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Import Relief, Unfair Trade Practices and the Generalized System of Preferences

MARK R. SANDSTROM*

I. IMPORT RELIEF

The economic principles of international trade preach the advantages of the interrelationship and non-restriction of the movement of goods and services. This philosophy may be theoretically sound, but the process itself can be fairly disruptive for a manufacturer in any country faced with the prospect of going out of business because a manufacturer in some other country has developed a more competitive product which will displace the U.S. manufacturer completely in the domestic market. Thus, the attempt to balance these competing interests—or at least to permit adjustment by the domestic industry on a temporary basis—is the motivation behind the import relief law.

The so-called import relief provisions, which were substantially amended by the Trade Act of 1974,[1] deal with fair trade conditions. In other words, there is nothing illegal or unjustifiable connected with the production or the export of the product which causes problems for the domestic producer; it is just that the product is so competitive in this country that it creates serious problems for domestic industries producing similar products.

A. *Injury Test*

The basic test under Section 201 of the Trade Act of 1974 (the Act) is whether or not an article is being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or a threat thereof, to any domestic industry producing a like or directly competitive article.[2] Serious injury is defined generally in the Act to mean: 1) a significant idling of productive facilities in this country; 2) an inability of a significant number of firms to

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1. 19 U.S.C. §§ 2101-2487 (1974).
2. 19 U.S.C. § 2251(b)(1) (1974).

operate at a reasonable profit level; or 3) significant unemployment or underemployment.[3]

The serious threat of injury is sufficient to trigger the remedies under the import relief provisions; actual injury need not be shown.[4] Some of the factors considered in making this injury determination include: a decline in sales; growing inventories in the country; downward trends in production, profits, wages, and employment;[5] and finally, one of the most crucial factors, the link between the imports and the injury to the domestic industry. Under the Act, the increased imports must be a substantial cause of that injury, "a cause which is important and not less than any other cause."[6] The scenario usually involves an increase in imports (whether in absolute or relative terms to the domestic industry) and a decline in the proportionate share of the domestic market that is served by the domestic industry.[7]

Under this rationale, it may be possible to find serious injury to the industry with a stable or even a declining level of imports because there may be an overall downward trend in the economy. For example, a domestic industry, on the whole, may decline by twenty percent in terms of production or employment, yet the imports supply a slightly larger share during that period than they did prior to that period. In other words, the imports have been able to maintain a larger portion of the market during that downturn relative to the domestic industry, possibly constituting serious injury, even though absolute imports of the product have not increased during that period.

The import relief provision is best designed for situations where, for example, a Japanese industry develops a new process and the U.S. counterpart in that industry asks for time to adjust to this innovation. The U.S. manufacturer would need time, for example, to acquire the necessary machinery and to train its employees in the new process. The problem is even tougher when there is a major decline in the economy as a whole, for every manufacturer at that point is selling less, reducing its number of employees, making less profits, or

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3. 19 U.S.C. § 2251(b)(2)(A) (1974). Underemployment here would mean the incapacity of an industry to maintain an adequate employment level at reasonable rates of production and capacity.

4. 19 U.S.C. § 2251(b)(1) (1974). The test as expressed in the statute is that of "[A] substantial cause of serious injury *or* the threat thereof. . . ." [Emphasis added].

5. 19 U.S.C. §§ 2251(b)(2)(B), (b)(6) (1974).

6. 19 U.S.C. § 2251(b)(4) (1974).

7. 19 U.S.C. § 2251(b)(2)(C) (1974).

suffering losses. At the same time, imports are arriving in this country in greater quantities, and the question becomes whether the imports or the overall decline in the market is the cause of the injury to the industry. Obviously, both factors are in some way responsible. Thus, the Act provides that the link between the import and the injury, the import's subsequent impact on the domestic industry, must be significant and no less than any other factor.[8] If the decline in the economy were the major factor, and imports, a secondary factor, there would be, strictly speaking, insufficient injury under the Act. In practice, however, there is no way to quantify these concepts. Hence the International Trade Commission (ITC) has wide latitude in this area, and in many cases, has found import injury where the market as a whole was declining and where that decline was probably the major source of the problem.[9]

B. Import Relief Procedure

The ITC is the organization which handles import relief actions. Located in Washington, it is an independent body whose duties lie somewhere between those of the Executive and the Congress. Its character probably more closely resembles that of Congress since approximately two-thirds of the Commissioners are former Congressional personnel or staff personnel. The ITC is composed of six Commissioners who make the determinations in import relief actions.[10]

To commence an import relief action, a petition may be filed by anyone who is a representative of the affected industry in this country: an association, a company, or a trade union.[11] (The ITC may initiate the action but this is rarely done.) The petition itself, unlike the petition in the area of countervailing duties and anti-dumping duties, stresses the condition of the domestic industry only.[12] The primary concern is the fact that the import is coming into this country and is causing problems to the U.S. industry. The petition must show that it is the import which is causing those problems to the U.S. industry.

The ITC investigation can last no longer than six months.[13] After the petition is filed and notice of the action is published in the

8. 19 U.S.C. § 2251(b)(4) (1974).

9. *See infra* note 9 and accompanying text.

10. *See* 19 C.F.R. § 201.00-.41 (1978) for a general description of the purpose, composition, and functions of the International Trade Commission.

11. 19 U.S.C. § 2251(a)(1) (1974).

12. *See* 19 U.S.C. §§ 2251(b)(1)-(3) (1974).

13. 19 U.S.C. § 2251(d)(2) (1974).

Federal Register, a thorough investigation is commenced; the ITC uses its own resources in conducting these investigations, including field research.[14] In this way, many companies who may not even be aware that a petition has been filed and who may be affected by the ITC procedure, become involved in the cases.

After the investigation is completed, informal public hearings are scheduled.[15] Each interested party is given an opportunity to make an oral statement before the ITC Commissioners, who may then ask questions; the parties are also permitted to question each other. This system is effective because substance is stressed over form, that is, the merits of a case are emphasized to the parties' benefit. Following the hearings, written briefs may be submitted based upon the arguments made at the hearings, the transcripts of which are available to the public.

At this point, the ITC must make two decisions: 1) whether there has been injury to the industry based upon the aforementioned criteria; and 2) if there is an injury, how to remedy that injury.[16] As part of this two-step process, the petitioner will not only allege injury to the industry, but will also make suggestions as to the remedies which should be imposed should injury be found. If there is a split decision on the injury question, the President may choose either recommendation.[17] If the President decides there is no injury, the action ends. Again, it should be recognized that in reality, the ITC tends to find injury more often than not if there is an economic problem in the industry. This happens because at this stage, the investigation has been focused almost primarily upon the *condition* of the industry; other questions are not examined, such as the impact of import relief upon consumers or upon U.S. foreign relations with the exporting country. Once injury has been determined, the ITC makes a recommendation of relief.[18] The terms of the Act become extremely significant when specific relief is being fashioned because there are tremendous sanctions available under the import relief provisions.[19] As a form of relief, tariffs may be increased by fifty percent ad valorem.[20] Alternatively, "quotas" may be established with

14. 19 U.S.C. §§ 2251(b)(5)-(6) (1974).
15. 19 U.S.C. § 2251(c) (1974).
16. 19 U.S.C. § 2251(d)(1) (1974).
17. 19 U.S.C. § 2252(a) (1974).
18. 19 U.S.C. § 2251(d) (1974).
19. *See* 19 U.S.C. § 2253(a) (1974). The President may order either of these actions separately or he may order any combination thereof.
20. 19 U.S.C. § 2253(d)(1) (1974).

the provison that the amount of the "quotas" be no less than the level of the import that has come in during the most recent representative period.[21] (This period is not defined, so there is some flexibility in framing and shaping the quota and in determining how restrictive it should be.) A tariff-rate quota may also be established whereby a product comes in at a certain duty rate up to a certain value—for example, ten million dollars—and once there is more than ten million dollars' worth of the import in the United States, a higher rate of duty will be assessed.[22] The ITC may also recommend that the United States negotiate an orderly marketing agreement[23] with the countries that ship a major portion of the product in question.[24]

The ITC determination and recommendation is sent to the President who must decide in sixty days whether to accept, modify, or reject it.[25] This stage of the process is too often ignored or insufficiently emphasized. It is important because the President looks not only at the injury to the industry, but at the impact of import relief, such as quotas or tariffs, on U.S consumers, the possible ramifications on U.S. international economic interests, and any other factors he may deem relevant.[26] The President must also consider the likelihood of retaliatory action by a country shipping the product against any import relief action taken by the United States. For example, if the United States restricts the importation of a German product, Germany, in some cases, has the right to restrict its own importation of a U.S. product. Such an action could affect industries and consumers completely divorced from those involved in the original case. For this reason, the President will often reject or modify, that is, liberalize, the sanctions recommended by the ITC. Congress has the authority, however, to reverse a Presidential rejection of an ITC recommendation.[27]

The Trade Policy Staff Committee (TPSC), an interagency committee headed by the Office of the Special Representative for Trade Negotiations (STR), is also involved in these decisions at the Presiden-

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21. 19 U.S.C. § 2253(a)(3) (1974).
22. 19 U.S.C. § 2253(a)(2) (1974).
23. An orderly marketing agreement shall permit the importation of a quantity or value of the article which is not less than the quantity or value of such article imported into the United States during the most recent period which the President determines is representative of imports of such articles. 19 U.S.C. § 2253(d)(2) (1974).
24. 19 U.S.C. § 2253(a)(4) (1974).
25. 19 U.S.C. § 2436(b)(1) (1974).
26. 19 U.S.C. § 2252(c) (1974).
27. 19 U.S.C. § 2253(c)(1) (1974).

tial level. There is no federal department of trade, hence the procedures described earlier may involve virtually every Cabinet department and most of the important government agencies, including the TPSC, the Department of State, the Department of Agriculture, and the ITC. To be effective within this administrative network, it is necessary for attorneys involved to educate the various members who will sit on the TPSC—those from Treasury, Labor, State or whatever—so that they may be aware of the special concerns and problems of the case.

In many cases, the type of relief chosen can have a tremendous impact on a country's exports. A good illustration of this impact can be found in the case of steel products. When the quotas on these products were established several years ago, small suppliers were not a major target. Quotas were established for the European Community (EC), Sweden, Canada, Japan, and other major countries, while the remaining countries were placed in a basket category and permitted to ship within limits imposed on the category as a whole. The problem was that the procedure for taking advantage of this general quota was on a first-come, first-served basis. The product must be shipped the day the quota opens, or otherwise, the quota may close a day later as a result of manufacturers from around the world attempting to enter the U.S. market. Such a situation could have been avoided through the establishment of a separate quota for each of the countries in the basket category so that each country could at least know how much it could export during the year and schedule its shipments accordingly.

In this particular instance, one of the other major country shippers of the steel products (a Spanish group) petitioned for, and received a separate country quota to alleviate the problem. This Spanish shipper had to export less as a result of the new separate quota, but at least he was aware of the exact amount beforehand. A further problem arose, however, from another Spanish manufacturer who began to ship the good when he became aware of the separate country quota. Thus, the first Spanish manufacturer, who had obtained the separate quota, found himself squeezed out again on the first day the new quota opened by a manufacturer from his own country. The lesson here is that there is great flexibility in how these sanctions are imposed; the President especially has much leeway in this area.

As mentioned earlier, if the President rejects or modifies the ITC recommendation, Congress has the right to overrule the Presi-

dent with a simple majority vote of both Houses and to reinstate the ITC's original relief recommendation.[28] This power is important because trade is a political item, and Congress, the ITC, and other administrative agencies are almost always involved, whether implicitly or explicitly. The import relief action is an interesting provision in this respect because under the Act, the Executive, the Congress, and the Administrative branches of government all take part in granting or denying import relief.

Congress has not vetoed or overruled the President since the Act has been in effect, but the fact that it possesses such power acts as a major influence on the President's deliberations. Therefore, the President must make accommodations to some extent to the political power of affected industries. Otherwise, industry representatives will pressure the House Ways and Means Committee and the Senate Finance Committee in an attempt to overturn the Presidential rejection. Attorneys practicing in this area should be aware of these congressional pressures at play in representing both domestic and foreign industries.

A remedy ordered under the Act may remain in effect no longer than five years and may last for a shorter period of time.[29] Import relief may be extended for a further three year period,[30] but the total period of import relief may be no longer than eight years. Under the prior law, relief could be renewed every four years for an indefinite period of time.[31] The Act struck a balance by liberalizing the criteria for an injury determination, while at the same time, ensuring that any relief be limited to an eight-year period.

The industry may petition for an extension of relief between six and nine months prior to the time when the particular import relief is scheduled to terminate.[32] The ITC will again review the issue, looking not only at the injury to the industry, but also considering the broader factors which were part of the President's earlier deliberations.[33] After this more extensive analysis, the ITC will recommend

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28. *Id.*
29. 19 U.S.C. §§ 2253(h)(1)-(2) (1974).
30. 19 U.S.C. § 2253(h)(3) (1974).
31. 19 U.S.C. § 1981(c)(2) (1962).
32. 19 U.S.C. § 2253(i)(3) (1974).
33. 19 U.S.C. § 2253(i)(4) (1974). An important factor analyzed at this stage is the progress and efforts made by the domestic industry to adjust itself to import competition.

whether the relief should be continued, and the President may accept or reject this recommendation.[34]

The Multilateral Trade Negotiation (MTN), now being held in Geneva, will probably change the Act somewhat, the most significant of these changes being in terms of what is known as selective application of the remedy. Selective application means that if only one or two countries are causing injury to a U.S. industry, then relief will be imposed with respect to the products of that country or countries alone. Some people agree with this theory because the countries that are not causing the problems are not adversely affected. Others argue that there may be a tendency to impose the remedy more often with respect to the major countries—the major sources of supply—which is likely to result in higher prices to consumers. It appears, however, that selective application of the remedy will be part of the package approved at Geneva.[35]

Market disruption (Section 406 of the Act), which is partly a political provision as well as an economic one, is an expedited form of import relief, under liberalized terms, for products from Communist countries.[36] If an industry feels it is being injured by an import from a Communist country—excluding Poland, Hungary, and Yugoslavia—the industry may file a petition to that effect.[37] The ITC will investigate and make a determination within three months, and the President, again, may accept or reject the ITC recommendation.[38] The injury criteria under Section 406 is that the import be a significant cause of material injury.[39] The test is not one of substantial cause of serious injury and is thus a fairly liberal standard. To

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34. 19 U.S.C. § 2253(i)(2) (1974).

35. A major failure of the Tokyo Round was its inability to reach a decision regarding selective application. The EC favors such a selective approach, but the United States and many Third World nations oppose it. They fear discrimination in applying the so-called safeguard, or retaliation by the country being singled out. Talks on the topic continue and negotiators hope to reach agreement by fall.

36. 19 U.S.C. § 2436 (1974).

37. 19 U.S.C. § 2436(a)(1) (1974). A "communist country" is defined as "any country dominated or controlled by international communism." 19 U.S.C. § 2436(e)(1) (1974).

38. 19 U.S.C. §§ 2436(a)(2)-(4) (1974).

39. 19 U.S.C. § 2437(e)(2) (1974):

> Market disruption exists within a domestic industry whenever imports of an article, like or directly competitive with an article produced by such domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat thereof, to such domestic industry.

date, two petitions have been filed under Section 406; the first one was rejected by the ITC,[40] and the second one was rejected by the President.[41] It will be interesting to see whether this section will be used more frequently in the future.

II. UNFAIR IMPORT PRACTICES

Section 337 of the 1930 Tariff Act[42] is a protective provision which provides significant sanctions ranging from cease and desist orders to outright embargo in cases of unfair methods of competition and unfair acts in the importation of articles which destroy or injure domestic industry, prevent the establishment of such industry, or restrain or monopolize U.S. trade and commerce.[43]

This section is especially important in the patent area since most of the cases are patent infringement cases. If the ITC finds a patent infringement, it may order an embargo, thus preventing that product from entering the United States.[44] In practice, the ITC also has the authority to issue cease and desist orders, meaning, in the patent example, that either the parties agree to a licensing system, or some other remedy, or an embargo will be imposed against the product.[45] The ITC may review the validity of the patent but only within the context of a Section 337 investigation; the ITC has no authority to void a patent.[46] The main advantage of Section 337 in this area is that it provides relief against foreign infringers of U.S. patents where normal domestic patent procedure would be an ineffective remedy.

Section 337 also deals with the concept of unfair trade practices, the most common of which involve illegal price actions and collusions relating to market allocation.[47] The non-patent jurisdiction here is approximately equal in scope to Section 5 of the Federal Trade Commission (FTC) Act.[48] The problem is that the definition of unfair trade practices is so vague that it can include a number of practices and overlap into other areas such as those of countervailing

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40. TA-406-1 (ITC Publication).
41. For the ITC decision, *see* 43 Fed. Reg. 59445 (Dec. 1978).
42. 19 U.S.C. § 1337 (1975).
43. 19 U.S.C. § 1337(a) (1975).
44. 19 U.S.C. § 1337(d) (1975).
45. 19 U.S.C. § 1337(f) (1975).
46. For ITC procedures governing a patent infringement action under 19 U.S.C. § 1337, *see* 19 C.F.R. § 210.20(a)(9)(A)-(I) (1978).
47. 19 U.S.C. § 1337(a) (1975).
48. 15 U.S.C. § 45(a)(2) (1975) states:

> The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, common carriers subject to the Acts

duties and anti-dumping duties, wherein conflicts in jurisdiction can arise between the ITC and the Treasury Department.

The procedure under Section 337 is initiated by a petition followed by a one year investigation (eighteen months in a complicated case).[49] The Administrative Procedure Act[50] (APA) applies here, meaning that there will be a relatively formal hearing before an administrative law judge. The President may overrule the ITC, but unlike the case of import relief, there is no provision for Congressional veto of a Presidential decision.[51] Therefore, the broader economic interests may prevail over the particular facts of a case. Assuming that the President does not overturn the ITC ruling, the parties may take an immediate appeal before the Court of Customs and Patent Appeals and bypass the Customs Court.[52] Unlike the import relief action, where there is no effective way to get judicial review (unless there is an abuse of discretion), judicial review is available under Section 337.[53] This opportunity for judicial review is an interesting tool: if used to its full extent, it can wreak havoc;. on the other hand, it may enable parties to settle their differences where without this leverage such agreement would have been impossible.

III. Generalized System of Preferences

The generalized system of preferences (GSP), first developed internationally and then codified by the United States under Title V of the Act,[54] is designed to give the products of less developed countries preferential entry into the U.S. market so that these products may have a competitive advantage in the U.S. market vis-á-vis imports from the developed nations. The system authorizes the duty-free importation of designated products from designated beneficiary developing countries which meet certain criteria relating to local cost and trade volume.[55] Under GSP, these countries are able to sell a greater number of products than they otherwise could.

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to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations. . . subject to the Packers and Stockyards Act. . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

49. 19 U.S.C. § 1337(b)(1) (1975).
50. 5 U.S.C. §§ 500-576 (1976).
51. 19 U.S.C. § 1337(g) (1975).
52. 19 U.S.C. § 1337(c) (1975).
53. *Id.*
54. 19 U.S.C. §§ 2461-2465 (1974).
55. 19 U.S.C. § 2461 (1974).

A. Eligible Countries

At present, there are approximately ninety-eight countries and another forty dependent territories and countries eligible for GSP treatment.[56] An eligible country must be designated as such by the President.[57] The Act specifically excludes developed countries by name along with other explicit country exclusions.[58] For example, all Communist countries are excluded from GSP unless: 1) they receive most-favored-nation (MFN) tariff treatment, such as Rumania; 2) they are members of the General Agreement on Tariffs and Trade (GATT) and the International Monetary Fund (IMF); and 3) are not dominated by international communism.[59] Under this definition, Rumania and Yugoslavia (the latter of which is not really a Communist country in an economic sense) are the only two Communist countries now eligible for GSP treatment.

Countries which are members of the Oil and Petroleum Exporting Countries (OPEC) are also excluded under the Act.[60] This exclusion has caused problems with respect to the OPEC countries which raised their prices with OPEC but did not participate in the oil embargo several years ago, including Venezuela and Ecuador. These two states feel that they should receive GSP treatment as a political matter since they did continue to ship oil to the United States during the embargo. There have been efforts to modify this provision so that Venezuela, Ecuador and other "non-embargoing" countries may become eligible, and any changes made in eligibility in the next year or two will probably be with respect to these countries.

A country that expropriates the products or assets of a U.S. company without providing just compensation may be excluded under GSP,[61] as may a country that does not cooperate in the control of international drug traffic[62] or fails to recognize arbitral awards.[63] The

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56. *See* Exec. Order No. 11,888, 3 C.F.R. 207 (1975), *reprinted in* 19 U.S.C.A. § 2462 (Supp. V 1979).
57. 19 U.S.C. § 2462 (1974).
58. 19 U.S.C. § 2462(b) (1974).
59. 19 U.S.C. § 2462(b)(1) (1974).
60. 19 U.S.C. § 2462(b)(2) (1974).
61. 19 U.S.C. § 2462(b)(4) (1974).
62. 19 U.S.C. § 2462(b)(5) (1974).
63. 19 U.S.C. § 2462(b)(6) (1974). Countries falling within the provisions of §§ (b)(4)-(7) may still be designated as beneficiary developing countries if the President believes that such a designation is in the national economic interests of the United States.

President may terminate a country's eligibility upon giving sixty days' notice to the particular country and to Congress.[64] Practically speaking, the list of country eligibility should remain relatively static.

B. Eligible Products

Eligible products are designated by the President based upon the five-digit Tariff Statutes of the United States (TSUS) tariff classification items, of which there are some 2800.[65]

Once both product and country eligibility have been determined, there are additional requirements for the product under the Act. The product must be imported directly into the United States.[66] If it is transshipped through another country into the United States, it will still be eligible as long as it did not enter the commerce of that other country. For example, the article may pass through a foreign trade zone of another country, provided only minor labelling and packing operations are performed in the zones of these other countries. In short, the bill of lading should designate the eligible country as the country of origin and the destination of the product as the United States.

The product must also meet the local cost requirement, which stipulates that in order for an article to be duty-free, 35% of the appraised value of the article must have been produced in the beneficiary developing country.[67] The product must be either grown or produced in that country, or the product must be manufactered in that country, meaning that the components that went into the manufacture were substantially transformed into a new article of commerce.[68]

Suppose the parts of a chair are brought from Japan to Thailand, and that the chair was assembled in Thailand. This minor assembly operation would not meet the local cost requirement since the materials were not substantially transformed into another article. A closer case would be one in which an actual operation—something more than minor assembly—is performed in Thailand. In an actual case, chemicals from Japan were fabricated into an adhesive in Taiwan

64. 19 U.S.C. § 2462(a)(2) (1974).
65. 19 U.S.C. § 2463(a) (1974). For TSUS classifications *see* 19 U.S.C. § 1202 (1978).
66. 19 U.S.C. § 2463(b)(1) (1974).
67. 19 U.S.C. § 2463(b)(2)(A) (1974).
68. 19 U.S.C. § 2481(8) (1974).

where it was then applied to the product, in this case, tape. The Customs Service has accepted this as a substantial transformation, at least with respect to the chemicals used in the adhesive applying operation.

This local cost requirement makes sense, but unfortunately, its adminstration is complicated and confusing. When an article comes into the United States under GSP, the importer must present a Certificate of Origin (Form A) which is required by Customs in order to apply for duty-free treatment. The percentage of local value is recorded on this form. This percentage represents a percentage of the ex-factory price, that is, the percent of the product that was actually produced or grown in that country, as a percentage of the price of that product as it left the factory. Therefore, it is generally assumed that any value above 35% which is recorded on Form A automatically qualifies the product under GSP. The problem is that Form A was developed for international commercial purposes, while GSP is part of U.S. national law. Under GSP, the local cost must be 35% of the appraised value, which is often equivalent to the FOB price. This means that the cost of transporting the product to the port and preparing it for shipment must be added to the ex-factory price. Thus, it is possible to have an ex-factory ratio of 36% or 37% and an FOB ratio of 34%. In these closer cases, the Customs Service will usually investigate, thus causing confusion for the importer (since the 35% requirement of Form A was satisfied) and possible serious consequences, as the article may be excluded from GSP treatment.

Another requirement for an eligible article under the Act is that it must pass the so-called competitive need formula, which excludes articles from specific developing countries whenever: 1) export value exceeds $25 million, adjusted for increases in the gross national product (GNP) since 1974 ($37.5 million in 1978);[69] and 2) any one country exports over 50% of total U.S. imports of a particular product.[70] The underlying theory of this formula is as follows: if a less developed country already ships a sufficient amount of a product into the United States, that country does not need preferential entry. Hence it would be better to exclude that product from duty-free treatment and grant GSP privileges to another less developed country that ships a lesser amount of that product to the United States. In order to qualify for

69. 19 U.S.C. § 2464(c)(1)(A) (1974).
70. 19 U.S.C. § 2464(c)(1)(B) (1974).

GSP treatment, a country must demonstrate a need for the duty-free treatment in order to be competitive in the U.S. market, and it must not fall within either of the two exclusionary provisions.

It is also possible that a GSP country will have to pay a duty when a developed country stops shipping a particular product, and the developing country increases production to meet the additional U.S. need. Before anyone has realized what has happened, the developing country has surpassed the 50% GSP limit, and Customs assesses a duty on the import.

There are several remedies which the practitioner may pursue in this situation. An attorney with a client or country interest should know which products are on the borderline; in other words, whether there is going to be more than thirty-seven million dollars' worth of that product in a particular year or whether the product will comprise more than 50% of U.S. imports thereof. A way to do this is to keep track of the import statistics which are published monthly; these figures will show the amounts of that product being imported into the United States from all countries.

An attorney representing an importer or a foreign manufacturer may have the greatest influence on the system during the annual review to determine what items should be added to or deleted from the GSP list. Beginning on the first of June each year, the TPSC announces in the Federal Register that it will accept petitions to add or subtract articles as eligible under GSP. The deadline for submitting those petitions is July 15; on August 1, the TPSC announces which petitions it has accepted. In mid-September of each year, the TPSC holds hearings on the matter, and will usually render a decision by the end of February, since all changes in the GSP articles list are effective as of March 1. An importer representing a foreign manufacturer or a foreign country desiring to export a particular product at lower prices, will submit a petition requesting that this particular item be added to the list. A favorable determination by the TPSC on the petition will result in duty-free GSP treatment for that article. On the other hand, a representative of a U.S. industry being injured by that import will submit a petition to remove the particular article from the GSP classification.

The government is generally biased in favor of maintaining articles as against subtracting them from the list. This bias exists because when the President originally designated these items, a whole series of investigations on each article took place. At this time, an effort was

made to exclude sensitive products; there were also statutory exclusions for specific sensitive products.[71]

Much can be done by the practitioner representing a foreign interest to enhance a petition's chances of being accepted. In the case of a problem product, it may be possible to carve out a new tariff classification. For example, within the classification for dolls, a sensitive item, an attorney may carve out a classification for blue and green dolls with purple hats that are three inches tall and have feathers inside them because it has been found that the domestic industry is more worried about purple dolls with blue hats. By making a very simple change in the petition which recommends that the item be carved out of the broader item and be given GSP treatment, the client is given a much greater chance of having the petition accepted.

The purpose of GSP is to encourage investment, but the problem is that the system has been too good for some countries. The GSP products coming from Hong Kong and Brazil and other similarly developing areas represent investments from the United States, Japan, and other major developed countries. Unfortunately, the investment usually goes to places such as Hong Kong and Brazil and not to Nigeria and Algeria and other countries that really need such support for local industry and incentives to export.

V. Conclusion

In the areas of import relief, unfair trade practices under Section 337, and GSP designation, there are many opportunities for attorneys representing exporters, importers, foreign countries, and virtually anyone else involved in the administrative proceedings under these provisions, to play a substantial role in fashioning the particular remedy. Counsel enables the ITC and the President to make an informed decision by providing economic data on the industries involved along with further labor, employment, trade, and other statistics. More importantly, however, the practitioner should assume an active role in the policy formulation stages *before* the tariff or quota is implemented and the case reaches conflict proportions. Often the practitioner becomes involved too late to do much good; thus, the key to cases in these areas lies in the prevention rather than the cure.

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71. 19 U.S.C. § 2463(c) (1974).