UNC SCHOOL OF LAW

NORTH CAROLINA JOURNAL OF INTERNATIONAL LAW AND COMMERCIAL REGULATION

Volume 12 | Number 1 Article 3

Winter 1987

Trade Wars - Arming for Battle

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A wide range of U.S. industries are feeling the adverse effects of imports from foreign countries. These effects, which at one time touched only basic or "smokestack" industries, are now experienced by a growing number of American businesses. Among the ranks of those impacted are high-technology and consumer-oriented production firms. The products involved are wide ranging: imports of radio pagers,[1] color television receivers,[2] motorcycles,[3] fish,[4] pork,[5] computer products,[6] carbon and stainless steel products,[7] and pistachio nuts[8] have all been the subject of U.S. producers' concern.

The difficulties U.S. businesses face in domestic and worldwide markets are in part due to foreign government programs that promote exports of their industries' products. Because many foreign companies are subsidized[9] by their governments, U.S. companies often must compete for sales of their goods with companies that need not generate profits to keep production lines going. Trade in

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[1] *See* In the Matter of Certain Multi-sequential Coded Radio Pagers, Inv. No. 337-TA-109, 46 Fed. Reg. 54,658 (Int'l Trade Comm'n 1981) (notice of investigation).

[2] *See* Color Television Receivers from Korea and Taiwan, USITC Pub. 1514, Inv. No. 731-TA-134, 135 (Apr. 1984) (Final).

[3] *See* Heavyweight Motorcycles, and Engines and Power Train Subassemblies Therefor, USITC Pub. 1342, Inv. No. 201-TA-47 (Feb. 1983); *see also* Recent Development, *The Harley-Davidson Case: Escaping the Escape Clause*, 16 LAW & POL'Y INT'L BUS. 325 (1984).

[4] *See* Certain Fresh Atlantic Groundfish from Canada, USITC Pub. 1844, Inv. No. 701-TA-257 (May 1986) (Final).

[5] *See* Live Swine and Pork from Canada, USITC Pub. 1625, Inv. No. 701-TA-224 (Dec. 1984) (Prelim.).

[6] *See* Dynamic Random Access Memory Semiconductors of 256 Kilobits and Above from Japan, USITC Pub. 1803, Inv. No. 731-TA-300 (Jan. 1986) (Prelim.); Erasable Programmable Read-Only Memories, USITC Pub. 1778, Inv. No. 731-TA-288 (Nov. 1985) (Prelim.); 64K Dynamic Random Access Memory Components from Japan, USITC Pub. 1735, Inv. No. 731-TA-270 (Aug. 1985) (Prelim.).

[7] *See, e.g.*, Certain Carbon Steel Products from Austria and Sweden, USITC Pub. 1759, Inv. Nos. 701-TA-225, 227, 228, 231, and 731-TA-219 (Sept. 1985) (Final); Stainless Steel Sheet and Strip Products from Spain, USITC Pub. 1593, Inv. No. 731-TA-164 (Oct. 1984) (Final).

[8] *See* In-Shell Pistachio Nuts from Iran, USITC Pub. 1875, Inv. No. 731-TA-287 (July 1986) (Final).

[9] *See infra* notes 46-51 and accompanying text.

many industries, such as steel manufacturing, is also characterized by pervasive "dumping."[10] As a result of these practices, foreign firms are able to undersell domestic producers in the U.S. market, even if it means engaging in below-cost selling.

The rising level of imports poses a threat to the U.S. economy as well as to the individual firms in the affected industries. On the national level, the Commerce Department reported that the 1986 trade deficit reached 169.8 billion dollars.[11] At this level, 1986 marked the fifth straight year in which the U.S. trade deficit has established a new world record.[12] Federal Reserve Chairman Paul Volcker, reflecting on the trade deficit's impact, stated that "the trade imbalance has been the most fundamental factor in the sluggishness of the economy."[13] The effects of imports on the national economy are even more pronounced during periods of economic downturn, exacerbating economic sluggishness and making the economy less responsive to traditional anti-recessionary policies.[14]

The effect of imports necessitates modification of standard business strategies for the U.S. businessperson. No longer does an industry's success depend only on making correct decisions about capital investment, research and development, marketing and improving productivity; business firms must also be familiar with U.S. trade laws and learn how to use them effectively.

This Article identifies the key statutory tools and remedies that U.S. firms must be familiar with and willing to use in order to remain competitive against the increasing influx of imports. Section I describes the major U.S. trade laws that U.S. firms can use to protect themselves from imports. Section II discusses how a firm may choose the correct law to effect the desired result.

I. Reversing the Trend—Tools to Secure Relief

Relief from imports in the U.S. market can be secured by five principal types of legal actions. The most effective approach depends on several factors, including:

1) The nature and extent of the injury to the domestic industry;

2) The types of practices used by foreign competitors in the

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[10] *See infra* notes 33-35 and accompanying text.

[11] *See* U.S. BUREAU OF THE CENSUS, U.S. TOTAL TRADE BALANCE WITH INDIVIDUAL COUNTRIES, 1980-86 (April 1987) (unpublished document, available in the Office of N.C. J. INT'L L. & COM. REG.).

[12] DEMOCRATIC POLICY COMMITTEE, SPECIAL REPORT: U.S. TRADE DEFICIT IS RUNNING AT AN ANNUAL RATE OF $168 BILLION, No. 10, 1 (1986).

[13] *Id.*

[14] During recessionary periods, imports tend to increase their penetration of the U.S. market. Imports may decline somewhat during periods of economic recovery, then further increase penetration during the next downturn. This is sometimes referred to as the "ratchet" effect.

U.S. market (dumping, use of foreign government subsidies, anti-trust-type practices such as pricing below cost of production, or even fair competitive practices that nevertheless injure U.S. industry);

3) The comparative costs of the variety of legal approaches;

4) Potential political support for the injured industry; and

5) The amount of time and effort the domestic industry is willing to put forth to be successful.

The kinds of options available, the time limits of the actions, and the relief they can offer are illustrated in Chart 1 (at the end of this Article). A discussion of each of the major avenues of relief from injurious import competition is set forth below.

A. "Escape Clause" Actions Under Section 201 of The Trade Act of 1974

The "escape clause" remedy is literally an "escape" from tariff concessions that are causing injury to a domestic industry.[15] The need for such a provision in the U.S. trade law became apparent after the passage of the Trade Agreements Act of 1934, an event that marked a transition in U.S. trade policy from an era of high tariffs to one emphasizing reciprocal tariff reductions.[16] U.S. business interests, concerned that the systematic lowering of tariffs would destroy U.S. industry, lobbied the Executive Branch to establish a method by which threatened industries could escape the effects of increasing import competition. After the initial use of an escape clause in a bilateral trade agreement between the United States and Mexico, President Truman issued an Executive Order requiring an "escape clause" to be inserted in all future trade agreements.[17] The escape clause has since become a permanent fixture in U.S. trade laws[18] as well as international agreements.[19]

Unlike other types of legal action, section 201 cases have the advantage of covering *all* countries exporting into the United States. Other legal approaches are aimed at one country or group of companies within a single country.

The process of obtaining escape clause relief begins with the filing of a petition with the International Trade Commission (ITC) by an industry alleging that increasing imports are a substantial cause of

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[15] *See* Reference File, Int'l Trade Rep. (BNA), 58:0101 (1986).

[16] Easton, *Temporary Relief from Import Competition under Section 201 of the Trade Act of 1974, The "Escape Clause,"* MANUAL FOR THE PRACTICE OF INTERNATIONAL TRADE LAW (Fed. Bar Ass'n) VI-1 (1984) [hereinafter FEDERAL BAR MANUAL].

[17] Exec. Order No. 9,832, 3 C.F.R. § 624 (1943-48 Comp.).

[18] *See* Trade Act of 1974, § 201, 19 U.S.C. §§ 2251-2394 (1982).

[19] *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XIX, 61 Stat. (5) A5, A58, T.I.A.S. No. 1700, 55 U.N.T.S. 187, 258 (effective Jan. 1, 1948) [hereinafter GATT].

serious injury to the domestic industry.[20] It is not necessary to prove that foreign competitors are engaging in unfair practices.[21]

In order to obtain section 201 relief, the petitioning U.S. industry must show that: imports are increasing, either in actual terms or relative to domestic production;[22] the domestic industry has suffered serious injury, or is threatened with serious injury;[23] and imports are a "substantial" cause of the serious injury, no less important than any other cause.[24] Within six months of the filing of a petition, the ITC must determine whether these three elements exist.[25] If the ITC concludes that the section 201 criteria have been met, it recommends to the President that import relief or adjustment assistance be granted.[26]

The President has sixty days to review the findings and recommendations of the ITC.[27] He can accept, reject, or modify the ITC's recommendations.[28] If the President decides import relief is desirable, he can impose quotas, tariff-rate quotas, increased import duties, or the negotiation of orderly marketing agreements with foreign governments.[29] Such import relief can be imposed for up to five years.[30] The President can also order that adjustment assistance be provided to domestic firms or workers.[31]

"Escape clause" cases involve a substantial political effort. To persuade the President to provide effective relief, it is necessary to generate support both in Congress and among key economic advisors in the Administration. A carefully planned public relations program must supplement the legal effort. Continuous coordination of the legal, political, and public relations aspects of the case is neces-

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[20] 19 U.S.C. § 2251(a)(1) (1982). The petition may be filed by a trade association, firm, certified or recognized union, or group of workers, which is representative of an industry. *Id.* In addition, the President, the U.S. Trade Representative, the House Ways and Means or the Senate Finance Committee may ask the ITC to conduct an investigation. *Id.* § 2251(b)(1). The Commission may also institute an investigation on its own. *Id.*

[21] *See infra* notes 33-51 and accompanying text.

[22] 19 U.S.C. § 2251(b)(2)(C) (1982).

[23] *Id.* § 2251(b)(2)(A)-(B). Although the statute does not define either "serious injury" or "threat of serious injury," Congress has provided a list of factors that the ITC must consider in determining whether injury exists. Among the factors are: (1) a significant idling of productive facilities in the industry; (2) the inability of a significant number of firms to operate at a reasonable level of profit; and (3) significant unemployment or underemployment within the industry. *Id.* § 2251(b)(2)(A). The statute provides that a decline in sales, a higher and growing inventory, and a downward trend in production, profits, wages, or employment in the industry are factors suggesting the existence of a threat of serious injury. *Id.* § 2251(b)(2)(B) (1982 & Supp. III 1985).

[24] *Id.* § 2251(b)(1)(4) (1982).

[25] *Id.* § 2251(d)(2).

[26] *Id.* § 2251(d)(1)(A), (B).

[27] *Id.* § 2252(b).

[28] *Id.*

[29] *Id.* § 2253(a)(1)-(5).

[30] *Id.* § 2253(h)(1).

[31] *Id.* § 2252(a)(1)(B).

sary to ensure success.[32]

B. Antidumping Cases

The antidumping law is designed to offset the advantages foreign producers enjoy from selling goods in the United States at a price less than the "fair value" of the merchandise.[33] The fair value of the merchandise is generally considered the price at which the merchandise is sold in the exporter's home market.[34] Merchandise sold in the United States[35] at less than fair value is considered "dumped." Dumping is an unfair trade practice under U.S. law.

An antidumping proceeding may be initiated by an interested party filing a petition[36] on behalf of the domestic industry,[37] or the Secretary of Commerce may initiate an investigation.[38] Petitions are filed simultaneously with the U.S. Department of Commerce and the International Trade Commission.[39] The Commerce Department determines whether dumping is present,[40] and the ITC determines whether the U.S. industry has been injured by dumped imports.[41]

If dumping and injury are proved, antidumping duties representing the difference between home market and U.S. prices are assessed. The special dumping duty is imposed in addition to all

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[32] For an excellent discussion of the section 201 process as applied to the Carbon and Certain Alloy Steel Products case, see Rosenthal, 18 LAW & POL'Y INT'L BUS. __ (1986) (to be published in April 1987).

[33] *See* 19 U.S.C. § 1673 (1982).

[34] *Id.* § 1677b(a)(1)(A). In some circumstances, the fair value of the merchandise may also be based on the price at which the merchandise is sold to third country markets, or alternatively, the "constructed value" of the merchandise, which is the cost of production plus certain expenses and an allowance for profit. *Id.* § 1677(a)(1)(B), (e).

[35] The precise method of calculating the U. S. price of the merchandise is set forth in 19 U.S.C. § 1677a (1982).

[36] *Id.* § 1673a(b)(1). Interested parties can include domestic producers, manufacturers or wholesalers, a certified union or recognized group of workers, or a trade or business association. *Id.* § 1677(9).

[37] *Id.* § 1673a(b)(1). The issue has recently arisen as to the extent to which a petitioner must show that he is filing on behalf of an industry. The U.S. Court of International Trade held in Gilmore Steel Corp. v. United States, 585 F. Supp. 670 (Ct. Int'l Trade 1984), that if a majority of the industry members oppose the petition, the petitioner does not have standing to proceed with the action. *Id.* at 676. The Commerce Department does not require an affirmative showing of majority support of the industry to initiate a case; if, however, a majority of the industry opposes the action, the Commerce Department will terminate its investigation.

[38] 19 U.S.C. § 1673a(a)(1982). In reality, however, the Secretary of Commerce rarely exercises its power to self-initiate either dumping or subsidy investigations.

[39] *Id.* § 1673a(b)(2).

[40] *Id.* § 1673a(c).

[41] *Id.* § 1673b(a). Within 20 days after the filing of the petition, the Commerce Department determines whether the petition alleges the necessary elements to assess antidumping duties. If the determination is negative, the Department dismisses the petition. If the determination is affirmative, the investigation begins. *Id.* § 1673a(c)(1)-(3). The ITC and the Commerce Department then make preliminary and final determinations as to the questions of injury and dumping, respectively. *Id.* § 1673b(a)-(b), 1673d(a)-(b).

regular duties imposed by law.[42] Foreign producers may avoid payment of these duties by adjusting their U.S. prices upward, lowering their home market prices, or a combination of both.

The petitioners have the right to challenge adverse ITC or Commerce Department rulings in the Court of International Trade.[43] The court's review is not a *de novo* review, but is based on whether the agencies' final determinations are supported by substantial evidence of record or are otherwise in accordance with the law.[44] The decisions of the Court of International Trade are appealable to the U.S. Court of Appeals for the Federal Circuit.

C. Countervailing Duty Cases

Like the practice of dumping, the provision of subsidies by foreign governments to stimulate exports is deemed an unfair trade practice under U.S. trade laws. The U.S. countervailing duty law[45] provides for the imposition of a duty on subsidized imports that adversely affect a domestic industry. The purpose of the countervailing duty law is to offset or neutralize the subsidy and thereby permit fair competition for U.S. producers forced to compete with unfairly traded imports.

Subsidies are divided into two general groupings under U.S. law: export subsidies and domestic subsidies. Export subsidies are benefits targeted by a government to assist or encourage exportation, such as reduced rail rates for exports,[46] price preferences for inputs used in the production of goods for export,[47] or preferential financing for the production of exports.[48] Domestic subsidies, on the other hand, are provided not to benefit exports but to assist an industry that the government wishes to aid for some other internal purpose. The reason for the assistance, however, is irrelevant to the question of whether an unfair benefit has been bestowed. Under

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[42] *Id.* § 1673e.

[43] *Id.* § 1516a.

[44] *Id.* § 1516a(b).

[45] Trade Agreements Act of 1979, tit. I, 19 U.S.C. §§ 1671-1677g (1982)(adding Title VII—Countervailing and Antidumping Duties—to the Tariff Act of 1930). Subtitle A relates to subsidies and replaces section 303 of the Tariff Act of 1930 (*id.* § 1303) with respect to imports from countries that are "under the Agreement." Countries under the Agreement are generally those that are signatories to the international Subsidies Code and, hence, entitled to an injury test under the U.S. countervailing duty laws. *Id.* § 1671(b)(1)-(3). Section 303 of the Tariff Act, however, still exists and applies to countries that are not under the Agreement, to whom no injury test is granted. For purposes of this Article, references to countervailing duty cases mean investigations under the Agreement of countries subject to Title VII.

[46] *See* Final Affirmative Countervailing Duty Determination; Prestressed Concrete Steel Wire Strand from South Africa, 47 Fed. Reg. 33,310 (Int'l Trade Admin. 1982).

[47] *See* Final Negative Countervailing Duty Determination; Certain Steel Wire Nails from the Republic of Korea, 47 Fed. Reg. 39,549 (Int'l Trade Admin. 1982).

[48] *See* Offshore Platform Jackets and Piles from the Republic of Korea, 51 Fed. Reg. 11,779 (Int'l Trade Admin. 1986).

current practice, the benefit must be provided to a particular industry or group of industries to be countervailable.[49] Examples of domestic subsidies include the provision of capital on terms inconsistent with commercial considerations[50] or the provision of loans at preferential rates.[51]

Countervailing duty investigations follow procedures at the Commerce Department and the ITC, virtually identical to dumping investigations, except that countervailing duty investigations are subject to shorter time limits. The petition alleges that the foreign government has provided subsidies on the production, manufacture or exportation of products imported into the United States and that a U.S. industry has been injured by reason of the subsidized imports. The Commerce Department determines whether subsidies are being paid, and the ITC determines whether the U.S. industry has suffered material injury due to the unfairly traded imports.

If subsidization and injury are proved, the Commerce Department will impose countervailing duties, which are designed to offset the unfair competitive advantage resulting from government subsidies. As in dumping cases, all final decisions of the Commerce Department and the ITC are subject to appeal.

D. Actions Under Section 337 of the Trade Act of 1930

Section 337 of the Trade Act of 1930 is an antitrust-type statute that generally prohibits "unfair methods of competition" in import trade.[52] Although section 337 has traditionally been used to enforce patents and trademarks against international encroachments, it has also been used against foreign producers engaged in other types of unfair trade practices, such as false advertising and misappropriation of trade secrets.[53] Under section 337, a complaint could allege that

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[49] *See* Final Results of Countervailing Duty Administrative Review; Carbon Black from Mexico, 51 Fed. Reg. 30,385 (Int'l Trade Admin. 1986). The *Carbon Black* decision reflects a recent change in Commerce Department policy as a result of the decision of the U.S. Court of International Trade in Cabot Steel Corp. v. United States, 620 F. Supp. 722 (Ct. Int'l Trade 1985). Prior to the *Cabot* decision, the Department held that if a benefit were "generally available" to all industries in a country, it was not countervailable. The Department now holds that in order for a benefit to be exempt from the countervailing duty laws, it must not only be generally available but must also be provided to a number of industries. 51 Fed. Reg. 30,386 (1986).

[50] 19 U.S.C. § 1677(5)(B)(i) (1982). *See* Stainless Steel Plate from the United Kingdom; Preliminary Results of Countervailing Duty Administrative Review, 51 Fed. Reg. 34,112 (Int'l Trade Admin. 1986).

[51] 19 U.S.C. § 1677(5)(B)(ii) (1982). *See* Final Affirmative Countervailing Duty Determinations: Certain Steel Products from Italy, 47 Fed. Reg. 39,356 (Int'l Trade Admin. 1982).

[52] 19 U.S.C. § 1337(a) (1982).

[53] *See* Certain Solder Removal Wicks, USITC Pub. 823, Inv. No. 337-TA-26 (July 1977) (false advertising); Certain Apparatus for the Continuous Production of Copper Rod, USITC Pub. 1017, Inv. No. 337-TA-52 (Nov. 1979) (section 337 successfully utilized to halt the misappropriation and subsequent disclosure of trade secret information).

imports are being sold below the variable costs of production or that importers have conspired to set prices.[54] Below variable cost selling is generally acknowledged to be a *per se* violation of U.S. antitrust laws.

Section 337 cases are much less "political" than are section 301, countervailing duty, antidumping, or "escape clause" cases. In addition, such actions differ from other international trade cases because they are governed by the Administrative Procedure Act (APA).[55] The APA establishes procedural requirements similar to those found in judicial proceedings. There are provisions for discovery, filing of motions, and hearings before an administrative law judge.[56] The ITC has exclusive jurisdiction over section 337 cases.

Remedies authorized by section 337 include cease and desist orders as well as temporary or permanent exclusion of the offending articles. Cease and desist orders direct a violator to stop engaging in an unfair act, and exclusion orders bar entry of the relevant merchandise from a producer found to be engaging in an unfair act.[57] Section 337 also contemplates imposition of a bond during the investigation if a preliminary finding of unfair practices is established.[58] The President, after receiving the recommendations of the ITC, makes the ultimate decision of what, if any, remedy to impose in the case.[59]

E. Actions under Section 301 of the Trade Act of 1974

Section 301 relief differs from the other trade relief measures in that, rather than directly protecting against injurious imports or import-related unfair trade practices, its primary purpose is to counter any discriminatory foreign trade practices that restrict or impair U.S. trade and commerce.[60] Whereas import relief actions such as the "escape clause" give legal remedies against import penetration or pricing practices, section 301's principal focus is on safeguarding U.S. exporters' rights of fair access to foreign markets. Section 301, however, is more than just a means of expanding foreign trade opportunities; it may also be used as a tool to encourage negotiations

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[54] Certain Welded Stainless Steel Pipes and Tubes, USITC Pub. 863, Inv. No. 337-TA-52 (Feb. 1978). In Chicory Root: Crude and Prepared, Inv. No. 337-TA-27, Notice of Investigation, 41 Fed. Reg. 29,496 (Int'l Trade Comm'n 1976), the complaint alleged that coffee companies and other producers conspired in an effort to set an artificially high price on Angolan coffee.

[55] Administrative Procedure Act, ch. 324, 60 Stat. 237 (1946)(current version at 5 U.S.C. §§ 551-576 (1982)).

[56] *See generally* 19 C.F.R. § 210.1-.71 (1986).

[57] 19 U.S.C. § 1337(d)-(f) (1982).

[58] *Id.* § 1337(c). The amount of bond posted upon each importation of the relevant article attempts to offset any competitive advantage resulting from the unfair method of competition. *See id.*

[59] *Id.* § 1337(g).

[60] *See id.* § 2411 (1982 & Supp. III 1985).

between the U.S. government and foreign governments that can result in relief from injurious imports or import-related unfair trade practices.

Under section 301, the President has broad authority to use a variety of measures against foreign practices and policies that unduly burden U.S. trade. Specifically, section 301(a) allows the President to take retaliatory action and enforce U.S. rights established under trade agreements such as the General Agreement on Tariffs and Trade (GATT) or international codes concerning non-tariff barriers to trade, and to respond to policies and practices that are inconsistent with, or negate U.S. benefits derived under such agreements.[61] The President has express authority to retaliate against any foreign action that is "unjustified, unreasonable, or discriminatory and burdens or restricts United States commerce."[62]

The types of trade restrictions that may be addressed by section 301 include denial of fair and equitable market opportunities, opportunities for establishment of an enterprise, or provisions for adequate and effective protection of intellectual property rights.[63] In particular, section 301 covers prohibitive tariffs or tariff preferences that discriminate against U.S. exporters by assessing a lower duty on goods exported from third countries, by using foreign import restrictions imposing quantitative import limits on U.S. goods, or by utilizing other non-tariff measures such as exchange controls or health and customs regulations that inhibit U.S. imports.[64] Foreign limitations or controls on exports essential to the United States—minerals, oil, or raw materials—are also within the scope of section 301.[65] Foreign government subsidization which deprives U.S. exporters of opportunities in foreign markets is also covered in section 301.[66] The 1979 amendments to the Trade Act of 1974 extended the scope of section 301 coverage to international trade in services, and specific provisions on relief for service industries were added in a 1984 amendment.[67] U.S. banking, insurance, and other service activities

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61 *Id.* § 2411(a).

62 *Id.*

63 *Id.* § 2411(e)(3) (Supp. III 1985).

64 *Id.* § 2411(a)(1)(B) (1982 & Supp. III 1985).

65 *Id.*

66 *Id.*

67 Pub. L. No. 98-573, § 304(f)(1), 98 Stat. 3002, 3005 (1984); *see supra* note 59; the definition of "commerce," for example, was amended to include services (including transfers of information) associated with international trade, whether or not such services are related to specific goods, and foreign direct investment by U.S. persons with implications for trade in goods or services. Pub. L. No. 98-573, § 304(f)(1), 98 Stat. 2948, 3005 (1984) (codified at 19 U.S.C. § 2411(e)(1) (Supp. III 1985)). "Commerce" had previously been defined as including, but not limited to, services associated with international trade, whether or not such services are related to specific products. *See also* Pub. L. No. 98-573, § 304(c), 98 Stat. 2948, 3003 (codified at 19 U.S.C. § 2411(c) (Supp. III 1985)), giving additional authority to the President for action regarding services.

abroad are now protected by section 301.

A section 301 proceeding begins when a complaint or petition is filed by an "interested party"[68] with the United States Trade Representative (USTR).[69] The complaint must allege and describe an unfair trade practice that is injurious to U.S. commerce.[70] Alternatively, the USTR may initiate an investigation,[71] or the President may take action on his own under section 301.[72]

The USTR has 45 days from the date of the filing of a petition to decide whether to undertake an investigation.[73] The length of time permitted for the USTR to investigate varies according to the type of practice alleged: the range is seven months, for an investigation of export subsidies, to twelve months.[74] The USTR is required to give public notice of its determination, and it also must present its recommendations to the President.[75] The "Section 301 Committee" of the USTR's Trade Policy Staff Committee, the body that originally reviews the section 301 complaint, may hold public hearings if requested by a party.[76] The ITC may also be involved, if requested by the USTR, to determine the impact of section 301 relief on the U.S. economy.[77] The President has twenty-one days following receipt of the USTR's recommendations to decide what, if any, action to take.[78]

If the President finds retaliatory measures are needed, he has statutory authority to "take all appropriate and feasible action" necessary to remedy the unfair trade restriction.[79] The relief can involve any form of countermeasure the President deems effective. The statute gives the President express power to "suspend, withdraw, or prevent the application of, or refrain from proclaiming,

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[68] 19 U.S.C. § 2412 (1982 & Supp. III 1985). The regulations of the Office of the United States Trade Representative define an interested party as one

> who has a significant interest; for example, a producer or a commercial importer or exporter of a product which is affected either by the failure to grant rights to the United States under a trade agreement or by the act, policy or practice complained of; a trade association, a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale distribution in the United States of a product so affected; or any person representing a significant economic interest affected either by the failure of a foreign government to grant United States rights under a trade agreement or by the act, policy or practice complained of in the petition.

15 C.F.R. § 2006.0(b) (1986).

[69] Specifically, the petition is filed with the chairman of the Section 301 Committee of the USTR. 15 C.F.R. § 2006.0(c) (1986).

[70] *Id.* § 2006.1.

[71] 19 U.S.C. § 2412(c) (Supp. III 1985).

[72] *Id.* § 2411(c).

[73] *Id.* § 2412(a)(2); 15 C.F.R. § 2006.3 (1986).

[74] 15 C.F.R. § 2006.12 (1986).

[75] 19 U.S.C. § 2414 (1982 & Supp. III 1985).

[76] *Id.* § 2412(b)(2).

[77] *See id.* § 2414(b)(3) (1982); 15 C.F.R. § 2006.11 (1986).

[78] 19 U.S.C. § 2411(d)(2) (Supp. III 1985).

[79] *Id.* § 2411(a)(1).

benefits of trade agreement concessions" in retaliations.[80] He also has authority to impose duties or other import restrictions on products and services of the appropriate foreign country.[81] The remedy may be terminated by the President if deemed appropriate.[82]

One of the most potent aspects of section 301 relief is its availability as a vehicle for initiating discussions between the governments of the United States and the offending country. Under section 303 of the Trade Act of 1974, the USTR is required, following the initiation of its investigation, to consult with the foreign country or countries concerned.[83] Although the mandatory nature of the consultation provision affords petitioners an important tool against barriers to U.S. exports, it can also be used by private parties to encourage the U.S. government to reach voluntary import restraint agreements with countries engaging in injurious or unfair trading practices.[84]

Because the President's authority to act pursuant to section 301 is entirely discretionary, statutory relief from unfair trade restrictions will most likely depend on policy considerations rather than on the merits of a petition. That is not to say, however, that section 301 should be disregarded as a source of relief from unfairly traded or injurious imports.[85] The ability of the private sector to seek enforcement of international trade agreements through section 301 should always be among the actions considered by domestic parties in formulating a strategy for combating injurious trade.

F. U.S. Customs Service Enforcement

In addition to the administrative proceedings just outlined, U.S.

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[80] *Id.* § 2411(b)(1) (1982 & Supp. III 1985).

[81] *Id.* § 2411(b)(2).

[82] *Id.* The President may exercise this power "for such time as he determines appropriate." *Id.*

[83] *Id.* § 2413.

[84] For example, the U.S. specialty steel industry has filed petitions with the USTR under section 301 three times within the last two years, concerning imports of Swedish specialty steel tubing and stainless steel wire, and each time negotiations have subsequently commenced between the U.S. and Swedish governments. The most recent petition was filed on August 26, 1986, and steel talks began on September 9, 1986. The industry's approach included the filing of a countervailing duty petition, on the eve of those September negotiations, followed by the filing of an antidumping petition on October 17, 1986. Although the section 301 petition was formally rejected by the USTR on October 10, 1986, it accomplished the desired result of getting the governments negotiating once again.

[85] Relief can be granted by various methods. The U.S. tool and stainless steel industry's section 301 petition, which alleged subsidization of specialty steel production by the European Community, resulted in the Reagan Administration's initiation of an investigation under section 201 of the Trade Act of 1974, to afford a coordinated approach to the industry's import problems. *See* President's Determination Under Section 301 of the Trade Act of 1974, 47 Fed. Reg. 51,717 (1982). The industry later received relief pursuant to an affirmative ITC determination in the section 201 proceeding. *See* Stainless Steel and Alloy Tool Steel, USITC Pub. 1377, Inv. No. 201-TA-48 (May 1983).

producers should be familiar with two Customs Service activities designed in part to ensure that goods are traded fairly. These mechanisms are the enforcement of country-of-origin marking law and Customs' tariff classification of imported merchandise.

1. Country-of-Origin Marking

U.S. country-of-origin marking law provides that "every article of foreign origin . . . imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the articles . . . will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article."[86] This provision is designed to allow the "ultimate purchaser" in the United States to choose between domestic and foreign products, or between products of different countries. The choice is made meaningful only when the ultimate purchaser knows the country of the products' origin.

The U.S. Customs Service administers the country-of-origin marking law,[87] and Customs regulations provide guidance as to acceptable methods, manner, and location of marking.[88] In addition to general marking standards, specific marking requirements apply to certain products.[89] Certain articles or classes of merchandise are excepted from country-of-origin marking requirements, in cases where marking is not commercially or economically feasible.[90]

The form of marking or the availability of an exception can de-

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[86] 19 U.S.C. § 1304(a) (1982).

[87] *See* 19 C.F.R. Part 134 (1986).

[88] In particular, section 134.41 states that "[t]he ultimate purchaser in the United States must be able to find the marking easily and without strain." *Id.* § 134.41(b). Other "acceptable methods" include "any method of marking . . . insuring that country of origin will conspicuously appear on the article . . . ." *Id.* § 134.44(a). Lastly, the regulations require that the marking be "legible and sufficiently permanent so that it will remain on the article (or its container when the container and not the article is required to be marked) until it reaches the ultimate purchaser unless deliberately removed." *Id.*

[89] Specific requirements may be imposed by the Commissioner of Customs pursuant to section 304(a) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1304(a) (1982), or by specific statutory provision, under 19 U.S.C. § 1304 (1982). For example, watches, clocks, and timing apparatus markings are intensive and require special methods (19 C.F.R. § 134.43(b) (1986)), and items such as knives, shears, surgical instruments, scientific and laboratory instruments, pliers, and their parts, must be marked by die stamping, cast-in-the-mold lettering, etching, engraving, or by metal plates attached by welding, screws, or rivets. *Id.* § 134.43(a). The Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 207, 98 Stat. 2948, 2976 (1984) added to this list of specially- marked articles, certain compressed gas cylinders and manhole rings, frames, covers, and their assemblies.

Another requirement applies to articles that are inscribed with either the name of a location in the United States or another address that varies from the country of origin. In either case, words such as "Made in" or "Product of" must be present on the article preceding the name of the country of origin. 19 C.F.R. § 134.46 (1986). The size of this marking is also specified: its letters must be comparable in size to the lettering of the U.S. location or other address. *Id.* The purpose of this requirement is to eliminate any confusion arising from two locations appearing on the product.

[90] See 19 C.F.R. § 134.32 (1986) for a list of general exceptions.

pend not only on the characteristics of a product, but also on the nature of the ultimate purchaser or purchasers. The general rule is that the last person in the United States to acquire the article by purchase in its imported condition is the ultimate purchaser.[91] If the article will be manufactured or processed in the United States so that the imported article is "substantially transformed" into a product having a new name, character, and use, then that manufacturer or processor is the "ultimate purchaser."[92]

Once Customs verifies an allegation of improper marking, a variety of sanctions can be imposed, including exportation, destruction, marking of the goods under Customs' supervision,[93] liquidated damages in the amount of the value of the goods involved plus duties,[94] seizure and forfeiture or civil penalties,[95] a non-penal *ad valorem* duty of ten percent,[96] and criminal penalties.[97]

Although it is Customs' responsibility to monitor imports for compliance with the marking law, personnel limitations often impede the agency's ability to enforce the law as fully as is necessary. Domestic producers of competing goods, who have an obvious interest in thorough enforcement, can aid the process by their own monitoring efforts. This should be followed by reporting instances of improper marking to Customs. The information needed by Customs enforcement officers must be as specific as possible, and should include the following: (1) importer name and address, (2) port(s) of probable entry, (3) date(s) of probable entry, (4) location of imported articles, and (5) description of improper marking (*e.g.*, no marking, blurred or

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[91] United States v. Gibson-Thomsen Co., 2 Cust. Ct. 172 (1939), *aff'd*, 27 C.C.P.A. 267 (1940).

[92] Determinations of "substantial transformation" are made by the Customs Service on a case-by-case basis. *See, e.g.*, Decision on Request for Internal Advice on the Country of Origin of Korean Tubular Products That are Upset, Threaded, and Fitted with Joints in Mexico Prior to Importation into the United States, U.S. Cust. Serv. Decision CLA-2 CO:R:CV:G 075174 JLV (Mar. 15, 1985). In the *Korean Tubular Products* decision, the Customs Service ruled that the processing in Mexico of Korean-made steel tubing did not amount to substantial transformation. As a result of Customs' decision, the steel tubing was treated as a product of Korea for tariff purposes when shipped into the United States from Mexico. *Id.* at 8. The Customs Service's inquiry into whether a particular product has been substantially transformed may require Customs to distinguish among different products in the same shipment arriving at port. For example, Customs recently decided that 14 of 99 Japanese-made fabricated structural units had not been substantially transformed in Taiwan, while the remainder of the shipment had been sufficiently altered in character and use to constitute substantial transformation. *See* Substantial Transformation of Structural Shapes; China Steel Structure Co., Ltd., U.S. Cust. Serv. Decision CLA-2 CO:R:CV:G 078231 JAS (May 21, 1986).

[93] *See* 19 C.F.R. § 134.51 (1986).

[94] *Id.* § 134.54.

[95] *Id.* § 134.52(d).

[96] 19 U.S.C. § 1592(4)(A)(iii) (1982).

[97] 19 C.F.R. § 134.4 (1986). Criminal penalties may be imposed for defacing, destroying, removing, altering, covering, obscuring, or obliterating any required country-of-origin marking, with an intent to conceal that information. Anyone convicted of such a violation is subject to a fine of up to $5,000, one year's imprisonment, or both. *Id.*

otherwise illegible marking, inconspicuous or impermanent lettering). In appropriate instances it may be helpful to provide Customs with dated photographs and to identify the location of the offending articles.

2. *Tariff Classification*

All articles imported into the U.S. Customs territory, with only a few exceptions, are subject to the tariff classification process.[98] The process involves determining the rate of duty applicable to an imported product by reference to the Tariff Schedules[99] of the United States, a list that contains thousands of product descriptions and their accompanying "item number" and duty rate(s). The first step in the process is to classify a product under the appropriate product description and item number.

As detailed as the Tariff Schedules may appear, an imported article can be susceptible of classification under two or more product descriptions, and in many instances, different tariff rates will apply. For this reason, importers will seek to have their goods classified within the product category that provides the most favorable rate. If a U.S. producer or seller[100] believes Customs is not assessing the proper duty on competing imports,[101] the assessment can be challenged. To do so, the domestic petitioner files a claim with the Commissioner of Customs explaining its reasons for believing that the appraised value, tariff classification, or rate of tariff duty is incorrect.[102] An allegation that a product is ineligible for duty-free treatment under the Generalized System of Preferences[103] can also be brought in this type of proceeding. Judicial review is available if the

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98 19 U.S.C. § 1202(1) (1982). Exceptions include: certain "intangibles," namely corpses, together with their coffins and accompanying flowers; metal or paper currency in current circulation in any country and imported for monetary purposes; electricity; securities and similar evidences of value; records, diagrams and other business, engineering or exploration data, in any media; certain articles returned from space; and vessels that are neither yachts nor pleasure boats. *Id.* § 1202(5).

99 *See id.* § 1202.

100 The Tariff Act of 1930 provides "interested parties" with the right to challenge a Customs classification. 19 U.S.C. § 1516(a)(1) (1982). An "interested party" can be a manufacturer, producer, or wholesaler in the United States; a certified union or recognized union or group of workers that is representative of an industry engaged in the manufacture, production or wholesale in the United States; or a trade or business association a majority of whose members are manufacturers, producers, or wholesalers in the United States, of goods of the same class or kind as the designated import merchandise. *Id.* § 1516(a)(2). The scope of this remedy was expanded by the Trade Agreements Act of 1979, Pub. L. No. 96- 39, § 1001(b)(1), 93 Stat. 144, 303 (1979). Previously, standing was available only to U.S. manufacturers, producers, or wholesalers.

101 The reference in section 1516(a) to goods of the "same class or kind," *see supra* note 100, has been interpreted as requiring that the petitioning party's product be "directly competitive with and substitutable for the imported product." *See* Golding-Keene Co. v. United States, 183 F. Supp. 947 (Cust. Ct. 1960).

102 19 U.S.C. § 1516(a)(1) (1982).

103 *See infra* notes 105-27 and accompanying text.

outcome of the administrative review is not satisfactory.[104]

G. Generalized System of Preferences

U.S. businesses should be aware of one further program that affects their ability to compete with imports—the Generalized System of Preferences (GSP).[105] The GSP, an international arrangement followed by the United States and eighteen other industrial nations,[106] grants nonreciprocal tariff concessions on a wide range of exports to certain developing countries. The goal of this preferential tariff scheme is to enhance economic growth in developing nations and promote international trade between such countries and industrialized economies.

On the premise that developing nations often need temporary preferential advantages to compete effectively with industrial countries,[107] the program affords duty-free entry of imports[108] from eligible beneficiary developing countries (BDCs).[109] The scheme of the GSP, although affording certain temporary advantages to developing

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[104] 28 U.S.C. § 1581(h) (1982) gives the Court of International Trade exclusive jurisdiction to review matters related to tariff classification, valuation, and rates of duty.

[105] The Generalized System of Preferences was authorized by the United States in the Trade Act of 1974, Pub. L. No. 93-618, tit. V, 88 Stat. 1978 (1975) (codified at 19 U.S.C. §§ 2461-2465 (1982)), and implemented by Exec. Order No. 11,888, 40 Fed. Reg. 55,275 (1975).

[106] In addition to the United States, countries that have established GSP systems are Australia, Austria, Canada, members of the European Economic Community, Finland, Japan, New Zealand, Norway, Sweden, Switzerland, Bulgaria, Czechoslovakia, Poland, and the Soviet Union. *See* UNCTAD/TAP/136/Rev.5 (1983).

[107] Pub. L. No. 98-573, § 501(b)(1), 98 Stat. 3018 (1984).

[108] Eligible articles are those identified in the Tariff Schedules of the United States by the symbols "A" or "A*" in the "GSP" column. 19 U.S.C. § 1202(3)(c)(ii) (1982). An item identified by "A" indicates that all "beneficiary developing countries" are given GSP treatment on exports of the item. *Id.* "A*" signifies that certain beneficiary developing countries do not receive GSP treatment on exports of the item. *Id.*

Not all products are eligible for duty-free entry; certain categories of goods are expressly excluded by statute (*i.e.*, those determined to be import-sensitive), including most textiles, watches, certain electronic and steel articles, certain footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel, certain semi-manufactured and manufactured glass products, and any other articles that the President determines under GSP to be import-sensitive. *Id.* § 2463(c)(1) (1982 & Supp. III 1985). Other articles ineligible for duty-free treatment include those that are the subject of any action pursuant to 19 U.S.C. §§ 1862, 1981 (tariff adjustment), or § 2253 (the "escape clause"). *Id.* § 2463(c)(2).

[109] The definition of a beneficiary developing country includes any foreign country and its territorial possessions that the President designates as such. *Id.* § 2462(a) (1982). The United States presently recognizes over 100 countries as BDCs. By statute, the President's authority to designate BDCs is restricted; he may not confer this status on any communist country (unless the country is a GATT member, an IMF member, or receives Most Favored Nation treatment), any OPEC member country, or any country that (i) aids or abets international terrorism, (ii) fails to afford internationally recognized worker rights, (iii) nationalizes or expropriates U.S. property or (iv) fails to recognize or enforce arbitral awards made in favor of U.S. persons. *Id.* § 2462(b) (1982 & Supp. III 1985). The factors the President shall consider in deciding whether to designate a country as a BDC are set out by statute. *See id.* § 2462(c).

countries, is also sensitive to changes in circumstances that affect a country's need for or entitlement to those benefits.

GSP treatment can be withdrawn either at the discretion of the President or when specified events take place.[110] The treatment must be withdrawn, for example, from articles receiving "escape clause" relief or those subject to "national security" clause import restraints.[111] U.S. law also prescribes "competitive needs limitations," two quantitative limits that, if exceeded, trigger withdrawal of GSP treatment. Reaching the prescribed limits results in a presumption that the country no longer needs the competitive advantage of preferential tariff benefits.[112]

The first limitation requires that GSP treatment be withdrawn for a specific article of a country where the value of U.S. imports of that article exceeds a specific dollar amount.[113] The second limitation applies when imports of an article from a BDC reach a value in excess of fifty percent of total U.S. imports of that article.[114] If either limitation is reached, GSP treatment must be withdrawn from the "eligible article" no later than July 1 of the next calendar year used for computing the limitations.[115] The President can, however, waive removal under prescribed conditions,[116] and terminate the waiver when it is no longer warranted because of changed circumstances.[117]

GSP tariff preferences may also be withdrawn from certain eligible articles once the exporting BDC is considered to have "graduated" to a higher level of competitiveness relative to other BDCs.[118] Under this provision, relatively more developed countries such as Brazil and Taiwan have recently lost their BDC status.

There is one further limitation on GSP eligibility. U.S. law requires that any article for which GSP preference is sought must be

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110 *See id.* § 2464 and *supra* note 109 for limitations on preferential treatment.

111 *See supra* note 108.

112 19 U.S.C. § 2464(c)(1) (1982 & Supp. III 1985).

113 *Id.* § 2464(c)(1)(A). The dollar amount is an amount "in excess of an amount which bears the same ratio to $25,000,000 as the gross national product of the United States for the preceding calendar year (as determined by the Department of Commerce) bears to the gross national product of the United States for calendar year 1974. . . ." *Id.*

114 *Id.* § 2464(c)(1)(B). This competitive need limit can be lowered to 25 percent when the President, after review, finds the BDC has demonstrated a sufficient degree of competitiveness (relative to other BDCs). *Id.* § 2464(c)(2)(B) (Supp. III 1985).

115 *Id.* § 2464(c)(1).

116 *Id.* § 2464(c)(3). Such conditions include: receipt of advice from the International Trade Commission as to whether any industry in the United States is likely to be adversely affected by the waiver; a determination by the President that waiver is in the U.S. national economic interest, *id.* § 2464 (c)(3)(A); consideration of the extent to which the BDC has assured the United States that it will give equitable and reasonable access to the markets and basic commodity resources of the BDC; and consideration of the extent to which the BDC provides adequate and effective means under its laws for foreign nationals to secure, exercise, and enforce exclusive rights in intellectual property. *Id.* § 2464(c)(3)(A), (B).

117 *Id.* § 2464(c)(3)(C).

118 *See id.* § 2464(c).

imported directly from a BDC.[119] An eligible article does not, however, lose its preference if it reaches the United States by going through a third country.[120] Country-of-origin issues arise in this context to ensure that a minimum of materials input and processing is accomplished in the BDC.[121]

The GSP program is essentially a system of incentives and controls imposed on trade between the United States and developing countries. As such, its potential effect on competitive conditions in U.S. trade deserves careful attention by U.S. industry. Notwithstanding the reciprocal benefit to be gained from the program, individual businesses can be subject to injury for the sake of improved international economic relations.

First, U.S. producers should be aware of two GSP-related proceedings that impact upon their ability to compete. The GSP program contains a periodic review mechanism in which GSP product eligibility is evaluated.[122] During the product review, interested parties[123] such as U.S. producers of like products may request review of a product's eligibility for inclusion in the GSP list. If the Office of the U.S. Trade Representative, with the advice of the ITC,[124] determines the product should be removed from the GSP eligible product list, the product's duty-free treatment ends.

Second, U.S. producers should be alert to petitions filed for the purpose of adding competitive articles to the GSP list.[125] Interested parties may oppose such petitions,[126] and should do so when the domestic party can demonstrate the likely injurious effect of provid-

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[119] *Id.* § 2463(b)(1) (1982).

[120] *Id.*

[121] *See id.* § 2463(b)(2) (to be eligible, the sum of the cost or value of materials produced in the BDC and the cost of direct processing performed in the BDC must equal at least 35 percent of the appraised value of an article at the time of its entry into the United States).

[122] An annual review of the list of products eligible for the GSP program is conducted by the Office of the U.S Trade Representative. *See* 15 C.F.R. § 2007.0-.8 (1986). The review concerns only product eligibility, not existing BDC status nor potential BDCs. The annual review is based principally on requests, or petitions, for changes in product coverage that are submitted by interested parties. *See id.* § 2007.0(a). The Trade Policy Staff Committee of the Office of the U.S. Trade Representative can also propose and consider changes *sua sponte*. *Id.* § 2007.0(f). The petitions must meet certain criteria to be accepted. *Id.* § 20078.0-.1. Once the petitioner is accepted, interested parties may submit supporting or opposing comments. Opportunity for brief oral testimony at public hearings is also available. *Id.* § 2007.2(d).

[123] For purposes of product eligibility review, "interested party" is defined as a party with a significant economic interest in the subject matter of the request, or any other party representing a significant economic interest that would be materially affected by the action requested, such as a domestic producer of a like or directly competitive article, a commercial importer or retailer of an article which is eligible for GSP or for which such eligibility is requested, or a foreign government. *Id.* § 2007.0(d) (1986).

[124] *See id.* § 2007.2.

[125] Requests for addition of articles to the GSP list are subject to the same regulations as petitions for removal. *See id.* § 2007.0-.8.

[126] *Id.* § 2007.0(c).

ing duty-free treatment to the article.[127]

Finally, because the GSP program offers significant benefits to less developed producing countries, the program can also be used by the U.S. government as an incentive to bilateral trading. The President's broad authority to grant or deny GSP eligibility is formidable encouragement for foreign economies to increase the access of U.S. goods to their markets. The GSP is, therefore, yet another vehicle potentially available to U.S. producers in their strategy for staying competitive.

II. Use of Import Relief Tools in Business Planning

Every U.S. business should be aware of, and seek protection against, the increasingly pervasive effects of foreign imports within the U.S. market. Companies should consider the offensive use of the U.S. trade laws as a strategic business tool in the same sense as more traditional elements of business planning such as research and development, capital investment, productivity improvements, marketing strategies, advertising, and public relations.

Often there is not anything more important to overall business planning than eliminating or reducing unfair trade practices by foreign competitors. When competing against foreign companies that engage in such practices, even the most modern, efficient, and competitive domestic industries may not be able to survive. Companies operating in the free enterprise system cannot compete with foreign firms that are not subject to the financial disciplines of private capital formation and the need to generate profits unless actions are taken to eliminate foreign dumping and subsidies.

Some economists argue that dumped and subsidized foreign products are good for the U.S. economy as a whole, because our consumers are able to obtain their products at a lower cost. These economists also suggest that such foreign ventures will not last because they will be a drain on the foreign government's resources. In the meantime, they argue, we should reap the benefits of the foreign government's largesse.[128]

The flaw in this reasoning is that the "life cycles" of foreign governments are longer than those of domestic private industry. It may take only a few years for a U.S. industry to reach the point of bankruptcy, but a foreign government can persist in subsidy practices for decades. British Steel Corporation, for example, has averaged losses of 4.5 million dollars *a day* for the last six years.[129] Despite a good amount of rhetoric to the contrary, the British government continues

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[127] *See id.* § 2007.1.

[128] *See, e.g.*, G. HUFBAUER & J. ERB, SUBSIDIES IN INTERNATIONAL TRADE 5 (1984).

[129] *See* appendix.

to support this uneconomic venture.[130] U.S. steel companies simply cannot compete on equal footing with a firm such as British Steel that need never be profitable to survive.

Many U.S. industries have already used the trade laws effectively in business planning, covering products such as specialty steel, televisions, carbon steel, and motorcycles. Other industries, encompassing the production of fasteners, pipe fittings, and ferroalloys, have unfortunately been less successful. Such industries have been devastated by imports, but have been either unwilling or unable to fight back effectively. As a result, these industries face substantial contraction and perhaps extinction.

Steps can be taken to evaluate the likely success or effectiveness of a trade relief case. A preliminary study can help determine the best option to use, and the results of the study can be used in any legal proceedings later undertaken. Such a study should include a questionnaire to be sent to each company in the involved industry, which would seek to determine costs, prices, production, shipments, employment, profits, and related information. No individual company information should be revealed publicly, and confidentiality should be preserved.

Once the industry data are found to support a trade relief case, the next step is to gather information on foreign prices and foreign government subsidies of the relevant product if an unfair trade action is contemplated. Information on home market prices and costs in the foreign country of the relevant merchandise, as well as detailed information on the foreign producers, can be gathered through foreign economic consulting firms, foreign business agents of U.S. companies, or overseas offices of U.S. firms. The information obtained as a result of this market research of foreign competitors can be invaluable to an industry, regardless of whether any trade case is ultimately filed. Foreign economic consultants can also gather information on government subsidies, although this information is often available in the press, in U.S. government agencies, or through foreign government embassies.

If, based on the information preliminarily gathered regarding the injury and the unfair trade practice, the decision is made to proceed with a trade action, several fundamental steps are then taken to develop the information needed to prepare the case:

1) Data are collected on prices of foreign competitors in the United States;

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[130] In the most recent examination of subsidies to British Steel, the Commerce Department found a net subsidy of 30.11 percent *ad valorem* on imports of stainless steel plate from the United Kingdom during the period of February 1983 through March 1984. *See* Stainless Steel Plate from the United Kingdom, 51 Fed. Reg. 34,112 (Int'l Trade Admin. 1986).

2) Additional details on foreign government subsidies or foreign prices are obtained if a subsidy or dumping case is contemplated;

3) A detailed economic survey of injury to the domestic industry is prepared. This must be done in order to determine whether the industry can pass the "injury" test under U.S. law. The survey itself is relatively simple. Generally, information for three prior years is required concerning an industry's profits, employment levels, production, shipments, capacity and capacity utilization;

4) Data on foreign competition are gathered on an ongoing basis. Records should be kept as soon as an import problem begins to develop. Company sales staff should be alert to keeping careful records of foreign offers or bids, and lost sales. Where possible, invoices should be obtained. If this is not possible, sales staff should prepare "lost order" reports describing the circumstances of the foreign sale, the date, the specific product, the quantity, the price, and any credit terms offered.

III. The Choice-Fight or Decline

A growing number of U.S. industries will not survive in the long term unless they battle unfairly traded imports. When competing against foreign governments and pervasive dumping, the usual efforts to compete are simply inadequate. Even modern and efficient domestic industries have difficulty coming out ahead in such confrontations.

A U.S. industry can do all of the right things in terms of capital investment, research and development, marketing, and improving productivity. When competing with foreign firms that do not operate under the same free enterprise principles, however, the traditional paths to success in a free enterprise system are simply not enough.

The solution for such U.S. companies is to use the trade laws effectively, which contemplates a continuing and aggressive program. It means a commitment by top management to devote the necessary time and resources to addressing the import problem; it means early perception of the problem; it means using the trade laws as an offensive weapon against imports.

Increased imports, unfair competition from imports, and increasing balance of payment deficits are now a fact of life in the U.S. business environment. At no time in U.S. industrial history has the need been more critical for our industries to learn how to use the trade laws in order for us to maintain competitiveness.

CHART 1

IMPORT RELIEF — ALTERNATIVE APPROACHES

	Antidumping	Countervailing Duties	Escape Clause (§ 201)	§ 337
Complainants	U.S. company or industry or workers	U.S. company or industry or workers	U.S. industry or workers	U.S. company or industry
Respondents	Foreign companies	Foreign governments	N/A	Foreign companies
Action Taken By	Commerce/ITC	Commerce/ITC	ITC/President	ITC/President
Injury Requirement	Yes	Yes	Yes	Yes
Proof of Unfair Trade Practices Required	Yes	Yes	No	Yes
Remedy	Increased duties	Increased duties	Quotas, tariff quotas, tariffs, or orderly marketing agreements	Exclusion or cease and desist order
Time Limits	9-14 months	7-10 months	8 months	12-18 months
Court Appeal	Yes	Yes	No (Congressional appeal)	Yes

APPENDIX
BSC LOSSES

	Loss in British Pounds (m)[1]	Exchange Rate[2]	Loss in U.S. Dollars (m)
FY 79-80	1,784	2.2240	3,967.6
FY 80-81	1,020	2.3850	2,432.7
FY 81-82	504	1.9080	961.6
FY 82-83	869	1.6145	1,403.0
FY 83-84	256	1.4506	371.4
Five year total			9,136.3
Average/yr.			1,827.3
Average/day			5.0

[1] British Steel Corporation, Annual Report FY 1983-84, Statement F.

[2] International Monetary Fund, *International Financial Statistics*, April 1985.