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In Our Stars: The Failure of American Trade Policy

Cover Page Footnote

International Law; Commercial Law; Law

. . . In Our Stars: The Failure Of American Trade Policy

“The fault dear Brutus, lies not in our stars, but in ourselves . . .”
Shakespeare, “Julius Caesar”—Act 1, scene II.

By William H. Lash, III †

I. Introduction

Free trade, fair trade, and protectionism: each of these terms has been heralded as the proper trade policy of the United States. The free traders, the intellectual heirs of Adam Smith¹ and David Ricardo,² claim that economic efficiency is maximized in a world free of trade barriers, where goods and services can flow freely in a borderless world. The fair traders espouse a trade policy of reciprocal trade benefits.³ Under this model, the real exchange is an exchange of trade privileges and market access. Finally, the protectionists support an “America First” theory of trade. Tariffs, quotas and other trade barriers would be used to keep foreign goods from entering our shores.⁴ The protectionists believe that U.S. industry benefits by being protected from foreign imports and competition.

Current U.S. trade policy may not be conveniently described by any of the aforementioned labels. Congress and the Administration lower trade barriers in one sector, negotiate multilateral and bilateral trade agreements for privileged trading partners, take unilateral trade sanctions against allies and erect barriers to trade all in the

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¹ ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* (Random House 1985).

² DAVID RICARDO, *PRINCIPLES OF POLITICAL ECONOMY AND TAXATION* (Dutton 1965). See generally ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS* (6th ed., Simon & Schuster 1986).

³ See, e.g., *Congressional Leaders are Looking at Possible Bill Merging Several Measures*, 9 INT'L TRADE REP. (BNA) 627 (1992).

⁴ See *Election-year Politics in U.S. Likely to Complicate Trade Issues This Year*, 9 INT'L TRADE REP. (BNA) 77 (1992); Charles D. Gray & John F. Nash, Jr., *U.S.-Bangladesh Towel Trade: Who's Unfair?*, CHRISTIAN SCI. MONITOR, Jun. 14, 1991, at 20.

same breath. This inherent conflict stems from the failure of U.S. policy makers to first determine what our international trade goals should be.

Only after establishing a trade agenda, can we hope to develop a plausible trade policy. I would like to propose the following goals of a functional trade policy: First, the trade policy must be consistent with the foreign policy of the state. Second, the policy must promote economic efficiency, stimulate the economy and promote consumer welfare. A trade policy should seek to create employment opportunities and promote market efficiencies. Third, the policy must be transparent and consistent so as not to mislead trading partners. Fourth, the policy must be flexible and permit the adoption of new tactics and techniques to promote trade and international political agendas. Trade policy should be result oriented and not be bound by ideological labels.

Our current trade policy suffers on all fronts. U.S. foreign policy is regularly jeopardized by application of the trade laws. Our stated commitment to human rights is questioned by discriminatory awards of trade privileges. Similarly, calls for open markets and support of the multilateral trading system are mocked by the actions of Congress and the White House.

Furthermore, the trade policies of the U.S. should not interfere with the country's stated foreign policy objectives. States that are strong trading partners of the U.S. also tend to be American political or military allies. Developing countries that are the beneficiaries of U.S. foreign aid programs for political or humanitarian reasons should also expect that American trade policies are consistent with aid packages. To escape from a system of perennial debtor or welfare states, U.S. trade programs must promote development in these states and not hinder their attempts to progress. By blinding ourselves to political and economic realities with a series of ideological masks, the U.S. is often a rudderless ship in the seas of international trade.

Our trading partners complain annually about the lack of transparency in U.S. trade law and its application. Similarly, American companies complain about a lack of flexibility in international trade which deprives them of much needed assistance to enter foreign markets. Finally, current U.S. trade law stifles and thwarts both domestic and foreign investment in many cases, leading to a loss of employment and technological opportunities.

This article will analyze some of the major flaws in U.S. trade policy. Particular attention will be paid to the U.S. laws and policies concerning foreign direct investment, unilateral retaliatory actions, antidumping, and the U.S. attitude toward the multilateral trading system and the General Agreement on Tariffs and Trade (GATT).

Economic, legal and political suggestions for improvement of our current situation will be presented.

II. The Iron Curtain in U.S. Markets

A. Chilling Foreign Investment: Exon-Florio

"The U.S. is not only the largest but the most open market in the world."⁵ This conclusory observation by then U.S. Secretary of Commerce Robert Mosbacher is dazzlingly inaccurate. Although the U.S. pushes for increased openness in foreign markets, these requests are from a house of glass. Despite the claims of the former Secretary, the U.S. is guilty of unfair trade practices on a colossal scale. This section will address restrictions of access to U.S. markets.

Since the days of Alexander Hamilton, the U.S. has historically welcomed foreign direct investment.⁶ Foreign capital has produced employment⁷ and tax revenues and has led to technology transfers.⁸ Despite the history and benefits of a liberal foreign investment policy, current federal laws and regulations restrict foreign investment in the broadcasting,⁹ domestic airline,¹⁰ maritime shipping¹¹ and nuclear energy industries.¹² Recent attempts to extend the assault on foreign investment would bar foreign ownership of cable TV stations¹³ and concessions in the national park system as well.¹⁴

⁵ *U.S. Commerce Secretary Urges Japan to Remove Barriers*, REUTER BUS. REP., Sept. 13, 1989 (quoting U.S. Secretary of Commerce Robert Masbacher), available in LEXIS, Nexis library, Wires file.

⁶ *See Japanese Investors are Valuable Helpers*, NIKKEI WEEKLY, Oct. 26, 1991. "Rather than treating the foreign investor as an adversary, we should consider him a valuable helper for he increases our production and the efficiency of our business." *Id.* *See generally* Jose E. Alvarez, *Political Protectionism and the United States International Investment Obligations in Conflict: The Hazards of Exon-Florio*, 30 VA. J. INT'L L. 1 (1989); William Lash, III, *The Buck Stops Here: The Assault on Foreign Investment in the U.S.*, 36 ST. LOUIS U. L.J. 1 (1992).

⁷ *See* William H. Lash, III, *Who's American? Who Knows?*, J. OF COM., Jun. 20, 1991, at 4A. *See also* Alan S. Blinder, *Why a War Mentality About Japan is Self-Defeating*, BUS. WK., Jul. 16, 1990, at 18; John Hoerr, *A Japanese Import That's Not Selling*, BUS. WK., Feb. 26, 1990, at 86; Susan W. Liebeler, *Fallacies of Discouraging Foreign Investment in the U.S.*, CHRISTIAN SCI. MONITOR, Mar. 5, 1990, at 19. *See generally* NORMAN J. GLICKMAN & DOUGLAS P. WOODWARD, *THE NEW COMPETITORS: HOW FOREIGN INVESTORS ARE CHANGING THE U.S. ECONOMY* (1989), at 312-16.

⁸ *See, e.g., Nippon Sanso Acquires Texas-Based Industrial Gas Operator Semi Gas*, COMLINE DAILY NEWS TOKYO FINANCIAL WIRE, Jan. 10, 1992, available in LEXIS, Nexis library, Wires file.

⁹ *See, e.g., Communications Act of 1934*, 47 U.S.C. §§ 301-310 (1988).

¹⁰ *See, e.g., Federal Aviation Act*, 49 U.S.C. §§ 1301-1542 (1988).

¹¹ *See, e.g., Merchant Marine Act of 1920*, 46 U.S.C. §§ 861-889 (1989); *Shipping Act of 1916*, 46 U.S.C. §§ 801-842 (1988).

¹² *See, e.g., Atomic Energy Act of 1954*, 42 U.S.C. § 2011 *et seq.* (1988).

¹³ *See, e.g., The Foreign Ownership of Cable Television Act of 1989*, H.R. 2643, 101st Cong., 1st Sess. (1989).

¹⁴ *See, e.g., H.R. 542, 102d Cong., 1st Sess. (1991); H.R. 3533, 102d Cong., 1st Sess. (1991); H.R. 3726, 102d Cong., 1st Sess. (1991); Resolution Regarding Awarding Contracts in National Park System*, H.R. Con. Res. 14, 102d Cong., 1st Sess. (1991); *Sense of Congress Regarding Concession Units in National Parks*, H.R. Con. Res. 20, 102d Cong.,

The primary vehicle for chilling foreign investment in the U.S. is the Exon-Florio Act.¹⁵ In 1988, Congress, believing foreign investment in certain critical industries could adversely affect national security, enacted the Exon-Florio amendment to the Defense Production Act. This provision gives the President the authority, without judicial review, to block mergers, acquisitions or takeovers of U.S. businesses by foreign entities if such business dealings threaten to impair U.S. national security.¹⁶ Exon-Florio is administered by the Committee on Foreign Investment in the United States (CFIUS), an interagency group composed of the Secretary of Commerce, the Secretary of State, the Secretary of Defense, the Attorney General, the U.S. Trade Representative, the Director of the Office of Management and Budget, the Chairman of the Council of Economic Advisers and the Secretary of the Treasury, who serves as chairman.¹⁷

Pursuant to Exon-Florio foreign acquirers of U.S. firms may file a "voluntary" report with CFIUS. The review period of the CFIUS submission may take up to ninety days. Within thirty days of receipt of written notice of a transaction, the committee decides whether to investigate the transaction. A full investigation takes forty-five more days, and the President can take an additional fifteen days to decide whether to block the acquisition.¹⁸

Although the committee has received nearly 700 notifications of foreign acquisitions under Exon-Florio, it has opened only 12 full investigations.¹⁹ The only time Exon-Florio has been used to block a transaction was in 1990, when the President ordered the import-export arm of the Ministry of Aerospace Industry of the People's Republic of China to divest its interest in MAMCO, a Seattle-based firm that manufactures metal parts for civilian aircraft, primarily for Boeing.²⁰

Congress has been unimpressed with its watchdog. Critics claim the committee fails to investigate enough transactions and blocks even fewer deals. To vent this displeasure, Congress seems deter-

1st Sess. (1991); *Lujan Defends Agreement to Sell Matsushita Yosemite Park Concession to Park Foundation*, 8 INT'L TRADE REP. (BNA) 90 (1991).

¹⁵ Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 5021, 102 Stat. 1107 (1988) (amending the Defense Production Act of 1950, 50 U.S.C. App. 2061, *et seq.*).

¹⁶ *Id.*

¹⁷ Securities Exchange Act of 1934, 15 U.S.C. § 78(b)(note) (1988); Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (1975).

¹⁸ Securities Exchange Act of 1934, 15 U.S.C. § 78(b)(note) (1988); Exec. Order No. 11,858, 40 Fed. Reg. 20,263 (1975).

¹⁹ See generally *Narrow Interpretation of Statute Hobbles Exon-Florio Reviews, Lawyers Told*, 9 INT'L TRADE REP. (BNA) 325 (1992); Andrew Rosenthal, *Bush, Citing Security Law, Voids Sale of Aviation Concern to China*, N.Y. TIMES, Feb. 19, 1992, at 1.

²⁰ MAMCO received an extension of time to complete this divestiture. Lionel Barber & Nancy Dunne, *Washington Expected to Let Peking Delay Divestment*, FIN. TIMES, May 1, 1990, at 8.

mined to place more impediments on foreign investors and to amend Exon-Florio.

The leading expression of Congressional dissatisfaction with the administration of Exon-Florio is the proposed Technology Preservation Act of 1991,²¹ introduced by Rep. Cardiss Collins (D-Ill), and co-sponsored by Rep. Richard Gephardt (D-Mo). The bill would require the committee to investigate any acquisition of a U.S. company involving "critical technology."²² Other proposed changes to Exon-Florio would transfer chairmanship of the committee to the Secretary of Commerce and replace the Chairman of the Council of Economic Advisers and the Director of OMB with the Secretary of Energy, the National Security Adviser and the Presidential Adviser for Science and Technology. The bill would also allow the President to nullify transactions that impair national security and to "restore such parties to the positions they held before."²³

The bill was modified on October 23, 1991 by the Commerce, Consumer Protection and Competitiveness Subcommittee of the House Energy and Commerce Committee. The new version of the Act gives the President total discretion to obtain any required assurances from foreign buyers to safeguard national security.²⁴ Although the annual review by CFIUS of foreign compliance with assurances was dropped, the new version adds CFIUS notification for industries engaged in activities covered by the Atomic Energy Act of 1954.²⁵ Under the proposed legislation, the President's Science Adviser would review transactions to determine whether a critical technology is involved.²⁶ Although there are indications that President Bush will veto this legislation,²⁷ nearly a dozen other bills designed to inhibit foreign investment are winding their way through Congress.²⁸

²¹ Technology Preservation Act of 1991, H.R. 2624, 102d Cong., 1st Sess. (1991).

²² *Id.*

²³ *Id.*

²⁴ *House Panel Approves Exon-Florio Bill*, 56 FED. CONT. REP. (BNA) 14, 17 (1991).

²⁵ *Id.*

²⁶ *House Subcommittee Approves Modified Version of Exon-Florio Legislation*, INT'L BUS. DAILY (BNA), Oct. 24, 1991.

²⁷ *DPA Legislation to Extend Exon-Florio Clears Senate, House Panel Approves Separate Bill*, 8 INT'L TRADE REP. (BNA) 321 (1991).

²⁸ For example, The Foreign Investment and Economic Security Act of 1991, H.R. 2386, 102d Cong., 1st Sess. (1991), would give the president power to block acquisitions that threaten "national and economic security." Another bill that would amend Exon-Florio is S. 2519, 102d Cong., 2d Sess. (1992). This proposed legislation would create a new government agency, the Office of Strategic Trade and Technology, designed to streamline U.S. export control procedures. CFIUS would then become an office of this new agency. Additionally, The Critical Technologies Act of 1991, H.R. 2445, 102d Cong., 1st Sess. (1991), would "amend chapter 15 of the National Security Act of 1947 to define critical technologies important to our national security." Under this legislation, "critical technology" is "the act of a domestic industry in producing a product without which machine tools necessary to support the national defense could not be produced." The bill also would establish a "Critical Technologies Commission" and address "national

The debate on foreign investment is laced with confusion, as states actively compete for foreign dollars and the federal government erects new barriers.²⁹ It is equally ironic to note that congressional leaders such as Representative Gephardt, who vigorously support additional restrictions on foreign investment in the United States, are also leading the charge to threaten foreign governments to open their markets to U.S. investors.³⁰

B. The Results of Exon-Florio

This lack of consistency confuses our trading partners and undermines U.S. efforts to open international markets through negotiation.³¹ It also jeopardizes many struggling American manufacturers. Recently, McDonnell Douglas proposed to sell a forty percent stake in its flagging commercial aircraft division to Taiwan Aerospace Corp. The struggling aircraft manufacturer would receive a much-needed \$2 billion capital infusion from its Taiwanese partners. This added capital would greatly assist McDonnell Douglas in building the new MD-12 jumbo jet and in competing with the heavily subsidized European Airbus consortium.³² The strategic alliance also promises to promote sales in the expanding markets of the Pacific Rim. This transaction has all the indicators of success: a motivated seller, an eager buyer, access to new markets and the preservation of thousands of jobs in a shrinking market. Unfortunately, the nationality of the buyer may prove to be a substantial obstacle to this friendly transaction. Sen. Jeff Bingaman (D-N.M.) is asking the federal government to review the deal in the name of national security. Thirty Democratic senators signed a letter asking President Bush to block McDonnell Douglas' proposed sale of forty percent of its commercial aircraft division to Taiwan Aerospace Corporation under the Exon-Florio Act.³³

This would not be the first time that Exon-Florio has been used to stop or chill a transaction. For example, in February, 1991, Fanuc Ltd., a Japanese manufacturer of machine tools and industrial robots, withdrew a \$10 million offer to buy forty percent of Moore Spe-

security impairment cases." Unlike other restrictive efforts, the Critical Technologies Act defines national security. Pursuant to the bill, " 'national security interest' means the interest of the United States government to preserve those basic conditions necessary for a domestic producer, using a critical technology, that are adequate to permit capital investment for needed improvements in technology that will enable the overall domestic industry to remain competitive." *Id.*

²⁹ States currently spend anywhere from tens to hundreds of millions of dollars to attract foreign investment. See GLICKMAN & WOODWARD, *supra* note 7, at 226-44.

³⁰ *Schumer to Introduce Tougher Bill on Fair Trade in Financial Services*, 8 INT'L TRADE REP. (BNA) 1149 (1991).

³¹ William H. Lash, III, *Why Not Let McDonnell Douglas Deal Fly?*, ST. LOUIS POST DISPATCH, Dec. 1, 1991, at 3C.

³² William H. Lash, III, *Crossed Signals on Investment*, J. OF COM., Dec. 3, 1991, at 10A.

³³ *Id.*

cialty Tool Co. of Bridgeport, Connecticut (Moore). Moore is a subcontractor to Department of Energy contractors that produce nuclear weapons. The dim view that CFIUS initially took of the deal probably contributed to Fanuc's retreat.³⁴

A similar fate befell a proposed acquisition of a Perkin-Elmer high technology business by the Japanese Corporation Nikon. Perkin-Elmer is one of the last remaining American makers of equipment that etches circuits on semiconductor chips. "The proposed sale was called off in the face of mounting political opposition in the United States."³⁵ Not content with Nikon's retreat from the deal, Sen. Exon and Rep. Florio sought to turn the foreign company's defeat into a rout. They asked the Administration to block the sale of Perkin-Elmer's semiconductor unit on the basis that such a sale would threaten national security. They wrote to President Bush that "[i]f Perkin-Elmer reaches an agreement with a foreign purchaser to sell its division, we think there could be no more clear-cut case for use of your full authority under the Exon-Florio amendment."³⁶

Investigation by CFIUS is not the only deterrent offered by Exon-Florio. Noticeably absent from the statute is any definition of "national security." This is not merely Congressional oversight. Congress purposefully failed to define national security in order to give CFIUS added flexibility.³⁷ However, this flexibility adds to the uncertainty and confusion of foreign bidders. National security is potentially boundless and has, on varying occasions, been applied to the footwear, pencils, paper, pottery and peanut industries.³⁸ Because national security is not defined and the notification of CFIUS is reputedly voluntary, foreign bidders spend countless dollars and hours in preparing needless CFIUS submissions. This lack of transparency has often been a source of U.S. complaints concerning investment regulations in other states.³⁹

³⁴ *Fanuc Seen Needing to Review Strategy*, JAPAN ECON. J., Mar. 2, 1991, at 18.

³⁵ Lash, *supra* note 32.

³⁶ *Perkin-Elmer Sale Fought*, N.Y. TIMES, Dec. 2, 1989, at 35.

³⁷ Conference Report for Pub. L. 100-418 (H.Rep 100-576), 100th Cong., 2d Sess. (1988), at 926. The predecessor House bill was broader yet. Instead of "national security" this legislation safeguarded "national security and essential commerce." H.R. 3, 100th Cong., 1st Sess., § 905, 133 CONG. REC. 2642, 2739 (1987).

³⁸ Susan W. Liebler, *Restrictions on Foreign Investment and their Effect on Pacific Rim Trade*, Speech at the Century City Chamber of Commerce, Presidents' Forum, Los Angeles, California (Sept. 19, 1989). Another unlikely claimant of national security was the wooden clothespins industry. *Id.* See generally Richard B. Dagen & Michael S. Knoll, *Duties to Offset Comparative Advantages*, 10 MD. J. INT'L L. & TRADE 273 (1986).

³⁹ With national security undefined by the act, the corporate community has no guidance in evaluating the Exon-Florio implications of their transactions. One critic commented that "[e]veryone thinks he has to file, even if he's only a cookie manufacturer." Martin Tolchin, *Agency on Foreign Takeovers Wielding Power*, N.Y. TIMES, Apr. 24, 1989, at D6. See also *Seminar Speakers Warn About Risks of U.S.-Japan Investment Disparity*, DAILY REP. FOR EXECUTIVES (BNA), Mar. 6, 1990, at A-11. One of the speakers at a seminar on international investment on March 1-2, 1990 addressed the problem of "voluntary" notification

Exon-Florio is a law ripe for abuse. Domestic corporations that are the targets of foreign bidders in hostile takeovers may seek refuge under the large and safe umbrella of national security. On March 26, 1990, BTR plc initiated a hostile takeover of Norton Company, a Massachusetts based manufacturer of abrasives and ceramics used in missiles. Norton successfully enlisted the assistance of the Massachusetts Congressional delegation and claimed that the transaction raised questions of national security and violated Exon-Florio. On April 19, 1990, over one hundred members of Congress joined in the chorus of national security and sought CFIUS review of the transaction.⁴⁰ The joint Congressional authors argued, "frankly, we do not believe that any takeover of Norton would be in our economic security or national security interests."⁴¹ The Exon-Florio national security concerns evaporated eight days later, however, when Saint-Gobain of France made a "white knight" bid for Norton, some \$15.00 higher than the BTR plc hostile bid.⁴²

Exon-Florio also undermines the U.S.-Canada Free Trade Agreement⁴³ and a host of bilateral investment treaties. Under the FTA, restrictions on bilateral investment between the two states were liberalized. The Canadians objected strongly in a diplomatic note to the "poison pill" nature of Exon-Florio. Canadian trade officials attacked the uncertainty created by the act and urged the U.S. to define national security as in the U.S.-Canada Free Trade Agreement.⁴⁴ Similarly, The U.S. successfully negotiated a series of bilateral investment treaties.⁴⁵ These treaties could be jeopardized by application of Exon-Florio. American investors might find that our trading partners have decided to follow our example and erect investment barriers as well.

III. U.S. Unilateral Trade Actions

A. Ignoring the GATT Processes

The U.S. has engaged in a number of practices that are contrary

under Exon-Florio. Davis Robinson commented that "[t]he fact of life is that so long as there is a disinclination to set parameters for national security or for the risk of divestment in the absence of notification, it is doubtful that many potential foreign acquirers will risk not filing with CFIUS." *Id.*

⁴⁰ Letter from House of Representatives to President George Bush (Apr. 19, 1990) (on file with author).

⁴¹ *Id.*

⁴² Susan W. Liebler, *Norton and the Pentagon Ploy*, J. OF COM., Jun. 4, 1990, at 8A; John Burgess, *Norton's Defense: The British are Bad, But the French Have a Better Deal*, WASH. POST, May 2, 1990, at G3.

⁴³ United States-Canada Free Trade Agreement, Pub. L. No. 100-449, 102 Stat. 1851 (1988).

⁴⁴ The definition of national security under the free trade agreement is limited to defense production, war, and nuclear proliferation. *Id.*

⁴⁵ For a discussion of U.S. bilateral investment treaties see, Kenneth J. Vandeveld, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201 (1988).

to prevailing international law doctrines and agreements, most notably the GATT. Although the U.S. is a member of the GATT and has been a leader in nearly every GATT round, the U.S. Senate has never ratified the GATT.⁴⁶ Congressional commitment to the GATT is often questioned.⁴⁷ Legislators continually deride this institution, referring to it pejoratively as the Gentlemen's Agreement to Talk and Talk.⁴⁸ Given this attitude, it is not surprising that the U.S. has a two-sided view of GATT obligations. We are content to bring issues before GATT panels on opening markets for American goods but decline to accord the same respect to foreign complaints on U.S. trade practices.

The U.S. has blocked the adoption of several GATT panel reports critical of U.S. trade policies. By blocking these reports and disregarding our GATT obligations, the U.S. undermines its commitment to multilateral trade negotiations. Most recently, the U.S. blocked a GATT panel report concerning discriminatory practices in U.S. government procurement.⁴⁹ An EC manufacturer of sonar mapping equipment, Atlas Electronik, was the leading candidate to sell sonar mapping equipment to the National Science Foundation. At the request of Senator John Kerry (D-Mass.), Senator Barbara Mikulski (D-Md.) inserted a line item into the appropriations legislation governing the National Science Foundation.⁵⁰ The provision stated that no appropriations "may be obligated for procurement of a multibeam bathymetric sonar mapping system manufactured outside of the United States."⁵¹ The carefully crafted line item was designed to steer the procurement award away from the European manufacturer and favor an American producer, Seabeam of Massachusetts.

After Atlas Electronik complained to EC trade officials, the EC brought its complaint pursuant to GATT. The U.S. argued that "since the purchase took place in the context of the provision of an extensive range of services, it [the sale] should not be considered as

⁴⁶ "The GATT is an executive agreement never ratified by the Senate under the constitution." H.Rep. No. 98-287, 98th Cong., 1st Sess., part I, at 22 (1983); Protocol of Provisional Application to the General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pts. 5, 6, 55 U.N.T.S. 308.

⁴⁷ For example, the legislative history of the Trade Act of 1974 observes that although funds have been appropriated to cover U.S. GATT expenses, this appropriation "does not imply approval or disapproval by the Congress of all articles of the GATT." See H.R. Rep. No. 1644, 93d Cong., 2d Sess. 4, at 27 (1974) (*reprinted in* 1974 U.S.C.C.A.N. 7367, 7373).

⁴⁸ *U.S. May Go Outside GATT Framework for Trade Talks if LDCs Continue to Balk*, *Yeutter Says*, INT'L TRADE REP. (BNA) 1461, 1465 (1985).

⁴⁹ *EC Commission 'Welcomes' GATT Report on Buy-American; U.S. Blocks Adoption*, INT'L TRADE REP. (BNA) 865, 871 (1992).

⁵⁰ Greg Rushford, *A Senator's Favor Unleashes Trade Disputes*, LEGAL TIMES, June 1, 1992, at 1, 22.

⁵¹ *Id.*

covered by the GPA."⁵² A GATT panel on April 23, 1992 determined that the U.S. procurement action violated the GATT. The panel urged that the U.S. "conduct the proposed procurement consistently with its obligations under the Agreement on Government Procurement."⁵³

Although the transaction in question was only valued at \$2.4 million, the U.S. blocked adoption of the panel report because it "raises fundamental questions about the way certain U.S. government contracts are awarded."⁵⁴ European Community officials quickly exploited the actions by the U.S., stating "This confirms what we have often said in the past that although the Americans claim to be opening contracts there are a great many exceptions The result is that they are doing a lot less than they claim."⁵⁵

The Sonar mapping dispute came on the heels of a successful U.S. ruling by the GATT concerning EC oilseeds subsidies. A GATT panel ruled in March 1992 that EC subsidies on oilseeds violated the GATT.⁵⁶ As part of an effort to get the EC to accept the panel report, the administration has threatened \$1 billion in retaliatory tariffs on the EC.⁵⁷ Interestingly enough, the U.S. also recently won a GATT panel dispute against Norway involving Norwegian government procurement.⁵⁸

Mexico, another close U.S. trading partner, has also successfully brought a U.S. action to a GATT panel only to have the report ignored by the U.S. The U.S. Marine Mammal Protection Act⁵⁹ prohibits the importation of tuna caught by driftnet fishing, which kills dolphins. Mexican tuna fleets asserted that this ecological standard was an impermissible trade barrier violative of the GATT.⁶⁰ A GATT panel concurred with the Mexican position, which was also supported by the EC.⁶¹ The U.S. not only ignored the panel report

⁵² U.S., *E.C. Clash on Difference Between Products and Services*, UPI, May 15, 1992, available in LEXIS, Nexis library, UPI file.

⁵³ Rushford, *supra* note 50, at 23.

⁵⁴ See *GATT Government Procurement Agreement - Report of a Panel on the United States Procurement of a Sonar Mapping Systems*, COMMISSION OF THE EUROPEAN COMMUNITIES RAPID, May 15, 1992.

⁵⁵ *E.C. Slams U.S. for Blocking GATT Panel Report*, REUTER LIBRARY REP., May 14, 1992, available in LEXIS, Nexis library, Wires file.

⁵⁶ *U.S. to Proceed with Sanctions Against EC over Oilseeds Dispute if No Offer Received*, 9 INT'L TRADE REP. (BNA) 955, 961 (1992).

⁵⁷ *Id.*

⁵⁸ *GATT Panel Rules in Favor of U.S. on Norway's Procurement of Toll Equipment*, 9 INT'L TRADE REP. (BNA) 911, 940 (1992).

⁵⁹ Marine Mammal Protection Act, 16 U.S.C.S. § 1361, *et. seq.* See, *Report on United States Trade Barriers and Unfair Practices*, Services of the Commission of the European Communities (1991), at 13; *Register of United States Barriers to Trade*, External Affairs and International Trade Canada (1992), at 14.

⁶⁰ *U.S. Comes Under Pressure Over Tuna Embargo*, REUTER BUS. REP., Apr. 30, 1992, available in LEXIS, Nexis library, Wires file.

⁶¹ *Id.*

but also introduced a resolution that no international agreement that "jeopardizes U.S. health, safety, labor or environmental laws"⁶² will receive Congressional approval. In light of this legislation and the precarious position of the proposed North American Free Trade Agreement⁶³ the Mexican government did not threaten retaliation or push the U.S. further on the panel report.

Mexico and the EC are not the only U.S. trading partners to successfully challenge U.S. trade barriers at the GATT and have the subsequent panel report ignored. Canada asserted that state taxes on beer and wine imports were discriminatory and violated the GATT.⁶⁴ A GATT panel determined that tax benefits were unfairly bestowed on U.S. brewers by the federal government and some forty states. Canadian complaints that the U.S. practice of forcing beer exporters to distribute via wholesalers instead of retailers also were supported by the GATT panel.⁶⁵ Although the panel report was supported by the EC, Australia and Canada, the U.S. blocked its adoption.⁶⁶

Perhaps the most significant example of the U.S. blocking a GATT panel report concerns Section 337⁶⁷ and U.S. actions against infringing imports. Despite the size of the U.S. trade deficit, the U.S. remains the largest exporter of copyrighted and patented material. Recognizing the importance of this market, the U.S. is zealous in its attempts to protect intellectual property overseas and domestically. Internationally, the U.S. relies on Section 301⁶⁸ to safeguard intellectual property.

Domestically, Section 337 has been the weapon of choice for U.S. manufacturers to protect U.S. patents, copyrights and trademarks by barring pirated goods from entering the United States. Challenges involving patent, copyright or trademark infringement are typically brought in U.S. federal court. However, when imports are asserted to infringe U.S. intellectual property, Section 337 is a superior weapon for the domestic producer. Pursuant to statute, Section 337 investigations must be completed within one year or, in "more complicated cases," within eighteen months.⁶⁹ Thus, a company complaining of patent infringement is assured of a quicker result at the ITC than in most courts.

⁶² H.R. Con. Res. 246, 102d Cong., 1st Sess., 1991.

⁶³ See *U.S. Recession will not Impede NAFTA: Negroponte*, NOTIMEX MEXICAN NEWS SERVICE, Feb. 21, 1992, available in LEXIS, Nexis library, Wires file.

⁶⁴ Peter Morton, *Canada Wins Round in Beer War as GATT Rules U.S. 'Unfair'*, FIN. POST, May 1, 1992, at 3.

⁶⁵ *Id.*

⁶⁶ *Canada Presses for Adoption of GATT Panel Report on U.S. Beer Taxes, Decision Delayed*, 9 INT'L TRADE REP. (BNA) 781, 793 (1992).

⁶⁷ 19 U.S.C. § 1337 (1988).

⁶⁸ 19 U.S.C. § 2411 (1988).

⁶⁹ 19 U.S.C. § 1337 (1988).

Furthermore, Section 337 actions are *in rem* actions against the infringing goods themselves.⁷⁰ Personal jurisdiction does not need to be established over the foreign exporter of the goods as in federal court. Additionally, a successful petitioner at the ITC gains the benefit of a government-enforced order in which the U.S. Customs Service bars offending products from entering the United States. Traditional forums such as judicial courts do not offer such enforcement assistance. Moreover, the ITC provides a user-friendly environment for prospective plaintiffs.⁷¹ The Trade Remedy Assistance Office at the Commission offers technical guidance and legal advice to small businesses bringing Section 337 actions.⁷²

Section 337 is a broad sword in the battle against "unfair practices in import trade."⁷³ It has been used in cases involving antitrust violations, product disparagement and the theft of trade secrets. For example, in 1988, Aunyx, an American manufacturer of photocopier toner, charged Japan-based Canon with unfair trade practices.⁷⁴ Aunyx alleged that Canon was disparaging its products in an attempt to monopolize the toner industry. An administrative law judge at the ITC ruled that Canon had violated Section 337 by engaging in unfair acts and competition in the importation and sale of toner.⁷⁵

Section 337 gives domestic manufacturers a tremendous advantage against infringing imports as compared to actions against domestic thieves of intellectual property. In 1988, a GATT panel ruled that Section 337 violates the GATT principle of national treatment, yet the U.S. Trade Representative (USTR) blocked adoption of the report.⁷⁶ In November 1989, the USTR withdrew its blocking of the panel report although the U.S. disagreed with the result.⁷⁷ When the U.S. adopted the report, U.S. Ambassador to the GATT Rufus Yerkza cautioned "[t]he contracting parties (GATT member states) should be aware that our ability to obtain appropriate legislation amending Section 337 will be maximized in the context of legislation implementing the results of the Uruguay Round. . . ."⁷⁸

⁷⁰ 19 U.S.C. § 1337 (1988).

⁷¹ See William H. Lash, III, *New Use for Old Trade Law*, J. OF COM., Oct. 24, 1991, at 8A.

⁷² See Annual Report 1990, USITC Pub. 2354, Dec. 31, 1990; See also Lash, *supra* note 71, at 8A.

⁷³ 19 U.S.C. § 1337 (1988).

⁷⁴ *In re Certain Electrically Resistive Monocomponent Toner and 'Black Powder' Preparations Therefor*, USITC Pub. 2069, Inv. No. 337-TA-253 (1988).

⁷⁵ According to the judge, these acts tended to restrain or monopolize trade and commerce in the United States. *Id.* Although the ITC later reversed this decision, the application of Section 337 to an antitrust case illustrated the statute's broad reach.

⁷⁶ *U.S. Continues to Block GATT Section 337 Report to Allow Further Study*, Hills Says, 6 INT'L TRADE REP. (BNA) 1005, 1024 (1989).

⁷⁷ *GATT Council Adopts Dispute Panel Reports on U.S. Section 337, Korea Beef Quotas*, 6 INT'L TRADE REP. (BNA) 1461, 1466 (1989).

⁷⁸ *U.S. Bows to GATT Finding Against Patent Laws*, REUTERS, Nov. 7, 1989, available in LEXIS, Nexis library, Wires file.

B. Abuses Under Section 301

Another area where the U.S. gleefully abandons GATT principles of multilateral negotiation in favor of unilateral trade actions is retaliatory action under Section 301.⁷⁹ Section 301 of the Trade Act of 1974 provides for retaliatory actions against foreign states that deny U.S. rights under international trade agreements, or unjustifiably burden or restrict U.S. commerce.⁸⁰ Some of the weapons in the arsenal of the USTR include the suspension or withdrawal of previously granted trade agreement concessions, the imposition of retaliatory tariffs or the setting of quotas on imports from the offending state.⁸¹ The USTR has other options available. Pursuant to Section 301, the USTR is also authorized to "enter into binding agreements" with foreign countries to eliminate the questionable practice or policy which burdens or restricts the U.S.⁸² These agreements may also provide the U.S. with compensatory trade benefits which need not necessarily benefit the aggrieved industry. If the "provision of such trade benefits is not feasible," another industry may be the recipient of the benefits.⁸³

No discussion of Section 301 can be undertaken without an analysis of the practices that are subject to complaint by the statute. Under Section 301, an act is "unreasonable" if it is "unfair and inequitable."⁸⁴ Actions by foreign states that are not violations of the international legal rights of the U.S. may nonetheless be characterized as "unreasonable." Another consideration in the determination of what constitutes an unreasonable practice is whether the U.S. offers foreign nationals reciprocal opportunities.⁸⁵

Section 301 also is designed to deter and punish "unjustifiable" practices which burden or restrict U.S. commerce.⁸⁶ An unjustifiable practice is one that is in violation of or is inconsistent with the international legal rights of the United States.⁸⁷ Policies that deny U.S. firms national treatment in trade, service or investment or fail to protect U.S. intellectual property are by statute "unjustifiable."⁸⁸ Most typically complained of under Section 301 are those practices which deny U.S. firms access to foreign markets, opportunity for direct investment, or adequate protection of intellectual property. However, Section 301 sanctions may also be imposed on states that violate

⁷⁹ 19 U.S.C. §§ 2411-2420 (1989).

⁸⁰ 19 U.S.C. § 2411(a)(1)(B)(ii) (1988).

⁸¹ 19 U.S.C. § 2411(c)(1)(A)-(B) (1988).

⁸² 19 U.S.C. § 2411(c)(1)(C) (1988).

⁸³ 19 U.S.C. § 2411(c)(4)(A) (1988).

⁸⁴ 19 U.S.C. § 2411(d)(3)(A) (1988).

⁸⁵ 19 U.S.C. § 2411(d)(3)(D) (1988).

⁸⁶ 19 U.S.C. § 2411(a)(1)(B) (1988).

⁸⁷ 19 U.S.C. § 2411(d)(4)(A) (1988).

⁸⁸ 19 U.S.C. § 2411(d)(4)(B) (1988).

workers' rights or states that engage in export targeting.⁸⁹

The United States Trade Representative annually compiles an "estimate report on foreign trade barriers".⁹⁰ This report is submitted to the President, the Senate Finance Committee and committees of the House of Representatives. It is typically the most eagerly awaited report by the Washington D.C. international trade bar. This directory of foreign barriers to U.S. trade is the fodder from which Section 301 targets are selected. In fact, the number of pages devoted to a country serves as an indicator of the likelihood that the state will be named a Section 301 target.⁹¹

Given the power and political pressure that surround the Section 301 process, the need for accurate information is obvious. However, the information gathering process for the National Trade Estimate (NTE) reports is clumsy at best. In compiling the report, the USTR solicits information from U.S. embassies abroad, the Departments of Commerce, Agriculture, Treasury, State, Labor, and Justice, as well as the National Security Council, the Council of Economic advisers and the Office of Management and Budget.⁹² However, private sector advisory committees also contribute information to the USTR for the purposes of the report.⁹³ Thus, corporations and individuals who stand to benefit directly from the finding or exaggeration of foreign trade barriers are also relied upon for information in determining the existence and impact of these barriers.

One fundamental issue of concern with the report is the determination of what exactly constitutes a trade barrier. According to the report, foreign trade barriers fall into eight distinct categories.⁹⁴ Included in this litany are "government-imposed measures and policies that restrict, prevent, or impede the international exchange of goods and services."⁹⁵ The lists of practices defined as barriers in the NTE reports are too numerous to mention here. However, it is notable that the report and the threat of a Section 301 trade sanction is often used as a bludgeon by U.S. manufacturers to gain access to markets that are closed as a matter of national policy.

For example, the USTR listed India's practice of not opening its lucrative insurance markets to foreign (meaning U.S.) insurers.⁹⁶ In fact, all insurance policies in the \$3 billion Indian market are issued by two state-operated firms: General Insurance Co. of India and Life

⁸⁹ 19 U.S.C. § 2411(d)(3)(B)(ii)-(iii) (1988).

⁹⁰ Pursuant to § 141 of the Trade Act of 1974, as amended by § 303 of the Trade and Tariff Act of 1984 and § 1304 of the Omnibus Trade and Competitiveness Act of 1988.

⁹¹ *E.g.*, Office of the U.S. Trade Representative, *1992 National Trade Estimate Report on Foreign Trade Barriers* (1992) (giving Japan twenty pages of attention).

⁹² *Id.* at 1.

⁹³ *Id.*

⁹⁴ *Id.* at 1-2.

⁹⁵ *Id.* at 1.

⁹⁶ *No Sanctions on India Trade*, N.Y. TIMES, June 15, 1990, at D6.

Insurance Co. of India.⁹⁷ Not even Indian nationals may sell insurance in this market.⁹⁸ Where is the discrimination or unfair trade practice in this market? Moreover, why should the Indian government be forced to extend a privilege to U.S. insurers that it will not offer its own people?

The USTR also assailed India's restrictive practices of foreign direct investment. Foreign investment in India may only control 40% of the equity in an Indian venture unless the firm is engaged in technology transfer or produces solely for export.⁹⁹ After an investigation, USTR Hills determined on June 14, 1990 that India's regulations of the insurance market are "unreasonable and burden or restrict U.S. commerce."¹⁰⁰ India has refused to negotiate under a threat of U.S. retaliatory trade sanctions. Indeed, Indian Commerce Minister Arun Nehru commented that "[t]hreats of retaliation are things of the medieval past. We don't negotiate under threat."¹⁰¹ New Delhi lawmakers were united in their refusal to bow to "U.S. blackmail" and stood fast to protect Indian sovereignty from U.S. pressure.

The action by the USTR is amazingly short-sighted. India is an acknowledged leader in the Third World, particularly in the Uruguay GATT rounds. The U.S. has repeatedly pushed for increased protection of intellectual property during this round and the lesser-developed countries are the main opponents of a GATT agreement on the protection of such rights. Given this situation, is it prudent to pressure and alienate India on insurance issues when Indian assistance is absolutely crucial on the much more significant issue of world-wide protection of intellectual property? USTR Hills, all too aware of India's role in the Third World "hoped that they [third world states] would understand our explanation of the profound problems we have had with respect to India."¹⁰² Although these states may "understand" the U.S. explanation of its treatment of India, it does not necessarily follow that they will accept this answer. Other developing states will obviously infer that if India, the world's largest democracy and a Third-World leader can be treated so brusquely, they have little hope for better treatment from the USTR.

A similarly short-sighted view has been taken regarding South Korea. When South Korea was a developing country under the Generalized System of Preferences (GSP), and not a competitor for U.S.

⁹⁷ Karen Riley, *Bush Will Be Buddy, Not Bully to Japan*, WASH. TIMES, Apr. 30, 1990, at B5.

⁹⁸ Office of the U.S. Trade Representative, *supra* note 91, at 119.

⁹⁹ K.K. Sharma, *India Attracts More Foreign Investment*, FIN. TIMES, Feb. 8, 1989, at 4.

¹⁰⁰ *Super 301 Sanctions Judged Inappropriate*, World Insurance Report, FIN. TIMES, June 22, 1990.

¹⁰¹ *India Rebuffs U.S. Trade Sanction Threat*, L.A. TIMES, May 1, 1990, at D5.

¹⁰² *Names India Again for Insurance Investment Issues*, 7 INT'L TRADE REP. (BNA) 614 (May 2, 1990).

products, retaliatory trade actions against Seoul would have been unthinkable. Now that South Korea has graduated from the GSP and is exporting capital as well as high technology goods, it has come under the spiteful gaze of the USTR. South Korea faced retaliatory actions in 1989 despite the political instability facing this keystone in the Pacific Rim.¹⁰³ Even though U.S. direct investment in Korea was \$1.9 billion in 1989,¹⁰⁴ and was continuing to grow, the USTR was not satisfied with this progress and Korea became a target of a Super 301 investigation under the 1988 Trade Act.¹⁰⁵ Korean investment law required that local equity be in place in many ventures.¹⁰⁶ In response to U.S. pressures, Korea has made progress in opening its market to foreign direct investment.¹⁰⁷

Another example of the unfair targeting of a nation's domestic practices may be seen in the case of the Thailand cigarette market. In Thailand, all cigarettes are manufactured by the state tobacco monopoly.¹⁰⁸ Despite the inability of Thai citizens and companies to sell cigarettes, R.J. Reynolds, Brown & Williamson, Phillip Morris and the Cigarette Exporters's Association (CEA) felt aggrieved by their inability to enter this market as the U.S. market was shrinking.¹⁰⁹ The Thai cigarette market was valued at \$744 million and the estimated American share of this market was \$166 million.¹¹⁰ Bolstered by past successes in using Section 301 to pry open markets in Japan, Taiwan and South Korea, the CEA brought a Section 301 action against Thailand and the Thailand Tobacco Monopoly.¹¹¹

Opposition to this trade action came from the American Medical Association (AMA) as well as other federal agencies. Surgeon General C. Everett Koop has compared the addictive nature of tobacco to that of heroin.¹¹² Hirayama Takeshi, Director of the Tokyo Insti-

¹⁰³ See *Talking Loudly and Carrying a Crowbar*, THE ECONOMIST, Apr. 29, 1989, at 23. See also Brooks, *A "Super 301" Ruling Too Early For Seoul And Taipei*, HERITAGE FOUNDATION REP., Backgrounder No. 91, May 25, 1989.

¹⁰⁴ Office of the U.S. Trade Representative, *1991 National Trade Estimate Report on Foreign Trade Barriers* 139 (1991).

¹⁰⁵ *Hills Hardline on Trade Draws Protest in S. Korea*, L.A. TIMES, Oct. 12, 1989, at D6.

¹⁰⁶ Office of the U.S. Trade Representative, *1989 National Trade Estimate Report on Foreign Trade Barriers* 122 (1989).

¹⁰⁷ Korea has agreed to revise or eliminate many of its discriminatory practices as part of the bilateral "Super 301" agreement of 1989. Many provisions have already been fulfilled, and the remaining liberalizations will be implemented in 1991, 1992, and 1993. Office of the U.S. Trade Representative, *1992 National Trade Estimate Report on Foreign Trade Barriers* 165 (1992).

¹⁰⁸ Peter Ungphakorn, *U.S. Cigarette Export Habit Hard to Break*, FIN. TIMES, Oct. 24, 1990.

¹⁰⁹ *U.S. Initiates Unfair Trade Case Against Thai Barriers to U.S. Cigarette Exports*, DAILY REP. FOR EXECUTIVES (BNA), June 1, 1989, at A-7.

¹¹⁰ *U.S. Initiates Section 301 Investigation of Thailand's Barriers to U.S. Cigarettes*, 6 INT'L TRADE REP. (BNA) 731 (1989).

¹¹¹ *Id.* at n.13.

¹¹² Christine Tierney, *Cigarette Row Heats Up As U.S. Seeks Asia Markets*, REUTERS, Aug. 18, 1989, available in LEXIS, Nexis library, Wires file.

tute of Oncology, analogized foreign cigarette promotions to "the old B-29 bombings' of World War II."¹¹³ Ted Chen, Executive Secretary of the Asian Pacific Association for the Control of Tobacco and professor of public health at the University of Massachusetts, similarly noted "Washington's pressure amounts to nothing less than a new Opium War."¹¹⁴ A study by the General Accounting Office in May 1990 stated "U.S. policy and programs for assisting the export of tobacco and tobacco products work at cross purposes to U.S. health policy and initiatives, both domestically and internationally."¹¹⁵ The report noted the inherent contradiction of using a federal agency to promote cigarette exports while the U.S. is a leader in the international anti-smoking movement.

The Thai government opposed the petition asserting that imports were restricted as a health and consumer measure designed to control smoking by Thais. Numerous members of Congress also opposed the petition. The Tobacco Export Reform Act¹¹⁶ was introduced as a sign of congressional dissatisfaction with the tobacco industry.¹¹⁷ This act will require that tobacco firms export U.S. health standards and warning restrictions as well as cigarettes.¹¹⁸ Tobacco growers who sell leaf tobacco to Thailand also expressed their dissatisfaction with the Section 301 petition which they felt might threaten their sales to Thailand.¹¹⁹

The GATT panel found that the Thai restrictions violated GATT.¹²⁰ Despite the ruling, the split between the USTR and Congress remained. Thirty-three members of Congress, representing both political parties, sponsored the Cigarette Export Reform Act of 1991.¹²¹ This bill prohibits the use of U.S. funds for U.S. trade agencies in any negotiations seeking the removal or reduction of restrictions on advertising or sales of tobacco products. Similarly, the Cigarette Export Labeling Act¹²² requires exporters of cigarettes to

¹¹³ See Michael Levin, *U.S. Tobacco Firms Push Eagerly into Asian Market*, *MARKETING NEWS*, Jan. 21, 1991, at 2. See also Dr. Alistair Brewis, *Letter: Advertising that Recruits New Smokers*, *THE INDEPENDENT*, Nov. 30, 1991, at 17.

¹¹⁴ Tierney, *supra* note 112.

¹¹⁵ Renu Sehgal, *Curb Sought on US Aid to Tobacco Firms*, *BOSTON GLOBE*, July 7, 1991, at 9.

¹¹⁶ 135 CONG. REC. E640 (1989).

¹¹⁷ Alexander Cockburn, *Getting Opium to the Masses: The Political Economy of Addiction; U.S. Tobacco Companies' Asian Campaigns*, Information Access Company, Nation Enterprises, Vol. 249, No. 14, at 482 (Oct. 30, 1989); Colman McCarthy, *Koop and the Cigarette Hustlers*, *WASH. POST*, at F1, June 25, 1989; *Selling Cigarettes Overseas: Push or Pull?*, *CHRISTIAN SCI. MONITOR*, May 26, 1989, at 20.

¹¹⁸ 135 CONG. REC. E640 (1989).

¹¹⁹ William H. Lash, III, *Burning Bridges with Cigarettes*, *J. OF COM.*, Feb. 14, 1992, at 4A.

¹²⁰ *USCEA Says Thailand Cigarette Import Ban Is Lifted; U.S. Cigarette Products Available to Thai Smokers*, *PR NEWswire*, Nov. 23, 1990, available in LEXIS, Nexis library, Omni file.

¹²¹ Cigarette Export Reform Act, H.R. 2781, 102d Cong., 1st Sess. (1991).

¹²² Cigarette Export Labeling Act, H.R. 2779, 102d Cong., 1st Sess. (1991).

make warnings similar to those on U.S. cigarettes.¹²³

The latest effort by U.S. tobacco manufacturers to penetrate foreign markets by using Section 301 marks the return of the USTR to Taiwan's cigarette market. The United States is trying to block a Taiwanese bill that would strengthen warning labels on cigarettes, prohibit cigarette vending machines and ban all advertising and promotion of cigarettes.¹²⁴ The Taiwanese bill is non-discriminatory; it would apply to domestic cigarettes as well as imports. This, however, did not stop U.S. manufacturers from opposing it with the assistance of the USTR.¹²⁵

The Thailand example and other cigarette cases illustrate a crucial question in U.S. trade policy. If the U.S. is to engage in market opening practices of questionable validity under international law and run the risk of trade war, should there be a semblance of consensus? Does the cigarette, a product of dubious benefit, merit retaliation from our trading partners, especially in light of the opposition from U.S. parties with no trade agenda, such as the AMA and Surgeon General?

Cigarettes are not the only health threatening items that the USTR has been willing to wage war to protect. Under Section 301, the USTR investigated the ban on imports of hormone-treated beef by the European Community. European Community directive 146/88¹²⁶ bans the sale of hormone-treated meats, regardless of their origin. The EC directive was not discriminatory and had a legitimate goal of protecting the health of EC citizens. Not satisfied by this claim, congressional sabre rattlers determined that this was a trade barrier aimed at the U.S. beef industry. In January 1989, the USTR imposed 100% tariffs on EC exports of pasta, Italian juices, tomato paste, pork products, tomato sauce and other goods in retaliation.¹²⁷ The EC threatened to impose similar tariff sanctions on U.S. exports of walnuts and dried fruits.¹²⁸

¹²³ For a good description of the use of Section 301 in support of the Tobacco Industry, see Fred H. Jones, *U.S. Tobacco Goes Abroad: Section 301 of the 1974 Trade Act as a Tool for Achieving Access to Foreign Tobacco Markets*, 14 N.C. J. INT'L L. & COM. REG. 439 (1989); Suthiphon Thaveechaiyagarn, *Current Developments: The Section 301 Cigarette Case Against Thailand—a Thai Perspective*, 21 L. & POL'Y IN INT'L BUS. 367-87 (1990).

¹²⁴ Lash, *supra* note 119.

¹²⁵ This action was met by a demonstration from health care leaders. See Annie Huang, *Taiwan Pushes Ban on U.S. Tobacco Ads; Trade: Health Officials and Lawmakers Say American Firms Are Seducing Teens into Smoking. A Ban May Take Effect This Week*, L.A. TIMES, Jan. 27, 1992, at D3. David Yen, President of the John Tung Foundation illustrated that this was a health, not a trade dispute: "We want our American friends to know that they can sell us more automobiles or blue jeans, but not harmful cigarettes." *Id.*

¹²⁶ Council Directive 88/146, art. 5, 1988 O.J. (L 70) (introduced Jan. 1, 1988).

¹²⁷ USTR Yeutter Confirms U.S. Intention to Retaliate Against EC Meat Hormone Ban, DAILY REP. FOR EXECUTIVES (BNA), Dec. 28, 1988, at A-6.

¹²⁸ U.S., *EEC Officials Meet over Farm Subsidy Disagreements*, L.A. TIMES, Mar. 11, 1989, Bus. section, at 10. House Panel Chairmen Consider Plan to Block Sale of EC Food Products to U.S. Military, INT'L TRADE REP. (BNA) 359 (1989).

The U.S. trade sanctions were not fully supported by Americans. American consumer groups supported the EC ban on hormone-treated beef, viewing it as an issue of consumer protection, not trade protection. The Consumer Federation of America and the Community Nutrition Institute recognized that " 'individual countries can make their own decisions' about health policies."¹²⁹ These consumers attempted to use the EC ban to gain acceptance of hormone-free beef in the United States.

The American Meat Institute (AMI), however, was "solidly behind the Bush administrations' efforts to end the unjustified EC hormone ban."¹³⁰ The AMI condemned the sanctions as "... a blatant trade barrier based on economic self-interest and cloaked in the guise of public health."¹³¹ AMI President Manly Molpus cautioned "[w]e must stand up for our rights in the international marketplace . . . Otherwise, the meat industry will be only the first victim in the movement toward a protectionist European trade policy."¹³²

U.S. consumer groups were not alone in their criticism of the trade sanctions. Texas State Commissioner of Agriculture Hightower approached EC representatives with offers of Texas-supplied hormone-free beef.¹³³ These Texas overtures were allegedly met with pressure from the USTR, who feared that internationally cooperative state policies might undermine the trade sanctions.

Contrary to the position of the Agriculture Commissioner, the Texas Cattle Feeders Association maintained support for the trade sanctions.¹³⁴ Beef industry representatives viewed a successful Section 301 sanction as the key to opening beef markets in Japan, South Korea and Taiwan.¹³⁵ The Texas Cattle Feeders, representing 25% of the U.S. market, predicted the failure of the Hightower plan, citing a lack of participation by beef producers.¹³⁶ The smaller beef producers, represented by the Texas and Southwestern Cattle Raisers Association joined in the denunciation of the Hightower proposal. Don King, General Manager of the 14,000 member association, asserted that the Hightower plan "was a tremendous disservice to

¹²⁹ *Consumer Coalition Calls on U.S. to Revoke Sanctions Against EC, Respect Hormone Ban*, 6 INT'L TRADE REP. (BNA) 140 (1989) (quoting Ron Leonard of the Community Nutrition Institute).

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Texas Agriculture Commissioner Hightower Announces Sale of Hormone-Free Beef to EC*, 6 INT'L TRADE REP. (BNA) 1012 (1989).

¹³⁴ *Texas Official Disputes EC Report that U.S. Urged State to Slow Hormone-Free Beef Plan*, 6 INT'L TRADE REP. (BNA) 895 (1989).

¹³⁵ Ronald E. Yates, *Exporters See Red Over Japanese Beef Quotas*, CHI. TRIB., Feb. 21, 1988, section 7, at 3.

¹³⁶ *Texas Official Disputes EC Report that U.S. Urged State to Slow Hormone-Free Beef Plan*, *supra* note 134, at 895.

the beef industry."¹³⁷

It is important to note that although these industry groups were united in expressing their support for trade sanctions, they failed to focus on a concrete reason for these sanctions. The desire for increased market access in the Pacific Rim fueled the support for the Section 301 process in the beef industry. The Pacific Rim trade barriers on beef imports were not related to health standards or consumer concerns as was the case in the EC. Trade sanctions for the Pacific Rim were favored by the beef producers to eliminate quotas or other barriers barring U.S. beef from entering these markets. No state by state or producer solution would gain access to these markets. The beef producers incorrectly surmised that negotiation with the EC on hormone-free beef would be viewed as a lack of resolve or a sign of weakness in the Pacific Rim market and would undermine their attempts to open those markets.¹³⁸

Rather than allow the dispute to explode into full scale trade war, the EC established a Task Force to address this \$100 million trade dispute.¹³⁹ In May 1989, the Task Force developed an interim solution which provided for the importation of foods with producer guarantees. By July 31, 1989, the first shipment of Texas hormone-free beef was sent to the EC. The Texas Department of Agriculture assisted beef producers in meeting EC certification standards. Hightower defended the actions of his department and lauded the work of the Task Force: "It never made sense for the U.S. and Europe to engage in a trade war over beef standards."¹⁴⁰ Hightower concluded "[w]e at the Texas Department of Agriculture felt that more was at stake than steak, and a whole lot more was at stake than growth hormones."¹⁴¹ The EC also sought relief at the GATT. On October 11, 1989, the Chairman of the GATT Council and the Director General consented to hold informal consultations to solve this controversy.¹⁴²

C. Section 301 and Japan Bashing

The Section 301 process most frequently has been targeted at Japanese business and trade practices. Since Commodore Perry and his gunboats opened Japan's markets to the U.S. in 1845, U.S. trade policies with Japan have been fraught with coercion. The Japanese

¹³⁷ *Id.* at 896.

¹³⁸ *Id.* at 895.

¹³⁹ *Little Progress Made by Hormone Task Force as Deadline Nears, USTR Official Indicates*, 6 INT'L TRADE REP. (BNA) 763 (1989).

¹⁴⁰ *Texas Agriculture Commissioner Hightower Announces Sale of Hormone-Free Beef to EC*, *supra* note 134, at 895.

¹⁴¹ *Id.*

¹⁴² *GATT Sets Up Flexible Mechanism Against Anti-Trade Acts*, XINHUA GENERAL SERVICES NEWS, Oct. 11, 1989, available in LEXIS, Nexis library, Omni file.

engage in a number of restrictive trade practices. In the 1989 National Trade Estimate on Foreign Trade Barriers (NTE), prepared by the USTR, a full seventeen pages were dedicated to highlighting unfair Japanese trade practices.¹⁴³ Some of the trade practices complained of include legitimate concerns such as Japanese policies forbidding imports of rice,¹⁴⁴ failure to protect intellectual property, and restrictions on foreign direct investment.¹⁴⁵ Yet the sheer volume of attention dedicated to Japanese trade practices indicates that many of the complaints asserted are mere "nit-picking". For example, the 1989 NTE complains of Japanese restrictions on "high cube containers" used on the roadways by U.S. shipping lines.¹⁴⁶ Prior to the mid-1980's, these high cube containers were not permitted on Japanese roadways. In 1987, Japan allowed these containers on certain routes. Unsatisfied by this partial access, U.S. shippers complain that the route application process is a costly and burdensome trade barrier. In response to this reasonable request by the U.S. shipping industry, U.S. agencies continue to monitor this "vital" concern.¹⁴⁷

Another identified Japanese trade barrier concerns the establishment of large retail stores. The Japanese Ministry of International Trade and Industry (MITI) administers the Japanese Large Retail Store Law,¹⁴⁸ which was intended to require only MITI notification of the opening of a large retail store. It is asserted that MITI has now converted this notification process into a process of approval.¹⁴⁹ As a condition of MITI approval, store owners must obtain a consensus with local merchants before the facility may be opened.¹⁵⁰ Allegedly, the law has been subverted and is now heavily slanted in favor of local merchants, with consumer interests being no factor in the process. Critics of the process maintain that it delays and restricts the establishment of large retail stores.

Nevertheless, this process is aimed at all retailers and there has been no demonstration that U.S. retailers face discrimination in this area. Where is the "unfair" international trade barrier? The barrier is at best an indirect one. According to the NTE report, large retailers provide opportunities for imports from the U.S.; therefore, a burden on these retailers will adversely impact U.S. exporters.¹⁵¹ The

¹⁴³ Office of the U.S. Trade Representative, *1989 National Trade Estimate Report on Foreign Trade Barriers* 139 (1989).

¹⁴⁴ See Paul C. Rosenthal, *A Lose-Lose Trade Bargain?: How the Democrats Could Turn GATT into a Hot Campaign Issue*, WASH. POST, Feb. 16, 1992, at C3.

¹⁴⁵ *Id.*

¹⁴⁶ Office of the U.S. Trade Representative, *1989 National Trade Estimate Report on Foreign Trade Barriers* (1989).

¹⁴⁷ *Id.*

¹⁴⁸ *Large Retail Store Law Hard to Abolish, Matsunaga Says*, JAPAN ECON. NEWSWIRE, Feb. 23, 1990.

¹⁴⁹ Office of the U.S. Trade Representative, *supra* note 91, at 113.

¹⁵⁰ *Id.*

¹⁵¹ *See id.*

NTE report fails to quantify "damages" to U.S. exporters. Nonetheless, the U.S. pushed Japan to shorten the processing time on retail store applications. The Japanese Administrative Reform Council recommended certain changes to speed the approval process.¹⁵²

Japan was named as a target of a Super 301 action for barriers to supercomputers, satellites and forest products in May 1989. Hiroshi Mitsuzuka, Director of MITI, echoed the response of India and stated that "[t]he government of Japan has no intention of entering into negotiations with the United States under the conditions imposed under Super 301."¹⁵³ However, the Japanese indicated that they would participate in discussions of these trade practices in an international multilateral forum, such as the GATT, but not within the unilateral framework of Super 301. The Japanese Foreign Ministry stated that if the U.S. retaliated under Super 301, they might bring an action against the U.S. at the GATT.¹⁵⁴

Understandably, the Japanese began to assert that the Super 301 action was a smokescreen by the U.S. to shift blame for the trade imbalance onto Japanese practices instead of U.S. domestic problems. Then Foreign Minister Sousuke Uno cautioned that further tactics by the U.S. might make relations between the two countries "severely strained."¹⁵⁵ Takeshi Isayama, Director of the Americas and Oceania Division at MITI, similarly assailed the Super 301 action and predicted that "[t]he decision will backfire ongoing efforts [in Japan] to improve bilateral trade relations, and certainly will be counterproductive on both sides."¹⁵⁶ Mr. Isayama stated that Japan will challenge the process in multinational forums like the Organization for Economic Cooperation and Development, as well as the GATT.¹⁵⁷

The singling out of Japan for this unilateral treatment is even more curious given the nature of the allegations. For example, the U.S. asserted that the Japanese supercomputer market was closed to U.S. manufacturers as a result of large discounting by Japanese producers.¹⁵⁸ The Japanese pointed out that U.S. sales of computers in Japan were rising and that Japanese firms had committed to purchase

¹⁵² *Id.* at 113-14.

¹⁵³ *Japanirate Over U.S. Trade Charges, Won't Negotiate; Threatens to Sue Over Sanctions*, L.A. TIMES, May 26, 1989, at A1.

¹⁵⁴ *Id.* Japan committed to liberalize Large Scale Retail Store Laws in an Interim Report (Apr. 5, 1990) and a Joint Report (June 28, 1990) issued by Japan and the U.S. *1991 Trade Policy Agenda and 1990 Annual Report of the President of the United States on the Trade Agreements Program*, U.S. Gov't Printing Office, Washington, D.C., at 58.

¹⁵⁵ *Unfair Trade Procedure: Japan Rejects Bilateral Negotiations with U.S. Under Super 301 Provision*, 6 INT'L TRADE REP. (BNA) 686 (1989).

¹⁵⁶ *International Trade: Top MITI Official Says U.S. Super 301 Action Could Lead to Erosion of Relations*, 108 DAILY REP. FOR EXECUTIVES (BNA), at A-5 (June 7, 1989).

¹⁵⁷ *Id.*

¹⁵⁸ Steven Brull, *Japan, United States Reach Basic Accord on Supercomputers*, REUTER BUS. REP., Mar. 23, 1990, available in LEXIS, Nexis library, Busrpt file.

supercomputers from the U.S.¹⁵⁹ The allegations of unfair Japanese trade practices in the government procurement of supercomputers was further challenged by Takuma Yamamoto, chairman of the Japan Electronic Industry Development Association. Mr. Yamamoto observed that no Japanese supercomputer had ever been purchased by any U.S. government agency and dismissed the unfair trade practices as “nonsense and irrational.”¹⁶⁰

An even more irrational attempt to coerce Japan in the name of free trade came in the spring of 1992. Senator McConnell of Kentucky noticed that the thoroughbred horse market in his state was flagging. With a shortage of investment bankers and oil sheiks to purchase this costly but “vital export,” he turned his eye to Japan. McConnell asserted that the import duties on race horses in Japan were a trade barrier.¹⁶¹ According to the Senator, “[t]he government of Japan has put up a web of import duties, quantitative restrictions, and non-tariff barriers. A system has been created which encourages the import of foreign horses for breeding purposes, but discriminates against horses imported for racing purposes.”¹⁶² The questionable validity of these allegations is not surprising. However, when the USTR “expressed support”¹⁶³ for the McConnell proposal, she joined in an attempt to legitimize this trivial demand.

The ludicrous uses of Section 301 against Japanese practices are particularly puzzling in light of the U.S. International Trade Commission report evaluating the viability of a U.S.-Japan Free Trade Agreement.¹⁶⁴ It is inconceivable to discuss the possibility of a Free Trade Agreement with a party that you are so often harassing with Section 301. The true impetus for this study was former Ambassador to Japan Mansfield, who earlier observed an erosion in U.S.-Japan relations. The vast majority of the witnesses in the ITC investigation agreed with Ambassador Mansfield that “the present methods of handling trade disputes engender some degree of bitterness and frustration on both sides of the Pacific.”¹⁶⁵

¹⁵⁹ *Unfair Trade Practices: Japan Rejects Bilateral Negotiation With U.S. Under Super 301 Provision*, 6 INT'L TRADE REP. (BNA) 686 (1989).

¹⁶⁰ *See id.*

¹⁶¹ *Japan: U.S. to Ask Government to Horse-Trade on Thoroughbred Racing*, 9 INT'L TRADE REP. (BNA) 582 (1992).

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ U.S. Int'l Trade Comm'n, *Pros and Cons of Initiating Negotiations with Japan to Explore the Possibility of a U.S. - Japan Free Trade Agreement*, USITC Pub. 2120, Inv. No. TA-332-255 (Sept. 1988). The ITC Section 332 study was undertaken at the request of Senator Lloyd Bentsen, Chairman of the Senate Finance Committee, on behalf of Senator Robert Byrd, Senate Majority Leader.

¹⁶⁵ *Trade Policy: Experts Pessimistic That U.S.-Japan FTA Would Solve Trade Woes, ITC Report Says*, 184 DAILY REP. FOR EXECUTIVES (BNA), Sept. 22, 1988, at A-11. The Japanese Ministry of International Trade and Industry began a similar study of a bilateral US-Japan Free Trade Agreement after a request by Senator Robert Byrd to Prime Minister Takeshita. *Id.*

D. Section 301 and China

The haphazard uses and abuses of Section 301 are best evidenced by the Administration's treatment of China. During the summer of 1991, Congress and the Administration debated the extension of most-favored-nation (MFN) status to China. President Bush claimed that MFN "is a means to bring the influence of the outside world to bear on China."¹⁶⁶ Only a few months later, the USTR announced the initiation of a Section 301 investigation of unfair Chinese trade practices. The practices subject to investigation included: import restrictions and quotas; import licensing requirements; testing and certification standards and a lack of transparency in import trade policies and rulings.¹⁶⁷ Thus, within the span of only a few months, the Administration drastically altered its trade policy towards China. If trade with China is such an important method of maintaining human rights and other pressures on China, one must wonder if the Section 301 process is the best manner of accomplishing this goal. How can the Administration hope to influence Chinese domestic policies while threatening them with trade war? Additionally, one must question the mercurial tendencies of an Administration that seeks to bestow MFN trade status one month and then moves to the brink of retaliation so quickly.

E. New "Fair Trade" Legislation—Reforming Section 301?

Super 301 expired in 1990. Congress, saddened to see its weapon of choice eliminated, quickly proposed new legislation to pick up the fallen mantle of the recently departed remedy. The proposed "Fair Trade and Export Expansion Act of 1991", would amend the Trade Act of 1974 and reincarnate Super 301.¹⁶⁸ Under the proposed legislation "a priority foreign country" is one that represents 15% or more of the total trade deficit of the United States, whose practices were identified in the National Trade Estimates, and who has not engaged in a free trade agreement with the U.S.¹⁶⁹ A "priority practice" is defined under the bill as a practice described in the NTE and "is associated with a sectoral deficit (as listed in the National Trade Estimates) of 5% or more of the balance of trade between the United States and the foreign country"¹⁷⁰ The proposed Super 301 would also remove discretion of the President concerning the targeting of priority countries.

¹⁶⁶ *Excerpts from Bush's Reports on China*, N.Y. TIMES, May 28, 1991, at A8.

¹⁶⁷ See *China: Chinese Trade Official Asks U.S. to End Annual Review of China's MFN Status*, 9 INT'L. TRADE REP. (BNA) 359 (1992).

¹⁶⁸ S. 301, 102d Cong., 1st Sess. (1991).

¹⁶⁹ *Id.* § 3 (proposing to amend § 310(a) of Trade Act of 1974, 19 U.S.C. 2040 by adding subsec. (e)(1)).

¹⁷⁰ *Id.* § 3 (proposing to amend § 310(a) of the Trade Act of 1974, by adding subsection (e)(2)).

Not surprisingly, the legislation was condemned by the Japanese Foreign Ministry. Taizo Watanabe, spokesman for the Japanese Foreign Ministry, criticized the legislation as "protectionist" and "against the multinational system of free trade to which the United States and Japan are committed."¹⁷¹ Watanabe stated that it was "inappropriate (for the United States) to lay the blame on its trading partner"¹⁷² for the trade imbalance. He pointed to the U.S. budget deficit and export programs as the "macroeconomic elements"¹⁷³ of the U.S. trade deficit.

The surprisingly gruff talk by the Japanese Foreign Ministry regarding this legislation illustrates another flaw in U.S. trade policy. Congressional fascination with "tough trade talk" and "prying open markets with crowbars" ignores U.S. culpability for the trade deficit. If the federal deficit and trade imbalance is an American, and not an international problem, why is there not an American solution? The new legislation assumes that by retaliatory action we can open additional markets and solve our trade imbalances. The proposed revisions to Super 301 also play directly into the hands of Japanese trade officials who assert that the Administration is blaming the trade deficit on other countries instead of looking at American economic ills such as a low savings rate.¹⁷⁴

The proposed Fair Trade and Expansion Act is not the lone Congressional initiative to force open foreign markets. New legislation has been introduced to strengthen and amend Section 301. The newest leading contender for this dubious distinction is The Trade Expansion Act of 1992, H.R. 5100.¹⁷⁵ This bill revitalizes the spectra of Super 301 by requiring the USTR to annually identify and target priority countries, practices and major trade barriers. At the heart of The Trade Expansion bill is the belief that countries with substantial trade surpluses and trade barriers should be targeted as "priority practices under Super 301."¹⁷⁶ The legislation also specifically targets the Japanese Auto market and the keiretsu system. Under this bill the USTR is directed to investigate Japanese practices which restrict access of U.S. automobiles and auto parts into the Japanese market. The USTR is also mandated to investigate "all acts, policies, and practices of Japan, Korea and Taiwan that affect the access of U.S. rice and rice products to each of these markets."¹⁷⁷

The Trade Expansion Act does not simply focus on the Section

¹⁷¹ *Japanese Foreign Ministry Criticizes Congress' Move to Revive Super 301*, INT'L TRADE DAILY (BNA), Oct. 30, 1991, available in LEXIS, Nexis library, Bnaid file.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ H.R. 5100, 102d Cong., 2d Sess. (1992).

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

301 process. One of the more protectionist measures in the initial version of the bill "require[d] the President to negotiate a voluntary restraint agreement with Japan limiting exports of automobiles and light trucks to the United States during each of the years 1993 through 1999."¹⁷⁸ This controversial provision was deleted from the bill by the U.S. House Ways and Means Committee on June 10, 1992.¹⁷⁹

Other bills that would restore the power of Section 301 include S.1850.¹⁸⁰ This legislation renews the Super 301 test of the 1988 Omnibus Trade and Competitiveness Act. A country would be targeted as a priority country if there were a large number of trade restraints or a pervasive system of trade barriers, and if the removal of these barriers would result in increased U.S. exports.¹⁸¹ Similarly, the Market Opportunity and Reciprocal Enforcement Act,¹⁸² H.R. 3702, would lead to increased retaliatory actions against unfair trading partners. Another bill, the Trade Agreement Compliance Act,¹⁸³ would grant "interested persons" the ability to petition the USTR and seek review of a state's compliance with international trade agreements.

In addition to violating the spirit of the GATT, shifting the burden for the problems of our economy and being blatantly protectionist, Section 301 poses other problems. First and foremost, as evidenced in the EC hormone-treated beef dispute, it is clear that Section 301 invites the escalation of retaliatory trade actions. Trade war mirrors its military counterpart; no one ever truly "wins," and innocent civilians are injured. The civilians in these disputes are the importers, exporters and consumers of the products facing higher tariffs in response to an unfair trade practice in a totally unrelated area of the economy. The pasta manufacturers in Italy were threatened by U.S. retaliation for actions in the EC beef industry. In fact, it may be argued that trade wars are purposefully targeted at "innocent civilians" in the exporter states. Because the EC does not export beef to the U.S., meaningful retaliation cannot be aimed at the European beef industry. Therefore, Section 301 actions are targeted by necessity at unrelated parties. To make the action even more powerful, in seeking a target, the U.S. traditionally seeks out an equivalent value of exports from a vulnerable industry or state. Thus, in the EC beef-hormone case, the Italian exports of pasta and

¹⁷⁸ *Id.*

¹⁷⁹ See *Trade Bill Reported to Ways and Means; Limit on Japanese Car Imports Dropped*, INT'L TRADE DAILY (BNA), June 11, 1992.

¹⁸⁰ Extension to Period to Identify Trade Liberalization Priorities, S. 1850, 102d Cong., 1st Sess. (1991).

¹⁸¹ *Id.*

¹⁸² H.R. 3702, 102d Cong., 1st Sess. (1991).

¹⁸³ S. 388, 102d Cong., 1st Sess. (1991).

tomato products were targeted because the Italian economy is more fragile than the economies of the UK, Germany, France, or the Netherlands. To return to the military analogy, the U.S. is retaliating against an attack on a naval base by bombing a foreign orphanage.

An additional problem with Section 301 is its acceptance as a proper tool of trade policy. Section 301 is contrary to GATT principles of nondiscrimination and MFN treatment.¹⁸⁴ If the U.S. turns its back on the multilateral dispute mechanisms of the GATT, it exposes itself to similar attacks from our trading partners. Fifty-one countries joined in a GATT Council meeting condemning the use of Section 301 as violative of the GATT in January 1989.¹⁸⁵ United States actions which discriminate against or restrict foreign investment may be the fuel for a "foreign-designed 301 action" by our trading partners. The discriminatory methods addressing patent infringement and other intellectual property disputes under Section 337 might similarly provide our partners with grounds for unilateral sanctions. We are indeed fortunate that our trading partners elect to seek resolution of these problems in the GATT instead of imitating our strategies in Section 301. If the U.S. is to remain a valid partner in the multilateral trading system, Section 301 should be abandoned and Section 337 should be made consistent with the GATT.

IV. Abuse In The Antidumping Laws

A. Introduction to Antidumping Law

At the heart of any discussion of U.S. trade law are the antidumping laws. "Dumping" as a term is often used, but seldom used properly. Even rarer are cases where dumping is properly understood. To the non-trade lawyer, increased sales of goods by a foreign manufacturer "flooding" the U.S. markets are often labelled as "dumping."¹⁸⁶ However, under the antidumping laws, dumping is simply the sale of goods at less-than-fair value (LTFV);¹⁸⁷ such sales are at a price that is lower than the price charged by the exporter in his domestic market.¹⁸⁸ This tactic of price discrimination is considered to be an unfair trade practice that may injure, or threaten to injure a domestic industry. Accordingly, when less than fair value sales are detected, and injury is established, antidumping

¹⁸⁴ GATT Article I provides for MFN status. GATT Article II of the Agreement is violated if the U.S. unilaterally imposes higher duties on imports contrary to the GATT binding level.

¹⁸⁵ Bhagwati, *Big Bite Flouts the Rules*, N.Y. TIMES, June 4, 1989, at F2.

¹⁸⁶ For example, then-President Reagan once defined dumping as "foreigners invading our market and selling at lower than production costs by government subsidies being provided to the producers . . . in those countries." *Remarks During a U.S. Chamber of Congress Teleconference*, Weekly Compilation of Papers of the President, No.19, at 692 (May 10, 1983).

¹⁸⁷ See General Agreement on Tariffs and Trade, Part I, Art. VI, ¶ 1.

¹⁸⁸ Jacob Viner, *DUMPING: A PROBLEM IN INTERNATIONAL TRADE* (1923).

duties are assessed on the goods imported. The antidumping duties are designed to make the price charged in the U.S. the same as the price charged in the exporter's home market. At first blush the entire scheme seems incredibly straightforward and simple. However, upon examination of the policies behind the dumping laws and the implementation of these statutes, it becomes clear that something is certainly amiss.

The first question that must be asked is why do we want U.S. consumers to pay the higher price of the exporter's market. Does society benefit by the imposition of dumping duties and the higher prices of imported goods? Who is ultimately served by the antidumping actions? Certainly not the consumers. Do workers benefit? In some cases, workers are affirmatively injured by the imposition of dumping duties. The same is true for the U.S. industrial base. The manufacturer of computers now pay a higher price for component parts such as screens or chips. The true beneficiaries of the antidumping largesse are bloated industries unwilling to compete globally or the scarecrow-like victims of the debt and leveraged buy-out (LBO) binges of the 1980s.

B. Development of Antidumping Law

The U.S., Canada, the EC, and Australia are the leading states that routinely punish dumping of goods.¹⁸⁹ Each of these states has a history of protectionism stemming back to the English Corn laws.¹⁹⁰ Dumping is merely a modern extension of this protectionist sentiment, grounded in economic terms to afford it a modicum of legitimacy.

In America, the views toward dumping were influenced initially by the antitrust laws. The Antidumping Act of 1916¹⁹¹ was a criminal act, and sanctioned anyone importing articles into the United States:

[A]t a price substantially less than the actual market value or wholesale price . . . Provided, that such act or acts be done with the intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolizing any part of trade and commerce in such articles in the United States.¹⁹²

The dumping laws were amended to go beyond the antitrust injury envisioned by the 1916 Act. By 1918, the Republicans replaced the Democratic Congressional majority which supported the 1916

¹⁸⁹ See Michael Knoll, *Dump our Anti-Dumping Law*, Foreign Policy Briefing, The Cato Institute, No. 11 (July 25, 1991).

¹⁹⁰ See FAY, *THE CORN LAWS AND SOCIAL ENGLAND* (1932).

¹⁹¹ Antidumping Act of 1916, Ch. 463, 39 Stat. 798, 15 U.S.C.A. § 72.

¹⁹² *Id.*

Act. The Tariff Act of 1921¹⁹³ marked a shift toward protectionism and away from the more difficult criminal standard of the 1916 Act.¹⁹⁴ The Antidumping Act of 1921¹⁹⁵ adopted an injury test that focused more on domestic industry injuries than on injuries to competition. The amendments to the law adopted eased the burden on the domestic industry by adopting the LTFV standard.¹⁹⁶

The rise of dumping cases coincides with the lowering of tariffs under multilateral negotiations such as the GATT. As the U.S. lowered tariffs under a series of GATT rounds, domestic producers needed to resort to a series of non-tariff barriers to protect their market shares. Quotas and voluntary restraint agreements were the preferred methods of protectionism. Under these non-tariff barriers, U.S. producers of steel,¹⁹⁷ automobiles,¹⁹⁸ and machine tools¹⁹⁹ have requested successfully that the government negotiate with foreign states and manufacturers and limit the importation of these goods into the United States. However, quotas and voluntary restraint agreements are not readily available, particularly to smaller industries and manufacturers. The cost of obtaining such restraint must be measured not only in cash but in political capital. It is not difficult to marshal political consensus to protect the automobile and steel industries which affect millions of jobs. But the U.S. urea²⁰⁰ or aspirin²⁰¹ manufacturers lack the political power and economic significance of larger groups.²⁰²

With smaller industries at risk from foreign imports, yet lacking the economic and political resources to secure protection, these manufacturers turned to the antidumping laws. In a series of reputedly "non-adversarial" investigations, the domestic industry has racked up impressive victories over foreign imports. Although the statute addresses factors to be considered in evaluating injury under

¹⁹³ Emergency Tariff Act of 1921, 42 Stat. 9, 9-11, Rule 12.4 (1921).

¹⁹⁴ The intent provisions of the 1916 Act erected a burden that was never met. According to one expert, no criminal or civil defendant has ever been successfully prosecuted under the 1916 Act. See CLUBB, UNITED STATES FOREIGN TRADE LAW (1991).

¹⁹⁵ Antidumping Act of 1921, Pub. L. No. 1, § 201(a), 67 Stat. 1, 11 (*repealed by Trade Agreements Act of 1979*, Pub.L. No. 96-39, 93 Stat. 144, 146-93).

¹⁹⁶ *Id.*

¹⁹⁷ *Steel: Specialty Steel Industry Asks Bush to Extend VRA's, Is Ready to File Trade Cases*, 9 INT'L TRADE REP. (BNA) 347 (1992).

¹⁹⁸ *Japan: U.S. Should Use Trade Remedies to Open Japan's Auto Parts Market, Industry Says*, 7 INT'L TRADE REP. (BNA) 289 (1990).

¹⁹⁹ *Trade Policy: Bush Approves Limited Extension of Machine Tool VRAs with Japan, Taiwan*, 9 INT'L TRADE REP. (BNA) 10 (1992).

²⁰⁰ *Urea From the German Democratic Republic, Romania, and the Union of Soviet Socialist Republics*, USITC Pub. No. 1992, Inv. No. 731-TA-338, 731-TA-340 (July 1987).

²⁰¹ *Bulk Ibuprofen From India*, USITC Pub. No. 2428, Inv. No. 701-TA-308, 731-TA-526 (Preliminary) (Sept. 1991); *Certain Acetylsalicylic Acid (Aspirin) from Turkey*, USITC Pub. 2001, Inv. No. 701-TA-283; 731-TA-364 (Aug. 1987).

²⁰² "[A]ntidumping . . . duties are, functionally, the poor (or small) man's escape clause." See H. Finger, *et al.*, *The Political Economy of Administered Protection*, 72 AM. ECON. REV. 452 (1982).

the trade laws, the Act does nothing to guide the International Trade Commission (ITC) in injury analysis. Over the past years, several manners of assessing trade injury have developed. Each test reflects the trade agenda or biases of the decision maker.

C. Methods of Dumping Analysis

One method of determining material injury under the dumping laws was the five factor test used in the mid-to-late 1980s. This method of analysis was employed by then Chairperson of the U.S. International Trade Commission, Susan Liebler. The five factor analysis examined causation of material injury in a manner which harkened back to the Antidumping Laws of 1916 and its views of predatory dumping. The method first asked if the material injury suffered by a domestic industry was due to LTFV imports. Chairman Liebler then examined the statutory requirement that the Commission consider the "volume of the imports of the merchandise which is the subject of the investigation," "the effect of imports of that merchandise on prices in the United States for like products" and "the impact of imports of such merchandise on domestic producers of like products."²⁰³ Liebler then concluded that "[a]lthough these factors fall under the heading 'Material injury,' it seems clear that the first two are directed at causation. The emphasized words, volume and effect, refer only to the issue of causation, not to the financial condition of a domestic industry in either a relative or absolute sense."²⁰⁴ Liebler then determined that the statute directs the causation analysis to two basic factors: volume of imports and the effects of the LTFV imports on prices.

This reasoning was based on her analysis of the legislative history of the 1974 trade act. In the legislative history, the Senate Finance Committee announced that "[t]he Antidumping Act is designed to discourage and prevent foreign suppliers from using unfair price discrimination practices to the detriment of a United States industry."²⁰⁵ The Chairman concluded that "the focus of the causation analysis must be on whether the material injury suffered by a domestic industry is by reason of price discrimination." Liebler finally inferred that Congress intended the Antidumping laws to be applied to instances of predatory pricing.²⁰⁶

Upon making this assumption, the Chairman then asserted that predatory pricing "is only rational if the firm expects to be able to

²⁰³ *Certain Red Raspberries from Canada*, USITC Pub. 1707, Inv. No. 731-TA-196 (June 1985) (additional Views of Chairman Liebler).

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Predatory Price Discrimination occurs when a firm sells below cost in some markets, and then after its competitors are driven out, it sets a monopoly price. RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 285 (3d ed. 1986).

raise its prices in the future to a level at which it can more than recoup the losses it suffers in the present. Thus, predatory pricing can only be practiced by firms that have or expect to have market power."²⁰⁷ Recognizing that the Commission would be unable to delve into the motivations or intentions of a foreign exporter, Chairman Liebler utilized volume and price data as proxies. The five factor test supports a finding of material injury by reason of less than fair value imports if the Commission finds: "(1) large and increasing market share, (2) high dumping margins, (3) homogenous products, (4) declining prices and (5) barriers to entry to other foreign producers (low elasticity of supply of other imports)."²⁰⁸ Liebler's understanding of the dumping laws and the legislative history was that Congress intended to prevent price discrimination.²⁰⁹

The five factor test was shortlived. The U.S. Court of International Trade in *USX Corporation v. U.S.I.T.C.*²¹⁰ rejected the analysis as contrary to the statute. Judge Restani observed:

One flaw is that this view necessarily makes the intent of a foreign producer the focus of the ITC causation inquiry. Another, but not unrelated flaw, is that this view seems to assume that the purpose of the antidumping statute is to prevent a particular type of 'injury to competition' rather than merely material 'injury to industry.'²¹¹

In remanding the investigation to the ITC, the Court determined that:

In applying the antidumping law under which this action is brought it is improper for ITC to place at the center of its causation analysis the intent of a foreign producer. This inquiry is unavoidable, however, if one equates unlawful dumping with unfair price discrimination in the form of predatory pricing. Unlike the 1916 Act, there is neither a scienter requirement to be found in the statute relevant here, nor evidence in the relevant legislative history that Congress intended such a requirement. Thus, contrary to the suggestion in defendants' brief, what occurred in this case is not the mere incorporation of another relevant economic factor into a causation analysis as is clearly permissible under 19 U.S.C. 1677(7)(B)-(C) (1982). Instead, the nature of the reliance on the barrier to entry factor has worked to change the focus of the injury investigation in a manner

²⁰⁷ *Certain Red Raspberries from Canada*, *supra* note 202, at 17.

²⁰⁸ *Id.* at 19.

²⁰⁹ *Id.* at 20.

²¹⁰ *USX Corp. v. U.S.I.T.C.*, 682 F. Supp. 60, 65 (Ct. Int'l Trade 1988).

²¹¹ *Id.* at 68. The remand and rejection of the five factor test came at a crucial moment in ITC and trade history. Although the test had survived for nearly three years, the *USX* opinion officially rejecting the analysis occurred when the nomination of ITC Chairman Liebler to the U.S. Court of Appeals for the Federal Circuit was pending before the Senate. The rejection of this mode of analysis was used by members of the Senate, such as Senator Lloyd Bentsen and the late Senator John Heinz to block the confirmation of Chairman Liebler. The Court to which Liebler had been nominated was the court which heard appeals from the Court of International Trade. See 134 CONG. REC. 7527 (1988) (statement of Senator Heinz); 134 CONG. REC. 3835 (1988) (statement of Senator Heinz); 133 CONG. REC. 17,005 (1987) (statement of Senator Heinz).

not permitted by Congress.²¹²

Another method of analysis is the bifurcated method. Under this analysis, the ITC examines two questions: first, is the domestic industry suffering material injury? Second, are there LTFV or dumped imports?²¹³ If the answer to each is in the affirmative, the decision maker typically votes in favor of a finding of material injury. This mode of analysis (often referred to as trend analysis) is flawed in its simplicity. Although the bifurcated method leads to a large number of affirmative findings, it fails to link dumping and LTFV goods with injury to the domestic industry.

The trend analysis also leads to a system of false determinations. Assume that the domestic industry controls 75% of the market and is doing well by all objective analyses (sales, prices, wages and employment are all improving). Now let us assume that the foreign producers who account for the remaining 25% of the market are dumping their goods at the dumping margin of 20%. Can we say that the LTFV imports are causing material injury to the domestic industry? Under a bifurcated analysis the answer might very well be no. Because the industry appears to be doing well, it cannot be said to be incurring material injury under this method of analysis. Thus, the question of whether the LTFV goods are the cause of this injury is not even reached.

The flaw of this analysis is obvious. Even though the domestic industry is doing well, that does not mean that it could not be doing better. If the LTFV sales were not present, perhaps the market share of the domestic industry might be 85% or more. Wages, employment and sales could be higher still. Thus, LTFV sales may be a cause of material injury to even a healthy industry.

More commonly, the bifurcated approach results in false positives. For example, assume that the domestic industry is losing market share and prices are depressed. Also assume that foreign manufacturers sell a superior product, use superior technology, take advantage of larger economies of scale, and even provide lower cost financing. Further suppose that the foreign manufacturer is selling his goods at a 10% dumping margin. A bifurcated decision maker typically would ignore any considerations other than the fact that the domestic industry is sick and would conclude that dumping exists.

Another method of analysis employed at the ITC is the unitary analysis. Under this method of analysis, the commissioner assesses

²¹² *Id.*

²¹³ See, e.g., *Digital Readout Systems and Subassemblies Thereof From Japan*, USITC Pub. 2150, Inv. No. 731-TA-390, (Jan. 1989) (views of Commissioners Eckes, Rohr, Lodwick and Newquist); *Light Duty Integrated Hydrostatic Transmissions and Subassemblies Thereof, With or Without Attached Axles, from Japan*, USITC Pub. 2079, Inv. No. 731-TA-425 (Preliminary) (Apr. 1988); *Fresh Kiwifruit From New Zealand*, USITC Pub. 2510, Inv. No. 731-TA-516 (May 1992).

whether or not the domestic industry is incurring domestic injury by reason of LTFV imports. Thus, the injury must be linked directly to the dumping. In analysis such as this, the ITC decision maker typically employs an economic model form of analysis. This model determines the Comparative Analysis of Domestic Industry Condition (CADIC).²¹⁴ Under a CADIC analysis, the decision maker must try to replicate the condition of the domestic industry to simulate a world free of dumped goods.²¹⁵ The CADIC approach is the method of analysis most consistent with the GATT.²¹⁶

CADIC analysis leads to consideration of other domestic sellers and fairly-traded dumped goods in the market when assessing damage. For example, assume the U.S. widget industry filed an antidumping petition. Let us also assume that the U.S. widget manufacturers control 60% of the domestic market, and that the remaining 40% of the market is controlled by foreign imports, some being fairly traded and others being LTFV goods. Now let's assume that 10% of the imported goods are LTFV goods from Burkina Faso and the remaining 30% are fairly traded goods from Japan. If we pursue a CADIC approach to this injury analysis we would remove the LTFV goods from the market. The 10% of LTFV sales from Burkina Faso might now go to the domestic industry. If this was the case, a decision maker might conclude that the domestic industry is suffering material injury by reason of the LTFV goods. In other words, if the LTFV goods were not in the market the sales would have gone to the domestic industry. Thus, the absence of these sales might constitute material injury.

Let us now take another approach. Assume the same facts as above regarding market share and dumping, but now envision a state where the domestic industry is in horrible decline. The decline may be attributed to a failure to modernize equipment because of massive LBO debt burdens or some other corporate mismanagement.²¹⁷ At the same time, assume that the fairly traded imports are really coming on like gangbusters and are perceived by purchasers as a supe-

²¹⁴ For an early ITC discussion of CADIC analysis, see 3.5'' *Microdisks and Media Therefor From Japan*, USITC Pub. 2076, Inv. No. 731-TA-389 (Preliminary) (Apr. 1988) (additional views of Commissioner Cass).

²¹⁵ For the definitive discussion of this model, see *Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan*, USITC Pub. 2237, Inv. Nos. 731-TA-426, 428 (Nov. 1988) (dissenting views of Vice Chairman Ronald A. Cass).

²¹⁶ Pursuant to the GATT Antidumping Code:

[I]t must be demonstrated that the dumped imports are, through the effects of dumping, causing injury within the meaning of this Code. There may be other factors which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, Art. 3, § 4.

²¹⁷ See *Granite from Italy and Spain*, USITC Pub. 2110, Inv. Nos. 701-TA-289, 731-TA-381, 382 (Aug. 1988).

rior product. Under a CADIC approach in this particular fact pattern, there is no assurance that the domestic industry will prevail. The decision maker may conclude that if the LTFV imports were removed from the market, the sales would not flow to the domestic industry as a matter of right. However, this is not necessarily the case. To the contrary, we might see a situation where the fairly traded imports would receive the benefit of the elimination of the dumped goods. Accordingly, in such a case there is no reason to impose dumping duties, because duties would benefit the fairly traded imports and not the domestic industry.

An even more curious situation occurs when all of the foreign imports are LTFV goods. It is possible to have a situation where even if the dumped goods are offset by dumping duties, the dumped goods are still preferred by the consumer. We must then inquire whether the domestic industry has in fact been injured *by reason of the LTFV goods*. If not, the antidumping duties serve no purpose other than to increase transaction costs and actual costs to the consumers. The duties will not drive the consumer back to purchase domestic goods. Unless the goods are truly fungible, the antidumping duties will not transfer the allegedly "lost sales" to the domestic industry.

An excellent example of how the models of dumping analysis may impact a determination is the recent ITC investigation of Minivans from Japan.²¹⁸ After struggling in the domestic car market for several years despite the assistance of Voluntary Restraint Agreements (VRA's) limiting auto imports, the Big Three automakers brought an antidumping action against Japanese imports of minivans. Domestic manufacturers of minivans are again trying to blame all of the industry's woes on unfair trade practices. They assert that they are damaged by the dumping of these vans by Japanese automakers. The United States International Trade Commission made an affirmative preliminary determination of material injury caused by dumped Japanese minivans.²¹⁹ In the ITC petition, the Big Three allege that the Japanese engage in unfair trading practices by charging less money for their minivans in the U.S. than they do in Japan. Naturally, the Japanese deny this. Regardless of whether there is dumping or not, the Japanese strategy is not unfair and does not injure Detroit.

Let us examine this particular investigation under both bifurcated and unitary approaches. Assume that the domestic minivan industry is suffering a decline. Also assume that the Japanese are selling their minivans for less in the U.S. than in Japan. Following a bifurcated approach, the domestic industry appears to be in decline

²¹⁸ *Minivans from Japan*, USITC Pub. 2401, Inv. No. 731-TA-522 (Preliminary) (July 1991).

²¹⁹ *Id.*

and dumping is also present. Therefore, the injury is presumptively attributed to the dumping. The flaw of this argument is obvious. For example, let us suppose that Rolls Royce charges \$1,000 less for its cars in the U.S. than it does in the U.K. Under the methodology described above, nothing would stop Ford from claiming that slumping sales of its Escort were caused by the dumping of the higher priced Rolls Royce.

If this sounds ridiculous, we need only look at the minivan investigations to see this theory actually utilized. Presently, the Big Three have approximately an 86.1% share of the domestic minivan market.²²⁰ Japanese manufacturers account for 13.2% of this market.²²¹ Detroit asserts that it has lost 20% of minivan jobs, sales and income during the first quarter of 1991.²²² ITC Commissioner Don E. Newquist notes that the Japanese market share has more than doubled during this period.²²³ What Commissioner Newquist and others fail to mention is the fact that the Japanese vehicles are priced higher than the domestic models, even with the allegations of dumping. According to George Borst, Vice President of Strategic and Products Planning for Toyota Motor Sales U.S.A., Inc., "the prices for top-of-the-line Previas seem to far exceed almost anything else on the market."²²⁴ The higher Japanese prices for minivans destroy the conspiracy theories of underselling that protectionists in Washington and Detroit love to bandy about.²²⁵

Now let us attempt a unitary approach. Is the U.S. domestic minivan industry materially injured by reason of LTFV sales of Minivans from Japan? Let us agree that the Minivans are being dumped. Let us also agree for the purposes of our argument that the domestic industry is incurring material injury. But is the injury linked to the LTFV sales of the minivans or solely to the existence of the foreign imports in the U.S. market? The Japanese products are priced higher than the domestic like product.

If the U.S. minivan industry is suffering injury, yet the higher

²²⁰ Stuart Auerbach, *U.S. Firms Backed on Minivans; Panel Rules Japanese Imports Hurt Big 3*, WASH. POST, July 11, 1991, at B8.

²²¹ *Id.*

²²² *Id.*

²²³ *Id.*

²²⁴ Diana T. Kurylko, *Mazda, Toyota Deny Dumping Charges*, AUTOMOTIVE NEWS, June 24, 1991, at 1.

²²⁵ The antidumping statute directs the ITC to consider the degree to which LTFV imports "undersell" the domestic goods. 19 U.S.C. § 1677(7)(C)(ii) (1988). "In almost every case in which the Commission has made an affirmative determination the imported product has undersold the domestic product." See William E. Perry, *Administration of Import Trade Laws By the United States International Trade Commission*, 3 B.U. INT'L L.J. 345, 408 (1985). See also *Certain Table Wine from the Federal Republic of Germany, France and Italy*, USITC Pub. 1771, Inv. Nos. 701-TA-258-260 (Preliminary), 731-TA-283-85 (Preliminary) (1985) (where domestic table wine oversold imported wine, there is no demonstration of causation by LTFV imports).

priced and allegedly dumped Japanese goods are not the cause of the injury, who is to blame? The true sources of the declining domestic auto industry surprisingly enough are the American consumer and Detroit. The consumer has not only lost confidence in American made vehicles, it has institutionalized these preferences. Armed with dog-eared, borrowed copies of *Consumer Reports* or *Car & Driver*, the well-heeled consumer has established a preference for Japanese products.

Two of the Japanese vehicles under investigation have benefited handsomely by positive reviews by U.S. industry analysts. *Car & Driver* named the Mazda MPV the best Minivan in the market in a 1989 survey.²²⁶ Individual articles praised the reliability, handling and design of the Mazda minivan. On the heels of Mazda's successes, Toyota released the Previa minivan in 1990. It too was met with cheers from car experts. According to a recent *Car & Driver* report, "the Previa is as good as minivans get."²²⁷ Similar kudos have been earned by other Japanese minivans under investigation in *Consumer Reports* magazine.²²⁸ Perhaps the highest compliment paid to the Japanese minivans came from the U.S. car makers themselves. *Car & Driver* reported in October, 1991 that both the 1991 Dodge Caravan and the Plymouth Voyager minivans have "... a vaguely MPVish look about them."²²⁹ This is no mere coincidence since Chrysler engineers apparently spent eighteen months analyzing, dismantling and driving the Mazda MPV in efforts to improve the Chrysler product.²³⁰

The antidumping investigation is a trade barrier employed by the Big Three automakers to chill other potentially successful Japanese entrants into the market. Mitsubishi plans to introduce the Expo minivan this summer and Honda plans to unveil its minivan in 1993 or 1994.²³¹ This investigation is simply designed to chill Japanese automakers from further penetration of the U.S. market and broaden application of the VRAs. Detroit is engaged in a shameless abuse of the dumping laws.²³²

D. Domestic Abuses of the Dumping Laws

Apart from the methodology followed by various decision mak-

²²⁶ William Jeanes, *et al.*, *Best Buys 1990*, CAR & DRIVER, May 1990, at 37.

²²⁷ John Phillips, III, *et al.*, *Toyota Previa LE*, CAR & DRIVER, Sept. 1990, at 73.

²²⁸ *New Car Ratings*, CONSUMER REPORTS, Apr. 1992, at 73.

²²⁹ John Phillips, *Dodge Caravan Plymouth Voyager*, CAR & DRIVER, Oct. 1990, at 99.

²³⁰ *Id.*

²³¹ *Id.*

²³² It is also asserted that the Minivan Investigation was designed as a fishing expedition for the Department of Commerce to investigate the Japanese keiretsu system. See Gates, *Mazda, Toyota Protest Dumping Edict*, AUTOMOTIVE NEWS, May 25, 1992. To the industry's surprise, the ITC reached a negative determination. *Minivan's From Japan*, USITC Pub. 2529, Inv. No. 731-7A-522 (July 1992).

ers, the dumping laws themselves virtually assure domestic industry victories and contradict stated U.S. trade policies. The U.S. has pushed for transparency in international trade and for a level playing field. Yet, the U.S. dumping laws are anything but level. For example, in determining whether a domestic industry is suffering material injury, the ITC is mandated to consider pricing information. The ITC must compare the exporters' home price with the sales in the United States. In many cases, the exporter will only be producing the good for export and will have no sales in its home market.²³³

In these instances, the Department of Commerce may either compare the U.S. sales price with a price charged by a comparable firm or simply construct the value of the goods. Under the statute, constructed value includes "[t]he cost of materials . . . and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise under consideration which would permit the production of that particular merchandise in the ordinary course of business."²³⁴ Constructed value also includes at least a 10% share of cost as general expenses and an "amount for profit not less than 8 percent of the sum of such general expenses and costs."²³⁵ This section of the statute and its applications are criticized by our trading partners and importers.²³⁶ The draft final agreement of the Uruguay Round of the GATT would amend the use of constructed value and repeal the arbitrary 8% profit calculation in constructed value.²³⁷

Imports from non-market economies are presented with similar problems under the antidumping laws. If the Department of Commerce is unable to construct the value due to inadequate information, foreign market value is determined "on the basis of the price at which merchandise that is (A) comparable to the merchandise under investigation, and (B) produced in one or more market economy countries that are at a level of development comparable to that of the non-market country."²³⁸ The government has no guidance as to what is an appropriate country for comparison. For example, one legendary antidumping case involved electric golf cars from Poland.²³⁹ Poland was a non-market economy, with no golf courses and no reliable domestic price. The Department of Treasury deter-

²³³ *Electric Golf Cars from Poland*, 40 Fed. Reg. 25497 (U.S. Dept. of Treasury 1975).

²³⁴ 19 U.S.C. § 1677b(e)(1)(A) (1988).

²³⁵ *Id.*

²³⁶ See *Register of United States Barriers to Trade 1992*, External Affairs and International Trade Canada; *Report on United States Trade Barriers and Unfair Practices*, Commission of the European Communities (1991); *Report on Unfair Trade Policies and Practices*, Japanese Fair Trade Center (1991).

²³⁷ *Few Changes Seen Required in U.S. Antidumping Law Under GATT Plan*, INT'L TRADE REP. (BNA) (Feb. 12, 1992).

²³⁸ 19 U.S.C. § 1677b (c)(2) (1988).

²³⁹ *Electric Golf Cars from Poland*, 40 Fed. Reg. 25497 (U.S. Dept. of Treasury 1975).

mined that for the purposes of constructing value, Canada was a country comparable to Poland.²⁴⁰ In other similarly speculative investigations, China has been compared to Argentina²⁴¹ and Thailand.²⁴² Portugal was used as a surrogate for Hungary.²⁴³

While the antidumping laws favor the domestic industry, they also punish developing states that the U.S. wishes to assist. For example, the Generalized System of Preferences (GSP) provides duty-free entry into the U.S. of certain imports from less developed nations.²⁴⁴ The GSP gives preferential duty-free entry to approximately 4,284 products from 134 beneficiary countries.²⁴⁵ As developing states mature industrially, they may "graduate" from the GSP program.²⁴⁶ Notable commercial successes of the GSP include Taiwan, South Korea, Hong Kong and Singapore.²⁴⁷ "Alumni" of the GSP program require far less U.S. foreign aid. Furthermore, their newly robust economies become new markets for U.S. goods and services.

Similarly, under the Caribbean Basin Initiative (CBI),²⁴⁸ twenty-three Caribbean Basin countries receive duty-free treatment for a variety of exports. Pursuant to the CBI, the U.S. provides economic assistance to facilitate private investment as well as tax incentives to U.S. firms hosting conventions in member states.²⁴⁹ Like the GSP, the CBI has twin goals of promoting political stability and economic development. By supporting development in strategically located neighboring states, U.S. foreign policy goals are achieved. Additionally, because the U.S. is the major exporter of goods to this region, further economic progress in CBI states will increase opportunities for U.S. exports.

Despite the fact that the U.S. ostensibly welcomes and encourages exports from these states, the antidumping laws and abuses of these laws thwart imports of these products. When imports or goods from a GSP state become competitive, domestic manufacturers insti-

²⁴⁰ *Id.*

²⁴¹ Certain Carbon Steel Pipes and Tubes From the People's Republic of China, USITC Pub. 1885, Inv. No. 731-TA-292 (1987).

²⁴² Porcelain on Steel Cooking Ware From Mexico, The People's China and Taiwan, USITC Pub. 1911, Inv. Nos. 701-TA-265, 731-TA-297-299 (1986).

²⁴³ Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers From Hungary, The People's Republic of China and Romania, USITC Pub. 1983, Inv. Nos. 731-TA-341, 344-345 (1987).

²⁴⁴ 19 U.S.C. §§ 2461-2465 (1988).

²⁴⁵ *Id.* See also OFFICE OF THE USTR, A GUIDE TO THE U.S. GENERALIZED SYSTEM OF PREFERENCES (August 1991).

²⁴⁶ "Graduation is the discretionary removal of GSP eligibility." *Id.* Products of countries may graduate from the GSP program. *Id.*

²⁴⁷ BRIAN KELLY & MARK LONDON, THE FOUR LITTLE DRAGONS (1989).

²⁴⁸ See The Caribbean Basin Economic Recovery Act of 1983; Caribbean Basin Economic Recovery Expansion Act of 1990, 19 U.S.C. § 2701, *et. seq.* (1990).

²⁴⁹ The Caribbean Basin Economic Recovery Act of 1983; Caribbean Basin Economic Recovery Expansion Act of 1990, 19 U.S.C. § 2701, *et. seq.* (1990).

tute antidumping actions. For example, steel,²⁵⁰ industrial belts,²⁵¹ baseball caps,²⁵² and wiping rags²⁵³ from CBI or GSP countries have all been on the receiving end of protectionist trade actions. If the U.S. decides that these goods are to be welcomed, let us welcome them wholeheartedly. Ideally, GSP and CBI goods should be totally exempt from the antidumping laws. However, such a proposal will never succeed. Therefore, I offer the following compromise: GSP and CBI goods should be exempt from the antidumping laws until the imports from a particular state represent 10% of the U.S. market share and a dumping margin of 50% or more is found. By establishing a statutory minimum market share and dumping margin, this proposal adopts a presumptive CADIC analysis to the issue. Imports of GSP and CBI states will be able to enter the U.S. free of harassment from ITC petitioners.

Under the antidumping law the Commission may "cumulatively assess the volume and effect of imports from two or more countries of like products" to determine material injury.²⁵⁴ Currently, CBI imports may only be cumulated with imports from other CBI nations.²⁵⁵ GSP should be included in this form of cumulation. Additionally, GSP or CBI states should be exempt from the cumulation provisions of the statute unless each state represents at least 5% of the U.S. market.

The institution of a frivolous antidumping petition already serves as an effective non-tariff barrier. The entire process of litigating an antidumping petition is not only biased and complicated, but in many cases, is nearly prohibitively expensive. For example, lesser-developed countries such as Bangladesh,²⁵⁶ Kenya,²⁵⁷ El Salvador,²⁵⁸ Costa Rica,²⁵⁹ Ecuador,²⁶⁰ and Pakistan²⁶¹ have been hit with antidumping petitions. For most respondents in these states, the

²⁵⁰ See *Steel Wire Rope From the Republic of Korea and Mexico*, Inv. Nos. 731-TA-546, 547 (Preliminary) (1992); *Certain Carbon Steel Butt-Weld Pipe Fittings From China and Thailand*, Inv. Nos. 731-TA-520, 521 (Preliminary) (1992).

²⁵¹ See *Industrial Belts From Israel, Italy, Japan, Singapore, South Korea, Taiwan, The United Kingdom, and West Germany*, USITC Pub. 2113, Inv. Nos. 701-TA-293-295, 731-TA-412-419 (1989).

²⁵² See *Sewn Cloth Headwear From The People's Republic of China*, USITC Pub. 2183, Inv. No. 731-TA-405 (1989).

²⁵³ See *Shop Towels From Bangladesh*, USITC Pub. 2487, Inv. No. 731-TA-514 (1992).

²⁵⁴ 19 U.S.C. § 1677 (7)(C)(iv) (1988).

²⁵⁵ 19 U.S.C. § 1677 (7)(C)(iv)(II) (1988).

²⁵⁶ *Shop Towels From Bangladesh*, USITC Pub. 2487, Inv. No. 731-TA-514 (1992).

²⁵⁷ *Certain Fresh Cut Flowers From Kenya and Mexico*, USITC Pub. 1968, Inv. Nos. 731-TA-332, 333 (1987).

²⁵⁸ *Operators for Jalousie and Awning Windows from El Salvador*, USITC Pub. 1934, Inv. No. 731-TA-319 (1987).

²⁵⁹ *Certain Fresh Cut Flowers From Canada, Chile, Colombia, Costa Rica, and Ecuador*, USITC Pub. 1956, Inv. Nos. 731-TA-327-331 (1987).

²⁶⁰ *Id.*

²⁶¹ *Shop Towels From Pakistan*, USITC Pub. 1490, Inv. No. 701-TA-202 (1984).

very concept of an antidumping action is news. These exporters are simply not prepared technically or financially to compete in the ITC arena. Respondents are unable to pull together the elaborate pricing, sales, and cost accounting data required by the ITC and the Department of Commerce. Not only is the data collection process nearly impossible for the respondents, the submission process itself becomes an insurmountable trade barrier. For example, in the Bangladesh shop towel investigation, the respondents were initially requested to supply their evidence on magnetic computer tapes.²⁶² The absurdity of this request is obvious. If the Bangladeshis had computers, why in the world would they be producing shop towels, a product on the bottom rung of the textile ladder?

Additionally, the cost of the antidumping investigation weakens or eliminates the prospect of a vigorous defense. LDC and GSP states may simply lack the financial resources needed to litigate an antidumping action. Legal fees in such cases routinely run in the hundreds of thousands of dollars, not to mention the thousands of dollars needed to retain economists or other experts. Many countries are simply ill prepared to respond to the allegations of dumping, let alone attempt to litigate them.

To truly understand the impact of the abuse of trade laws on lesser-developed countries we will examine a recent investigation.²⁶³ Bangladesh, with an annual per capita income of \$180 is one of the world's poorest countries.²⁶⁴ The people of Bangladesh are annually visited by floods, cyclones and typhoons of truly epic proportions; for example, a 1991 storm claimed over 125,000 lives. Enduring regular natural disasters and clinging to economic survival by a thread, Bangladesh bravely fights on. Indeed, despite its financial woes, Bangladesh contributed to Operation Desert Storm by sending a small detachment of troops to join the allied coalition.²⁶⁵

With the Gulf War ended and Bangladesh struggling to survive its most recent natural disaster, American industry decided to "repay" the people of Bangladesh for their support. Did we forgive their debts? Establish new businesses in Bangladesh? No. Instead, corporate America and the protectionists chose to repay Bangladesh by attacking their fledgling economy with allegations of unfair trade practices and instituting an antidumping investigation, effectively closing our markets to certain Bangladesh exports.

At this point, even the most protectionist corporate, political, or

²⁶² *Shop Towels From Bangladesh*, USITC Pub. 2487, Inv. No. 731-TA-514 (1992).

²⁶³ The author assisted in the representation of the Bangladeshi importers described in this investigation on a *pro bono* basis.

²⁶⁴ Disbursements of aid to Bangladesh from the U.S. in 1986 was \$104 million, with total disbursements from the major aid donors of \$1,303 million. *BANGLADESH, A COUNTRY STUDY*, Area Handbook Series (2d Ed. 1989).

²⁶⁵ McCrory, *The "Ahem" Bangladesh Challenge*, WASH. POST, 1991.

economic observer must pause and wonder what export from Bangladesh could threaten to materially injure a U.S. industry. Surely the U.S. semiconductor, steel, and automobile industries can withstand competition from Bangladesh. Yet, the Bangladeshi were selling cheap rags in the United States—the vital area of our economy that is under siege from these “unfair practices” is the crucial “shop towel industry.”

The U.S. textile industry asserts that Bangladesh manufacturers of “industrial wiping cloths”, more commonly referred to as “shop towels”, dump these products in the U.S. markets. This petition to the U.S. International Trade Commission was filed by Milliken & Co. (Milliken), a firm dominated by an avowed protectionist.²⁶⁶ The total value of shop towels imports from Bangladesh was only \$2.46 million. Milliken, on the other hand, has estimated annual sales of \$2.5 billion.²⁶⁷ Imports from Bangladesh have not had an adverse impact on inventories in the domestic industry. The domestic industry, led by petitioner, has adopted a system of tight inventory controls and maintains a low ratio of inventories to monthly shipments. Petitioner also has computerized inventory controls.

The Bangladeshis were just the next target of the Milliken campaign against lesser-developed countries producing shop towels. On August 24, 1982, Milliken & Co., the petitioner in the current investigation, filed an antidumping petition with the ITC and the Department of Commerce on cotton shop towels from the People's Republic of China.²⁶⁸ In September 1983, the Commission determined that an industry in the United States was materially injured by such imports from China.²⁶⁹ On July 29, 1983, Milliken filed a countervailing duty petition with the ITC and Department of Commerce on cotton shop towels from Pakistan.²⁷⁰ The Commission determined that an industry in the United States was materially injured by such imports from Pakistan in 1984.²⁷¹ On March 28, 1984, Milliken filed a countervailing duty petition with the Department of Commerce on cotton shop towels from yet another “industrial giant,” Peru.²⁷² The Department of Commerce decided to suspend the investigation, effective September 12, 1984, based on an agreement to

²⁶⁶ Mr. Milliken's announcement that “I want to do everything in my power to do away with the Uruguay Round” is an example of his protectionist ardor. See Greg Rushford, *Threading Political Needles; How Textile Magnate Roger Milliken Wins Quotas and Influences People*, LEGAL TIMES, Nov. 19, 1990, at 1.

²⁶⁷ Milliken is the world's largest privately-held textile company and the largest textile company in the United States. Annual sales by Milliken are approximately \$2.5 billion. Report on Milliken & Co., Inc., HOOVERS HANDBOOK (1991).

²⁶⁸ *Shop Towels From China*, USITC Pub. 1431, Inv. No. 731-TA-103 (1983).

²⁶⁹ *Id.*

²⁷⁰ *Shop Towels From Pakistan*, USITC Pub. 1490, Inv. No. 701-TA-202 (1984).

²⁷¹ *Id.*

²⁷² *Shop Towels From Bangladesh*, USITC Pub. 2487, Inv. No. 731-TA-514 (1992).

cease exports of the product to the United States.²⁷³ Since the suspension, the government has made two unsuccessful attempts to terminate the investigation. Ever vigilant, Milliken objected to the Department of Commerce's intent to terminate the suspended investigation.²⁷⁴

Each time a new shop towel exporter has appeared on the scene in the last ten years, Milliken has petitioned the U.S. government for relief. China, Pakistan, and Peru have all been victimized by Milliken's rapacious desire to monopolize an industry. Milliken enjoys a healthy market share of over 60% in the shop towel industry. Unsatisfied by this success, Milliken has been abusing the trade laws to squeeze out any foreign exporter that it perceives as a rival. Milliken's own officers acknowledge the firm's anticompetitive trade agenda. Terry Topp, product manager for shop towels at Milliken boasts "I know everybody at [the U.S. Trade Representative] and at Commerce. When they see me coming down the hall, it's 'Here comes Terry, the shop-towel man. Who do you want us to go after now?'"²⁷⁵

Milliken's petitions in this investigation are illustrative of the depths to which he will sink to control a market. Initially, on December 13, 1990, Milliken filed a petition with the Department of Commerce alleging that the Bangladeshi government was subsidizing shop towel exports to the United States. The absurdity of the allegation that one of the world's poorest nations was subsidizing anything was recognized by the Department of Commerce and the countervailing duty action was dismissed.²⁷⁶ Milliken also recognized the futility of this action, yet instituted the investigation regardless of merit. John Greenwald, an attorney at Wilmer, Cutler & Pickering and counsel for Milliken admits that "[w]e brought a countervailing duty case [against Bangladesh] in part because it was cheaper than an antidumping proceeding in that it did not require a finding of injury and in part because we frankly did not have hard evidence on Bangladeshi pricing practices."²⁷⁷ The dismissed CVD action was merely a fishing expedition by Milliken to harass and intimidate Bangladesh, as Peru, Pakistan, and China had been similarly harassed in the past. In fact, had Milliken instituted a similarly meritless action in Federal Court they would have found themselves on the receiving

²⁷³ *Id.*

²⁷⁴ See *Shop Towels From Bangladesh*, USITC Pub. 2379, Inv. No. 731-TA-514 (Preliminary) (May 1991), at 19.

²⁷⁵ See Terrence Moran, *Riches From Rags*, LEGAL TIMES, May 27, 1991, at 5.

²⁷⁶ See *Commerce Says Only De Minimis Subsidy Found on Shop Towels From Bangladesh*, INT'L TRADE DAILY (BNA), July 5, 1991. See also William Lash, III, *U.S. Textile Makers Fear Bangladesh's Rags*, WALL ST. J., June 19, 1991, at A12.

²⁷⁷ Transcript of Proceedings of the U.S. International Trade Commission, Inv. No. 731-TA-514 (Preliminary), Testimony of John Greenwald, Apr. 19, 1991, at 8.

end of Rule 11²⁷⁸ sanctions for filing a frivolous and baseless suit.

Milliken's instant antidumping petition is equally baseless. Milliken alleged that the Bangladeshi shop-towel makers are deliberately selling their products at a loss to seize U.S. market share. The charges are based on information provided to the Department of Commerce during the countervailing-duty investigation: balance sheets from 1990 show all five Bangladeshi exporters operating at a loss. In essence, Milliken is suggesting that the Bangladeshi exporters are engaged in predatory pricing behavior. In its brief, Milliken alleges a predatory intent by the Bangladeshi exporters. This is clearly contrary to the economics, law, and reality that the Court of International Trade recognized in *USX Corporation v. United States*,²⁷⁹ stating that "[i]n applying the antidumping law . . . it is improper for the Commission to place at the center of its causation analysis the intent of a foreign producer."²⁸⁰ This inquiry is unavoidable, however, because Milliken equates unlawful dumping with unfair price discrimination in the form of predatory pricing.

This allegation is not supported by either facts or economic analysis and ignores the antidumping laws. First, Bangladesh cannot hope to expand or capture market share by engaging in predatory practices. A quota on Bangladeshi shop towels was recently negotiated following a quota call imposed by the Department of Commerce on October 31, 1990. The Memorandum of Understanding between the United States and Bangladesh, dated April 5, 1991, imposed a limit on shop towels imports of 1,010,640 kilograms for quota year 1991, 1,071,278 kilograms for quota year 1992, and 1,135,555 kilograms for quota year 1993.²⁸¹ The recently adopted quota on Bangladeshi imports removes any incentive for dumping or predation by Bangladeshi exporters. Because imports of Bangladeshi shop towels are limited under the quota, even the chimerical predatory practices alleged would not assist Bangladesh in seizing additional market share because Bangladesh simply will not be permitted to increase sales in the U.S. market in contravention of the quota. Furthermore, The United States Supreme Court observed in *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*²⁸² that "predatory pricing schemes are rarely tried, and even more rarely successful."²⁸³ If a predatory pricing scheme by an industrial giant such as Matsushita was unlikely, such a scheme by Bangladeshi manufacturers and their hand looms is ridiculous.

²⁷⁸ FED. R. CIV. P. 11.

²⁷⁹ 12 Ct. Int'l Trade 205, 682 F. Supp. 60 (1988).

²⁸⁰ 682 F. Supp. at 68.

²⁸¹ *Shop Towels from Bangladesh*, USITC Pub. 2379, Inv. No. 731-TA-514 (Preliminary) (May 1991), at 36-37.

²⁸² 475 U.S. 574, 589 (1986).

²⁸³ *Id.*

Milliken argued that "[t]he losses incurred by each [Bangladeshi] producer on its shop towel exports necessarily mean that those exports are at less than fair value prices."²⁸⁴ What petitioner conveniently ignored is the fact that these businesses are all in the start up stages. Upon entry into an industry, losses are common. To subscribe to the ludicrous argument advanced by petitioner would convert the bulk of new exporters in every industry into a cadre of predatory dumpers. Such a conclusion is neither supported nor warranted.

In support of its petition, Milliken also asserts that by using constructed value they can demonstrate that the Bangladeshi sales are being made at less than fair value. Milliken improperly maintains that "[s]ince every producer exports all its production to the United States, the only statutory basis available to establish the fair value of the exported towels is constructed value."²⁸⁵ In making its constructed value calculation, Milliken adds what it purports to be the cost of production of shop towels by each Bangladeshi producer: the selling costs, general and administrative expenses, and a profit of eight percent.²⁸⁶ The constructed value asserted by Milliken is inherently contradictory. The attribution of a profit of 8% to the Bangladeshi exporters is obviously illogical in light of Milliken's own recognition that the Bangladeshi exporters are all operating at a loss.

As evidenced in Milliken's petition and in respondent's brief, Milliken has succeeded, for the past decade, in driving foreign competitors out of this market by abusing the trade laws. Although petitioner's strategy is reprehensible, it also illustrates the absence of any damage to Milliken from imported shop towels. In 1982, China was driven from the market by Milliken, yet Milliken did not pick up the former Chinese customers. These buyers of low quality shop towels preferred to buy from Peru. Eventually Peru emerged as an exporter and Milliken forced them from the market. Peru's place in the market was taken by Pakistan, not by the domestic industry. Finally, Pakistan was squeezed from the market by Milliken's antidumping actions in 1984. Again the sales of shop towels formerly made by Pakistan went to Bangladesh, another less developed country.²⁸⁷ The evidence furnished by Milliken's history of harassment in this industry suggests that Bangladesh is competing not with the domestic industry but with other less developed countries. If the imports from Bangladesh were eliminated by antidumping duties, another less developed country would fill the gap created by the loss

²⁸⁴ Shop Towels from Bangladesh Milliken Antidumping Petition, Mar. 29, 1991, at 8.

²⁸⁵ *Id.* at 7.

²⁸⁶ *Id.* at 6-13.

²⁸⁷ See Statement of Azher Khan, President, Calderon Textiles, *Shop Towels from Bangladesh*, USITC Pub. 2379, Inv. No. 731-TA-514 (Preliminary) (May 1991).

of the Bangladeshi exports.²⁸⁸ Thus, any curtailment or elimination of Bangladeshi imports would not benefit the domestic industry.

Bangladeshi shop towels pose no threat of material injury to the domestic manufacturers; they have dropped substantially in the past year. There are several reasons for the decline in shipments. First, the quota imposed on Bangladeshi imports will hold them to 6% growth per year, starting from a figure well below that of even the troubled 1990 year. A second reason for the decline in shipments is the typhoon that visited Bangladesh in the spring of 1991, killing over 150,000 people and demolishing much of the Bangladeshi shop towel facilities. According to Naiz Rahim, owner of Greyfab Ltd., "[t]he factory was under chest-deep water, and only the structure itself and the standing machines were not washed away. We are now disassembling the machines, cleaning them of the mud, and reassembling them by hand."²⁸⁹

The domestic industry in March 1992 won an affirmative decision at the ITC by a vote of 3-2.²⁹⁰

E. Domestic Ills Resulting from the Dumping Laws

Third World states are not the only ones injured by abuse of the antidumping laws. United States firms and workers utilizing imported goods are hit hardest and most regularly. Unlike the antitrust laws which protect injuries to competition, the dumping laws are abused to protect domestic competitors. The argument that workers are protected or even considered under the act is indeed a hollow one. For example, in 1991, the International Trade Commission addressed a case of dumping involving foreign producers of active matrix liquid crystal computer screens.²⁹¹ The foreign manufacturers sold their screens to several firms in the U.S., notably IBM, Apple, and Compaq computers.²⁹² Toshiba also manufactured computers in the U.S. utilizing imported screens. The Advanced Display Manufacturers of America, a coalition of six start-up U.S. screen manufacturers instituted the antidumping action.²⁹³ The ITC determined that the U.S. screen industry was suffering material injury from the LTFV sales of imported laptop screens. An antidumping duty of

²⁸⁸ As a result of the antidumping duties, the importers of Bangladeshi shop towels are shifting supply from Bangladesh to Nepal. Interview with Azher Khan, President of Calderon Textiles (Jan. 24, 1992).

²⁸⁹ Moran, *supra* note 274.

²⁹⁰ *Shop Towels From Bangladesh*, USITC Pub. 2487, Inv. No. 731-TA-514 (1992). See also William Lash, III, *Goliath Slays David at the ITC*, J. OF INT'L COM., Mar. 17, 1992.

²⁹¹ *High-Information Content Flat Panel Displays and Display Glass Thereof from Japan*, USITC Pub. 2413, Inv. No. 731-TA-469 (Aug. 1991).

²⁹² See *Imported Japanese Flat Panel Displays Injure U.S. Industry*, ITC Says, INT'L TRADE REP. (BNA), Aug. 21, 1991.

²⁹³ *U.S. Manufacturers Threatened by Duties on Japanese Computer Displays*, INT'L TRADE REP. (BNA), June 12, 1991.

62.67% was imposed on the imported screens in question.²⁹⁴

Unfortunately, the antidumping duty threatened to raise the price of U.S.-made computers by an estimated \$500 per machine.²⁹⁵ Under the import laws of the U.S., in light of the antidumping duties, it is cheaper for manufacturers to import the entire computer instead of paying the prohibitively high punitive tariff. Toshiba switched production from Irvine, California to Japan to avoid the antidumping duties.²⁹⁶ Similarly, Apple and Compaq began discussions to assemble color SLT laptops in Singapore, abandoning earlier plans to manufacture domestically.²⁹⁷ One of the sharpest critics of the ITC determination was industry leader IBM. IBM characterized the new tariffs as "an eviction notice from the U.S. Government to the fastest-growing part of the U.S. computer industry."²⁹⁸ IBM transferred laptop computer development to IBM Japan to avoid the steep antidumping duties. IBM Chairman John Akers acknowledged that this relocation of production to Japan would mean ". . . an export of American jobs" and a worsening of the trade imbalance.²⁹⁹

This case illustrates a major flaw in the trade laws. The true loss or damage to the nation comes from the relocation of jobs, and not from the dumping by the Japanese manufacturers. If the duties were not imposed, the screen manufacturers claim that they would not be able to compete with the lower priced Japanese goods. The screen industry might go out of existence and dozens of jobs would be lost. But here, when the duties are imposed, hundreds of jobs will be transferred overseas as the laptop manufacturers move abroad.

The trade laws should be amended to address situations such as this. Currently, under the antidumping laws, impact of LTFV sales on employment must be considered. I propose to expand the scope of this analysis. The impact of LTFV sales *and antidumping duties on employment should be considered*. Thus, in a case like the laptop screens, the impact of duties on the importer's work force would be analyzed. In the event that more jobs are saved by failure to impose antidumping duties, this factor could legitimately be considered by the ITC.

Another factor needing consideration under the antidumping laws is U.S. foreign policy goals. The U.S. pushes states such as Venezuela to be less dependent on oil revenues. Colombia is urged to abandon the lucrative illegal cocaine trade and develop more posi-

²⁹⁴ *Japanese Flat Panel Manufacturer Halts Exports To U.S., Routes to Asia*, INT'L TRADE REP. (BNA), Aug. 28, 1991.

²⁹⁵ Neal Boudette, *Dumping the Color LCD Tariff Will Save Jobs; Liquid Crystal Display Editorial*, P.C. WEEK, Feb. 10, 1992, at 76.

²⁹⁶ See David E. Sanger, *U.S. Tariff Appears to Backfire*, N.Y. TIMES, Sept. 26, 1991, at D1.

²⁹⁷ *Id.*

²⁹⁸ *Id.*

²⁹⁹ See David E. Sanger, *Company News; I.B.M. Chief Issues Threat on U.S. Tariff*, N.Y. TIMES, Nov. 8, 1991, at D4.

tive exports. The results of these efforts have been less than spectacular. The Venezuelan exporters who diversify and export aluminum³⁰⁰ and cement³⁰¹ have been met with antidumping petitions. As illustrated earlier, these petitions will prevent or chill exports from these newly industrialized states. In the case of Venezuelan cement, the import was not "under selling" the regional producers in Florida. However, the Venezuelan producers simply met competition, selling their product in the U.S. at the same price as the local manufacturers.³⁰² This price discrimination made them vulnerable to an antidumping allegation. The greater foreign policy aim of supporting a U.S. encouraged transition from oil dependency to a diversified economy plays no part in the antidumping decision.

Similarly, the Colombian and Peruvian exporters of roses and fresh-cut flowers have been on the receiving end of a series of antidumping investigations.³⁰³ As the U.S. attempts vainly to combat the international cocaine cartels, domestic flower producers threaten Colombian and Peruvian exports. Again, the more significant foreign policy goal of weaning the Colombian and Peruvian economies from cocaine exportation is ignored in the antidumping scheme.³⁰⁴

The antidumping law should be further amended to allow the International Trade Commission to consider foreign policy or other national agendas in analyzing dumping cases. The domestic flower industry may indeed be incurring material injury due to LTFV sales of Colombian roses. However, the higher goal of encouraging non-illicit Colombian exports surely is worthy of consideration by the ITC. The foreign policy goal may not necessarily outweigh the interests of the U.S. in protecting the domestic industry in all cases. However, the ITC should be given the flexibility and discretion to consider U.S. foreign policy as well as the impact on consumers and employment. Foreign policy goals and initiatives of the United States should be added as a factor to be considered in determining material injury. The Department of State should be required to analyze the impact of an antidumping action on U.S. foreign policy.

³⁰⁰ *Certain Electrical Conductor Aluminum Redraw Rod From Venezuela*, USITC Pub. 2103, Inv. No. 701-TA-287 (Aug. 1988).

³⁰¹ *Gray Portland Cement and Cement Clinker from Venezuela*, Inv. No. 303-TA-21 (Mar. 18, 1992).

³⁰² See Clarkson & Morrell, *The Adverse Consequences on Competition and the Florida Economy from Restricting Cement Imports*, Sept. 1991 (on file at the ITC and with the author). See also Passell, *Cement Shoes for Venezuela*, N.Y. TIMES, Sept. 25, 1991.

³⁰³ See *Certain Fresh Cut Flowers From Canada, Chile, Colombia, Costa Rica, and Ecuador*, USITC Pub. 1956, Inv. No. 731-TA-327-331 (Mar. 1987); *Certain Fresh Cut Flowers From Peru*, USITC Pub. 1968, Inv. No. 731-TA-334 (Apr. 1987).

³⁰⁴ Dumping investigations are not the only dilemma for Colombian flower producers. The Fresh Cut Flower Import Regulation Act, H.R. 3484, 102d Cong., 1st Sess. (1991), introduced by Rep. Leon Panetta, (D-Cal.) would limit imports or impose a quota on imported cut flowers, require the Commerce Department to monitor the price of imported flowers and take action to impose higher penalties for illegally traded flowers.

Consideration of these factors is analogous to the treatment of the public interest under the antidumping laws. Currently, the ITC may consider the "public interest" in deciding whether to terminate or suspend an antidumping investigation.³⁰⁵ The ITC is statutorily mandated to "take into account . . . whether, based upon the relative impact on consumer prices and the availability of supplies of the merchandise, the agreement would have a greater adverse impact on United States consumers than the imposition of dumping duties."³⁰⁶ Additionally, the ITC may evaluate "the relative impact [of the agreement] on the international economic interests of the United States."³⁰⁷

V. The Lack of Coordination In Trade Policy

Another flaw in the U.S. trade policy is the lack of flexibility and consistency. The U.S. has been sending mixed signals to its trading partners for several years. An excellent example of this is the U.S.-China trade relationship. The administration has pushed for most-favored-nation status for China. Simultaneously, China has been assailed by U.S. Trade Representative Carla Hills as a leading pirate of copyrighted, patented, and trademarked materials, and as being responsible for nearly half a billion dollars in losses to American industries. China was recently listed as a priority foreign country in the National Trade Estimate Report on Trade Barriers.³⁰⁸ Thus, within the course of one year, the Administration has fought to offer China the reward of MFN status while threatening them with massive trade sanctions for patent infringement.

Additionally, the decision to grant support of the MFN privilege for China despite Beijing's repressive regime runs counter to the current linkage of tariff and trade concessions to human rights. The United States has successfully used trade policy to achieve foreign policy and human rights objectives. For example, trade with the former Soviet Union and other Eastern bloc states has been linked to free emigration policies for many years. The 1974 Jackson-Vanik Amendment³⁰⁹ prohibits most-favored-nation status for countries that do not allow their citizens to emigrate freely. Pressure from the United States and the threat of prohibitive tariffs (high enough to double the cost of exports to the United States) was a vital force in

³⁰⁵ See 19 U.S.C. § 1673 c(a)(2)(B) (1988).

³⁰⁶ 19 U.S.C. § 1673 c(a)(2)(B)(i) (1988).

³⁰⁷ 19 U.S.C. § 1673 c(a)(2)(B)(ii) (1988). The ITC is also instructed to consider "the relative impact on the competitiveness of the domestic industry producing the like merchandise, including any such impact on employment and investment in that industry." 19 U.S.C. § 1673 c(a)(2)(B)(iii) (1988).

³⁰⁸ *U.S.-China Intellectual Property Accord Ends Threat of U.S. Retaliatory Duties*, 9 INT'L TRADE REP. (BNA) 139 (1992).

³⁰⁹ 19 U.S.C. § 2432 (1988).

opening these countries' borders.³¹⁰ Supporters of Jackson-Vanik claim partial responsibility for the more than ten-fold increase from 16,000 in 1988 to 200,000 in 1990 of Jewish emigres from the Soviet Union.³¹¹ The United States also has linked trade benefits to other human rights and labor issues. Many developing countries export into the United States under the Generalized System of Preferences. Nations that violate workers' rights such as the Sudan, Romania, and Chile have been denied GSP privileges. Benin, Haiti, the Dominican Republic, Thailand, the Republic of Korea, Israel, Malaysia, and Bangladesh all have been investigated for workers rights abuses at the risk of losing GSP benefits.³¹²

Perhaps the non-trade issue most successfully linked to international trade is apartheid. The Comprehensive Anti-Apartheid Act of 1986³¹³ prohibits most U.S. investment, loans, technology transfer, or other trade with South Africa. Furthermore, foreign companies replacing abandoned U.S. commerce with South Africa face U.S. trade sanctions. In enacting this landmark legislation Congress announced that "... the United States no longer accepts further delays in human, economic and political rights for all citizens of South Africa."³¹⁴

In his recent address, President Bush claims that trade "... is a means to bring the influence of the outside world to bear on China."³¹⁵ The President dismissed the arguments that "hurting China's economy will somehow help the cause of privatization and human rights."³¹⁶ This is the identical argument that the Administration used in 1986 in its opposition to the anti-apartheid legislation. It is no more persuasive in 1992.

The United States has threatened to withhold trade privileges from allies such as Bangladesh and Israel while ignoring Chinese repression. The Bush Administration's support of MFN status for China confuses our trading partners and is internally inconsistent with standard policies.³¹⁷ Unfortunately, the trade situation with China is only one of the mixed signals that we have been sending our

³¹⁰ See Michael Beasley, Note, *An Interim Analysis of the Effects of the Jackson-Vanik Amendment on Trade on Trade and Human Rights: The Romanian Example*, 8 LAW & POL'Y INT'L BUS. 193, 195-219 (1976).

³¹¹ *International Relationships*, Political Risk Services, May 1, 1991.

³¹² *Czechoslovakia Eligible for GSP Immediately, Sudan Benefits Cut for Worker Rights Abuses*, 8 INT'L TRADE REP. (BNA) 649 (1991); see also William Lash, III, *Unwelcome Imports: Racism, Sexism and Foreign Investment*, 13 MICH. J. INT'L LAW 1, 41 (1991); William Lash, III, *Don't Reward China's Leaders*, J. OF COM., June 4, 1991, at 8A.

³¹³ 22 U.S.C. § 5001, *et seq.* (1988).

³¹⁴ H.R. 4868, 99th Cong., 2d Sess., House Report on H.R. 4868, Comprehensive Antiapartheid Act of 1986.

³¹⁵ *Remarks at the Yale Commencement Ceremony in New Haven, Connecticut*, 27 WEEKLY COMP. PRES. DOC. 674 (May 27, 1991).

³¹⁶ *Id.*

³¹⁷ *Don't Reward China's Leaders*, *supra* note 312.

trading partners. The lack of flexibility and recognition of commercial, economic, and political reality also frustrates U.S. exporters and trading partners. A prime example of this flaw is the Administration view regarding countertrade.³¹⁸

Many American companies, including Monsanto, McDonnell Douglas, Boeing, General Electric, and United Technologies, use countertrade as a matter of course. About 6% of all U.S. exports involve some form of countertrade.³¹⁹ Countertrade has transformed from being a necessary evil in international trade to an increasingly valuable tool in competing globally. According to Acting Assistant Commerce Secretary for Trade Development James Lake, over 100 countries require countertrade in some part of their government procurement. The U.N. estimates that countertrade accounts for ten to twenty percent of all world trade.³²⁰

Countertrade allows the buying country to save currency for other purchases and stimulates technology transfer,³²¹ but is far from perfect. In non-market economies, for example, the valuation of goods to be traded is chancy at best. Importation of goods from these countries could lead to dumping complaints and market disruption investigations.³²² Critics of countertrade also point out, quite correctly, that countertrade is economically inefficient. An exporter of auto parts, for example, may not have any need for the office furniture he accepts as payment under a barter agreement. Also, the more complex countertrade transactions carry high transaction costs. In many cases, exporters must use a middleman to find a buyer for the unneeded countertrade goods. Another headache of countertrade is that the process itself can spawn foreign competitors.³²³

³¹⁸ Counterpurchase: Exporters agree to purchase a specific quantity of goods from a country in exchange for that country's purchase of the exporter's product. The goods being sold by each party are typically unrelated but are equivalent in value. Offset: The exporter agrees to use goods and services from the buyer's country in the product being sold. Offsets may be direct or indirect, depending on whether the goods and services are integral parts of the product. In a direct offset, a U.S. manufacturer selling a product uses a component that is made in the purchasing country. In an indirect offset, the exporter would buy products that are peripheral to the manufacture of its product. Compensation or Buy-back: In these deals, exporters of heavy equipment, technology or even entire facilities agree to purchase a certain percentage of the output of the facility. For example, Occidental Petroleum built anhydrous ammonia factories in the U.S.S.R. and agreed to buy specified amounts of ammonia from these plants for 20 years. See generally WELT, *TRADE WITHOUT MONEY: BARTER AND COUNTERTRADE* (1984).

³¹⁹ William Lash, III, *Time to Support Countertrade*, J. OF COM., Nov. 13, 1991, at 8A.

³²⁰ *U.S. Still Against Playing Active Role in Barter, Countertrade, Officials Say*, 8 INT'L TRADE REP. (BNA) 1644 (1991).

³²¹ Offsets in military trade among NATO members, for example, are credited with establishing standardized military hardware in NATO and rebuilding a portion of the industrial bases of Western Europe.

³²² *Anhydrous Ammonia From the U.S.S.R.*, USITC Pub. 1051, Inv. No. TA-406-6 (1980).

³²³ This is not idle speculation. In the 1960s, Raytheon transferred Sparrow missile technology to Italy as part of an offset program. The result was the Italian missile Aspide,

In general, however, countertrade is a useful tool in gaining access to global markets. It has been used widely and successfully by American companies. For example, PepsiCo's world trading subsidiary successfully offered countertrade services in the former Soviet Union for over a decade, by trading Pepsi for Stolichnaya vodka. Last year, PepsiCo signed a ten-year, \$3 billion deal with the former Soviets. It calls for construction of twenty-six Pepsi bottling plants to be paid for by the sales of Russian vodka in the U.S. Additionally, Russia will build a minimum of ten commercial ships for international sale or lease. Foreign exchange credits from this transaction will be used to build two Pizza Hut restaurants in Moscow.³²⁴

Countertrade is indispensable to building market share in developing economies. To help exporters compete in global markets, the Administration should make funds available through the Export-Import Bank, an independent agency that guarantees payment for exports. Through the Department of Commerce, it should also actively counsel exporters in need of advice. Unfortunately, the White House intends to do otherwise. In testimony before the Senate Commerce, Science and Transportation Committee, Assistant Acting Secretary of Commerce Lake stated that the Commerce Department would continue its "non-interventionist" policy on countertrade.³²⁵ That was a euphemistic way of saying the Administration will not actively support exporters who may need advice on countertrade. Mr. Lake was not entirely clear how much countertrade help the Commerce Department will offer exporters. However, his testimony was unpopular with members of Congress and business representatives attending the hearing. The failure of active U.S. government involvement in countertrade places U.S. exporters at a competitive disadvantage to foreign companies offering countertrade.³²⁶

Trade policy decisions are also often held hostage by members of Congress in pursuit of a particular agenda. For example, under the current budget rules of the U.S., proposed losses of revenue must be offset by another revenue source.³²⁷ In the fall of 1991, this provision threatened to delay or prevent the granting of MFN status or GSP status to states of the former Soviet Union. House Ways and Means Committee Chairman Rostenkowski postponed votes on MFN

which now competes directly with the Sparrow. See *Offset Agreements, Hearing before the Subcommittee on Economic Stabilization of the Committee on Banking, Finance and Urban Affairs, House of Representatives, 99th Cong., 2d Sess., Serial No. 99-86, June 18, 1986.*

³²⁴ William Lash, III, *Time to Support Countertrade*, J. OF COM., Nov. 13, 1991, at 8A.

³²⁵ *U.S. Still Against Playing Active Role in Barter, Countertrade, Officials Say*, supra note 320.

³²⁶ *Id.* According to Gary L. Pacific, Manager of Countertrade for McDonnell Douglas Helicopter Co., "U.S. companies must either rise to the challenge by implementing countertrade in their marketing departments or concede the international market to their competitors." *Id.*

³²⁷ The Budget Enforcement Act of 1990, 2 U.S.C. § 902 (1990).

status because the change to a lower tariff status would cost an estimated \$23 million in lost revenues.³²⁸ The delay threatened trade normalization between the U.S. and the former Soviet Union. By jeopardizing trade with the former Eastern bloc states, democracy and the economic and political survival of the fledgling democracies were also threatened by the game of political football being played by Rostenkowski and the Bush Administration.

Another example of a lack of flexibility and coordination in U.S. trade and commercial policy is the U.S. view towards keiretsu.³²⁹ In February 1992, United States Attorney General William Barr announced his intention to have the Department of Justice investigate Japanese business cartels, or "keiretsu," as violative of U.S. antitrust laws.³³⁰ According to Mr. Barr, keiretsu restrict the ability of U.S. firms to penetrate lucrative Japanese markets.³³¹ This announcement was met with criticism both inside and outside the Bush Administration. United States Trade Representative Carla Hills, Vice President Dan Quayle, and the Department of State all expressed their hostility to the Barr plan. Even the White House has shied away from it.³³² Clayton Yeutter, the United States Trade Representative under President Reagan and current counselor to the President for domestic policy, has labeled the Barr initiative as "something coming out of Justice" and not necessarily a policy endorsed by the President.³³³

There are a host of problems with the Barr plan. First, it reflects an expansion of the extraterritorial application of the U.S. antitrust laws. For nearly a century, it has been recognized that U.S. antitrust laws may be extended to cover activities outside of the United States. However, application of U.S. laws must be done gingerly, and must balance U.S. commercial goals with the effects on other states. Furthermore, the Barr plan would alter the Justice Department's Antitrust Enforcement Guidelines for International Operations, issued in November 1988. Traditionally, foreign activities are subject to Sherman Antitrust Act enforcement only to the extent that the activities

³²⁸ *No Vote on Soviet MFN Status Without Revenue Offsets, Rostenkowski Reiterates*, 8 INT'L TRADE REP. 1505 (1991).

³²⁹ "Keiretsu" is a Japanese "group of corporations tied together by interlocking directorates and mutual shareholding." KAREL VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWER* 477 (1989). Keiretsus are said to constitute the "ultimate vertically integrated megacompany." *There are Capitalists, Then There are the Japanese*, BUS. WEEK, Oct. 8, 1990, at 21. See also BURNSTEIN, *YEN!: JAPAN'S NEW FINANCIAL EMPIRE AND ITS THREAT TO AMERICA* (1990).

³³⁰ *Barr Tells TV Interviewer Sherman Act May be Used to Attack Japanese Cartels*, 9 INT'L TRADE REP. (BNA) 341 (1992).

³³¹ Vicini, *U.S. to Extend Antitrust Laws to Japanese Cartels*, REUTER BUS. REP., Feb. 21, 1992, available in LEXIS, Nexis library, Wires File.

³³² Ann Devroy & Stuart Auerbach, *Antitrust Proposal Draws Opposition; Get-Tough Plan on Japanese Cartels Splits Bush Administration*, WASH. POST, Feb. 23, 1992, at A9.

³³³ *Id.*

injure U.S. consumers.³³⁴

For U.S. antitrust laws to be invoked, the United States must be the nation primarily impacted by the activity in question. As noted by former Attorney General Nicholas Katzenbach, "anything that affects the external trade and commerce of the United States also affects the trade and commerce of other nations, and may have far greater consequences for others than for the United States."³³⁵ Another test employed in examining the extraterritorial application of U.S. antitrust laws focuses on "the nexus between the parties and their practice and the United States, not on the mechanical circumstances of effect on commodity exports or imports."³³⁶

The keiretsu system is at the heart of Japan's industrial success. This practice of interlocking ownerships among a group of Japanese corporations is an integral part of the Japanese corporate culture.³³⁷ Japanese keiretsu such as Mitsubishi, Mitsui, Dai Ichi Kangyo, Sumitomo, Sanwa and Fuyo reportedly constitute nearly one-quarter of Japanese business revenues.³³⁸ An antitrust action against these firms would be an action against Japanese corporate culture. Such an extraterritorial attack would weaken an already strained relationship with one of our closest trading partners.

Since July 1989, under the Structural Impediments Initiative, Japan and the United States have been examining the causes of their trade imbalance.³³⁹ On June 28, 1990, the Japanese government committed to a series of undertakings in six areas, including the keiretsu system.³⁴⁰ These undertakings are aimed at achieving a more open and transparent trading system. A Department of Justice antitrust action now would jeopardize these negotiations. The Japanese Foreign Ministry condemned the Barr plan of increased extraterritorial application of the Sherman Act as unacceptable on February 25, 1992. Masamichi Hanabusa, Spokesman for the Japanese Foreign Ministry, admonished that the Barr plan would "definitely" be addressed during U.S.-Japan trade meetings.³⁴¹ Additionally, the Japanese parliament is considering a bill to strengthen antitrust enforcement and penalties. This bill, drafted by the Japanese Fair Trade Commission, is scheduled for a vote shortly

³³⁴ *Sherman Act Can Be Used to Fight Import Curbs, Attorney General Says*, 9 INT'L TRADE REP. (BNA) 398 (1992).

³³⁵ Nicholas Katzenbach, *Conflicts on an Unruly Horse*, 65 YALE L.J. 1087, 1150 (1956).

³³⁶ *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 815 (D.C. Cir. 1968), cert. denied, 393 U.S. 1093 (1969).

³³⁷ Kelly, Port, Treece, DeGeorge & Schiller, *Learning from Japan*, BUS. WEEK, Jan. 27, 1992. Van Wolferen, *supra* note 329, at 46.

³³⁸ Van Wolferen, *supra* note 329, at 46.

³³⁹ See, Office of the U.S. Trade Representative, *1992 National Trade Estimate, Report on Foreign Trade Barriers*, at 137 (1992).

³⁴⁰ *Id.*

³⁴¹ *Tokyo Rejects U.S. Antitrust Move as "Unacceptable"*, UPI, Feb. 25, 1992, available in, LEXIS, Nexis library, UPI file.

before parliamentary elections in July, 1992.³⁴² The Liberal Democratic Party (LDP), a close ally of corporate Japan, is feeling pressure from the business community on this bill. With the LDP facing an uphill battle in the election, U.S. intervention would further imperil the legislation.

The Japanese Fair Trade Commission has also increased enforcement activities against antitrust violators and has completed a study on the keiretsu system. Recently, Japanese antitrust enforcers brought criminal charges alleging price fixing against eight plastic food wrap manufacturers. Similar complaints against plastic irrigation pipe producers followed. These charges, the first criminal actions brought by the Japanese Fair Trade Commission in seventeen years, may signal a trend towards more aggressive antitrust enforcement by the Japanese.³⁴³

Finally, before any antitrust actions are brought, the possible beneficial impacts of the keiretsu system must be examined. The keiretsu system is often credited with the industrial success of Japan.³⁴⁴ Because of the interlocking ownership, keiretsu members are not required to sacrifice long-term corporate goals in favor of short-term profits. This system of economic cooperation also drastically lowers transaction costs. Collaborative research efforts speed the development of new technologies. Members know that parts supplied from keiretsu affiliates will be delivered promptly and will be of acceptable quality.

U.S. business leaders and economists recently have been calling for American industry to form keiretsu-like organizations and take advantage of cooperative efforts. David E. Cole, director of the University of Michigan's Office for the Study of Automotive Transportation, believes that U.S. firms are now organizing in "an American-style keiretsu." Another supporter of the development of U.S. keiretsu is TRW Chairman Joseph T. Gorman, who says that without keiretsu-like cooperation, "we don't stand a chance against the Japanese."³⁴⁵

The U.S. government is already moving in this direction. On February 27, 1992, the U.S. Senate approved the National Cooperative Research Act Extension.³⁴⁶ This bill promotes international joint ventures and industrial cooperation and exempts certain combinations from U.S. anti-trust law. Sematech, the U.S.- government

³⁴² *Japan Fair Trade Commission Drafts Bill to Raise Antitrust Fines*, INT'L TRADE DAILY (BNA), Mar. 13, 1992.

³⁴³ Merrill Goozner, *U.S. Critics Unimpressed as Japan's Sluggish Trustbusters Show Some Life*, CHI. TRIB., Feb. 26, 1992, at C1.

³⁴⁴ See CHALMERS A. JOHNSON, *MITI AND THE JAPANESE MIRACLE* (1982); Van Wolferen, *supra* note 329.

³⁴⁵ Kelly, *supra* note 337, at 52.

³⁴⁶ S. 479, 102d Cong., 1st Sess. (1991).

sponsored consortium of semiconductor chip producers, is a collaborative effort that resembles keiretsu.³⁴⁷ Detroit's Big Three automakers also have moved toward cooperation, with a \$120 million federal government grant to develop batteries for electric cars.³⁴⁸ Additionally, the Big Three automakers formed the United States Council for Automotive Research (USCAR), an umbrella group designed to coordinate research and development.³⁴⁹

These proposals show how uncertain the United States is about its views on Japanese corporate integration. To abandon our policy of negotiation, and instead adopt a stance of aggressive extraterritorial application of our antitrust policies, would weaken our trading relationship with Japan and endanger Japanese antitrust efforts. Even worse, it might block a vital Japanese import: the spirit of industrial cooperation.³⁵⁰

VI. Conclusion

We have witnessed how the trade laws of the U.S. undermine foreign policy, confuse our trading partners, and threaten domestic economic development and investment. America needs a trade agenda that is clear, coordinated, and flexible. One possible answer lies in The Trade Reorganization Act of 1991.³⁵¹ Under this proposed legislation, a cabinet level U.S. Department of Trade would be established. The bill would consolidate the functions of the United States Trade Representative and the international activities of the Secretary of Commerce. The Export-Import Bank of The United States would be transferred to the new agency as well. The legislation "[d]irects the Secretary, among other things, to: (1) coordinate U.S. policies for promoting beneficial international trade relationships; (2) negotiate U.S. international trade agreements; (3) protect American industry, agriculture, and labor from unfair or injurious foreign competition; (4) develop trade monitoring systems; (5) develop and implement U.S. policies concerning foreign investments; and (6) administer export controls."³⁵²

Another element of the proposed act establishes an Interagency

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ See *Big Three U.S. Automakers Form U.S. Automotive Research Council*, INT'L TRADE DAILY (BNA), June 9, 1992. John McTague, Ford's Vice President of Technical Affairs, spoke in a manner supporting such keiretsu-like cooperation. According to McTague, "[b]y pooling resources, we are able to better tackle the technological hurdles that will affect the entire industry. The societal benefit of such joint efforts is improved products in the market sooner." *Id.*

³⁵⁰ See William Lash, III, *U.S. Should Import Antitrust Ideas*, SAN FRAN. CHRON., Mar. 9, 1992, at A21.

³⁵¹ H.R. 726, 102d Cong., 1st Sess. (1991).

³⁵² *Id.*

Committee on Trade Development and Finance. This Committee would

[c]oordinate Federal policies, programs, and activities relating to international trade development and finance, including: (1) collection, analysis, and dissemination of market information; (2) information on and coordination of export financing; (3) representation of United States business interests in interactions with officials of foreign governments and international organizations; (4) assistance in identifying joint venture partners and foreign research and development projects; (5) counseling on foreign standards, testing, and certification requirements; (6) trade missions and other trade events; and (7) identification of agents and distributors.³⁵³

The Committee would be composed of "representatives of the Departments of Treasury, Agriculture, the Office of the United States Trade Representative, the Office of Management and Budget, the Small Business Administration, the Export-Import Bank of the United States, the Agency for International Development, the Overseas Private Investment Corporation, the United States Information Agency, and the Trade and Development Program."³⁵⁴

A similar, yet less comprehensive, bill is the Export Trade Promotion and Trade Finance Act of 1991.³⁵⁵ The sponsor of this legislation would establish a Bureau of Trade Development and Finance within the Department of Commerce. The proposed Bureau would consist of the Export-Import Bank of the United States, the United States and Foreign Commercial Service and the Assistant Secretary of Commerce for Trade Development.³⁵⁶

These legislative initiatives should be supported. Only by consolidating and coordinating the agencies engaged with international trade can a viable and successful trade policy be operational. A consolidated trade agency could work more closely with the Department of State to avoid current foreign policy-international trade conflicts.

This appeal for a coordinated and flexible trade agency is not unduly radical. One need only look at the successes of Japanese trade policies and the Japanese Ministry of International Trade and Industry (MITI) to recognize the benefits of coordination.³⁵⁷ MITI has long been lauded as a leading force in Japan's "economic miracle."³⁵⁸ Part of MITI's success may be attributed to "Mental Flexibility," the ability "to adjust, chameleon-like, to changing conditions."³⁵⁹

The U.S. must also adhere to its stated commitment to the mul-

³⁵³ H.R. 726, 102d Cong., 1st Sess., § 5 (1991).

³⁵⁴ H.R. 726, 102d Cong., 1st Sess. (1991).

³⁵⁵ S. 1721, 102d Cong., 1st Sess. (1991).

³⁵⁶ *Id.* at § 3.

³⁵⁷ Van Wolferen, *supra* note 329, at 126.

³⁵⁸ See Johnson, *supra* note 344.

³⁵⁹ Van Wolferen, *supra* note 329, at 126.

tilateral trading system. Discriminatory and unilateral actions must be abandoned. We should adhere to GATT principles and accept GATT panel reports. Similarly, when we push other states to open their markets to foreign investment and trade, we must be consistent in our own views. The U.S. must define "national security" or offer a more transparent Exon-Florio that offers guidance to foreign investors.

The current debate in U.S. international trade is little more than a "blame-game." The U.S. has blamed each of our major trading partners for the trade deficit and the assorted ills of our economy. Congress blames the President, who blames American business, which in turn blames Congress. In reality, many of our current trade problems stem from our absence of a coherent trade policy. "The fault dear Brutus, lies not in our stars, but in ourselves."³⁶⁰

³⁶⁰ Shakespeare, *Julius Caesar*, 9 (Loius B. Wright ed. 1968) (Act I, Scene 2 of the play).

