Congress. But I do think this issue reflects the changing dichotomy between the Congress and the Administration, and that we are not going to be able to escape it, and we will just have to deal with this as we go through the next few Congresses.

I will close by referring again to the dual standard that we have discussed on a number of occasions and just two points that I would like to make. I think our Puritan ancestors would roll over in their graves at the suggestion that success is based on working less hard. We certainly are not suggesting to ourselves that we need to work less hard, and I think that it is a real mistake to seek a solution in other countries that requires working less hard. I will repeat a story that Congressman Bill Frenzel, who was going to be with you today but could not be, has stated, and that is: What we are going through now as we worry about a "level playing field" and our relationship to foreigners with respect to trade policies and as we criticize foreign countries for providing a locale with low-wage, nonunion, low-tax incentives for production, is not so unlike the domestic argument we went through when the South was attracting businesses from the North by offering low-wage, nonunion, low-tax, government assistance locales for businesses.

PROFESSOR KOH: Again, if I can provide some vocabulary for people who are coming to the trade field for the first time, we have gotten some history from Gary Horlick on the statutory enactments in this field. The principal enactments have been the 1974 Act, which was sort of the progenitor of the fast-track procedure; the 1979 Act, which implemented the Tokyo Round; the 1984 Act; and now the proposed 1987 Act. The various numbers that you hear us throwing around—201, 301, 337—are not numbers plucked out of the air like R2-D2 or C-3PO; they are provisions of the 1974 Act as they have been embellished. This helps us to understand why our next speaker has so much experience in the field. Richard Rivers is a graduate of Tulane University, the University of Texas, and Catholic University Law School. He was then International Trade Counsel to the Senate Finance Committee during the negotiation for the enactment of the 1974 Act and then was the Special Trade

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9. See Glossary at 130.
Controlling Imports

Representative's General Counsel, the same office which Judy Bello is now the Deputy General Counsel, during the Tokyo Round, where he participated in the passage of 1979 Act. He is now a partner at the law firm Akin, Gump, Strauss, Hauer & Feld in Washington, D.C. He is also the General Counsel of the Coalition of Service Industries which, as we have seen, has a great interest both in the Trade Act and in the new Uruguay Round.

MR. RICHARD RIVERS: Thank you very much. You have heard quite a lot this morning about these laws: the antidumping law and the countervailing duty law, the escape clause, and Section 337. I do not believe that there is much I can add to the commentary on those specific provisions by my distinguished colleagues on this panel and the preceding panel. I would like, however, to talk about these laws in a slightly different context and in a broader perspective.

To begin with, I would like to pose a question to Judy Bello, who told the story concerning the boy and the pony. The question is, "How did that manure get into the national living room?" It is a problem in cosmology, Judy; where did it come from? How did we get into this situation that we are in now? Seven years ago, Gary Horlick and I were invited to serve on a panel for the Practicing Law Institute held at the Mayflower Hotel in Washington, D.C. I joined Gary at his office, and we walked to the Mayflower Hotel. I walked into that hotel anticipating a small room with perhaps a dozen young lawyers and that we would discuss the antidumping law. Instead, we walked into the ballroom of the Mayflower Hotel, and there were 400 lawyers with their sleeves rolled up and their yellow pads out. I turned to Gary and said, "There is no way the antidumping law of the United States can support all of these lawyers. If it ever appeared to be a threat, we would have to stop it in the interest of the United States." "Well," Gary replied, "don't be so sure." And do you know what? I was wrong and Gary was right, because all of those lawyers are currently working in Washington on any number of trade cases. We simply had not anticipated the tremendous proliferation of trade cases. In 1981 we had not expected many things. We had not seen the galleys for David Stockman's book, the tax bill, or defense appropriations and spending. We had not anticipated the largest budget deficits in human history or the perverse effect that it was going to have on the world economy and on the external accounts of the United States. It is this perspective that I think we should consider as we talk about import competition.
My law partner, Bob Strauss, often tells the story that whenever he reported to Lyndon Johnson that he was in control of the situation, Johnson would reply with a story about two ants (I will not tell you what kind of ants LBJ said they were) on a log in the Colorado River. Both of these ants thought that they were controlling events by guiding that log through the rapids. I suspect the same thing is occurring with regard to our international trade. We are not in control of our affairs. We have pursued macroeconomic policies that have grossly distorted our economy and have contributed to a disequilibrium in the world economy which is unprecedented since the 1930s. It is alarming that we are riding a log through these rapids, but we are hardly steering it.

I submit to you that the antidumping and countervailing duty laws are not going to solve these problems. What we need to be doing is, as the name of this panel indicates, controlling imports and opening access to foreign markets. It is not, however, Section 301 nor the antidumping law that is going to help us. In the final analysis, it will be intelligent macroeconomic policies. This is the reason why, in my view, we have found all of this manure in the national living room. It also explains why Congress, as my colleague here noted, really does not want to get into the business of regulating imports, because these laws were enacted by Congress to take Congress out of import regulation. Congress no longer wanted to deal with the interests of individual producers who were appealing for protection from foreign competition. As a result, we have overloaded the system, which explains why we have had enormous cases regarding several gloriously dramatic products: wine, Japanese semiconductors, automobiles, and softwood lumber. For those who think that this field is full of drama and glory, I have some additional citations of other, less glamorous cases, such as plastic mattress handles from Taiwan, or pregnant mares' urine from Canada. These are two landmark cases in the annals of American trade law.

In any event, I submit to you that current remedies, even for dealing with the micro problems, are imperfect. I am not sure that they always serve the national interest. They sometimes serve the interests of particular producers and, I will be candid enough to say, I frequently represent those producers.

One example illustrating my point that the current trade remedies are imperfect is the semiconductor case, a case in which I continue to be involved. My client is a foreign producer of semiconductors. I am not sure that the antidumping law is an effective statute for deal-
Controlling Imports

ing with a complex problem involving an intricate industry operating in a global marketplace, in which the product can be carted around in a suitcase. Technology is advancing so rapidly that massive expenditures of research and development are required in order to maintain the ability to sell a product in next month’s marketplace. During the semiconductor cases, I often had the feeling that we were using a law that was really more suited for dealing with something like cast-iron manhole covers from India than for dealing with a 21st century industry and a 21st century global economic problem. I do not believe that this is the way in which we ought to be making our national policies. These problems have their roots in global economic policies and in foreign industrial policies. It does not always follow that the statutes about which we have been talking this morning are particularly effective for dealing with those problems. No one, however, has come up with any better ideas.

I do not have any easy solutions to these problems, but I do think we need some type of Hippocratic oath in U.S. trade policy which has as its premise, first and foremost, that we will not make the patient any worse off. The current laws are not likely to be repealed, and will remain part of our permanent political landscape. We need to view them, however, in the proper context and understand that they are not and can never be a substitute for intelligent national policies.
AUDIENCE MEMBER: I am a law clerk from the Court of International Trade, and an L.L.M. student at New York University Law School. I have a question for Mr. Rivers, although he is welcome to tip the ball to anyone else on the panel if he chooses. Taking your premise that what the United States needs is not antidumping and countervailing duty laws, but intelligent macroeconomic policy, I wonder if you could address the cumulation provisions and how trade imbalances will get better when we are taking actions against really de minimis dumping?

MR. RIVERS: I'll try to explain the background of the question, and I invite my colleagues to address what is in the present bill to a much greater extent. In order to obtain a final antidumping order, or in most instances a final countervailing duty order, one must prove injury by reason of the dumped or subsidized imports. This oftentimes involves trade from multiple countries. Congress amended the law because prior to that the ITC's practice was to require that basically you had to prove material injury in the case of imports from each of the export-producing countries disaggregated. Several years ago, Congress amended the law basically to require that the ITC "cumulate," that is, one could prove material injury by reason of the cumulated injury from several countries, any one of which might not, by itself, rise to the standard of material injury, but in the aggregate were sort of like piranha bites: One piranha doesn't kill you, but seven might. That's an example of congressional tinkering with the trade laws. They all have to be found to be dumping. It has become a very controversial provision because it provides an incentive for petitioners to add countries; you name many respondents in order to have the maximum case to make to the ITC that you have injury. I might add that as I understand it (and it doesn't surprise me), this is a point of some consternation and disagreement in the current U.S.-Canadian negotiations, because the Canadians are of the view that they are regularly named in cases where they ought not be named.

I assume what is in the current law moves even further in that direction. I turn it over to Judy Bello to explain further refinement in that direction.

MS. BELLO: There has been refinement, and fortunately so, because it is of great concern to us and in particular to foreign governments from whom we hear regularly. There is a provision, I believe
Controlling Imports

in the House bill, that allows a "carve-out" where imports are considered to have a negligible contribution. So there is at least some discretion in the House bill, but the Senate provision (Josh Bolten can correct me if he recalls better) does make it more draconian than it currently is.

**MR. HORLICK:** I think cumulation is a good example of the two problems here. The first, the statutory one that Dick and Judy mentioned, of de minimis dumping. The reason why is simple competitive behavior. Using the piranha example, the domestic producer of widgets would have to spend another $20,000 on lawyer fees to toss in five more goldfish. Each of those goldfish will have to spend $100,000 defending itself. This is use of the judicial process, the transaction cost—which the U.S. judicial process usually ignores—for harassment.

The second problem is a good example of how in the administrative process these laws can become a substantive fact in themselves. The cumulation statute provides that the ITC has to find they are both being sold there and they have to find they are both competing. So the logic is fine. The ITC has to find that the piranhas are actually biting the same industry. But, in administrative terms—and anyone is welcome to correct me—the ITC tends to be very mechanical about that, because administering agencies (I used to work for one) fall back on mechanical devices. So what they look at is whether there are imports from the two different countries in the same place at the same time. But that is not what a competition lawyer would look at (correct me if I am wrong) to determine whether they are really competing with each other. The ITC just looks mechanically, i.e., were they imported in the same area of the country at the same time? They could be serving very different markets. I am not criticizing the ITC for that. It is a good example of how when Congress passes a statute it doesn’t always anticipate how it will have to be administered.

**MS. BELLO:** I might add that, if you go back and look at the legislative history of the particular margin provisions, I think this is an example of what I was referring to earlier. The goal was more a political one. It was an effort by particular industries, in this case the textile industry, to weight the calculations and weight the procedures to their advantage. There wasn’t much thought given, although there was a lot of discussion at that time, to de minimis measurement. When the decision came to be made, it was "try to make that cumulation provision as strict as possible" so that the ITC
would not have much discretion and neither would the Administration.

MS. ASKEY: At the beginning of a case, of course, the ITC makes its preliminary finding before there is any finding by the Commerce Department about whether any of the merchandise concerned has been sold at less than fair value. So, in the beginning the margins are just assumed and, of course, an affirmative ITC preliminary determination is a basis for suspension. So, there is a draconian trade effect that can occur even in cases where it is not at all warranted, because only the piranha has dumped; maybe the goldfish are completely innocent.

MR. APPLEBAUM: If you look within the perspective of the antidumping law itself, why weren't the semiconductor cases among the most successful for domestic petitioners? In the 64KD RAM case, the domestic industry prevailed and obtained large dumping margins, and in the 256KD RAM case, the domestic industry was on its way to prevailing in a similar fashion. This caused the pressure that brought about the agreement, and even if you look at the way the agreement is administered, the Commerce Department is still applying antidumping principles in monitoring whether or not the Japanese semiconductor companies are selling at prices within their agreement. If you accept the premise of the antidumping law, isn't the semiconductor agreement one that did succeed within the perspective of what the antidumping laws hoped to achieve? One could criticize the agreement, as I did, but for other reasons, potentially as to what it did in terms of arguably “cartelizing” the market. But, it is certainly a major achievement; in many respects it is grounded on antidumping proceedings.

MR. HORLICK: I believe five or ten years from now the people that brought those cases are going to recognize that it really didn't serve their long-term strategic interests. That's something I feel in my gut. The problems that afflict the U.S. semiconductor industry—and they are many—are not simply categorizable, if you will permit me, or attributable, to their trade problems. I think anybody in the industry—and there is someone here sitting in the middle of this classroom from Texas Instruments, who is far more knowledgeable than I about the industry—would say this industry has got problems for a variety of reasons. They are not all offshore, they are not all attributable to foreign market access, third-country dumping, or dumping of chips in the United States.
Controlling Imports

The people who make chips abroad tend to be vertically integrated, for example. They don't tend to be chip manufacturers. They tend to be computer manufacturers who make chips in order to make computers. The people in the United States that have had the most difficulty in this cyclical industry are the people who tend to be merchant chip manufacturers who don't make computers; they sell them in the marketplace. I think the antidumping law for some of these producers provided short-term relief and maybe will allow them to get out of a losing business at a higher price than they might otherwise have gotten out, or maybe allow them to sustain their operations in the United States for a little longer time than was previously permitted. But it's a palliative; it's not a long-term solution to the problems that afflict the industry. So I really believe that 10 years from now there are going to be some producers who will rue the day they filed those cases and set up the elaborate system that is now in place.

But there is no question that the antidumping law serves someone's interest or it wouldn't be there. I assume if it served no one's interest we would have repealed it by now, but as for serving a national interest, I have grave doubts. It was in that perspective that I was saying that I don't think that the application of the antidumping law was particularly good in that semiconductor case. It provided a weapon, it provided a club with which the U.S. Government could basically throttle the Japanese government and the Japanese producers to do things they wanted them to do. But I am not sure it is in the national interest. We now have a high price island of semiconductors. It's another example; it's not too much different from the mandatory oil import program. We have a price for semiconductors in the United States; there is a world price that's lower. We are moving systems manufacturers offshore. I am not sure that's in the national interest.

MR. EHRENHAFT: I have the luxury of having been conflicted out of the semiconductor case, which is surprisingly frequent in these complex cases involving multinationals. I think it raises two questions: First, was it effective for the semiconductor producers in getting relief? The answer is yes. The danger here, though, is that this case was not done as a dumping case; this was done as a fit of national hysteria that semiconductors were crucial to our national security. I am not going to argue the point one way or another. Suffice it to say that the Administration treated this, as Mike Stein pointed out—I believe he was involved in the cases also—as "We're
going to make this industry work! And we are going to sit down and do it!” Now, the dumping law, whatever else you want to say about it, sure wasn’t done to take care of national security concerns.

So there was a dumping calculation done in the midst of a negotiation with Japan about third country prices and the Japanese market situation, and a decision that this is essential to the national security. There are arguments that the dumping margins were higher than they otherwise would have been because of that. The problem is that once you decide on how you allocate R&D in a semiconductor dumping case, in order to make sure you get high margins, so you can force a deal on the Japanese, you establish precedents. I frankly didn’t care—as I said I was conflicted out—but I was involved in an orange juice case and the exact same rules were then going to be applied to orange juice, because that’s the way the U.S. legalistic system works. We are into precedents with the same principles on allocation. We were watching semiconductors very closely because we were worried about orange juice. I might add that this was imported orange juice from a well-known U.S. company, a big U.S. multinational, to show you how crossed these are. So, first of all, is it effective as a dumping case? Yes, but when you start doing it as more than a dumping case, when you start doing it to protect an important U.S. industry, you are setting precedents for future dumping cases.

The second question goes to the mechanism for using a dumping law to help an important U.S. industry, semiconductors. My criticism of it is very simple: It was all secret. There is no one in this room except Mike Stein, Judy Bello, maybe Harvey Applebaum and maybe Dick Rivers, who were privy to all that was going on. An important policy setting up a worldwide cartel (because that is what it is on chips) was formulated in the dark. If the U.S. antidumping laws have one thing in their favor, it is transparency. So, it was done in the dark. Show me the 20% on paper, Mike. Now there is literally a worldwide cartel on chips, whether that is good or bad; but there is a shortage, according at least to the client who conflicted me out of this case, of 1 DRAM chips as a result. Because the U.S., in order to really make this agreement work, finally had to order Japan to reduce production.

To put that in an economic context for a second, the gains in productivity in semiconductors are huge. When you start having government mess around in trade (I am not taking a position on whether the Japanese government or the U.S. government was more
Controlling Imports

involved in the trade), you are affecting enormous gains in productivity, which in theory is what the free market trading system is all about.

PROFESSOR KOH: I would like to exercise my prerogative again and to close this morning's session by asking one question at a higher level of generality to all the panelists. What we seem to be getting out of this morning is that we have an extraordinary range of extremely talented and articulate and experienced practitioners and Congresspersons who are totally unable to deal with this problem. What strikes me as odd is that we are talking about the very same committees who last year sat down and said, “Okay, we are going to do tax simplification.” Whether they succeeded or not, is a question which could be independently debated. The question that I have is, if there is such universal agreement about the need for simplification, why is simplification the one thing that is not going to emerge from this trade bill?

MS. BELLO: I don’t think simplification was one of the goals to begin with. However, I do think we may achieve some simplification in the process. I think we are still on the trend that began in 1984 of having less litigation in the process, and fewer legal challenges until the end of the process. In spite of the argument with the Administration on presidential discretion, there are several areas of the bill that provide general discretion to the agencies, so that they can make policy decisions on some of the cases without being challenged every step of the way. So, we may achieve some simplification by accident. But I don’t think that was the goal of the bill. It certainly was a political goal when it began two years ago, and only this year became a goal that we would actually like to reach in the form of some policy changes. But I think simplification was never very high on the agenda and it got lost in the process.

MS. ASKEY: I think the short answer is that if you are in Congress you score points and get votes not when you keep markets open but when you do something for constituents. The usual problem in sustaining the consensus for freer trade (there being no such thing as free trade) is that the support for free trade is quite diverse. But the support for special interest protection is quite concentrated, vocal, and very loud in the Congress. So, you always fight in the Administration and in the Congress the uphill battle against the types of provisions which are designed basically to ensure protectionist results for special interests. It is an uphill battle because someone who loses a job in Texas is much more concerned than I
am if I pay $.50 more for a shirt. It matters more to the job-loser because it’s his whole job, it’s his mortgage, it’s his future, whereas for me, I gripe if I pay $.50 more for a shirt, but it obviously doesn’t have much impact on me. So I don’t stand up as much to yell for freer trade as the guy in Texas who is out of work yells for some form of protection.

**MR. RIVERS:** I think it gets almost more mechanical. Special interest trade legislation is no different than special interest tax legislation; the tax code was certainly a monument to it. How come Congress can simplify it? The answer is that every American sits down once a year and recognizes what a mess the tax code is, so it was politically saleable to do that. If you put a label on every imported good saying how much more expensive it was to buy that blouse than if there hadn’t been a multifiber arrangement (MFA),

10 which we haven’t discussed, you’d get rid of the MFA in a day. But no one knows it. Whereas the tax laws forced you to confront it. That is the difference in a nutshell.

**MR. HORLICK:** Trade legislation in my view is an exercise in political self-immunization. You vote for a trade bill, you sponsor an amendment for your constituent, you’ve done it and now they can’t be heard to complain about it at the polling booth at the next election day. The result of this year’s trade exercise is likely to be quite simple; it is likely to be a presidential veto, I think, and probably no bill at all. It’s a good possibility.

**PROFESSOR KOH:** Well, that brings us to the relationship between the President and Congress.

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